RECENT DEVELOPMENTS IN CANADIAN LAW: CONSTITUTIONAL LAW

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I. INTRODUCTION**

The proclamation of the *Canadian Charter of Rights and Freedoms*[1] on April 17, 1982, was not greeted by Canadians with uniform enthusiasm. Even such a strong proponent of the *Charter* as Thomas Berger, who welcomed it warmly as safeguarding minority rights, added that the *Charter*'s guarantees were not "complete safeguards". Its value could be greatly enhanced by a more tolerant society, a greater receptiveness to aboriginal rights and the preservation of Quebec's distinctive cultural heritage and identity by providing the province with a veto power.[2] Another writer deplored the "judicialization of public policy-making" implicit in the new reforms and was apprehensive that the *Charter* would enhance "the political power of those sectors of society that already wielded the greatest power" while representing a drastic curtailment of democratic choice.[3]

The record in *Charter* interpretation to date would tend to support Thomas Berger's tempered optimism rather than Professor Ison's more pessimistic outlook. With the appointment of Chief Justice Brian Dickson to his present office on April 18, 1984, the *Charter* began to take on real form and meaning. Whereas the Supreme Court of Canada under Chief Justice Laskin was often bedevilled by dissents, which at times included the Chief Justice himself, the Court as we know it today is led with more vigour. However, it is sad that someone of Chief Justice Laskin's unquestionable talents and commitment to civil liberties should pass away at this important juncture in the Court's history.

II. INSTITUTIONS

A. *The Composition and Role of the Supreme Court of Canada*

With the adoption of the *Charter*, the composition of the Supreme Court of Canada becomes even more important, especially if the Court

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** This Survey covers the period to November 1986. There have been important developments in the field of Constitutional Law since then. Although the author is unable to report these developments at this time, he does expect to cover them in his next Survey. While assuming sole responsibility for the contents of the Survey, he would like to thank Professor Donald H. Clark for materials and information on the appointment of judges in England.

[1] *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B of the *Canada Act, 1982* (U.K.), 1982, c. 11 [hereinafter the *Charter*].

[2] T.R. Berger, FRAGILE FREEDOMS: HUMAN RIGHTS AND DISSENT IN CANADA (Toronto: Clarke, Irwin & Co. Ltd., 1982) at 255-60.

[3] T.G. Ison, *The Sovereignty of the Judiciary* (1986) 10 ADEL. L. REV. 1. This was the opening address by Professor Ison of Toronto's York University to the annual meeting of the Australian Universities Law Schools Association held in 1985 in Adelaide, South Africa.

must look into the "merits" of legislation, as a recent decision suggests.[4] Inevitably, the judges will have to decide not only important issues of law but questions of policy as well. However, as Chief Justice Dickson recently cautioned: "Though it is inevitable that law will be created by judges in the process of resolving disputes, the courts have no business questioning the wisdom and policy of legislation *beyond what is required by the Constitution*".[5] New constitutional provisions now make the Supreme Court of Canada one of the most powerful tribunals in the world, a strong rival in this respect to the United States Supreme Court. Subsection 52(1) of the *Constitution Act, 1982*, which includes within its purview the entrenched provisions of the *Charter*, requires courts to declare statutory provisions, and perhaps sometimes even executive decisions, "of no force and effect" if they are inconsistent with the *Charter*. Moreover, under subsection 24(1) of the *Charter*, courts of competent jurisdiction have the power to provide a remedy where certain rights or freedoms have been denied or infringed.

The Supreme Court of Canada judges who must now fill this demanding mandate come from varied backgrounds. As of January 16, 1985, the number of former law school deans among its members increased to three with the appointment of Mr. Justice Gérard La Forest in January 1985.[6] The two other former deans are Mr. Justice Beetz who was dean at the Université of Montreal's Faculté de droit, and Mr. Justice Le Dain, who served as dean of York University's Osgoode Hall Law School.

As for the other members on the bench, Mr. Justice Lamer was a professor of law at l'Université de Montreal before his appointment to the Quebec Superior Court and subsequent appointment to the Quebec Court of Appeal. In 1976, he became Chairman of the Law Reform Commission of Canada. Madame Justice Wilson, the sole woman on the Court and the only judge born outside Canada,[7] had practised law for seventeen years with the Toronto firm of Osler, Hoskin and Harcourt before serving on the Ontario Court of Appeal. She has already proven to be a superior judicial craftsperson as was evident in her concurring judgment in *Operation Dismantle Inc.* v. *R.*[8] and in her dissenting opinion in *Reference Re Ownership of the Bed of the Strait of Georgia*,[9] both reflecting deep and painstaking analysis. Mr. Justice Estey and Mr. Justice McIntyre are both

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[4] *Reference Re British Columbia Motor Vehicle Act*, [1985] 2 S.C.R. 486, 24 D.L.R. (4th) 536, *aff'g* (*sub nom. Reference Re S. 94(2) of the Motor Vehicle Act, R.S.B.C. 1979, c. 288*) 42 B.C.L.R. 364, 147 D.L.R. (3d) 539 (C.A.) [hereinafter *Motor Vehicle Act*].

[5] W. Monopoli, "Dickson Warns Judges not to be Legislators", *The National* (September 1985) 17 (emphasis added).

[6] Mr. Justice La Forest has been Dean of Law at the University of Alberta, serving also as Assistant Deputy Attorney General of Canada overseeing research and planning. For many years prior to this, he was Professor of Law at the University of New Brunswick.

[7] At Kircaldy, Scotland, the birthplace of the celebrated economist, Adam Smith.

[8] *Infra*, note 243.

[9] (1984), [1984] 1 S.C.R. 388 at 427, (*sub nom. A.G. Canada v. A.G. British Columbia*) [1984] 4 W.W.R. 289 at 322 [hereinafter *Strait of Georgia*].

graduates of the University of Saskatchewan's College of Law. The former was appointed to the Court in 1977 after having served as Chief Justice of Ontario, whereas Mr. Justice McIntyre came to the Court in 1979 from the British Columbia Court of Appeal. Mr. Justice Estey, an expert in administrative, commercial and tax law, has long been an advocate of "specialization" within the legal profession, while Mr. Justice McIntyre is, *inter alia*, an expert in criminal law. Both have extensive practical experience. The members' backgrounds therefore encompass private practice, legal education and public service.

Of the present judges, one was appointed by Conservative administrations while the remaining seven were appointed by the Liberal administrations of Prime Minister Trudeau, who also elevated Chief Justice Brian Dickson to his present position early in 1984. There is one vacancy on the Court as a result of Mr. Justice Chouinard's death early in February 1987. One of the remarkable features of the Court is the substantial academic background of almost half of its members. It is also remarkable that all of the judges have had prior judicial experience, primarily at the provincial Appeal Court level, although Mr. Justice Beetz was appointed from the Quebec Court of Queen's Bench in 1974 and Mr. Justice Le Dain came from the Federal Court of Appeal in 1984.

