

THE DEFERENTIAL TROJAN HORSE:
A DECADE OF CHARTER DECISIONS

Dale Gibson*
Edmonton

The Canadian Charter of Rights and Freedoms came into force in April, 1982. This article surveys its first decade of operation. General principles of Charter law, developed by Canadian courts during the decade, are examined, as are rates of Charter reliance and success in both the Supreme Court of Canada and other courts. The author concludes that the impact of the Charter, though generally powerful, has varied markedly from right to right, from one area of law to another, and from time to time. He speculates about the causes of these variations.

La Charte des droits et libertés est entrée en vigueur en avril 1982. Dans cet article, l'auteur fait le point sur les dix premières années de son application. Il passe en revue les principes généraux du droit de la Charte établis par les tribunaux canadiens au cours de la décennie. Il montre aussi dans quelle mesure les plaideurs s'appuient sur la Charte et dans quelle mesure ils le font avec succès devant la Cour suprême du Canada ainsi que devant les autres tribunaux. Il en conclut que l'influence de la Charte, quoiqu'importante en général, varie d'un droit à l'autre, d'un domaine du droit à l'autre et d'une époque à l'autre et il s'interroge sur les raisons de ces différences.

*Dale Gibson, Belzberg Fellow of Constitutional Law, Faculty of Law, University of Alberta, Edmonton, Alberta.

The research assistance of Mark Yamamoto, Robert Katzell and Sandra M. Anderson is gratefully acknowledged.

Introduction

When it became clear in late 1981 that the 72%¹ of Canadians who supported enactment of the Canadian Charter of Rights and Freedoms² were going to have their way, misgivings were expressed in many different quarters, for various, often contradictory, reasons. There were frequent predictions, on the one hand, that a continuation of the extreme judicial deference for governmental autonomy that had all but killed the Canadian Bill of Rights, 1960³ would also cripple the Charter experiment. Other critics took the opposite tack, fearing that courts would not be deferential enough, and would, by taking full advantage of the sweeping new constitutional tools entrenched in the Charter, make themselves "politically more important than the House of Commons, the Senate and all of the provincial legislatures", with authority to "alter almost every law and almost every aspect of life in the land". The quoted author described the Charter as a "Trojan horse for the courts".⁴

After more than ten years' experience⁵ with the Charter it appears that these opposing forecasts were both correct in some respects and mistaken in others. Judicial response to the document has differed from context to context, from court to court, and from one Charter right to another. It has also fluctuated significantly over time. At certain times, and especially in respect to certain types of rights, the Supreme Court of Canada and other key tribunals have been very adventurously. They have secured entry of the Trojan Horse into both administrative and legislative precincts, where they have used it as a base for many attacks on administrative and legislative actions affecting a wide range of

¹ Winnipeg Free Press, Nov. 10, 1981, p. 4, reporting the results of a poll of 1,960 adults across Canada conducted in June 1981 by CROP Inc. on behalf of the Canadian Human Rights Commission. Only 16% of respondents disapproved of Charter entrenchment, with 11% undecided and 1% failing to answer the question. The proportion of respondents who described themselves as "strongly agreed" to entrenchment was just 32%, however, (8% "strongly disagreed"), and 65% agreed or strongly agreed that promoting public awareness of human rights and their implications would be more effective than a charter of rights.

² Constitution Act, 1982, Part I, referred to throughout as the Charter. References to "sections" are to sections of the Charter, unless the contrary is indicated.

³ S.C. 1960, c.44; see now R.S.C., 1985, App. III. See: W.S. Tarnopolsky, *The Canadian Bill of Rights* (2nd ed., 1975).

⁴ Douglas Mackintosh, *Charter of Rights: A Trojan Horse for the Courts?*, Toronto Globe and Mail, Sept. 7, 1981, p.7. The figure of speech was used in two ways in the Mackintosh article. The entire Constitution Act, 1982, which patriated the Canadian Constitution, was compared to the Trojan Horse because, "tucked inside the new constitution, just as the enemy soldiers were hidden inside the horse, is this Charter of Rights". Reflected in the title of the article was another application of the metaphor: the Charter itself as Trojan Horse, full of huddled judges waiting to swarm out of concealment, to pillage and loot democratic prerogatives, once the Horse was safely within the citadel of government. It is the latter image with which the present commentary deals.

⁵ This article attempts chiefly to examine the first decade of Charter decisions: from April 17, 1982, when it came into force, to April 16, 1992. Occasionally, however, reference will be made to more recent developments.

guaranteed rights. At other times, and with respect to other rights, judicial deference to the political side of government has been marked. An attempt to examine the dynamics of these varied responses will be made after a closer look at certain aspects of the decade's experience.

I. Preparations

Not every forecaster was entirely objective; perhaps few were. Certainly there were many who hoped their commentaries would influence the direction of judicial response to the Charter. Among these were two rival advocacy groups,⁶ one composed primarily of Crown counsel, led by R.M. McLeod, Q.C., the other consisting of academics, defence counsel, and other Charter enthusiasts, brought together by Professor Walter S. Tarnopolsky and Mr. Justice Roy Matas under the aegis of the Canadian Institute for the Administration of Justice.

Both groups conducted seminars for judges and lawyers across the country. The Crown group committed a tactical blunder by placing an early compilation of its contributors' papers in loose-leaf binders with black covers, which some sympathizers of the C.I.A.J. group quickly labelled the "Black Book".⁷ The collection of largely pro-Charter papers prepared by the latter group was referred to by contrast as the "White Book". The resulting notoriety of the Crown essays led Manitoba's Attorney-General, Roland Penner, to instruct Crown counsel in his department to disregard interpretations suggested in the "Black Book".⁸ Both essay collections eventually evolved into useful permanent publications: *The Canadian Charter of Rights: The Prosecution and Defence of Criminal and Other Statutory Offences*, 1983, by R.M. McLeod, T.D. Takach, H.F. Morton, and M.D. Segal (with blue covers), and *The Canadian Charter of Rights and Freedoms*, 1982, by W.S. Tarnopolsky and G.A. Beaudoin (with red covers). The latter collection was updated in 1989 in a second edition prepared by G.A. Beaudoin and E. Ratushny, but the Black/Blue Book may end up making the more lasting impression, due to its editors' choice of a continuously revisable loose-leaf format.

While the Black and White seminars contributed much to the massive educational process by which the legal profession prepared itself and the general public for the advent of the Charter, they were far from the only sources of information available. Other Charter symposia, and speculative articles of all complexions, abounded. Lawyers seemed determined that the Charter would not share the Canadian Bill of Rights' fate of being damned with faint

⁶ It may be a little unfair to refer to "advocacy groups". Opinion was not altogether uniform among the members of either group, and everyone involved strove to avoid conveying the impression of doctrinaire commitment. Nevertheless, the net effect of the commentaries presented by those associated with each group was of sharp, if not diametrical, opposition.

⁷ *Black Book Arguments Seen as Threat to Charter*, *Toronto Globe and Mail*, June 2, 1982, p. 5.

⁸ *Manitoba Attorney-General Disavows Advice on Charter*, *Toronto Globe and Mail*, Nov. 1, 1982, p. 5.

attention. The judiciary also took pains to prepare for the onslaught of constitutional arguments expected to follow the Charter's coming into force on April 17, 1982. Judges attended most of the Charter seminars staged by academic and professional groups, and many courts organized in-house training sessions for their members.

The Supreme Court of Canada was in an awkward position as regards those preparations, since although it would ultimately be expected to give direction to the lower courts about the meaning of the Charter, it would not have an opportunity to exercise that function until Charter appeals began to arrive in Ottawa, by which time, a large body of lower level decisions would have accumulated, and the reversal of undesirable trends would be disruptive. An early intimation of the final court of appeal's general attitude toward the Charter and its interpretation would have contributed to a more uniform approach by other courts. Yet the Supreme Court did not seem very eager, initially, to involve itself in Charter issues. The first time a Charter argument was advanced before that court, in December 1982, Laskin C.J.C. (who had been considered a civil-liberties activist throughout most of his career) interrupted counsel with so many unsympathetic questions and comments that the argument was finally abandoned. Lawyers seemed "so mesmerized" by the Charter, the Chief Justice complained on that occasion, that they had lost sight of other constitutional considerations.⁹

It was not until May, 1984, that the Supreme Court first ruled on a Charter argument.¹⁰ Although it unanimously rejected the argument, the court seemed more conscious by then of the need to provide instruction on the adjudication of Charter issues, and its reasons for judgment in that case, written by Estey J., offered useful guidance, at least to the extent of alerting courts to the fact that they would be expected to take the Charter seriously in appropriate cases:¹¹

We are here engaged in a new task. ... The *Charter* comes from neither level of the legislative branches of government but from the Constitution itself. It is part of the fabric of Canadian law. Indeed, it "is the supreme law of Canada". ... It cannot be readily amended. The fine and constant adjustment process of these constitutional provisions is left by a tradition of necessity to the judicial branch. ... With the *Constitution Act, 1982* comes a new dimension, a new yardstick of reconciliation between the individual and the community and their respective rights, a dimension which, like the balance of the Constitution, remains to be interpreted and applied by the Court.

This was followed up a few months later by the expression of vigorously pro-Charter sentiments by Dickson J., in the course of a unanimous ruling upholding a Charter challenge. The judiciary is "the guardian of the Constitution", he said, and the Charter should be used for "the unrelenting protection of

⁹ Winnipeg Free Press, December 3, 1982, p. 13. The case in question was *R. v. Westendorp*, [1983] 1 S.C.R. 43, (1983), 144 D.L.R. (3d) 259.

¹⁰ *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, (1984), 9 D.L.R. (4th) 161.

¹¹ *Ibid.*, at pp. 365-367 (S.C.R.), 167-168 (D.L.R.).

individual rights and liberties".¹² Not long after his appointment as Chief Justice of Canada Dickson made use of a number of media interviews and speaking engagements to make further important observations, extra-mural but conspicuous and influential, about the role of the courts under the Charter. An address to the 1985 Mid-winter Meeting of the Alberta Section, Canadian Bar Association, was typical.¹³

I believe it is already clear that the experience of the Canadian Bill of Rights will not be repeated. It was often said that, when dealing with the Bill of Rights, the Canadian judiciary were indecisive and unadventurous, and that they "sapped the Bill of Rights of necessary potential for protection against government heavy-handedness." I do not think that charge could be laid against the judiciary in dealing with Charter cases. Canadian courts, including the Supreme Court of Canada, have accepted the new responsibility which has been thrust upon them by the parliamentarians. They recognize the vital role they will play in determining the kind of society Canada is and will become under the Charter. I expect that in our Court we will proceed with the Charter cases one by one in a reasonable and principled way, guarding against excessive enthusiasm in light of the various and serious implications of striking down otherwise valid legislation, but willing to impose limits upon governmental action where warranted by the dictates of the Charter.

The apparent zeal of the new Chief Justice of Canada and his colleagues to provide firm leadership in developing approaches to the Charter's application and interpretation may account for the relative cohesiveness of the Supreme Court's early Charter decisions. As Table 1¹⁴ shows, its first three Charter rulings (the only ones in 1984) were all unanimous, and although dissents and separate concurrences began to appear the following year, the Court's total 1984-85 Charter performance (fifteen cases in all) included eight unanimous decisions (53%), and only two with dissenting reasons (13%). In 1987, 13 of the 26 Charter rulings were unanimous (50%) and 10 included dissenting opinions (39%).¹⁵ By 1991 unanimous decisions were down to 33% and cases with dissents were up to 40%. It is instructive to compare these figures with those for non-Charter Supreme Court decisions for the periods in question. The great discrepancy in the overall cohesiveness ratings for Charter and non-

¹² *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 155, (1984), 11 D.L.R. (4th) 641, at p. 649. The Court's second Charter ruling, *A.-G. Quebec v. Quebec Association of Protestant School Boards*, [1984] 2 S.C.R. 66, (1984), 10 D.L.R. (4th) 321, had also upheld a Charter claim unanimously, but lacked the ringing Charter endorsement found in the *Hunter* case, perhaps because of sensitivity to the unpopularity of the Charter in Quebec.

¹³ Address to Mid-Winter Meeting Canadian Bar Association, Alberta Section, Feb. 2, 1985. Further Charter pronouncements were made by Chief Justice Dickson in an Address to the Princeton Alumni Association, April 25, 1985. Copies of these talks can be found in the E.K. Williams Library, Faculty of Law, University of Manitoba: KF 298, D53, and KF 4483, C519, D53 respectively.

¹⁴ *Infra*, at p. 452.

¹⁵ Compared to the Court's non-Charter performance for the same period — 75% unanimous and 12% with dissents — this may not seem very noteworthy, but it must be remembered that the non-Charter work included many criminal appeals as of right and other issues more cut-and-dried than the interpretation and application of a radically new constitutional instrument. More important than the comparison to non-Charter appeals is the contrast with the Court's later performance on Charter matters.

Charter decisions (9.8 and 60.2 respectively) is perhaps to be expected, given the divisive issues of social policy which Charter cases raise and the newness of Charter law. More noteworthy is the contrast between the two groups of cases in terms of the relative decrease in cohesiveness between 1984 and 1991. Whereas the non-Charter cases dropped only 10.2% in unanimous decisions, and rose only 8.1% in decisions with dissenting decisions, for a total decrease of 18.3 in cohesiveness between 1984-5 and 1991, Charter cases fell 20% in unanimous rulings and increased 26.7% in dissents, for a total decline of 46.7 in cohesiveness during the same period. The Supreme Court's approach to Charter questions had clearly changed more dramatically than its approach to other issues during those years.

It is probable, too that the Supreme Court of Canada's apparent early enthusiasm for Charter rights contributed to the success rate of Charter-based arguments in the lower courts. Whereas the general success rate for Charter claims in all courts for criminal, administrative and family litigation in the year 1984 was 36% (43% in criminal cases),¹⁶ the Charter success rate in the Supreme Court of Canada for 1984-85 was 67%.¹⁷ The Supreme Court's non-Charter success rate for the same period was only 50%. By 1987 the Charter success rate in all courts had risen to 39% (44% in criminal cases). It seems likely that there was some correlation between this increase and the Supreme Court's early openness to Charter arguments.

An important consideration in preparing for effective Charter litigation was the need to ensure that the persons who most required Charter protection had access to adequate resources, advisory and financial, to enable them to assert their rights in courts and other appropriate forums. A scattering of self-help organizations (one of the first and most effective being the Women's Legal Action and Education Fund — LEAF¹⁸) undertook Charter advocacy on behalf of their respective members, but, apart from LEAF, their involvement has generally been sporadic, and their success spotty. To help overcome this difficulty, a major governmental initiative, known as the Court Challenges Program, was established, providing arms-length funding and advice for important Charter challenges to federal legislation.¹⁹ Regrettably, similar programs were never instituted at the provincial level, and the federal program was ended in 1992, a victim of austerity measures by the Mulroney government.²⁰

¹⁶ Table 2, *infra*, at p. 453.

¹⁷ Table 3, *infra*, at p. 453.

¹⁸ See, S. Razack, *Canadian Feminism and the Law: The Women's Education and Action Fund and the Pursuit of Equality* (1991). According to Robert Hough, *The Rise of LEAF*, *Canadian Lawyer*, Mar. 1991, p. 36, LEAF has been on the losing side of only 3 out of 40 decided cases it was involved in.

¹⁹ See Canadian Council on Social Development: *Equality Rights Five Years Later - Annual Report*, Court Challenges Program, 1989-90.

²⁰ M.P.s Denounce Plan to Kill Federal Aid for Equality Battles, *Toronto Star*, Mar. 1, 1992, B8. See, Parliament of Canada, *Paying Too Dearly: Report of Standing Committee*

II. Impact

The effect of the Charter on the way certain types of cases were argued in court was powerful and immediate. Table 5²¹ shows that by 1984, Charter arguments were being advanced in 40% of criminal cases, and 25% of administrative law cases, and that by 1987 this had risen to 62% and 28% respectively. Even in a field as private as family law, the Charter occasionally raised its head. Although the use rate had begun to drop in all three fields by 1991 (58%, 19% and 1% respectively), it is clear that constitutional law has been transformed from an arcane discipline, of interest chiefly to academics and governmental counsel, to something most lawyers must at least watch from a corner of the eye. Professor Robin Elliott has noted that whereas there were only nine constitutional decisions by the Supreme Court of Canada in 1978-79, there were fifty constitutional rulings (of which forty-one involved the Charter) in 1989-90.²² Lamer C.J.C. may have exaggerated a little when he told an interviewer in April 1992 that the Charter has spawned "a revolution comparable in law to Louis Pasteur's discoveries in science",²³ but the revolutionary nature of the document cannot be disputed.

Courts were not the only institutions affected by the Charter's new constitutional norms. Police practices had to change in significant respects, such as in the warning administered to arrested persons and the opportunity made available to them to contact lawyers.²⁴ Investigative and adjudicative procedures of administrative bodies have been altered to meet Charter requirements.²⁵ Parliament and the provincial legislatures undertook self-assessments of their statute books with a view to cleansing them of obvious Charter violations without being ordered to do so by the courts.²⁶ The latter exercise, expected to be so sweeping that the implementation of equality rights under section 15 was delayed for three years to reduce the pressure,²⁷ resulted, in fact,

on Human Rights, June 11, 1992. There are suggestions, as this article goes to press, that the Court Challenges Program, or something like it, will be re-initiated.

²¹ *Infra*, at p. 455.

²² Developments in Constitutional Law: The 1989-90 Term (1991), 2 S.C.L.R. (2d) 83.

²³ Toronto Globe and Mail, April 1992, A6.

²⁴ *R. v. Therens*, [1985] 1 S.C.R. 613, (1985), 18 D.L.R. (4th) 655; *Clarkson v. The Queen*, [1986] 1 S.C.R. 383, (1986), 26 D.L.R. (4th) 493; P.B. Michalyshyn, The Charter Right to Counsel: Beyond Miranda (1987), 25 Alta. L. Rev. 190; S.A. Cohen, The Impact of Charter Decisions on Police Behaviour (1984), 39 C.R. (3d) 264.

²⁵ *Hunter v. Southam Inc.*, *supra*, footnote 12; *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, (1985), 17 D.L.R. (4th) 422 (S.C.C.); Administrative Law and the Charter (Special Issue), (1984-85) 10 Queen's L.Rev. 263; Administrative Law: Past Present and Future (Special Issue), (1991) 16 Queen's L. Rev. 5.

²⁶ Each jurisdiction went about the task differently. See generally: C.F. Beckton, Section 15 of the Charter - Statute Audits and the Search for Equality (1985-86), 50 Sask. L. Rev. 111. As to the Government of Canada, see: Department of Justice, Toward Equality: Response to the Report of the Parliamentary Committee on Equality Rights (1986).

²⁷ *Supra*, footnote 2, s.32(2).

in relatively few amendments,²⁸ but the impact of the surveys was salutary nonetheless, if only in enhancing Charter awareness among those responsible for the formulation of future legislation.

There are linkages, of course, between the way police, administrators and legislators have reacted to the Charter and the judiciary's response to the document. If courts had not been as disposed to accept Charter claims as they were from the outset, other branches of government would not have been so ready to modify their behaviour. Reference has already been made to the fact that in 1984 Charter arguments succeeded, when raised, in 43% of criminal cases and in 29% of administrative cases in all courts, and that in 1984-85 67% of all Charter claims succeeded before the Supreme Court of Canada.²⁹ By 1987, although the Supreme Court success rate had fallen, the all-court success rate had risen. The courts' determination to accord major legal impact to the new constitutional instrument was unmistakable.

It is interesting that by 1987, when the apogee of Charter enthusiasm was reached by other courts, the Supreme Court of Canada's love affair with the Charter appeared to be on the wane. That year, the success rate of Charter claims in the Supreme Court had fallen to 23%. Professors Knopff and Morton have calculated a 35% success rate in the first 100 Charter decisions of the Supreme Court,³⁰ and Professor Elliott found only 24% of the 1989-90 Charter claims in that court to have been victorious. This decline may have been a temporary phenomenon, however; by 1991 the Supreme Court's Charter success rate had risen again, to 43%, which was not far from the all-court figure.³¹

In addition to fluctuating over time, the Charter's impact has varied considerably according to both the area of law in question and the particular Charter right involved. It has already been noted that the reliance rate and the success rate have both been consistently higher in criminal litigation than in other areas of law.³² Dramatic differences in success rates can also be seen among particular Charter rights, as Table 4³³ indicates. In the reports surveyed, four Charter rights were upheld every time they were relied upon: democratic rights (section 3); the rights to be informed promptly of the reasons for arrest (section 10(a)), and, when charged, of the specific offence (section 11(a)); and the right to an interpreter in legal proceedings (section 14). By contrast, arguments based on freedom of religion (section 2(a)); mobility rights (section 6(2)); freedom from testifying (section 11(c)); and the benefit of reduced punishment (section 11(i)) failed every time they were raised. While those

²⁸ The limited nature of the federal response, for example, can be seen in the Report cited *supra*, footnote 26.

²⁹ Table 2, *infra*, at p. 453, and Table 3, *infra*, at p. 453.

³⁰ R. Knopff and F.L. Morton, *Charter Politics* (1992), p. 20; Elliot, *loc. cit.*, footnote 22, at p. 91.

³¹ Table 2, *infra*, at p. 453; Table 3, *infra*, at p. 453.

³² Tables 2, *ibid.*; Table 4, *infra*, at p. 455; Knopff and Morton, *op. cit.*, footnote 30, reported that 75% of the first 100 Supreme Court of Canada Charter cases were criminal.

³³ *Infra*, at p. 454.

success rates may have been the product, in part, of the relatively infrequent resort by litigants to the rights in question, there were also striking disparities among Charter rights with heavy use rates. The right to counsel (section 10(b)), the right to be tried within a reasonable time (section 11(b)), and freedom from unreasonable search and seizure (section 8), all had much higher success rates than the 38% average. The presumption of innocence (section 11(d)), freedom from cruel and unusual punishment (section 12), and protection from arbitrary detention and imprisonment (section 9), on the other hand, all fared much less well than average.

Table 5 also reveals discrepancies among Charter rights in regard to the impact of section 1 in justifying particular infringements as "reasonable limits ... in a free and democratic society". Claims for denial of free expression (section 2(b)) for example, were reduced from a 53% success rate to 24% by reason of several section 1 "saves", and the success rate for the presumption of innocence (section 11(d)) dropped from 41% to 18% for the same reason. Other major Charter rights, however, such as the right to fundamental justice (section 7), freedom from unreasonable search and seizure (section 8), and the right to counsel (section 10(b)), were relatively unaffected by section 1. While this is readily understandable in the case of rights like section 8, which have built-in standards of reasonableness, it is not so easily explained in the case of section 10(b), which contains no such internal qualifier. The discrepancy will be examined more fully below.

III. *Charter Law*

The decade produced a huge body of Charter law. Space limitations preclude any attempt to deal extensively in this article with substantive rulings about particular rights. Much can be learned about the shape of Charter law, however, from key decisions about general questions such as scope and remedies. The following observations will concern such general issues: immunity of the private sector from Charter obligations; the meaning of "government"; interpretation of the "opt-out" provision in section 33; the application of "reasonable" limits under section 1; and certain remedial questions.

A. *Private Sector Immunity*

While section 32(1) stipulates that governmental activities in the federal, provincial and territorial spheres are subject to Charter obligations, it does not explicitly state that the Charter applies only to such activities. For that reason, and because section 52(1) of the Constitution Act, 1982 proclaims the Constitution to be the "supreme law of Canada," some early commentators contended that the Charter should be construed as applicable to private sector activities, at least those activities which, like security services, schools and hospitals, resemble traditional governmental operations. The present writer was among those commentators.³⁴ That point of view was soon rejected by the Supreme

³⁴ See, D. Gibson, *Law of the Charter: General Principles* (1986), p.110.

Court of Canada, however. In *Retail Wholesale and Department Store Union v. Dolphin Delivery Ltd.*³⁵ the court emphatically endorsed the view that the Charter exists solely to protect the rights of individuals and groups from governmental interference.

The significance of the *Dolphin* decision grows with every increase in the privatization of what were formerly governmental services. There are very few public institutions - from schools to health care facilities, to prisons, to land registration offices — that are not capable of being operated by private entrepreneurs, and politicians seem currently determined to exploit that capability to its fullest. With each new step in the privatization process the Charter's ambit shrinks.

By what counter-measures might this growing gap in constitutional protection for individual rights be filled? Human rights legislation which exists in every Canadian jurisdiction, federal provincial and territorial, certainly applies to the private sector. It is important to realize, however, that most human rights legislation restricts itself to the problem of discrimination, and does not address other important aspects of human rights, such as, for example, the fundamental freedoms of expression, religion, association, and assembly. If private sector operations are expected to respect freedom of speech or other fundamental freedoms in their dealings with employees or customers, new legislative measures will be required. The Canadian Bill of Rights, 1960,³⁶ could be modified by a unilateral Act of Parliament to embrace private sphere operations that fall within federal jurisdiction, for example, and those provinces with similar rights documents could do likewise. Other provinces could either enact new private-sector charters, or simply expand their present human rights statutes to cover important fundamental freedoms. While it is doubtful that the political will to enact such measures exists at the present time, it might not take many conspicuous infringements of fundamental freedoms by privateers to create a climate conducive to their enactment. Oppressive conduct is no less hurtful, after all, when it comes from Big (or little) Business than when it comes from Big Government.³⁷

B. The Meaning of "Government"

The Charter's scope is described in section 32(1):

This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

³⁵ [1986] 2 S.C.R. 573, (1986), 33 D.L.R. (4th) 174. See, D. Gibson, *What Did Dolphin Deliver?*, in G.A. Beaudoin (Ed.), *Your Clients and the Charter* (1988), p. 57.