Reflecting the regionalized character of the country, Chief Justice Dickson from Manitoba represents the prairie provinces. In succeeding Mr. Justice Ritchie, Mr. Justice La Forest from New Brunswick represents the Atlantic provinces; Mr. Justice McIntyre represents British Columbia; Justices Beetz and Lamer represent Quebec; whereas Justices Estey, Wilson and Le Dain (who is trained both in common law and Quebec civil law) and Wilson represent Ontario.[10]

As mentioned, one of the conspicuous features of the Court is the presence on it of several academics. In a 1984 address at the University of Sheffield,[11] the Right Honourable Sir Robert Megarry, the Vice-Chancellor of the United Kingdom Supreme Court, mentioned that no law teacher had ever been appointed to the bench in England. It is reported that in 1934, Lord Chancellor Sankey had considered appointing Professor H.C. Gutteridge to the High Court of Justice, but drew back when he received

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[10] The only statutory requirement for provincial representation on the Court is contained in the *Supreme Court Act*, R.S.C. 1970, c. S-19, s. 6, *as am. An Act to Revise References to the Court of Queen's Bench of the Province of Quebec*, S.C. 1974-75-76, c. 19, s. 2. It stipulates: "At least three of the judges shall be appointed from among the judges of the Court of Appeal or of the Superior Court, or of the barristers or advocates of the Province of Quebec." Although other provinces are not mentioned, there is probably a convention now that the nine judges will represent the principal regions of the country. In addition to the three judges from Quebec, there are presently, as usual, three from Ontario, one from the four Atlantic Provinces, one from the three Prairie Provinces and one from British Columbia.

[11] Sir R. Megarry, *Seventy-five Years On: Is the Judiciary What it Was?* in D.C. Hoath, ed., THE EDWARD BRAMLEY AND JUBILEE LECTURES, 1984 (Sheffield: University of Sheffield, 1985) at 7.

advice against such an appointment. In speculating on the reasons why English academics have not been appointed, Sir Robert said:

> Consider what would happen if a distinguished teacher of law were to be appointed a High Court judge. He would at once be pitchforked into the general High Court mixture of procedure, practice and evidence in a wide variety of cases, usually argued by experienced and wily members of the Bar who have for many years lived their daily lives in this atmosphere. However great the teacher's learning in the branches of substantive law . . . he almost of necessity will have had little or no experience of the procedural side of a High Court practice.[12]

Sir Robert's point was that although academics could function well at the appellate level, the increasing and virtually universal practice was to appoint English Court of Appeal judges from the High Court rather than the practising bar. Judges of the High Court have acquired judicial skills through practice and their merits can be more readily appraised by the appointing power. Since academics are weak on the procedural side, they are never appointed to the High Court which is the customary route to the Court of Appeal. However, England lacks an entrenched bill of rights, such as the one Canada possesses in the *Charter*. A Supreme Court of Canada with a mixed membership of former practising lawyers and academics (and the two are not mutually exclusive as the Court's dossiers would reveal) is a superior tribunal for *Charter* interpretation, since it combines practice and theory. This is particularly important since the *Charter*'s historically-rooted provisions on rights and freedoms require the kind of research at which many academics are adept. For instance, the *Charter* raises theoretical issues in areas where a "philosophical" background is advantageous, such as the right to "life, liberty and security of the person" under section 7 or the "fundamental freedoms" provision. To be productive, however, theory must always be informed by practice. The skills of the consummate practitioner and the legal scholar can interact more creatively, perhaps, when the Court is interpreting the *Charter* rather than construing the provision of a straightforward statute. None of the above is meant to suggest that there are no "practitioners" in the judiciary who are able scholars in their own right, or academics who also have considerable practice at the bar.

B. *Language Rights*

In *Reference Re Manitoba Language Rights*,[13] the Supreme Court of Canada struggled valiantly with the question of whether something could and could not be a law at the same time. From the Province of Manitoba's early history, known then as Red River Colony, the French-speaking Metis and the English, and later the non-Metis francophone minority, had coex-

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[12] *Ibid.* at 7.

[13] (1985), [1985] 1 S.C.R. 721, 19 D.L.R. (4th) 1.

isted uneasily. Although official bilingualism in the courts and legislature was constitutionally guaranteed under section 23 of the *Manitoba Act, 1870*,[14] in 1890 the provincial legislature adopted the *Official Language Act, 1890*[15] which provided that English was to be the sole official language in the province. Section 1 of the Act stipulated that provincial statutes "need only be printed and published in the English language". In spite of occasional intimations that the legislation and indeed all of Manitoba's unilingual statutes were constitutionally invalid, they continued to be enacted in one language.

In 1892 and 1909 two successive unreported judgments[16] of the County Court of St. Boniface, Manitoba, ruled that the *Official Language Act, 1890*[17] was unconstitutional, since the provincial legislative assembly by ordinary statute was powerless to alter or repeal the provisions of a constitutionally-entrenched statute unless the Constitution itself was properly amended. Years later, in *A.G. Manitoba* v. *Forest*,[18] a case involving the constitutional validity of a unilingual parking ticket, the Supreme Court of Canada held unanimously that the unilaterally-enacted provincial statute was unconstitutional.

In *Reference Re Manitoba Language Rights*,[19] the issue was essentially whether the requirement in section 23 of the *Manitoba Act*, 1870[20] respecting the use of both English and French in provincial statutes was permissive or mandatory. In other words, did past statutes which were not printed in both languages have any legal force and effect?

The Court held that the word "shall" in section 23 of the *Manitoba Act, 1870*[21] and in section 133 of the *Constitution Act, 1867*[22] was to be construed in "its normal imperative sense".[23] There was no discretion left to the provincial legislature to repeal or vary the provision in the future, as there might have been had it been held to be "directory" only. In addition, subordinate legislation that in Quebec would be subject to section 133 of

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14 S.C. 1870, c. 3, *reprinted in* R.S.C. 1970, App. II. This Act which forms part of the *Constitution Act, 1871* (U.K.), 34-35 Vict., c. 28 (formerly *British North America Act, 1871*) has since been incorporated in the *Constitution Act, 1982*, being Schedule B of the *Canada Act, 1982* (U.K.), 1982, c. 11, by virtue of paragraph 52(2)(b).

15 S.M. 1890, c. 14.

16 *Pellant* v. *Hébert* (1892) [unreported]. The decision was subsequently published in *Le Manitoba* (9 mars 1892) and reproduced in J.E. Magnet, *Court Ordered Bilingualism* (1981) 12 R.G.D 237 at 242-4; *Bertrand* v. *Dussault* (20 January 1909) [unreported] reproduced by Mr. Justice Monnin (now Chief Justice of the Manitoba Court of Appeal) in his dissenting opinion in *Re Forest and Registrar of Court of Appeal of Manitoba* (1977), 77 D.L.R. (3d) 445 at 458-62, [1977] 5 W.W.R. 347 at 361-6 (Man. C.A.).

17 S.M. 1890, c. 14.

18 (1979), [1979] 2 S.C.R. 1032, [1980] 2 W.W.R. 758.