³⁶ *Supra*, footnote 3.

³⁷ "What I may call the constitutional law of the private corporation is in many respects today quite as important to Canadians as what we call constitutional law proper.", F.R. Scott, *Canadian Federalism: The Legal Perspective* (1966-67), 5 Alta. L.Rev. 263, at p. 265.

Subsection (b) also extends to the Territories by reason of section 30, which states that any reference in the Charter to a Province or its legislature also applies to the Territories and their legislatures.

Judicial interpretations of section 32(1) have been liberal in some respects, and narrow in others. The Supreme Court of Canada's first ruling about the section, in *Operation Dismantle v. The Queen*,³⁸ was generous, holding that "government" embodies the Crown, and that the Charter penetrates, where appropriate, to the innermost sanctums of government, including the Cabinet room. It is also clear that Crown corporations and other Crown agents are subject to the Charter. In *Lavigne v. O.P.S.E.U.*,³⁹ for example, the Supreme Court of Canada held, without dissent, that the Council of Regents of community colleges, being a Crown agent subject to control by the Minister of Colleges and Universities, was bound by the Charter as a part of "government", in regard to a compulsory check-off of union dues included in a collective agreement with a union representing college employees. Earlier lower-level decisions suggesting that even Crown agents are exempt from the Charter with respect to functions of a "private" nature, such as collective bargaining,⁴⁰ or business activities,⁴¹ appear to have been displaced by *Lavigne*.

There has also been general judicial agreement that section 32(1) extends Charter obligations to municipal governments, in spite of its explicit reference to only the federal, provincial and territorial orders of government.⁴² Although the Supreme Court of Canada has not yet ruled conclusively on the question, La Forest J. has offered an *obiter dicta* explanation for applying the Charter to local governments:⁴³

... if the *Charter* covers municipalities, it is because municipalities perform a quintessentially governmental function. They enact coercive laws binding on the public generally, for which offenders may be punished ...

In other respects, however, judicial determinations about what constitutes "government" for Charter purposes have been quite restrictive. Among the

³⁸ [1985] 1 S.C.R. 441, (1985), 18 D.L.R. (4th) 481.

³⁹ [1991] 2 S.C.R. 211, (1991) 81 D.L.R. (4th) 545.

⁴⁰ For example, *Bartello v. Canada Post Corporation* (1987), 46 D.L.R. (4th) 129, 62 O.R. (2d) 652 (Ont. H.C.).

⁴¹ For example, *Trieger v. Canadian Broadcasting Corporation* (1988), 54 D.L.R. (4th) 143, 66 O.R. (2d) 273 (Ont. H.C.). Contrast *Byers v. Clancy* (1992), 35 A.C.W.S. (3d) 814 (B.C.S.C.).

⁴² *Re McCutcheon v. City of Toronto* (1983), 147 D.L.R. (3d) 193, 41 O.R. (2d) 273 (Ont. H.C.); *Hardie v. District of Summerland* (1985), 24 D.L.R. (4th) 257, 68 B.C.L.R. 244 (B.C.S.C.); *Re Ontario English Catholic Teachers Assoc. and Essex County Roman Catholic School Board*, (1987), 36 D.L.R. (4th) 115, 58 O.R. (2d) 545 (Ont. Div. Ct.). But see, *Phillips v. Moose Jaw Board of Police Commissioners* (1988), 67 Sask. R. 49 (Sask. Q.B.).

⁴³ *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, at p. 270, (1990), 76 D.L.R. (4th) 545, at p. 640. The question of "coercive laws" at the local level being Charter-prone is distinct from general application of the Charter to local governments, of course, because s.52(1) of the Constitution Act, 1982 subjects all laws to Charter obligations: *R. v. Pinehouse Plaza Pharmacy Ltd.* (1991), 20 C.R.Q. 125.20-03 (Sask. C.A.)

more remarkable of these was the Supreme Court of Canada's January 1993 decision in *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*⁴⁴ exempting the Nova Scotia Legislative Assembly from having to comply with the Charter with respect to its rule prohibiting the presence of television cameras in the legislative chamber.

Two of the eight judges who participated in the *New Brunswick Broadcasting* judgment disagreed with that conclusion. Cory J. dissented, finding that the Charter had been violated. Sopinka J. was of the view that the Charter was applicable, but concurred with the majority in the result because he considered the restriction on television cameras in the Legislative Assembly to be a "reasonable limit," justifiable under section 1 of the Charter. The six judges who found the Assembly exempt from the Charter offered varying rationales. The most extreme was that of Lamer C.J.C., who held that the term "legislature" in section 32 of the Charter refers only to the complete body required to enact legislation, inclusive of the Crown, and does not apply in isolation to one chamber of a legislative body. That approach is open to the criticism that it amounts to treating the constitutional powers of the part as greater than those of the whole. The remaining judges were somewhat less radical than the Chief Justice. They held that although legislative assemblies may be subject to Charter constraints for some purposes, their "inherent privileges," including the power to expel "strangers", are not open to Charter scrutiny. Because they are constitutionally entrenched, albeit by implication, those privileges cannot be abrogated by another constitutional norm, in the view of the judges.

The basis for the majority's view that the "inherent" privileges of legislative chambers are constitutionally entrenched was the Preamble to the Constitution Act, 1867, which calls for a constitution "similar in principle to that of the United Kingdom," together with traditions inherited from British and colonial experience. The majority judges took no apparent notice of the fact that this historical experience included some quite egregiously arbitrary exercises of political power, as when the British House of Commons imprisoned the Sheriff of Middlesex for merely serving a writ in a defamation action based on statements made in a Parliamentary debate and reported in Hansard.⁴⁵ By restricting assembly immunity to "inherent" privileges, and not defining that term, the majority of the Supreme Court of Canada did perhaps preserve the ability of the courts to curb such abuses by Canadian legislative assemblies in future, however.

Why the majority did not take the more direct approach of Sopinka J., who simply held the particular Assembly rule to be a justifiable "reasonable limit" under section 1 of the Charter, is probably best explained by their desire, at the present stage of Charter development, to appear more self-abnegating than they did at an earlier stage. Lamer C.J.C. observed, for instance:⁴⁶

⁴⁴ [1993] 1 S.C.R. 319, (1993), 100 D.L.R. (4th) 212.

⁴⁵ *Sheriff of Middlesex Case* (1840), 11 A. & E. 273, 113 E.R. 419 (K.B.).

⁴⁶ *Supra*, footnote 44, at pp. 354 (S.C.R.), 232 (D.L.R.).

Historically, the courts have been careful to respect the independence of the legislative process just as legislators have been careful to respect the independence of the judiciary.

McLachlin J. made several references to the “tradition [or “history”] of curial deference”,⁴⁷ and appended a caution:⁴⁸

I add this. Our democratic government consists of several branches. ... It is fundamental to the working of government as a whole that all these parts play their proper role. It is equally fundamental that no one of them oversteps its bounds, that each show proper deference for the legitimate sphere of activity of the other.

There was, it seems, a conscious judicial reluctance, by the end of the period under review, to tread too heavily on political toes.

The Charter’s application to the judiciary has been the subject of much confusion,⁴⁹ due largely to some cloudy remarks made by MacIntyre J., on behalf of a majority of the Supreme Court of Canada, in *Retail Wholesale and Department Store Union v. Dolphin Delivery Ltd.*:⁵⁰

... where the word “government” is used in s.32 it refers not to government in its generic sense — meaning the whole of the governmental apparatus of the state — but to a branch of government. The word “government”, following as it does the words “Parliament” and “Legislature” must then, it would seem, refer to the executive or administrative branch of government.

While in political science terms it is probably acceptable to treat the courts as one of the three fundamental branches of Government, that is, legislative, executive, and judicial, I cannot equate for the purposes of *Charter* application the order of a court with an element of governmental action. This is not to say that the courts are not bound by the *Charter*. The courts are, of course, bound by the *Charter* as they are bound by all law. It is their duty to apply the law, but in doing so they act as neutral arbiters, not as contending parties involved in a dispute. To regard a court order as an element of governmental intervention necessary to invoke the *Charter* would, it seems to me, widen the scope of *Charter* application to virtually all private litigation.

Read in isolation, some of these observations would appear to exclude the judiciary altogether from the ambit of the Charter, and they seem to have been so interpreted by some courts.⁵¹ Such a reading overlooks two factors. One is the fact that McIntyre J. was addressing only the question of whether the Charter applies to common law principles arising in the course of purely private litigation. The passage quoted was offered as a rebuttal to suggestions that the crystallization of a common law rule in a judicial order in private litigation would provide a sufficient “governmental” element to bring the Charter into play.⁵² The other overlooked factor is McIntyre J.’s statement that, “the courts are, of course, bound by the Charter as they are bound by all law”. That proviso,

⁴⁷ *Ibid.*, at pp. 370-371 (S.C.R.), 259-260 (D.L.R.).

⁴⁸ *Ibid.*, at pp. 389 (S.C.R.), 273 (D.L.R.).

⁴⁹ See: G. Otis, *Judicial Immunity from Charter Review: Myth or Reality?* (1989), 30 C. de D. 673.

⁵⁰ *Supra*, footnote 35, at pp. 598, 600 (S.C.R.), 194, 196 (D.L.R.).

⁵¹ For example, *Re Law Society of Prince Edward Island and Johnson* (1988), 54 D.L.R. (4th) 18, at p. 25 (P.E.I. App.D.)

⁵² Gibson, in Beaudoin, *op. cit.*, footnote 35.

coupled with a subsequent ruling of the Supreme Court of Canada, in *British Columbia Government Employees Union (B.C.G.E.U.) v. Attorney-General of British Columbia*,⁵³ that the Charter applies to judicially initiated exercises of the contempt of court power, indicates that whatever McIntyre J. might have intended by his *Dolphin dicta* about the meaning of “government”, courts are subject to Charter obligations for most, if not all purposes.

In the *B.C.G.E.U.* case, the question in issue was whether the Charter was violated by an order of the Chief Justice of the British Columbia Supreme Court restraining, as contempt of court, peaceful picketing of British Columbia courthouses by courthouse employees in support of a lawful strike. The Supreme Court of Canada held that the order did amount to a *prima facie* breach of the picketers’ freedom of expression under section 2(b) of the Charter, but that it was justified as a “reasonable limit,” within the meaning of section 1. Explaining the Charter’s applicability to this judicial order, Dickson C.J.C. pointed out, for a majority of the court, that in this case, as distinct from *Dolphin*:⁵⁴

The court is acting on its own motion and not at the instance of any private party. The motivation for the court’s action is entirely “public” in nature, rather than “private”. The criminal law is being applied to vindicate the rule of law and the fundamental freedoms protected by the *Charter*. At the same time, however, this branch of the criminal law, like any other, must comply with the fundamental standards established by the *Charter*.

If only this passage, and the McIntyre *dicta* quoted earlier, were available for guidance, it would be reasonable to conclude that the Charter applies to courts only as to the law they apply, and not as to their application of that law in particular instances. The decision in the *B.C.G.E.U.* case went much further than that, however. Dickson C.J.C. defined the issue raised by the case as “whether the law of criminal contempt and the injunction to enforce the law pass scrutiny under the *Charter*”,⁵⁵ and the formal answer he pronounced on behalf of the majority addressed the application of the law, rather than the substance of the law itself:⁵⁶

The order by the Chief Justice of the Supreme Court of British Columbia dated November 1, 1983 restraining picketing and other activities within the precincts of all courthouses in British Columbia did infringe or deny the rights and freedoms guaranteed by s. 2(b) of the ... *Charter* ...

The order was justified by s. 1 of the *Charter* ...

It must be concluded, therefore, that courts are subject to Charter scrutiny, with respect to both the substance of the laws they apply and the manner in which they apply them to particular cases (so long, if common law is involved, as the question does not arise from litigation between private parties).⁵⁷

⁵³ [1988] 2 S.C.R. 214, (1988), 53 D.L.R. (4th) 1.

⁵⁴ *Ibid.*, at pp. 244 (S.C.R.), 22 (D.L.R.).

⁵⁵ *Ibid.*, at pp. 245 (S.C.R.), 23 (D.L.R.). (Emphasis added).

⁵⁶ *Ibid.*, at pp. 250 (S.C.R.), 27 (D.L.R.). (Emphasis added).

⁵⁷ It must be admitted, however, that the Court avoided an opportunity to make this absolutely clear in *United Nurses of Alberta v. A.-G. of Alberta*, [1992] 1 S.C.R. 901, at p. 930, (1992), 89 D.L.R. (4th) 609, at p. 635.

This is not to say that members of the judiciary are necessarily on an equal footing with government administrators or police officers under the Charter. Judges, as opposed to courts, have long enjoyed immunity from personal liability for violating law in the course of carrying out their judicial functions. The appropriate remedy is considered to be appeal, rather than personal liability of the judge. This personal immunity is applicable to liability for violating the Charter, and it has survived Charter attack so far.⁵⁸ There is also some authority for the view that judicial orders alleged to violate the Charter cannot simply be ignored, as an unconstitutional statute can be, but remain effective until expressly set aside by higher judicial authority.⁵⁹

C. Notwithstanding Clause

Section 33 of the Charter is a Trojan Horse within a Trojan Horse. It permits Parliament and the provincial and territorial legislatures arbitrarily to override section 2 (fundamental freedoms) and sections 7 to 15 (legal and equality rights) for renewable five-year periods. This is accomplished by means of a declaration that the Act containing the declaration, or portions of it, shall operate notwithstanding some or all of the Charter rights to which section 33 applies.⁶⁰

The origins of this unusual and controversial provision can be found in section 2 of the Canadian Bill of Rights, 1960:⁶¹

Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate or infringe ... any of the rights or freedoms herein recognized and declared ...

In that context a notwithstanding clause is not especially surprising, since the Bill, as a regular federal statute lacking constitutional status, is technically no more than an interpretation Act, designed to resolve legislative ambiguities, and like all other such Acts it is subject to contrary intentions expressly articulated. As Minister of Justice Davie Fulton, the Bill's chief sponsor, explained to the Parliamentary Committee which studied it before enactment:⁶²

[W]e have made a provision ... which we believe will carry forward the effect of this Bill as a rule of construction and interpretation to be applied by the courts even in dealing with statutes passed after this Bill of Rights.

⁵⁸ For example, *Royer v. Mignault* (1988), 50 D.L.R. (4th) 345 (Que. C.A.).

⁵⁹ *R. v. Bridges* (1990), 78 D.L.R. (4th) 529 (B.C.C.A.).

⁶⁰ Territorial legislatures are not expressly included in s.33, and Roger Tassé has expressed the view that they are excluded from its ambit: G.A. Beaudoin and E. Ratushny, *Canadian Charter of Rights and Freedoms*, (2nd Ed.), pp. 103-104. Section 30 of the Charter appears, however, to extend the provision to the territorial legislatures in words too clear to contradict.

⁶¹ *Supra*, footnote 3. (Emphasis added). See, generally: A.F. Bayefsky, *The Judicial Function Under the Canadian Charter of Rights and Freedoms* (1986-87), 32 McGill L.J. 791; G. Boilard and J. Desjardins, *Clause Nonobstant: Article 33 de la Charte Canadienne des Droits et Libertés*: Bibliographie sélective et annotée, Québec: Bibliothèque de l'Assemblée Nationale, 1988.

⁶² *Proceedings and Evidence, Special Committee on Human Rights and Fundamental Freedoms*, House of Commons, Canada, July 1960, pp. 444, 572.

[W]hat our Bill of Rights does is to ensure that no subsequent Parliament can override the Bill of Rights without that fact being clearly in its mind and out in the open, as it were, so that it cannot be done inadvertently or by concealment, either from Parliament or the country.

Similar provisos were subsequently incorporated in the equivalent provincial rights guarantees of Alberta, Quebec, and Saskatchewan.⁶³

Because the Charter is much more than an interpretive aid, the "notwithstanding clause" contained in its section 33 is of more radical import than its Bill of Rights equivalent, permitting constitutional guarantees to be entirely suspended, albeit temporarily, by Parliament and the provincial and territorial legislatures. Strong opposition to its inclusion was expressed by many people, including Prime Minister Pierre Trudeau, but for the governments of several provinces it was an essential condition to their acceptance of the Charter. The Trudeau government eventually relented, therefore, after first ensuring that the measure was restrained by a five-year time limit.⁶⁴

Although the prediction of Justice Minister Jean Chrétien, when speaking in support of the Charter in the House of Commons' constitutional debate in November, 1981, that the notwithstanding clause was a "safety valve ... unlikely ever to be used except in non-controversial circumstances ..." ⁶⁵ was less than accurate, the commonly held view that the political risks of invoking the notwithstanding clause would be a strong deterrent to doing so was generally borne out during the Charter's first decade. Apart from massive reliance on the provision by René Lévesque's Parti Québécois government of Quebec, which was a product of Quebec's special circumstances at the time, section 33 was employed only twice during the period: by the Devine government of Saskatchewan in 1986, and by the Bourassa government of Quebec in 1988. The government of Saskatchewan used the clause to forestall Charter attacks on a statute ordering provincial government employees back to work after a lengthy dispute.⁶⁶ The Bourassa government did so to overcome a ruling by the Supreme Court of Canada which had held a provincial statute prohibiting the use of English on commercial signs to contravene the Charter's guarantee of free expression.⁶⁷

The Lévesque government's fling with section 33 was extraordinary. Although it led to an assessment of the provision by the Supreme Court of

⁶³ Alberta Bill of Rights, S.A. 1972, c. 1, s. 2 (R.S.A. 1980, c.A-16); Quebec Charter of Human Rights and Freedoms, S.Q. 1975, c.6 (R.S.Q. 1977, c.12), s. 52; Saskatchewan Bill of Rights, 1947, as amended S.S. 1979, C.24.1, s.44.

⁶⁴ R. Romanow, J. Whyte and H. Leeson, *Canada Notwithstanding* (1984), pp. 206-211. Mr. Trudeau later said that it was only with "great anguish" that he concurred in the inclusion of s.33: *Toronto Globe and Mail*, Mar 10, 1989, p. 2.

⁶⁵ Canada House of Commons, Hansard, November 20, 1981, p. 13042.

⁶⁶ *Winnipeg Free Press*, February 1, 1986, p. 13.

⁶⁷ The validity of the override was confirmed in *Devine v. A.G. Quebec*, [1988] 2 S.C.R. 790, (1988), 55 D.L.R. (4th) 641. The Supreme Court decision which was effectively set aside by the override was *Ford v. A.G. Quebec*, [1988] 2 S.C.R. 712, (1988), 54 D.L.R. (4th) 577.

Canada that will be of permanent utility, the situation which provoked it is unlikely to be repeated, at least not by any province that intends to remain a part of Canada. When Mr. Lévesque and his Quebec colleagues arrived at the Ottawa Conference Centre on the final morning of the November, 1981 federal-provincial constitutional conference, and learned that an overnight deal to patriate the Constitution and enact the Charter had been reached by the governments of Canada and the nine other provinces, without consulting Quebec, they considered themselves freed from any future moral or political responsibility to respect the Charter. The political risk which inhibits reliance on section 33 by other governments did not therefore apply to Quebec, and the Lévesque regime had no difficulty persuading the Quebec legislature to enact an omnibus "notwithstanding" statute (with the perhaps unintentionally ironic title in English, *An Act Respecting the Constitution Act, 1982*)⁶⁸ that purported to opt out of every possible Charter guarantee with respect to every existing provincial statute and regulation. This measure was followed up by the practice of automatically inserting a section 33 opt-out clause in every subsequent enactment of the Lévesque government.⁶⁹

The impact of these moves faded over time for both political and legal reasons. When the Parti Québécois government of Quebec was defeated by Robert Bourassa's Liberals, the policy of inserting automatic opt-out clauses in every new statute ended. Then the Supreme Court of Canada ruled, in *Ford v. Attorney General of Quebec*,⁷⁰ that the retrospective aspects of the omnibus opt-out were impermissible. That ruling, based on the principle of interpretation that legislation should not be construed to operate retrospectively unless it so provides either expressly or by necessary implication,⁷¹ was by then of chiefly academic interest so far as the Lévesque opt-outs were concerned, because only a short retroactive period (from April 17, 1982 to June 23, 1982) was involved, and because more than five years had already elapsed from enactment of the provision. It may nevertheless have affected some pending litigation. More significant for the future was the court's rejection of other restrictive interpretations of section 33 that had been partially adopted by the Quebec Court of Appeal. There could be no complaint about a notwithstanding clause, it held, merely because of its omnibus character; the validity of the Quebec provision was "not affected by the fact that it was introduced into all Quebec statutes enacted prior to a certain date by a single enactment".⁷² Nor is it necessary, it

⁶⁸ S.Q. 1982, c.21.

⁶⁹ Winnipeg Free Press Cartoonist Dale Cummings noted these events in May, 1982 with a depiction of Mr. Lévesque standing in front of the Constitution, brandishing, like a banner, a roll of toilet paper on which the word "NOTWITHSTANDING" was emblazoned.

⁷⁰ *Supra*, footnote 67.

⁷¹ *Ibid.*, at pp. 744-745 (S.C.R.), 600-601 (D.L.R.). Another possible basis for that interpretation, though not mentioned by the court, is the fact that permitting the opt-out to operate retrospectively would enlarge the opt-out period beyond the five year period specified in s. 33(3).

⁷² *Ibid.*, at pp. 741-742 (S.C.R.), 600 (D.L.R.).

held, for an opt-out clause to specify either the precise section or sections of the legislation that might raise Charter issues, or the precise Charter provisions that require to be overridden in respect of particular aspects of the legislation. "[A] s.33 declaration is sufficiently express if it refers to the number of the section, subsection or paragraph of the Charter which contains the provision or provisions to be overridden",⁷³ and it is acceptable to specify the entire statute and all overridable Charter provisions.

A more radical possible restriction on section 33 than those addressed in the *Ford* case has been occasionally suggested by academic writers: that the reasonableness of legislative invocations of section 33 should be subject to judicial review under section 1 of the Charter.⁷⁴ This notion has not yet been ruled upon definitively.⁷⁵

Many still believe that section 33 of the Charter should be repealed. The Canadian Bar Association has taken that position on more than one occasion,⁷⁶ and the Mulroney government also did so for a time during the constitutional debate of 1989.⁷⁷ The fact that the clause has been employed very sparingly since the demise of the Parti Québécois "omnibus opt-outs" offers little reason to resist those proposals, since it is in rare times of crisis, when public opinion is tolerant of rights abuses alleged to further the public good,⁷⁸ that the civil liberties of individuals are most at risk. The prospect of section 33 being repealed in the foreseeable future does not seem high, however. The provision has many distinguished defenders, in the academic world as well as in political arenas,⁷⁹ and the prevailing attitude at the moment seems to be that expressed in the title of an article by Professor Lorraine Weinrib: "Learning to Live with the Override."⁸⁰ That attitude will probably persist until some national calamity causes minority rights to be trammelled on a wholesale basis, and Canadians' sensitivities to such abuses are re-awakened.

⁷³ *Ibid.*, at pp. 741 (S.C.R.), 598-599 (D.L.R.).

⁷⁴ For example, B. Slattery Canadian Charter of Rights and Freedoms - Override Clauses Under S.33 - Whether Subject to Review Under S.1 (1983), 61 Can. Bar Rev. 391; N. Finklestein: Laskin's Canadian Constitutional Law (5th Ed., 1986), pp. 999-1000.

⁷⁵ See, Tassé, in Beaudoin and Ratushny, *op. cit.*, footnote 60, pp. 106-107. An interesting middle-ground position on the question was outlined by D. Greshner and K. Norman, The Courts and Section 33 (1987), 12 Queen's L.J. 155.

⁷⁶ Toronto Globe and Mail, March 16, 1983, p. 5; Winnipeg Free Press, June 21, 1989, p. A 4.

⁷⁷ Edmonton Journal, April 8, 1989, p. 3.

⁷⁸ A poll conducted for the Department of National Defence in 1985 indicated that 59% of Canadians favoured suspending Charter rights during a national civil emergency: Toronto Globe and Mail, December 17, 1985, p. 1.

⁷⁹ For example, Peter H. Russell, Standing up for Notwithstanding (1991), 29 Alta. L.R. 293; Patrick Monahan, The Charter, Federalism and the Supreme Court of Canada (1987), p. 81.

⁸⁰ (1989-90), 35 McGill L.J. 541.

D. Reasonable Limits⁸¹

Section 1 of the Charter, which "guarantees" the rights set out in the rest of the document, but subjects them to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society," is capable of plunging judges into the cauldron of "small p" political controversy, because it necessitates an examination and prioritization of competing social policy goals in order to determine the reasonableness of particular limits.⁸² Judicial discomfort with the prospect of such controversy has undoubtedly influenced the way section 1 has been interpreted and applied.