19 *Supra*, note 13.

20 S.C. 1870, c. 3, *reprinted in* R.S.C. 1970, App. II.

21 S.C. 1870, c. 3, *reprinted in* R.S.C. 1970, App. II.

22 (U.K.), 30 & 31 Vict., c. 3 (formerly *British North America Act, 1867*).

23 *Supra*, note 13 at 737, 19 D.L.R. (4th) at 13-4.

the *Constitution Act, 1867*[24] is, in Manitoba, subject to section 23 of the *Manitoba Act, 1870*.[25]

Despite the fact that the Court had held that the statutes published only in English were unconstitutional, it was difficult to strike them down as being legally ineffective in a definitive sense, since that would result in legal anarchy. Unless either laws enacted before 1890 or the common law provided a rule, no statute enacted in English only after 1890 would now be in effect and this would result in chaos. In this potentially catastrophic situation, the Court invoked the principle of the rule of law, which is "a fundamental principle of our Constitution".[26] The principle reflects the supremacy of law over government and requires the creation of a regime of positive laws for its efficacy. In view of the dire consequences of finding a legal vacuum in the province, the Court refused to take a narrow and literal approach to constitutional interpretation. The Court held, therefore, that all Manitoba statutes which would currently be in force were it not for the constitutional defect will be deemed to be temporarily valid until the minimum time required for the enactment of a French version expires. It did not, in this case, attempt to define the actual time limit.

As might be expected, the Attorney General of Manitoba, the Société franco-manitobaine and other interested parties were soon before the Supreme Court of Canada for more precise directions as to the time allowable to enact the statutes in the French language.[27] In a short order, made without written reasons, the Court stipulated that in the case of (i) the Continuing Consolidation of the Statutes of Manitoba; (ii) the Regulations of Manitoba; and (iii) Rules of Court and Administrative Tribunals, the period of temporary validity would expire on December 31, 1988, and for all other provincial laws the time limit for translation would be December 31, 1990. The parties could return to the Court for further determination if required.[28]

In *Quebec Assoc. of Protestant School Bds.* v. *A.G. Quebec*,[29] the courts had to resolve a direct conflict between the "Canada clause" in section 23 of the *Charter* and the "Quebec clause" in section 72 of the Quebec *Charter of the French Language*.[30] Section 23 allowed, *inter alia*, English-speaking Canadian citizens who had received English language primary instruction anywhere in Canada to send their children to English language primary or secondary schools in Quebec. Section 72 of *Bill 101* required all instruction at those levels to be in French except, most

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[24] (U.K.), 30 & 31 Vict., c. 3 (formerly *British North America Act, 1867*).

[25] S.C. 1870, c. 3, *reprinted in* R.S.C. 1970, App. II. *See also A.G. Quebec* v. *Blaikie*, [1981] 1 S.C.R. 312, 123 D.L.R. (3d) 15.

[26] *Supra*, note 13 at 748, 19 D.L.R. (4th) at 22.

[27] *Order: Manitoba Language Rights* (1985), [1985] 2 S.C.R. 347.

[28] *Ibid.* at 348-9.

[29] (1982), [1982] C.S. 673, 140 D.L.R. (3d) 33, *aff'd* [1983] C.A. 77, 1 D.L.R. (4th) 573, *aff'd* [1984] 2 S.C.R. 66, 10 D.L.R. (4th) 321.

[30] R.S.Q. 1977, c. C-11 [hereinafter *Bill 101*].

importantly, where one of the parents had received elementary instruction in English in Quebec.

The important differences in the two provisions were that in the future, under the Quebec law, any English-speaking parents who moved to Quebec, not having resided there or gone to elementary school there, would have to educate their children in French. However, under section 23, parents moving to Quebec whose children had been educated in English elsewhere in Canada had a right for them to receive further education in English in Quebec at both the primary and secondary school levels. In order to preserve its French language and culture, Quebec sought to ensure that the children of "immigrants" to the province, from other countries or for that matter, from other regions of Canada, receive their instruction in French. Counsel for the Quebec government argued that the linguistic provisions in section 72, and other parts of the *Charter*, were "reasonable limits" demonstrably justifiable in a free and democratic society, according to which section 1 of the *Charter* could exempt Quebec from the application of section 23.

After a thorough statistical review, Chief Justice Deschênes of the Quebec Supreme Court held that any influx of new English language students into Quebec because of section 23 would be negligible. In the whole of the Quebec school system the trend was toward a reduction in the size of the English-speaking sector. The "Quebec clause" of *Bill 101* was not, therefore, a "reasonable limit" which would modify the application of section 23. It was not proportional or necessary to the purpose it sought to achieve. Insofar as they are inconsistent with section 23, therefore, those parts of Quebec's *Bill 101* which conflict with the section are of no force and effect.[31]

In an article criticizing some of the reasoning in the above judgment,[32] Professor Woehrling cites a decision of the Council of State of the Swiss canton of Zurich. In that particular canton, Swiss citizens who moved there from other parts of the federation were required to educate their children in German, irrespective of their mother tongue. Accordingly, although French and Italian are also "official languages" in Switzerland, members of those linguistic groups were required to educate their children in German when they moved to Zurich, at least after a short transitional period. Professor Woehrling's point is that there is a parallelism between the Zurich provision and section 72 of *Bill 101*, even though one was considered valid and the other invalid in what were presumably "democratic" societies. What is a "reasonable limit"? What is a "democratic society"?

Chief Justice Deschênes's judgment was upheld unanimously by the Quebec Court of Appeal[33] and by the Supreme Court of Canada.[34] The

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31 *Supra*, note 29, [1982] C.S. at 708-9, 140 D.L.R. (3d) at 90-2.

32 J. Woehrling, "La Suisse serait-elle moins démocratique?", *Le Devoir* [*de Montréal*] (15 septembre 1982) 7.

33 *Supra*, note 29.

34 *Ibid.*

sweeping limits imposed by Chapter VIII of *Bill 101* simply cannot be reconciled with section 23. Section 23 was adopted after the enactment of *Bill 101*, and its very purpose was to override those parts of *Bill 101* that negated the "Canada clause". The real effect of section 73 of *Bill 101*, according to the Supreme Court of Canada, is to make exceptions to paragraph 23(1)(b) and subsection 23(2) of the *Charter* in Quebec, and whatever "limits" section 1 of the *Charter* allows, "it cannot be equated with exceptions such as those authorized by subsections 33(1) and 33(2) of the Charter, which in any event do not authorize any exception to section 23".[35] Section 72 cannot be construed as a "reasonable limit" of section 23 of the *Charter* within the meaning attributed by section 1. The only other conceivable ways to make "exceptions" to section 23 in Quebec would be through a legislative override or a constitutional amendment. However, since the override in section 33 does not embrace section 23 and since there have been no amendments with respect to *Bill 101*, the latter is of no force or effect insofar as it conflicts with the *Charter*.

C. *The Crown*

Canada joined most of the fifty or so members of the Commonwealth in opposition to British Prime Minister Thatcher's "no-sanctions" stance against South Africa on the apartheid issue in 1985-86. As a loose, voluntary association having about one-quarter of the world's population, when united, the Commonwealth possesses the capacity to exert considerable influence in world affairs. Prime Minister Thatcher had shown herself to be such a determined opponent of economic sanctions, however, that any prospect of a united stand on South African sanctions seemed unlikely.

A constitutional furor arose in Britain when a source close to the Queen allegedly reported that over the past two years the monarch had sharply disagreed with her British Prime Minister on the government's decision to allow American fighter planes from British bases to participate in the punitive raid on Libya in 1986. She also reportedly disagreed sharply with her Prime Minister on South African economic sanctions and on the divisive year-long miners' strike.[36]

Although the reputed palace news leak was later termed "preposterous" in a letter to the Editor of the *Sunday Times* by the Queen's private secretary, Sir William Heseltine,[37] the protracted dispute over what the Queen may have said confirmed suspicions of some observers that a serious rift existed between the two leaders. Andrew Neil, the Editor of the

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35 *Supra*, note 29, [1984] 2 S.C.R. at 86, 10 D.L.R. (4th) at 337.

36 J. Fraser, "Queen Impartial Senior Official Asserts", *The [Toronto] Globe and Mail* (29 July 1986) A9; *see also* P. Viopuillem, "Regal Opposition", *MacLean's* (28 July 1986) 13.

37 Sir W. Heseltine, "Palace Leak 'Preposterous' Queen's Secretary Writes", *The [Toronto] Globe and Mail* (29 July 1986) A9.

Sunday Times, which had originally printed the story after a briefing by Michael Shea, the Queen's press secretary, would not retract the newspaper's version. Referring to Heseltine's letter, the Editor said: "'The Palace has finally admitted it did brief us for the article and that it was read back. It says that we read only parts back. We say we read all of it back . . . and that it was completely clear what we were doing at all times.'"[38]

The Queen was in a difficult position. She is both Queen of Britain, Queen of a number of commonwealth countries and head of the Commonwealth. If other units of the Commonwealth were bitterly antagonistic towards a policy of her British prime minister, must she voice only the policy or sentiments of her British prime minister, or might she not intimate in some way that she had her own policy views on an issue on which Britain and the other commonwealth members were divided? This question takes on some proportion particularly when, for example, the Commonwealth of which she is head is in danger of disintegrating over the issue of apartheid. If she speaks only as Queen of Britain on an issue of vital importance to the whole Commonwealth, is she not implicitly, as head of the Commonwealth, negating the co-equal status of Britain and other commonwealth countries which has been a feature of commonwealth relations since the *Statute of Westminster, 1931*?[39] But she cannot contradict her own British prime minister, since all communications between them are privileged and confidential. In such a precarious position, with no precedents to guide her, might a leak not be made on her behalf reflecting the strong views of other commonwealth members, which might prompt her prime minister to reconsider what the others regarded as an incredibly short-sighted policy?

In the theory of the Constitution that has come down to us from Walter Bagehot, a monarch has the right vis-a-vis her prime minister "to be consulted, to encourage and to warn".[40] She is, therefore, entitled to have her own opinions. Having acquired vast political experience during her reign of thirty-four years, particularly through her weekly meetings with eight prime ministers,[41] might she not "warn" her incumbent prime minister of the possibly disastrous consequences of a policy of passivity or inanition towards apartheid. It is to be remembered that the Commonwealth over which she presides was founded on the principle of the equal partnership of different racial groups in the task of governing multi-racial societies. Is there any concern that is more central to the Commonwealth?

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38 Fraser, *supra*, note 36 at A9.

39 (U.K.), Geo. V, c. 4; *see* N. Hillmer, "Commonwealth" in THE CANADIAN ENCYCLOPEDIA, vol. 1 (Edmonton: Hurtig, 1985) at 380-1; *see also* W.H. McConnell, "Constitutional History" in THE CANADIAN ENCYCLOPEDIA, vol. 1 (Edmonton: Hurtig, 1985) at 412-4.

40 J.P. Mackintosh, THE BRITISH CABINET, 3d ed. (London: Stevens, 1977) at 118n.1.

41 Elizabeth II succeeded to the throne in 1952 when Winston Churchill was prime minister. Subsequent prime ministers were Eden, Macmillan, Douglas-Home, Wilson, Heath, Callaghan and Thatcher.

On matters such as Irish Home Rule, Queen Victoria expressed political views that were intensely hostile to Prime Minister Gladstone's support for that doctrine,[42] and Fulford, in *The Prince Consort* said that Prince Albert "enjoyed more political power and influence than any English sovereign since Charles II".[43] A strong political role is certainly nothing new for a British sovereign to take. The distinction here is that the issue concerns not only the United Kingdom but the Commonwealth and her interest is in forestalling the demise of an organization which seems to her to play a significant and positive role in world affairs.

There has been some criticism of Canadian Governors General for making unauthorized statements of a political character. For example, Governor General Alexander, who served from 1946 to 1952, was criticized for his declaration that the armed forces might be used to contribute to the development of Canada's empty regions. This was regarded as a matter of political policy for his government.[44] It is important to remember, however, that no governor general has ever presided over his government for thirty-four years and of course no governor general is head of the Commonwealth.

D. *The Senate*

In 1980, the Supreme Court of Canada decided unanimously that the Trudeau government's Bill C-60 to reconstitute the Senate into a "House of the Federation" was unconstitutional.[45] In January 1984, a Parliamentary Joint Committee issued its Report[46] on Senate reform. Among the recommendations in the Report was that, in the future, senators be elected, and that they represent major "regions" of the country as well as minority groups. In addition, it was suggested that the present Senate be enlarged to 144 seats from the present 104 seats to provide additional representation for the Atlantic and Western provinces.[47]

Senators would be elected for a single nine-year term and they would therefore not be eligible for re-election. One-third of the total membership of the Senate would be elected at three-year intervals to ensure continuity. The reconstituted Chamber would only have a 120-day suspensive veto over most legislation passed by the House of Commons. Re-passage of

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42 C. Hibbert, QUEEN VICTORIA IN HER LETTERS AND JOURNALS (Hardmondsworth: Penguin, 1985) at 296, 324 and 326.

43 *Supra*, note 40 at 119n.3.

44 W.H. McConnell, COMMENTARY ON THE BRITISH NORTH AMERICA ACT (Toronto: MacMillan, 1977) at 36.

45 *Reference Re Authority of Parliament in Relation to the Upper House* (1979), [1980] 1 S.C.R. 54, 102 D.L.R. (3d) 1; *see also* W.H. McConnell, *Annual Survey of Canadian Law: Constitutional Law* (1982) 14 OTTAWA L. REV. 502 at 509-14.

46 *Report of the Special Joint Committee of the Senate and House of Commons on Senate Reform* (Ottawa: Queen's Printer, January 1984) (Chair: G. Molgat and P. Cosgrove).