Such discomfort has, for one thing, probably affected the frequency with which courts have undertaken section 1 analyses. Before section 1 needs to be considered at all, a Charter claimant must establish that the Charter right is substantively applicable to his or her situation. A judge reluctant to get into the "small p" political factors that section 1 requires to be balanced can avoid doing so by ruling that the claimant has not met this first requirement. Suppose that a person accused of gross indecency defended the charge on the ground that criminalizing such conduct violates the Charter guarantee of free expression. The Crown could defeat such a defence by satisfying the court that the prohibition is a "reasonable limit" under section 1, but doing so would force the court to balance complex social and moral considerations. That difficult exercise could be sidestepped by merely holding, as a matter of definition, that acts of gross indecency do not constitute "expression" within the meaning of the Charter guarantee. In cases where interpretations advocated by claimants are far-fetched or strained, courts are doubtless wise to thus truncate the litigation. The temptation to do so also arises, however, in cases where the claimant's definition of the Charter right is entirely plausible, but where a section 1 analysis would be difficult. Some writers have added to the temptation by urging courts to reject claims at the definitional stage wherever possible, thereby reducing their intrusion into the political arena.⁸³ In my opinion, the temptation ought to be resisted in those circumstances, but courts have not consistently done so.

Disposing of Charter claims at the definitional stage, rather than by means of section 1, can have several important ramifications. For one thing, the onus of proof and persuasion lies with the Charter claimant at the definitional stage, but with the supporter of the restriction under section 1. For another, a restriction can only be justified under section 1 if it is "prescribed by law". A third difference is that definitional rulings close doors for the future and shape the subsequent application of the rights in question; section 1 determinations, although undoubtedly influential in practice, are mere findings of fact, lacking formal precedential impact for the future.

Before examining judicial tendencies in relation to this first decisional threshold, a distinction should be drawn between two types of Charter rights:

⁸¹ See generally: P.W. Hogg, Section 1 Revisited (1991-92), 1 N.J.C.L.1.

⁸² See: Knopff and Morton, *op. cit.*, footnote 30.

⁸³ For example, Hogg, *loc. cit.*, footnote 81; P.A. Bender, Justifications For Limiting Constitutionally Guaranteed Rights and Freedoms (1983), 13 Man. L.J. 669.

those which contain explicit built-in limitation provisions (for example, section 8 - "unreasonable search and seizure"; and section 11(a) - "unreasonable delay"), and those which are expressed in unqualified terms (for example, section 2(b) - "freedom of ... expression,"). As for the former group of rights, or some of them, there may be good reason to avoid a balancing of competing interests under section 1 if the same factors have already been taken into account in deciding whether a violation has occurred in the first place. Wilson J. expressed the view in one case that the "reasonableness" requirements of section 8 and section 1 are tautologous,⁸⁴ and the same might be said for certain of the other Charter rights as well. I have expressed the opposite opinion elsewhere, arguing these internal qualifiers of substantive rights are all capable of bearing meanings distinct from the concept of reasonableness under section 1,⁸⁵ but my view is not universally shared. To the extent that the Wilson approach prevails, it would make sense to by-pass section 1 for rights which are not stated in unqualified terms.

Many courts have gone further than that, however. There appears to be a marked tendency to avoid the "reasonable limits" analysis for all rights, even those expressed in unqualified language. As Table 4⁸⁶ indicates, section 1 was invoked in just 14% of the Charter arguments raised in the administrative, criminal and family cases surveyed for this article, and it provided the basis for rejecting Charter claims in only 10% of unsuccessful claims. Professor Robin Elliot, in a survey of Supreme Court of Canada Charter decisions during the 1989-90 term, found that of thirteen non-criminal Charter cases that term not a single case proceeded to a section 1 analysis, and ten of them were determined on the ground that the Charter right invoked did not extend to protection of the interest asserted by the Charter claimant.⁸⁷ The Charter rights restrictively defined in the cases examined by Professor Elliot included freedom of association; life, liberty and security of the person; freedom from unreasonable search or seizure; and equality.

Perhaps the most dramatic instance of definitional shrinkage of an important Charter right by the Supreme Court of Canada was its treatment of equality rights in the term preceding that which Professor Elliot's article examined. The court's first consideration of equality guarantees under section 15(1) of the Charter, in *Andrews v. Law Society of British Columbia*⁸⁸ had seemed, by fulsome remarks concerning the importance of the right, and by its extension to include discrimination on the unlisted ground of citizenship, to offer the prospect of generous construction. It contained the seed of a narrower approach, however. This seed was the court's suggestion, borrowed from American

⁸⁴ Dissenting in *Thompson Newspapers Ltd. v. Canada*, [1990] 1 S.C.R. 425, at p. 501, (1990), 67 D.L.R. (4th) 161, at p. 215. See also *Jackson v. Joyceville Penitentiary*, [1990] 3 F.C. 95, (1990), 55 C.C.C. (3d) 50 (F.T.D.) and *Cloutier v. Langlois*, [1990] 1 S.C.R. 158, (1990), 53 C.C.C. (3d) 257.

⁸⁵ Gibson, *op. cit.*, footnote 34, pp. 135, ff.

⁸⁶ *Infra*, at p. 454.

⁸⁷ Elliot, *loc. cit.*, footnote 22, at p. 104.

⁸⁸ [1989] 1 S.C.R. 143, (1989), 56 D.L.R. (4th) 1.

jurisprudence, that equality rights exist for the benefit of “discrete and insular minorities”.⁸⁹ Later, in *R. v. Turpin*,⁹⁰ that suggestion was taken up and applied by the court in a unanimous ruling to the effect that Charter equality rights (at least with respect to unlisted grounds of discrimination) are available only to those who are members of “discrete and insular minorities”. That expression was stated to refer to groups that have been the victims of previous disadvantage, quite apart from the detriment complained about in the instant case. The *Turpin* case involved an unusual Criminal Code provision that granted accused persons in Alberta a right, not available to residents of other provinces, to opt out of jury trials.⁹¹ Since persons accused of criminal offences outside Alberta were found not to constitute, as a group, a prior-disadvantaged “discrete and insular minority”, they were denied the right to object to the geographic discrimination involved in the special Alberta jury option.⁹² The provision might or might not have been justifiable under section 1, but the court’s narrow interpretation of the right removed any need to consider section 1.

The courts’ limited reliance on section 1 is not entirely attributable to narrow definitions of rights; definitional restriction is only one way that section 1 can be avoided. After the claimant has established that he or she has suffered a *prima facie* violation of a Charter right, there are two further thresholds to be crossed before section 1 is engaged. Unlike the definitional threshold, the responsibility for crossing these latter barriers lies with the Crown or other person resisting the Charter claim.

The first Crown threshold relates to the severity of the restriction imposed on Charter rights. One way of avoiding the need to assess the reasonableness of a restriction on Charter rights is to classify it as more than a “limit”. Deschênes C.J. of the Quebec Superior Court adopted that approach in *Quebec Association of Protestant School Boards v. A.-G. Quebec*.⁹³ The challenge in that case was to a provincial statute restricting the right of Anglophone parents, under section 23 of the Charter, to have their children educated in the English language. Only parents born in Quebec were allowed by the provincial statute to exercise that right. Since the Charter extends the benefit of section 23 to all Canadian citizens, wherever born, the right was seriously interfered with by this statute. Deschênes C.J. held that section 1 of the Charter could not be used to justify the provision, because s.1 authorizes only “limits”, not complete denials of constitutional rights. For Quebec Anglophones who were Canadian citizens, but who had not been born in Quebec, the statute completely nullified their section 23 right, and could not, therefore, be considered a mere “limit” under

⁸⁹ *Ibid*, at pp. 183 (S.C.R.), 24 (D.L.R.) (per McIntyre J.), and at pp. 151-153 (S.C.R.), 32-33 (D.L.R.) (per Wilson J.).

⁹⁰ [1989] 1 S.C.R. 1296, (1989), 48 C.C.C. (3d) 8.

⁹¹ Criminal Code, R.S.C. 1970, as amended, s. 430.

⁹² For a criticism of this aspect of the *Andrews* and *Turpin* decisions, see, D. Gibson, *Equality for Some* (1991), 40 U.N.B.L.J. 2.

⁹³ (1982), 140 D.L.R. (3d) 33, [1982] C.S. 673 (Q.S.C.). He did not use it to avoid engaging in a s.1 analysis, however, which he did in the alternative.

section 1. A similar approach was taken by Bouck J. of the British Columbia Supreme Court, who struck down, in *R. v. S.B.*,⁹⁴ a legislative provision depriving all accused juveniles of the right to trial by jury.

When the limit/denial issue reached the Supreme Court of Canada in the *Protestant School Board* case, it was dealt with less forthrightly than Deschênes C.J. had.⁹⁵ The Deschênes ruling that section 1 did not justify excluding parents born outside the province from section 23 rights was affirmed, but the basis for doing so was expressed somewhat differently. While purporting not to settle the limit/denial issue, the court stated that section 1 could not be employed to achieve the same purpose as might be accomplished by a section 33 override, or by a constitutional amendment, and held that the provision in question attempted to do just that. Whether there is a significant difference of substance between the formulation of Deschênes C.J. and that of the Supreme Court of Canada is doubtful. Both approaches seem to mean that although reasonable conditions may be placed on the exercise of Charter rights (busing requirements for children exercising section 23 rights, perhaps, or specially-composed juries for the trial of juveniles) no such right may normally be withheld completely from any category of persons without invoking section 33 or amending the Charter. The Supreme Court's apparent reluctance to adopt Deschênes' limit/denial dichotomy may simply have been based on the fact that the line is often hard to draw. Particularly stringent limits may be tantamount to denials; limits on rights of a general group may involve a complete denial of the right for particular individuals; and some rights (such as the freedom to engage in religious practices involving human or animal sacrifice) may reasonably be banned altogether. Bearing those provisos in mind, however, the distinction between "limits" and "denials" propounded by Deschênes C.J. nevertheless provides a useful rule of thumb to describe this first Crown threshold to section 1 analysis.

A second threshold that the Crown must cross before a court can concern itself with the reasonableness of a Charter limit, is the requirement that section 1 limits be "prescribed by law." This factor has two components: (a) that the limit be embedded in a "law" of some kind, and (b) that it be articulated with sufficient clarity and precision to be considered "prescribed". The first component was well illustrated by *R. v. Therens*,⁹⁶ in which the Supreme Court of Canada refused to apply section 1 to a restriction on the right to legal counsel because the restriction was imposed by police officers seeking to obtain a breath sample from a suspected impaired driver, rather than by any law. The term "law" has not yet been defined exhaustively in this context.⁹⁷ It seems, however,

⁹⁴ (1983), 142 D.L.R. (3d) 339 (B.C.S.C.).

⁹⁵ *Supra*, footnote 12. The distinction between limits and complete denials was, however, adopted by L'Heureux-Dubé J. in *McKinney v. University of Guelph*, *supra*, footnote 43, at pp. 436 (S.C.R.), 691 (D.L.R.).

⁹⁶ *Supra*, footnote 24.

⁹⁷ Wilson J. in *McKinney v. University of Guelph*, *supra*, footnote 43, at pp. 386 ff. (S.C.R.), pp. 604 ff. (D.L.R.), pointed out that the purpose of s.1 would call for a narrower

to include statutes, regulations, common law,⁹⁸ as well as lawfully authorized orders of judges⁹⁹ and other adjudicators.¹⁰⁰ Mere administrative directives, even those authorized by statute, are not included.¹⁰¹

The second component of "prescribed" is precision. It calls for limits on Charter rights to be written down in advance in a manner capable of being understood and complied with by those to whom it is intended to apply. This requirement was the basis of several early decisions striking down legislative contraventions of the Charter expressed in language too vague to be considered "prescribed". A provision of provincial highway legislation which empowered police officers to suspend drivers' licences summarily on suspicion of alcohol consumption was invalidated on that basis,¹⁰² as were a section of the federal Customs Tariff prohibiting the importation of books "of an immoral or indecent character,"¹⁰³ and a provincial film censorship statute that failed to lay down adequate guidelines for the exercise of censorship powers.¹⁰⁴ The Supreme Court of Canada has not been eager to invoke the principle, however. It has acknowledged that an overly vague standard will not satisfy the "prescribed by law" requirement, but it has also ruled that so long as a law provides an "intelligible standard" (which seems to mean "intelligible by the judiciary") the fact that it bestows a discretion, or is capable of more than one interpretation, will not preclude the application of section 1. The Supreme Court's attitude toward vagueness was recently summarized by Gonthier J. in *R. v. Nova Scotia Pharmaceutical Society*.¹⁰⁵ While accepting that legal vagueness is offensive because it deprives citizens of fair notice, Gonthier J. pointed out that the requirement for limits to be "prescribed" is only one of three Charter controls over vagueness. Vague laws can also be attached as violations of "fundamental justice" under section 7 of the Charter, or as a more than "minimal impairment" of Charter rights under section 1.¹⁰⁶ Gonthier J. concluded that the Supreme Court of Canada "will be reluctant to find a disposition so vague as not to qualify as 'law' under s.1 ..., and will rather consider the scope of the disposition under the 'minimal impairment' test".¹⁰⁷

interpretation of "law" than the same word ought to be given in s. 52(1) of the Constitution Act, 1982.

⁹⁸ *Canadian Newspapers Co. v. Swail* (1984), 31 Man. R. (2d) 187, 16 C.C.C. (3d) 495 (sub nom. *Canadian Newspapers Co. v. R.*) (Man. C.A., per Matas J.).