47 *Ibid.* at 29.

legislation by the lower house at the termination of the veto period would make it law in spite of Senate opposition. The reformed Senate, however, would possess an absolute veto over language rights, with a double majority composed of (1) French-speaking senators and (2) the Senate as a whole being required to enact such laws.

One of the more controversial features of the above proposal is the limitation on elected membership to a single, nine-year, non-renewable term. This would deprive the upper chamber of the fund of experience that members of bodies like the United States Senate or the British House of Lords can accumulate over time. The proposal, obviously, was to create a truly independent legislative body. The Committee considered that a single, relatively longer term would make Senators more independent by relieving them of political pressures and anxieties. The proposal is in some ways reminiscent of Jacksonian democracy in that its non-elective feature suggests that one senator is roughly as good as another. It is redolent of egalitarianism. But is the premise involved a good one?

There has been a long debate on Senate reform in Canada. Once elected, however, governments do not take decisive action to reform the upper Chamber. Perhaps the greatest deterrent to establishing an elected Senate is simply that the appointed one is too valuable a source of political patronage for a prime minister to sacrifice. Nevertheless, as presently constituted, the chamber lacks vigour (although it does perform useful committee work) and should either be abolished or reformed. Irrespective of any reform, the lower house should continue to be the actual centre of government. The government should continue to be responsible solely to the House of Commons, according to the unwritten convention of responsible government, and money bills should originate only in the lower house. In addition, it should be required that the prime minister and a substantial number of his cabinet colleagues sit in that Chamber, and especially those holding major portfolios. With these features firmly in place in the lower house, that body should have no fear of creating too powerful a rival centre of political authority in a newly-reformed Senate.

There has been some suggestion by the Opposition Leader in the present Senate that it should play a more obstructive role.[48] Politically, this may be untenable, since as an unelected anachronism in a democratic age, the present Senate is not truly representative. In any legislative confrontation with the House of Commons, the question would arise of what constituency it was appealing to. The answer to this question is, in effect, one of the primary reasons for reform.

E. *Quebec and the Veto*

On November 5, 1981, the federal Parliament and nine provinces agreed to patriate the Constitution, complete with a *Charter of Rights and*

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[48] *See* C. Lynch, "Liberal Senators Giving Old Age a Bad Name", *The [Saskatoon] Star-Phoenix* (31 July 1986) A5.

Freedoms and a domestic amending formula. In its 1981 judgment on patriation, the Supreme Court of Canada held that as a matter of convention, concurrence between Parliament and an unspecified consensus of the provinces was necessary to obtain the amendment before the Court.[49] The Court was apparently reluctant to declare which provinces, if any, needed to consent and what precise *numerical* consensus was required, because this was normally a matter for the political actors to determine by their conjoint actions and admissions through time. In other words, the Court could declare if and when a convention existed, but it might not have enough evidence at its disposal to stipulate exactly what all the incidents of that convention were.

The fact that Quebec was the single non-concurring province, however, created difficulties of its own. Exponents of the "compact theory" which was popular among some influential Quebec jurists, asserted that *unanimous* consent was necessary to secure an amendment encroaching on provincial powers. Although the Supreme Court of Canada rejected this theory, the question remained whether Quebec, with its distinctive language and culture and its position of influence in a bilingual and bicultural Canada, had a legitimate claim to a veto power. If the Supreme Court of Canada accepted the "dualistic" theory of Canadian federalism with all of it legal as well as its political and social implications, recognition of a veto power was a distinct possibility.

In a 1981 provincial reference case, the Quebec Court of Appeal unanimously held that Quebec did not possess a veto power.[50] The Court held that the Supreme Court of Canada had not prescribed unanimous provincial consent for an amendment (which would imply a provincial veto), nor did it find that the "dualistic" theory of Canadian federalism was a distinct source of the veto power. In the agreement of November 5, 1981, to which Quebec was not a party, "the necessary measure of provincial consent was specified and achieved by the political actors in accordance with the decision of the Supreme Court".[51] It was surely most significant that the five judges of Quebec's highest court, in a unanimous unsigned opinion, decided against their province's own government on the question of a veto. The Supreme Court of Canada agreed with the Quebec Court of Appeal that provincial counsel had failed to establish the existence of a conventional power of veto. After an exhaustive survey of possible precedents, the Court held that Quebec had been unable to show assent by Canadian political actors generally to any explicit assertion of the veto power by that province. In the Court's words:

> We know of no example of a convention being born while remaining completely unspoken, and none was cited to us. It seems to us that the contention

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[49] *Reference Re Resolution to Amend the Constitution* (1981), [1981] 1 S.C.R. 754 at 909, (*sub nom. A.G. Manitoba v. A.G. Canada*) [1981] 6 W.W.R. 1 at 124.

[50] *Reference Re A.G. Quebec and A.G. Canada* (1982), [1982] C.A. 33, 134 D.L.R. (3d) 719.

[51] *Ibid.* at 38, 134 D.L.R. (3d) at 727.

> of appellant's counsel to the effect that conventions need not be explicitly accepted is impossible to distinguish in practice from a denial of the requirement of acceptance by the actors in the precedents. It is precisely through reported statements by numerous actors that a convention could be identified in the *First Reference*. Such statements provide the only true test of recognition and, once again, unmistakably to [*sic*] distinguish a constitutional rule from a rule of convenience or from political expediency.[52]

With the recent defeat of Quebec's Parti Québecois government, which initiated the foregoing reference, discussions are continuing between Prime Minister Mulroney and Premier Bourassa, which presumably include talks on agreeing to a veto power, or limited veto power, in return for delayed acceptance of the new Constitution. The Quebec veto power, however, would be difficult to obtain in a political sense:

> The province's [i.e. Quebec's] most important — and most controversial — constitutional demand is a veto over future amendments. At present changes can only be made with the consent of seven provinces representing at least 50 per cent of Canada's population. Under a formula proposed at the 1971 Victoria Conference, constitutional changes would require the approval of two Atlantic provinces, two Western provinces, Quebec and Ontario. That would give Quebec a veto over amendments.
>
> Mulroney has yet to express his government's position on veto powers for Quebec. But in his letter [of July 1986] he reminded the premiers of a promise he made in the last election campaign to study possible changes to the amending formula. As well Senator [Lowell] Murray has hinted that he favors at least a limited veto for Quebec. Said Murray, in a 1981 Senate speech that he still cites: "I believe that most Canadians acknowledge, as an essential fact of our national existence, that Quebec has had and does have a veto on changes which affect her own status and the powers of her legislature.[53]

It seems manifestly obvious that Quebec is not a province like the others, but is the guardian of a distinctive language and cultural heritage without which Canada would be a much diminished nation. To concede Quebec an absolute veto power over future amendments, however, requires a collective act of political will which would be most difficult to obtain. It is not probable that seven provinces having half the national population, as required by section 38 of the *Constitution Act, 1982*,[54] would agree to such an amendment. However, in an act of statesmanship which acknowledged the continuing duality of the country, they may agree to confer a more limited veto power on Quebec in matters relating to her linguistic and cultural interests, and possibly in certain matters of social and economic policy as well, although the latter would be more difficult to

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52 *Reference Re Objection to a Resolution to Amend the Constitution* (1982), [1982] S.C.R. 793 at 817, (*sub nom. Re A.G. Quebec and A.G. Canada*) 140 D.L.R. (3d) 385 at 405.

53 P. Jessell, "A Secret Proposal", *Maclean's* (28 July 1986) 12.

54 Being Schedule B of the *Canada Act, 1982* (U.K.), 1982, c. 11.

obtain. There would seem to be no problem in securing a consensus that Quebec is a distinct society.[55]

Although Quebec constitutional scholars such as Gilles Rémillard (now Quebec Minister responsible for Canadian Intergovernmental Affairs) have acknowledged that the province has never possessed a veto, they have insisted that Canadians elsewhere have always respected Quebec opinion and have frequently called for the modification of the 1982 amending fomula obtained without Quebec's consent.[56]

F. *The Judiciary*

In 1983 and early in 1984, the Canadian Bar Association established two committees to enquire into the independence of the judiciary and the appointment of judges in Canada. Both committees issued extensive written reports in 1985.[57]

1. *The Independence of the Judiciary*

Interference by the Crown with the judicial process was indicated as a factor that could potentially undermine judicial independence in the *Independence of the Judiciary Report*. Such interference was notorious during the era of the Stuart monarchs in the seventeenth century, when there was no constitutional impediment to hinder the King's power or King's ability to remove judges who displeased him. It was only some years after the accession of William and Mary that the *Act of Settlement, 1701*[58] provided that judges should hold their commissions "during good behaviour". Although this provision, surprisingly, was not extended initially to the colonies, the enactment of section 99 of the *Constitution Act, 1867*[59] extended a similar guarantee of judicial independence to Canadian superior court judges.

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55 B. Marotte, "Quebec Ready for Another Go at Constitution", *The [Toronto] Globe and Mail* (9 August 1986) A8.

56 G. Rémillard, "Monsieur Garneau et le droit de véto du Québec", *Le Devoir [de Montréal]* (28 juillet 1984) 7. After the above was written, Premier Bourassa and Mr. Rémillard proposed a new amending formula requiring seven provinces with seventy-five percent of Canada's population, instead of the present seven provinces with fifty percent, to concur in future constitutional amendments. Because of the population threshold, future amendments would require the consent of Quebec and Ontario and give Quebec a veto but not necessarily "special status" as formerly defined. The proposal, which was made at the Premiers' Conference in Edmonton in August, 1986, was regarded as a good starting point for negotiations. *See* J. Cruickshank, M. Fisher & R. Howard, "Premiers Set for Discussion on Quebec and Constitution", *The [Toronto] Globe and Mail* (13 August 1986) A1.

57 *Report of the Canadian Bar Association Committee on the Independence of the Judiciary in Canada* (Ottawa: Canadian Bar Foundation, 1985) (Chair: L-P. de Grandpré) [hereinafter *Independence of the Judiciary Report*]; *Report of the Canadian Bar Association Committee on the Appointment of Judges in Canada* (Ottawa: Canadian Bar Foundation, 1985) (Chair: E. McKelvey) [hereinafter *Report on the Appointment of Judges*].

58 (U.K.), 12 & 13 Wm. III, c. 2.

59 (U.K.), 30 & 31 Vict., c. 3 (formerly *British North America Act, 1867*).

Only some of the chief recommendations of the very detailed Report can be mentioned here. While recognizing that the need for specialized expertise had led to a proliferation of administrative tribunals, the Committee criticized the resulting "erosion of the judiciary", recommending that the trend be reversed.[60] As far as possible, judicial functions should be confined to the courts, and where such functions were entrusted to tribunals and boards, their members should enjoy independence. All judges of Canadian courts should be guaranteed tenure during good behaviour.[61]

The three modes of leaving the bench were resignation, retirement and removal (which is rare in Canada). Resignation was desirable when a judge was in poor health and, provided he had had long service on the bench, his full pension should be ensured. On retirement, superior court judges should be debarred permanently from pleading in any court; but provincially-appointed judges should be allowed to plead five years after retiring if the provincial law society approves. The reasons for these restrictions are to avoid the undesirable public perception of bias by sitting judges in favour of former judicial colleagues and to eradicate the perception by lawyers that such pleaders enjoyed a special and unfair advantage based on the insight they had acquired into the psychology of former colleagues. It would also remove the perception that judicial service was being used as a prelude to private barrister's work.[62]

The above limitations on pleading relate to the barrister's function and, in the Committee's estimation, there would seem to be no barrier against a retired judge practising as a solicitor, unless, perhaps, he was preparing pleadings for use by another counsel before a court.

Adequate remuneration is essential to ensure judicial independence. The requirement in the *Act of Settlement, 1701* that judicial salaries be "ascertained and established"[63] has been extended to designated Canadian judges by section 100 of the *Constitution Act, 1867*,[64] thus guaranteeing the payment of salaries. The desirable level of judicial salaries is another matter. Superior court judges should, however, enjoy a salary level not less than that paid to senior deputy ministers in the federal government, and provincially-appointed judges should receive at least the salary levels of senior deputy ministers in each province.[65] The present statutory limit of one thousand dollars for accountable expenses in the *Judges Act*[66] is unrealistic and should be removed. Furthermore, pensions should vest after ten years and should be non-contributory, since judges have often

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60 *Independence of the Judiciary Report, supra,* note 58 at 14.

61 *Ibid.* at 15-6.

62 *Ibid.* at 42-3.

63 (U.K.), 12 & 13 Wm. III, c. 2.

64 (U.K.), 30 & 31 Vict., c. 3 (formerly *British North America Act, 1867*).

65 *Independence of the Judiciary Report, supra,* note 58 at 18-9.

66 *An Act to amend the Judges Act and certain other Acts in consequence thereof,* S.C. 1980-81-82-83, c. 50, s. 13(1), *amending Judges Act,* R.S.C. 1970, c. J-1, s. 20(1), *as am. An Act to amend the Judges Act,* S.C. 1970-71-72, c. 55, s. 6(1).

already made sacrifices through their appointments to lower-paid positions at a relatively advanced age.

Subject to exceptional cases, the Committee also recommended that judges not be appointed before their late forties. Some judges have been appointed at too young an age, in which case they may lack the requisite experience and balance, and may "burn out" before reaching the ordinary retirement age.[67] Moreover, judges should enjoy legal immunity from lawsuits or harassment arising out of acts or omissions performed in their official capacity.[68] The burden of vexatious suits by aggrieved litigants would be too onerous to endure.