⁹⁹ *Re Regina and Speid* (1983), 3 D.L.R. (4th) 246, 43 O.R. (2d) 596 (Ont. C.A.).

¹⁰⁰ *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, (1989), 59 D.L.R. (4th) 416.

¹⁰¹ *Weatherall v. A.-G. Canada*, [1989] 1 F.C. 18 (F.C.A.).

¹⁰² *R. v. Robson* (1985), 19 D.L.R. (4th) 112, 19 C.C.C. (3d) 137 (B.C.C.A.).

¹⁰³ *Luscher v. Revenue Canada*, [1985] 1 F.C. 85, (1985), 17 D.L.R. (4th) 503 (F.C.A.).

¹⁰⁴ *Ontario Film & Video Appreciation Society v. Ontario Board of Censors* (1984), 5 D.L.R. (4th) 766, 45 O.R. (2d) 80 (Ont. C.A.).

¹⁰⁵ [1992] 2 S.C.R. 606, at pp. 621, ff. esp. at pp. 626-627, (1992), 93 D.L.R. (4th) 36, at pp. 44, ff., esp. at p. 48.

¹⁰⁶ See *infra*, text associated with footnote 117, ff.

¹⁰⁷ *Supra*, footnote 105, at pp. 627 (S.C.R.), 48 (D.L.R.).

Having successfully established that a restriction of Charter rights is a "limit," and is sufficiently "prescribed by law", the Crown or others who defend the restriction bear the further onus of showing that it is "reasonable" and "demonstrably justified in a free and democratic society". The word "demonstrably" is misleading if read literally. Those who support the limit must show more than that its reasonableness is capable of being demonstrated; they must actually demonstrate the reasonableness.¹⁰⁸ This may require the calling of evidence concerning the purpose and effect of the restriction,¹⁰⁹ but it is also possible for courts to take judicial notice of the social, political or economic circumstances underlying and allegedly justifying the restriction, if those matters are self-evident.¹¹⁰ As McLachlin J. stated, extrajudicially, before joining the Supreme Court of Canada:¹¹¹

In many cases, perhaps the majority, it will be possible to answer the question ... whether an infringement is reasonable and demonstrably justified in a free and democratic society, simply by reference to intuition or to facts of which the court may take judicial notice.

What must be established, by evidence or judicial intuition, to justify a limit as "reasonable" within the meaning of section 1? Every law student since 1986, and every lawyer having had any significant contact with the Charter since then, can recite or at least paraphrase the "holy writ"¹¹² on that subject handed down by Dickson C.J.C. in *R. v. Oakes*.¹¹³ The *Oakes* formula calls for an examination of both the objective sought to be achieved by the restriction, and the means used to achieve that objective. The object must be "pressing and substantial", and "of sufficient importance to warrant overriding a constitutionally protected right or freedom".¹¹⁴ The means employed must satisfy three components of a "proportionality test":¹¹⁵

- (a) they "must be rationally connected to the objective";
- (b) they "should impair as little as possible the right or freedom in question"; and
- (c) "there must be a proportionality between the effects of the measures ... limiting the Charter right or freedom, and the objective..."

While *Oakes* is a convenient shade tree under which deserving measures can avoid being scorched by the Charter, the extent of its protection is not entirely certain. One difficulty in the *Oakes* formula lay in its repetitive

¹⁰⁸ See, Gibson, *op. cit.*, footnote 34, p. 155.

¹⁰⁹ For example, *Alex Couture Inc. v. A.-G. Canada* (1991), 83 D.L.R. (4th) 577, [1991] R.J.Q. 2534 (Que. C.A.).

¹¹⁰ *R. v. Oakes*, [1986] 1 S.C.R. 103, at p. 138, (1986), 26 D.L.R. (4th) 200, at p. 227, per Dickson C.J.C.

¹¹¹ B. McLachlin, *The Charter of Rights and Freedoms: A Judicial Perspective* (1988-89), 23 U.B.C.L.R. 579, at p. 585.

¹¹² The term used by Hogg, *loc. cit.*, footnote 81.

¹¹³ *Supra*, footnote 110.

¹¹⁴ *Ibid.*, at pp. 138-139 (S.C.R.), 227 (D.L.R.), the second quotation being taken from *R. v. Big M. Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 352, (1985), 18 D.L.R. (4th) 321, at p. 366.

¹¹⁵ *Ibid.*, at pp. 139 (S.C.R.), 227 (D.L.R.). (Emphasis in the original).

references to “proportionality”, three in all. The importance of the objective is to be assessed, first, in relation to the right overridden. Then all three “means criteria” are described as constituting a “proportionality test”. Finally, the third of those criteria calls for “proportionality” once again. Dickson C.J.C.’s intention was probably that the legislative objective be considered important enough to override some Charter right, that the first two “means” criteria address the proportionality of the objective to the particular right suppressed, and that the third “means” test address the effect of the measure on the particular right. If so, the formula has proved too subtle to be easily understood and applied. What has tended, therefore, to happen, is that the final “means” component has been ignored, and the *Oakes* formula has been boiled down to a simpler three-step test:

1. Is the objective of the restrictive measure sufficiently “pressing and substantial” to justify infringing on the plaintiff’s rights?
2. Is the measure “rationally connected” to the objective?
3. Does the measure impair the plaintiff’s rights “as little as possible”?

Another source of initial confusion was the expression “as little as possible” in Dickson C.J.C.’s formulation of the minimal impairment component. If courts were to apply that standard literally, it would be necessary for them to consider all possible alternative means of achieving the objectives sought. Such exercises would be hugely time-consuming, and courts could almost always identify some other way, expensive or inconvenient though it might be, to achieve the objective with less harm to the plaintiff’s rights than the impugned measure caused. It is inconceivable that the Chief Justice and his colleagues ever intended the “minimal impairment” test to be so rigidly construed, and they found an early opportunity to make that clear. In *R. v. Edwards Books and Art Ltd.*,¹¹⁶ in which the court upheld a provincial day-of-rest statute, despite its detrimental impact on the sabbatarian observances of certain religious groups, Dickson C.J.C., writing again for a majority, commented that courts are “not called upon to substitute judicial opinions for legislative ones as to the place at which to draw a precise line”, and he re-stated the minimal impairment test with a subtle change of wording. Charter rights must be interfered with, he held, “as little as reasonably possible”.¹¹⁷

Although this modification was probably not inconsistent with the intended purport of the *Oakes* formula, there is a widely held perception that it signalled a “softening” of the minimal impairment test, and a generally more deferential attitude on the part of the judiciary toward legislative autonomy.¹¹⁸ This new attitude is perhaps most obvious in the opinions of La Forest J., who was not a member of the court when it decided *Oakes*, and who has, for example, stated that:¹¹⁹

¹¹⁶ [1986] 2 S.C.R. 713, at p. 782, (1986), 35 D.L.R. (4th) 1, at p. 51.

¹¹⁷ *Ibid.*, at pp. 772 (S.C.R.), 44 (D.L.R.). (Emphasis added).

¹¹⁸ See Hogg, *loc. cit.*, footnote 81.

¹¹⁹ *McKinney v. University of Guelph*, *supra*, footnote 43, at pp. 286 (S.C.R.), 652 (D.L.R.). (Emphasis in the original).

... the question is whether the government had a reasonable basis for concluding that it impaired the relevant right as little as possible given the government's pressing and substantial objectives.

Increased deference is also thought by many to be attributable, to some extent, to the entire court. Former Supreme Court Justice Wilson is reported to have told an audience in 1991, after her retirement from the bench:¹²⁰

The Supreme Court of Canada is giving government more leeway under the *Charter* to limit individual Canadian's constitutional human rights ... [R]ecent *Charter* decisions show that the Supreme Court is moving from its original strict view ... to "a more flexible test of reasonableness" under s.1 of the *Charter*.

She was also quoted as saying: "...the increased emphasis on deference to the legislatures appears to be tied to judges' lingering doubts about the legitimacy of judicial review under the *Charter*".¹²¹

Professor Hogg, who favours, where possible, the use of definitional restrictions on *Charter* rights to determine cases rather than adventuresome section 1 analyses,¹²² has suggested that lessened reliance on section 1 will reduce the overall deference of courts to legislators. This is so, he contends, because restricting the occasions when courts are called upon to judge legislative reasonableness will encourage judges to take those few occasions when they absolutely have to do so more seriously than if they make frequent use of section 1. If former Justice Wilson's observations are accurate, Professor Hogg's prediction seems mistaken. There is perhaps some support for the Hogg view in the fact that over the total period surveyed for this article, courts upheld the section 1 argument in only 39% of the cases where it was considered.¹²³ If one looks more carefully at the statistics, however, it will be found that the Supreme Court of Canada has tended to find justification for limits on rights in a much higher percentage of cases where section 1 was invoked (64%) than the all-court average. Since the decisions of the Supreme Court are highly influential at lower judicial levels, it seems safe to say that the attitude of all courts toward section 1 justifications will become similarly pro-governmental, and will remain so until the Supreme Court of Canada points in a different direction.

E. Remedies

The department of *Charter* law where the courts seem to have been, and to remain, least timorous, concerns appropriate remedies for *Charter* violations. While their enforcement exploits can hardly be described as swashbuckling, they have been moderately adventuresome.

Judges are not solely responsible for this remedial creativity themselves; much of the responsibility lies with the drafters of the *Charter*. Section 24 offers an extremely wide range of options to a judge called upon to repair damage done by violation of someone's *Charter* rights:

¹²⁰ Lawyers Weekly, June 14, 1991, p. 20.

¹²¹ *Ibid.*

¹²² *Loc. cit.*, footnote 81.

¹²³ Table 4, *infra*, at p. 454.

24.(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

Where Charter infringement results from a statute or some other law, a powerful additional group of remedies flows from s.52(1) of the Constitution Act, 1982:

52.(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Even so sweeping an enforcement mandate could have been interpreted narrowly by the courts, of course, but this has not, generally speaking, been the case.

The expression "court of competent jurisdiction" in section 24(1) has been construed somewhat restrictively, however. The early hope of some Charter enthusiasts that section 24(1) would be treated as authority for any court to award any remedy it saw fit, regardless of the court's normal competence, powers and procedures, was punctured by rulings that Charter relief may only be sought from tribunals having jurisdiction, apart from the Charter, over the parties, the subject-matter of the transaction or proceeding in which the Charter issue arises, and the type of relief sought. In other words, no tribunal has greater competence or enforcement power in a Charter dispute than it normally possesses in non-Charter matters.¹²⁴

Once satisfied that it is a "court of competent jurisdiction," and that a Charter violation has occurred, a tribunal is likely to be generous in fashioning an "appropriate and just" remedy. Where suitable, Charter claimants may be awarded, among other things: damages,¹²⁵ prohibitory or mandatory injunctions,¹²⁶ declaratory relief,¹²⁷ acquittals,¹²⁸ stays of proceedings,¹²⁹ exclusion of unconstitutionally obtained evidence,¹³⁰ or the invalidation or modification of statutes and other laws.¹³¹ Although each of these forms of relief could be the subject of a complete article, only the last-mentioned — statutory modification — will be elaborated upon here.

Section 52(1) unequivocally authorizes the outright invalidation of legislation found to contravene the Charter. Invalidation can be a blunt instrument,

¹²⁴ *Mills v. The Queen*, [1986] 1 S.C.R. 863, (1986), 29 D.L.R. (4th) 161.

¹²⁵ See, K. Cooper-Stephenson, *Charter Damages Claims* (1990).

¹²⁶ See, R.J. Sharpe, *Injunctions and Specific Performance* (2nd ed., 1992).

¹²⁷ See, L. Sarna, *Law of Declaratory Judgments* (1988).

¹²⁸ *R. v. Jewitt*, [1985] 2 S.C.R. 128, (1985), 20 D.L.R. (4th) 651.

¹²⁹ *Ibid.*

¹³⁰ *R. v. Therens*, [1985] 1 S.C.R. 613, (1985), 18 D.L.R. (4th) 655.

¹³¹ *Schacter v. The Queen*, [1992] 2 S.C.R. 679, (1992), 93 D.L.R. (4th) 1.

however. To rule that a statute, or a portion thereof, is "of no force or effect" may cause incidental injury to innocent persons dependant upon the statute. All that may really be needed to meet the Charter difficulty is the excision or restricted interpretation of a few offending words, or the addition of a few qualifying or supplementary words, and third party rights can often be preserved by restricting Charter relief to such modest measures. Courts have occasionally been willing, since long before the Charter's advent, to "read down" statutory provisions to narrower interpretations that avoid the constitutional problems inherent in broader interpretations.¹³² They have sometimes also engaged in the delicate surgery, known as "severing," required to eliminate the unconstitutional parts of an Act without invalidating the whole.¹³³ Where a statute is clearly invalid in its entirety, but its immediate nullification would cause great disruption or inconvenience, the courts have also been prepared, in recent years, to suspend invalidation for a sufficient period of time to permit the problem to be dealt with legislatively.¹³⁴ It was not until 1992, however, that the Supreme Court of Canada approved "reading in" new legislative words, a form of statutory modification that many lawyers had until then considered too drastic a remedy to entrust to the courts.¹³⁵

The case in which "reading in" was legitimized was *Schacter v. The Queen*.¹³⁶ The plaintiff challenged a provision of federal unemployment insurance legislation that granted more favourable parental leave benefits to adoptive parents than to natural parents. He was successful to the extent that the Supreme Court of Canada found the discrimination between natural and adopted parents to violate the equality guarantee in section 15(1) of the Charter. Because Parliament had already amended the legislation to remove the discrimination, however, the court found the matter to be moot, and declined to award a remedy. It nevertheless took the opportunity to discuss at length the remedy it would have awarded, had the offending provisions still existed. Lamer C.J.C., speaking for a majority of the court, stated that he would, in that case, have declared the provision to be of no force or effect whatsoever, but would have suspended the declaration of invalidity for a period of time sufficient to permit Parliament to re-consider the legislation in light of the court's ruling.

Of greatest interest in the current context was Lamer C.J.C.'s discussion of "reading in" as a possible remedy. The plaintiff had contended that the offending provisions should not be struck down outright because to do so would not benefit the victims of the discrimination (natural parents), and would harm the other group (adopted parents) by depriving them of their benefits. A better solution, the plaintiff had argued, would be to "read in" natural parents to the legislation, and thereby extend the benefits to all new parents. Lamer C.J.C.

¹³² *Ibid.*

¹³³ *Ibid.*

¹³⁴ For example, *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, (1985), 19 D.L.R. (4th) 1; *Sinclair v. A.-G. Quebec* (1992), 89 D.L.R. (4th) 500 (S.C.C.).

¹³⁵ See, D. Gibson, *Non-Destructive Responses to Legislative Inequalities* (1988-89), 27 Alta. L.R. 181.

¹³⁶ *Supra*, footnote 131.

decided that "reading in" is a legitimate form of relief in appropriate circumstances, but held that it would not have been suitable in the case before him.

Judicial modification of statutes is justified, the Chief Justice held, by the fact that section 52(1) authorizes the invalidation of statutes for inconsistency with the Constitution "to the extent of the inconsistency" only.¹³⁷ It is for this reason, he pointed out, that courts have long been prepared to cleanse legislation of unconstitutional components by either "severing" them outright, or "reading down" the statute to an interpretation that excludes broader meanings that would be unconstitutional. Since section 52(1) refers to invalidation of the "law" in question, rather than of the words in which the law is expressed, "the inconsistency can be defined as what is left out of the verbal formula as well as what is wrongly included".¹³⁸ Thus, "reading in" new words to a statute in order to meet a constitutional deficiency is as legitimate as "severing" words which are positively unconstitutional.

Neither "severing" nor "reading in" is always appropriate. The key in both cases, is to avoid intruding unduly into the legislative realm. If either technique would interfere more extensively with the apparent legislative goal than would complete invalidation of the statutory provision, it should not be employed. "Reading in" has greater potential for interfering with legislative prerogatives than severance does because it is not as easy in the case of "reading in" to tell "... how the statute ought to be extended in order to comply with the Constitution ... with a sufficient degree of precision ..." ¹³⁹ If remedial precision is not possible, the Chief Justice stated, "it is the legislature's role to fill the gaps, not the court's".¹⁴⁰ Other guidelines, such as the significance, financial and otherwise, of the proposed addition, relative to that of invalidating the entire provision should also be considered.¹⁴¹

A remedy which entails an intrusion ... so substantial as to change the nature of the legislative scheme in question is clearly inappropriate.

Although "reading in" may seem, at first glance, to involve a radical incursion into legislative territory by the courts, a thoughtful examination of the *Schacter dicta* leads to a different conclusion. "Reading in," properly employed, supports legislative autonomy rather than undermining it, since it permits the preservation of legislation that would otherwise be entirely invalidated, with greater resulting disruption than is caused by judicious "reading-in".

This is not to deny that "reading in" can have dramatic consequences. A striking illustration of its potential was the Ontario Court of Appeal's ruling in *Haig v. Canada*¹⁴² that the Canadian Human Rights Act¹⁴³ should be read as

¹³⁷ *Ibid.*, at pp. 695 (S.C.R.), 11 (D.L.R.).

¹³⁸ *Ibid.*, at pp. 699 (S.C.R.), 13 (D.L.R.).

¹³⁹ *Ibid.*, at pp. 705 (S.C.R.), 18 (D.L.R.).

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*, at pp. 709-710 (S.C.R.), 21 (D.L.R.).

¹⁴² (1992), 94 D.L.R. (4th) 1, 9 O.R. (3d) 495 (Ont. C.A.).

¹⁴³ R.S.C. 1985, c.H-6.

prohibiting discrimination on the basis of sexual orientation, even though there was no reference to that type of discrimination in the Act. Finding that discrimination against homosexuals is analogous to the forms of discrimination proscribed by section 15(1) of the Charter, the court concluded that the exclusion of sexual orientation from the discrimination criteria specified in the statute violated section 15's guarantee of equality. Since striking down the listed forms of discrimination would interfere more with the objective of the legislation than would "reading in" an additional ground, and since the addition could be formulated with precision, it was held that the situation was an appropriate one, under the *Schacter* guidelines, for a judicially-created supplement to the Act.

In remedial matters, then, Charter adjudication continues to be creative, albeit for essentially conservative reasons.

Conclusion

The history of judicial reaction to the Canadian Charter of Rights and Freedoms during its first decade can be summed up by two newspaper cartoons. The first, by Duncan Macpherson, illustrates the initial fervour of the courts. It depicts the judges of the Supreme Court of Canada at tea. Lamer J., holding a copy of the Charter, announces: "*Ipse dixit!* The Charter overrules Parliament." Beetz J., brow thoughtfully furrowed, the pinky of his teacup hand fastidiously extended, observes: "*Ipso facto!* We overrule the Charter." Laskin C.J.C., his face twisted by a Mephistophelian leer, proclaims: "*Ipso jure!* We rule."¹⁴⁴ The other cartoon, by "Ehore", shows a judge listening impassively through three panels of the strip to a long-winded presentation by counsel: "Your honour ... Blah Blah Blah Blah Blah Etc. Etc. ... Blah Blah ... on and on ... Ramble Blah Blah Digress Blah Blah Blah and so forth." In the fourth panel the judge says to himself: "If I have to hear another *Charter of Rights* argument I'm going to SCREAM."¹⁴⁵

Both cartoons were prophetic. The former, drawn before the Supreme Court's first Charter decision (and mistaken in its assessment of Laskin C.J.C.'s attitude) correctly predicted the tone of Charter rulings for roughly the first half of the period under review. The latter, although also published early in the decade, accurately conveyed the judicial ennui that became increasingly observable toward the end of the period.

The statistics suggest that the Supreme Court of Canada was influential as to both of these judicial reactions. The all-court success rate for Charter claims, as well as the Charter reliance rate by litigants, increased markedly after the first pro-Charter pronouncements by the Supreme Court, and the use rate dropped off again after the Supreme Court's enthusiasm began to wane in the middle of the decade.

¹⁴⁴ Toronto Star, October 24, 1983, p. 6.

¹⁴⁵ Toronto Globe and Mail, Apr. 20, 1983, p. 18.

Judicial reaction to various parts of the Charter has not been uniform. The tapering off of judicial support has been most noticeable in regard to questions of scope and equality rights, and least so in regard to legal rights in criminal proceedings and remedies for Charter violations. While some rights, such as freedom of religion and protection from double jeopardy, seem to have been given relatively short judicial shrift from the beginning, others, like freedom of expression, remained in favour throughout the decade.

How can the fluctuations of the decade be explained? Only speculation is possible. The courts' first-blush enthusiasm for the Charter must have been more than fascination with a new toy. They had, after all, displayed much less support for the Canadian Bill of Rights, 1960¹⁴⁶ when it was newly minted.¹⁴⁷ The notion of parliamentary sovereignty, deeply entrenched in inherited British constitutional traditions, nourished an attitude of judicial deference toward the decisions of democratically-elected legislators that was widely prevalent at the time the Canadian Bill of Rights was launched. By 1982 that attitude had changed; there appeared by then to be much greater acceptance by Canadian courts of their responsibility under the Charter to exercise vigilance against majoritarian infringements of the rights of individuals and minority groups. The probable reasons for this altered attitude are numerous.

Intense criticism of the courts' overly deferential approach to the Bill of Rights undoubtedly played an important role.¹⁴⁸ Another factor must have been the general public's high approval rate for the Charter. The controversial opt-out provision under section 33 of the Charter may also have been influential, since a court's compunction about striking down a legislative provision should be diminished by knowledge that the legislature could have immunized the provision from Charter scrutiny by invoking section 33 if it had wanted to avoid judicial review. And, of course, the legal status of the Charter was fundamentally different than that of the Bill, being a part of the Constitution, which section 52(1) of the Constitution Act, 1982 proclaims to be the "supreme law" of the country, rather than a merely "quasi-constitutional" document like the Bill. It is not surprising, then, that judges decided in the early 1980s to stop being so deferential toward legislators, and to play a more active role than formerly as guardian of the fundamental rights of individual Canadians from threats by the "tyranny of the majority".

It was not long, however, before the courts were being castigated for doing just that. Typical of such criticism was a compellingly written and influential article by Professor Andrew Petter.¹⁴⁹ He contended that since Charter adjudication is a "zero sum game",¹⁵⁰ in the sense that a right conferred on A must be

¹⁴⁶ *Supra*, footnote 3.

¹⁴⁷ See, W.S. Tarnopolsky, *The Supreme Court and the Canadian Bill of Rights*, (1975), 53 Can. Bar Rev. 649

¹⁴⁸ *Ibid.* See the comments of Dickson J. in *R. v. Big M Drug Mart Ltd.*, *supra*, footnote 114, at pp. 342 (S.C.R.), 358 (D.L.R.); and of Wilson J. in *Singh v. Minister of Employment and Immigration*, *supra*, footnote 25, at pp. 209 (S.C.R.), 461-462 (D.L.R.).

¹⁴⁹ *The Politics of the Charter* (1986), 8 S.C.L.R. 473.

taken from B, and since B is always the government, vigorous judicial enforcement is less likely to benefit the disadvantaged, who rely on government for support and assistance, than to help the well-to-do, from whom governments seek a disproportionate share of the financial resources needed to help the disadvantaged. While acknowledging that the Charter offers important protections to the poor in criminal matters,¹⁵¹ Petter claimed that in other respects Charter rights "enable the courts to impose limitations on all manner of government regulatory and redistributive activity".¹⁵² He pointed out that the six non-criminal Charter cases which had been decided by the Supreme Court of Canada at the time he wrote involved claims by two corporations, a school board, a political organization, and just two individuals, of whom only one was economically disadvantaged.¹⁵³ He expressed concern that the newly operative equality rights under section 15 of the Charter might be used to strike down measures designed to benefit the disadvantaged.¹⁵⁴ He concluded:¹⁵⁵

In sum, the track record of Canadian courts with respect to equality rights suggests that even a seemingly 'liberalized' attitude toward such rights under the Charter is unlikely to address the underlying causes of social inequality in Canada. At best, the courts may strike out the few remnants of overt governmental discrimination, such as the treatment of women in the armed services, and thereby divert attention from more deeply-rooted manifestations of social injustice. At worst, court decisions could serve to legitimize measures directed against the disadvantaged and could produce results that are socially regressive.

According to scholars like Andrew Petter (now a professional politician of the neo-left, by the way), legal liberalism is dead, or ought to be, since it embodies a condescending philosophy that has served chiefly to perpetuate the privileged position of society's elite, and should be displaced by less even-handed governmental and legal policies, designed to target the special needs of disadvantaged groups.

In my view, the Petter thesis, though usefully cautionary, is essentially erroneous.¹⁵⁶ His claim that Charter challenges are brought chiefly at the behest and for the benefit of corporations and the well-to-do is simply not borne out by the facts. As we have seen, the overwhelming majority of Charter arguments are raised in criminal cases, an area of law that has much greater impact on disadvantaged persons than on members of the elite. The success rate of Charter arguments is, moreover, markedly higher in criminal litigation than anywhere else. The notion that the Supreme Court of Canada is generally inaccessible to Charter claimants other than corporations and wealthy individuals is also

¹⁵⁰ *Ibid.*, at p. 474.

¹⁵¹ *Ibid.*, at pp. 481-482.

¹⁵² *Ibid.*, at p. 482.

¹⁵³ *Ibid.*, at p. 483.

¹⁵⁴ *Ibid.*, at p. 503. He overlooked the effect of s.15(2).

¹⁵⁵ *Ibid.*, at p. 505.