Freedom of judges from extramural interference by cabinet ministers or departmental officials is absolutely essential if independence is to be fully achieved. In the 1979 Govan affair, the action of the Deputy Attorney General of British Columbia led to an official provincial enquiry. Knowing that a particular provincially-appointed judge had decided that a certain provincial statute was *ultra vires*, the official had suggested to the Chief Justice that his subordinate be transferred elsewhere so that another judge, "presumably one who viewed the legislation as *intra vires*", could preside over a pending case concerning the statute.[69] The Commissioner, Mr. Justice Seaton, recommended that, in the future, the assignment of judges should be an "unalloyed judicial function", preferably handled by the Chief Justice of the Court. The appearance that departmental bureaucrats might have a role in determining the outcome in particular cases should be avoided. In rare cases, cabinet ministers have approached judges on cases being litigated before them and this, too, should be avoided at all costs.

It might be added that the geographical reassignment of judges, sometimes without their consent, can be an especially acute problem in many provincially-appointed courts where judges enjoy neither independence nor permanence. It is not unknown for attorneys general to occasionally indulge in the punitive transfer of judges to remote hardship jurisdictions. Such "discretionary" transfers, with their adverse impact on the independence of the provincial judiciary, could be avoided if the Committee's recommendation to leave such matters in the disposition of the Chief Justice were followed.[70]

Generally speaking, rules of professional or ethical behaviour for judges should be left in the hands of their judicial colleagues on the various federal and provincial councils.[71] Undoubtedly, strict observation of the separation of powers is the best warranty of independence. The Committee recommended that such councils be established in New Brunswick and

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67 *Independence of the Judiciary Report, supra,* note 58 at 14.
68 *Ibid.* at 20-1.
69 *Ibid.* at 22.
70 *Ibid.* at 23.
71 *Ibid.* at 24-6.

Prince Edward Island, the only provinces which at the time of the inquiry had no judicial councils of any kind.[72]

Another recommendation was that the practice of plea bargaining, where an accused may be encouraged to plead guilty to a lesser offence in the expectation of receiving a lighter sentence, should be discontinued.[73] A judge should be free to determine the sentence in a particular case according to his own assessment of the evidence, based solely on his experience and judgment, unconstrained by the actions of the parties appearing before him.

Concerning the selection process, the necessity of removing political considerations from judicial appointments is obvious. This may present special problems where prospective judges are members of legislatures or are publicly associated with particular political groups.[74] Generally, judges should not be appointed from the ranks of the civil service and there should be a waiting period before active politicians are appointed.[75] Physical security of judges, courts and court houses should be rigorously maintained[76] and a judge's power to preserve order and decorum in his court should be ensured through the power to cite for contempt.[77] While recognizing that fair and objective comment was always appropriate, the Committee criticized the increasing frequency with which members of legislatures, who enjoyed legal immunity, indulged in unfair verbal attacks on courts or decisions.[78]

Problems associated with the workload of judges could be scrutinized more closely. The workload may be diminished by pre-trial conferences, mini-trials and arbitration, as well as by ensuring that all tribunals are adequately staffed.[79] Maintaining levels of competence can be ensured by periodic legal seminars, although paid sabbaticals should be discouraged because a judge improves "primarily by the exercise of his judicial office".[80] The Committee was not generally in favour of judges conducting official inquiries for governments, since the time spent away from the bench imposed a strain on judicial colleagues. Moreover, such inquiries may be perceived to have compromised the judge's independence on the matter being investigated. The question may be raised as to whether the judge was truly independent of the government which had secured his services. In any event, no additional emolument other than incidental travelling expenses should be provided in these cases, since the judge was performing "a public service".[81]

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72 *Ibid.* at 58.
73 *Ibid.* at 26-7.
74 *Ibid.* at 32.
75 *Ibid.* at 32 and 58.
76 *Ibid.* at 33-4.
77 *Ibid.* at 35.
78 *Ibid.*
79 *Ibid.* at 36.
80 *Ibid.* at 37.
81 *Ibid.* at 43-4.

The danger inherent in promoting judges from lower to higher courts is that aspirants might "tailor" their judgments to please the appointing authorities and so lose their independence. Incumbent judges of all superior courts should, accordingly, have salaries "within relatively narrow limits" to avoid an undue financial inducement to lobby for such appointments. The concept of such promotion should therefore be discouraged.[82]

A possible objection to the above recommendation is that prior judicial experience may be a valuable asset for appointment to a higher court.[83] Would the implementation of the Committee's recommendations result in members of such appeal forums being appointed mainly from the ranks of practising lawyers? In this respect, the Committee does recognize that promotions may be useful "in guaranteeing that higher courts have the best understanding possible of the workings of lower courts".[84] In addition, it might be argued that experience and knowledge acquired at a lower court level is often an inestimable advantage on a higher court.

The Report correctly stresses the interrelationship of an independent bar and an independent judiciary. Can judges be truly independent if they have not imbibed "a strong tradition of independence during their years at the Bar"?[85] Finally, the Committee criticized the present reliance of the Supreme Court of Canada on the infrastructure of the public service, particularly the Department of Justice, for funding and ancillary services. This is unseemly when the Department is constantly in litigation before the Court. The Supreme Court of Canada needs its own independent administration, subject to control only by another agency such as, for example, the Auditor General of Canada.[86]

The Supreme Court of Canada should also be unequivocally entrenched in the Constitution. The fear is that it might be possible for the federal government, or Parliament, to abolish or unacceptably interfere with the functions of a purely "statutory" as contrasted with a "constitutional" court.[87]

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82 *Ibid.* at 44 and 59.

83 *See, e.g.,* Megarry, *supra,* note 11 at 6:

> The advantages [of promotion from a lower to a higher court] are obvious. The risk of making an unsatisfactory appointment to the Court of Appeal is greatly reduced if nobody is appointed save a judge who has shown his quality on the High Court Bench for several years. His judgements will have been subjected to searching criticisms by appellants in the Court of Appeal; he will have learned much about his craft and how far judicial life is for him; if he is a Queen's Bench judge he will often have sat in the Criminal Division of the Court of Appeal; and far more will be known about him, both by himself and by others, than when he was first appointed a judge. In short, if he is appointed to the Court of Appeal, he will be appointed from a much greater depth of knowledge than if he had come straight from the Bar.

84 *Independence of the Judiciary Report, supra,* note 58 at 44. Is this the main reason why promotions are beneficial? *See* Megarry, *ibid.*

85 *Independence of the Judiciary Report, ibid.* at 50.

86 *Ibid.* at 51-2.

87 *Ibid.* at 52-3. The Report notes, however, the opinion of some legal scholars that the Court has already achieved such constitutional status.

The Committee further recommended that in any constitutional amendment entrenching regulatory tribunals, which, for instance, may enable provinces "to confer exclusive jurisdiction over a field of substantive law on a single-purpose tribunal", provision should be made for appeals to the regular court system. If a non-independent tribunal enjoyed a right of final disposition of the cases before it, all the manifest evils of government manipulation might result.[88]

2. *The Appointment of Judges*

The companion Committee on the Appointment of Judges was set up by the Canadian Bar Association early in 1984.[89] Its establishment reflected a growing concern by many observers that the appropriate partisan political affiliation afforded one of the main routes to judicial appointment at both the provincial and federal levels.