¹⁵⁶ This contention is elaborated more fully in: D. Gibson, *New-Age Constitutionalism*, in *Journal of Constitutional Studies* (forthcoming), a review article provoked by L. Trakman, *Reasoning with the Charter* (1991). Professor Trakman's book expresses views similar to some of Petter's.

mistaken. Of the first 100 Charter decisions by that Court, 73% invoked challenges by individuals.¹⁵⁷ A few of those were admittedly by relatively well-off persons, such as two would-be lawyers, but the great bulk of them were by non-advantaged persons charged with criminal offences. Only 12% of the cases dealt with Charter challenges by corporations. Trade unions and other organizations accounted for 10%, and constitutional references by governments (most involving interventions by public interest groups) for the remaining 5%. Even those few cases in which corporations and over-advantaged individuals triumphed in Charter challenges have become precedents establishing general principles available for application on behalf of everyone, whether underdog or overdog.¹⁵⁸

The "zero-sum game" premise is also wrong. Constitutional rights are not a finite resource. The Supreme Court of Canada's ruling that *Southam Ltd.*¹⁵⁹ was entitled to fairer search and seizure procedures than legislation had previously provided for in anti-combines investigations did not deprive anyone else of that entitlement. On the contrary, the ruling became a basis for determining the constitutionality of search and seizure procedures in countless other circumstances, most of them involving non-elite individuals. The only sense in which Charter wins by corporations could be thought to deprive the disadvantaged of anything is that weakened governmental controls over corporations might reduce government's ability to act in the overall public interest. While this may be true, it should be remembered that section 1 of the Charter permits reasonable measures to regulate business, and that control measures which are found not to satisfy Charter standards may be, and usually are, legislatively re-designed to overcome the difficulty. Even if Petter is right in asserting that the disadvantaged are disproportionately unable to enforce their Charter rights, it makes no sense, except as some sort of class retribution, to reduce the Charter's impact further by shrinking of its protections for the majority of Canadians.

Right or wrong, the views expressed by Andrew Petter and those who share his approach to Charter rights have rubbed off on the Supreme Court of Canada, to the extent, at least, of persuading it to deny to all but the disadvantaged Charter protection from forms of discrimination not expressly listed in section 15(1).

Meanwhile, an accumulation of other factors began to give some judges second thoughts about the wisdom of embracing the Charter as wholeheartedly as they originally had. It had become apparent for one thing, that legislatures would only rarely dare to invoke the Charter-avoidance mechanism in section 33.¹⁶⁰ It would be unrealistic, therefore, to treat a legislature's failure to invoke section 33 as an implied submission to judicial review. More important — much

¹⁵⁷ Based on F.L. Morton, P.H. Russell, and M.J. Withey, *The Supreme Court's First 100 Charter Decisions: A Statistical Analysis* (1992), 30 Osgoode Hall L.J.1.

¹⁵⁸ For example, *Andrews v. Law Society of British Columbia*, *supra*, footnote 88; *Hunter v. Southam Ltd.*, *supra*, footnote 12.

¹⁵⁹ *Hunter v. Southam Ltd.*, *ibid.*

¹⁶⁰ See the discussion, *supra*, at pp. 431-432.

more — was the fact that the tidal wave of Charter litigation that had all but swamped lower level courts was, by the middle of the decade, rolling toward the Supreme Court of Canada, where Dickson C.J.C. and his colleagues were struggling to eliminate the court's already large case backlog.¹⁶¹ The Chief Justice, determined to clear the docket before his retirement in 1990, was also visibly tiring under the immense work load he had undertaken, and some of his colleagues appeared to be feeling the pressure as well.

Was it any wonder, then, that the message of scholars like Andrew Petter found a receptive audience among the judges of the Supreme Court of Canada? They could stem the flow of Charter litigation a little, and thereby ease the pressure on themselves, by adopting, through principles like the "discrete and insular minorities" notion, a selective approach to constitutional protection. Such an approach would also enable them to respond to complaints of judicial elitism by demonstrating that their elitism now served non-elite groups: the socially and economically disadvantaged. And so by about the mid-point of the period under review both the sweep and the pace of the Charter blitzkrieg had markedly diminished.

The extent of the diminution must not be exaggerated, however. Professor Elliott's suggestion that the Supreme Court of Canada has "abandoned" Charter activism¹⁶² goes too far. In the first place, a semantic quibble about the word "activism" seems justified. The Supreme Court of Canada acted in a supremely activist manner when it chose, in *Andrews v. Law Society of British Columbia*¹⁶³ and *R. v. Turpin*,¹⁶⁴ to convert the equality guarantee of "every individual" in section 15(1) to a protection (at least with respect to unspecified grounds of discrimination) for members of historically disadvantaged groups only. It is the direction of judicial activism that has changed, more than its strength. At a more substantial level, Professor Elliott's claim that Charter activism has been "abandoned" seriously overstates the degree of retrenchment that has occurred. The courts at all levels remain highly responsive to Charter claims in criminal matters (in part, perhaps, because accused persons tend to come from disadvantaged groups), and in certain other areas as well (freedom of expression, language rights, democratic rights, remedies) they continue to be as open as ever to Charter claims. Although some of the shrinkage of the Charter's potential may be irreversible (for example, exclusion of the private sector), other narrowing trends (for example, reluctance to employ section 1; and the "discreet and insular minority" approach to equality rights) seem capable of future modification, and the sharp rise of the Charter success rate in the Supreme Court of Canada for 1991¹⁶⁵ was a reminder that the courts retain formidable potential power to review and control governmental conduct.

¹⁶¹ K. Makin, *Case Backlog Almost Gone, Dickson Says*, *Toronto Globe and Mail*, August 24, 1989, p. A-11.

¹⁶² R. Elliot, *loc. cit.*, footnote 22, at pp. 96-100.

¹⁶³ *Supra*, footnote 88.

¹⁶⁴ *Supra*, footnote 90.

¹⁶⁵ See Table 3, *infra*, at p. 453.

To return to the title image, the Charter Trojan Horse now stands in the courtyard of government, but the judicial troops it houses are more cautious about looting and pillaging politicians' precincts than they were when the Horse was first taken in at the gate. Although they still venture out on patrol from time to time to affirm and enforce their earlier victories, and they occasionally seize new booty, they are mainly content to remain within the Horse, acting as quiet sentinals and developing friendlier relations with their former legislative enemies. But their power must not be underestimated. There is no prospect of the Trojan Horse being removed from governmental environs, and so long as it stays there its judicial crew remains capable of taking charge of almost any situation it considers to endanger fundamental constitutional rights.

TABLE 1
SUPREME COURT OF CANADA COHESIVENESS

YEAR	TOTAL	UNANIMOUS	MAJORITY AND CONCURRING REASONS ONLY	DISSENTING REASONS	COHESIVENESS RATING*
1984	Charter: 3	3 (100%)	0 (0%)	0 (0%)	100
	Non-Charter: 62	46 (74.2%)	8 (12.9%)	8 (12.9%)	61.3
1985	Charter: 12	5 (41.7%)	5 (41.7%)	2 (16.7%)	25
	Non-Charter: 69	57 (82.6%)	4 (5.8%)	8 (11.6%)	71
1984/ 1985	Charter: 15	8 (53.3%)	5 (33.3%)	2 (13.3%)	40
	Non-Charter: 131	103 (78.6%)	12 (9.2%)	16 (12.2%)	66.4
1987	Charter: 26	13 (50%)	3 (11.5%)	10 (38.5%)	11.5
	Non-Charter: 66	51 (77.3%)	9 (13.6%)	6 (9.10%)	68.2
1991	Charter: 30	10 (33.3%)	8 (26.7%)	12 (40%)	-6.7
	Non-Charter: 79	54 (68.4%)	9 (11.4%)	16 (20.3%)	48.1
1984/ 1991	Charter: 71	31 (43.7%)	16 (22.5%)	24 (33.9%)	9.8
	Non-Charter: 276	208 (75.4%)	30 (10.9%)	42 (15.2%)	60.2

SOURCES: [1984] S.C.R.; [1985] S.C.R.; [1987] S.C.R.; and [1991] S.C.R. Where concurring reasons by a judge simply stated agreement that the appeal should be dismissed or allowed, the judgment was counted in the unanimous category. *Charter* cases were recorded wherever the Court dealt with a *Charter* issue

*Cohesiveness Rating was calculated by subtracting the percentage of decisions with dissenting reasons from the percentage of decisions with unanimous reasons.

TABLE 2
SUCCESS RATE* FOR CHARTER ARGUMENTS
(ALL COURTS)

YEAR	ADMINISTRATIVE CASES	CRIMINAL CASES	FAMILY CASES	TOTAL
1984	7/24 (29%)	34/84 (43%)	1/12 (8%)	42/116 (36%)
1987	4/24 (17%)	56/126 (44%)	4/15 (27%)	64/165 (39%)
1991	3/18 (17%)	41/94 (44%)	1/2 (50%)	44/114 (39%)

SOURCES: *Administrative Law Reports*: 1984, 1987, 1991

Criminal Reports: 1984, 1987, 1991

Reports of Family Law: 1984, 1987, 1991

* "Success" was considered to obtain whenever a significant *Charter* claim was upheld, and survived a s.1 analysis if s.1 was invoked.

TABLE 3
SUCCESS RATE FOR CHARTER AND NON-CHARTER ARGUMENTS
(SUPREME COURT OF CANADA)

YEAR	CHARTER		NON-CHARTER	
1984-85**	10/15	66.67%	65/131	49.62%
1987	6/26	23.08%	25/66	37.88%
1991	13/30	43.33%	29/79	36.71%

SOURCES: [1984] S.C.R.; [1985] S.C.R.; [1987] S.C.R.; [1991] S.C.R.

* "Success" in *Charter* cases was considered to obtain whenever a significant *Charter* claim was upheld, and survived a s.1 analysis, if s.1 was invoked. In non-*Charter* cases, "success" meant final victory, in whole or in substantial part, by the plaintiff in civil litigation, and by the accused in criminal prosecutions. Excluded from consideration in the non-*Charter* category were constitutional references and other litigation where a "plaintiff" could not be readily identified, as well as cases where success was so divided that a victor was difficult to designate.

** A two year sample was used because only three *Charter* cases reached the Supreme Court of Canada in 1984, the first year in which that Court rendered *Charter* decisions.

TABLE 4
CHARTER SUCCESS RATES BY SECTION
(ALL COURTS)

CHARTER SECTION	NO INFRINGEMENT	INFRINGEMENT FOUND	SAVED BY SECTION ONE	SUCCESS RATE EXCLUDING S.1 (%)	ACTUAL SUCCESS RATE* (%)
s. 2(a)	3	1	1	25.00	0.00
s. 2(b)	8	9	5	52.94	23.53
s. 2(c)					
s. 2(d)	3	2	1	40.00	20.00
s. 3		3		100.00	100.00
s. 6(1)					
s. 6(2)	1			0.00	0.00
s. 7	72	42		36.84	36.84
s. 8	22	23	1	51.11	48.89
s. 9	13	6	1	31.58	26.32
s. 10(a)		3		100.00	100.00
s. 10(b)	18	24	2	57.14	52.38
s. 10(c)					
s. 11(a)		1		100.00	100.00
s. 11(b)	11	12		52.17	52.17
s. 11(c)	2			0.00	0.00
s. 11(d)	23	16	9	41.03	18.42
s. 11(e)					
s. 11(f)	5	1		16.67	16.67
s. 11(g)					
s. 11(h)	7	1		12.50	12.50
s. 11(i)	1			0.00	0.00
s. 12	14	4		22.22	22.22
s. 13	3	1		25.00	25.00
s. 14		2		100.00	100.00
s. 15(1)	21	10	2	32.26	25.81
s. 15(2)					
language rights					
s. 23					
TOTALS	231	163	22	41.37	32.74

Sources: *Administrative Law Reports, Criminal Reports, and Reports of Family Law* for 1984, 1987 and 1991.

*The "actual success rate" was calculated taking the number of times an infringement was found, less those instances where the infringement was saved by section 1, divided by the total number of cases in which the *Charter* was raised for that section. It should be noted that this table deals with the success rate of particular *Charter* arguments, several of which may have been made in a given case, and not the *Charter* claimants' overall success rates, which are addressed in Tables 2 and 3.

TABLE 5
CHARTER USE RATES
(ALL COURTS)

YEAR	ADMINISTRATIVE	CRIMINAL	FAMILY	TOTAL
1984	23/91 - 25%	66/164 - 40%	7/368 - 2%	96/623 - 15%
1987	23/83 - 28%	89/144 - 62%	11/368 - 3%	123/595 - 21%
1991	23/122 - 19%	75/130 - 58%	3/321 - 1%	101/573 - 18%

SOURCES: *Administrative Law Reports:* 1984, 1987, 1991

Criminal Reports: 1984, 1987, 1991

Reports of Family Law: 1984, 1987, 1991