The National Committee on the Judiciary of the Canadian Bar Association had been set up in 1967 with a mandate to assess the suitability and qualifications of candidates for appointment to the bench. Since that date the Committee has grown from nine to twenty-three members and there was pressure to increase its size so that it could make more knowledgeable inquiries in densely populated regions such as Quebec and Ontario. The Committee does not itself provide names, but assesses qualifications along a spectrum of "highly qualified", "qualified" and "not qualified". In 1981-84 an unhelpful category of "qualified with reservations" was used, but this category has apparently been eliminated.[90] The Report declares that in one recent three-year period "the Committee reviewed 382 names, 64 of which were rated as not qualified".[91]

In the very year the Committee on the Appointment of Judges was established, the "midnight" appointment of a number of judges, by what many observers considered to be a government on the verge of defeat, gave rise to an important and incendiary issue in the 1984 federal election. Among those appointed to the bench were two sitting Cabinet Ministers, Government House Leader Yvon Pinard and Minister of Justice Mark MacGuigan, both of whom were appointed to the Trial Division and the Appeal Division of the Federal Court of Canada respectively. In Mr. Justice Pinard's case, contrary to the 1967 agreement, there was no prior assessment by the Bar Association of his qualifications for the judicial appointment. Mr. Justice MacGuigan, as Minister of Justice, had sent his own name to the Association for assessment. When the then President of the Canadian Bar Association, Robert McKercher, asked Mr. Turner's Minister of Justice why no assessment had been requested of Mr. Pinard, he received no explanation as to why the long-standing practice was broken.

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88 *Ibid.* at 55-6.
89 *See Report on the Appointment of Judges, supra,* note 58.
90 *Ibid.* at 31-2.
91 *Ibid.* at 31.

However, the Minister reassured Mr. McKercher that the violation of the agreement was an isolated incident and in no way constituted a precedent.[92]

Members of the Committee visited every province and territory in Canada, interviewing virtually every chief justice or chief provincial judge, including the chief justices of the Supreme and Federal Courts of Canada. Among the criteria the Committee recommended for judicial appointment were high moral character, sympathy, generosity, charity, patience, experience in the law, intellectual and judgmental ability, good health and good work habits and, where required, bilingualism.[93] The Committee added that while it would be unfair to exclude ex-ministers indefinitely from the bench, they should not be appointed for at least two years after leaving the Cabinet.[94]

A frequently recurring theme in the interviews conducted by Committee members with chief justices was that with the increasing preoccupation of the Supreme Court of Canada with *Charter* issues, provincial courts of appeal were likely, at least for the present, to become *de facto* final authorities on private law issues of property, contracts, torts and so forth.[95] While the Supreme Court of Canada has always operated as a "general" appellate court for the whole country,[96] in the immediate future it may, perforce, have to devote its time and energies to developing *Charter* law. It would be ironic if, by inadvertance, this unintentional bifurcation resulted in a Canadian approximation of the American "double-stream" system of judicature where local or federal issues are generally disposed of by two separate court systems.

In its investigation of possible political patronage or favouritism in the case of federally- and provincially-appointed judges, the Committee confined its investigation to the period since 1978.[97] There was extensive communication with the local branches of the Canadian Bar Association, various law societies, as well as individual lawyers. It was thereby able to ascertain, within reasonable limits, the degree of political involvement of candidates for the bench before their appointment. Professor Peter Russell was helpful in refining the methodology used for this purpose. Mere casual political contacts were discounted.

The Committee found the incidence of political favouritism in the selection of judges uneven across the country. It found, however, that at least in the recent history of the Supreme Court of Canada, "political

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92 The agreement was breached for the first time in June, 1984 when Yvon Pinard was appointed by Prime Minister Trudeau to the Federal Court of Canada without having first consulted the legal profession. *See* "Lawyer Group, Justice Minister patch up dispute", *The* [*Toronto*] *Globe and Mail* (27 August 1984) 3.

93 *Report on the Appointment of Judges, supra,* note 57 at 69-70.

94 *Ibid.* at 70.

95 In doing research for the committee, the writer visited every province in Canada and heard a number of chief justices express this opinion.

96 *See, e.g., Crown Grain Co.* v. *Day* (1908), [1908] A.C. 504 (P.C.).

97 *Report on the Appointment of Judges, supra,* note 58 at 2.

favouritism has not had an influence on appointments".[98] In the Federal Court of Canada "political favouritism has been a dominant, though not the sole consideration; many appointees have been active supporters of the party in power".[99]

When prospective judges are chosen primarily on political grounds, good nominees associated with rival parties, or of no ascertainable political background, will be overlooked. There can be no assurance in such cases that the "best" candidate for any judicial position has been selected.[100] This is why change is necessary.

In the period examined, political favouritism could be divided into three categories with respect to appointments to section 96 courts, and also with respect to provincially-appointed courts. Favouritism had been a dominant, but not sole, consideration in appointments to superior courts in New Brunswick, Nova Scotia, Prince Edward Island and Saskatchewan. An intermediate group, where favouritism was found to be "significant" but not dominant, included Alberta, Manitoba, Newfoundland and the Ontario county and district courts. In British Columbia, Quebec, the Ontario Appeal and High Courts, the Northwest and Yukon Territories, favouritism was not a significant influence on appointments.[101]

In provincially-appointed courts, favouritism was again the dominant, but not the sole consideration in New Brunswick, Nova Scotia and Prince Edward Island. Favouritism played some part in appointments in Manitoba and the Yukon, while in the other provinces and in the Northwest Territories it was seen to play no part.[102]

Under the present system, the Prime Minister and the Minister of Justice exercise the main influence in choosing section 96 judges and other federal judges, although powerful regional ministers have also exerted considerable influence. The Minister of Justice generally conducts the search for puisne judges, while the Prime Minister has the power to name all chief justices and associate chief justices on federal courts and provincial superior, county and district courts.

In its Report the Committee attempted to isolate the main weaknesses in the appointing process at both the provincial and federal levels. Public suspicion of improper political motivations was intensified by the secrecy of the appointing process. Greater efforts should be made to acquaint the general public with how, and on what basis, judges are chosen. Where the present selection process was imperfect, it should necessarily be improved. One defect in the past was the practice carried on by powerful regional ministers of putting forward rival candidates against those prefer-

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98 *Ibid.* at 57.

99 *Ibid.* This is particularly disquieting, since this is a forum which should be perceived as being impartial, considering its frequent rulings on legal disputes involving the federal government.

100 *Ibid.* at 60.

101 *Ibid.* at 57.

102 *Ibid.*

red by the Minister of Justice. This was often done for political reasons. If partisan considerations have outweighed merit in the ultimate appointments, this may have been due to an influential regional minister prevailing over a weak or vacillating Minister of Justice.[103]

One element that can hardly be emphasized too strongly is the importance of having a well-qualified staff member, usually a Special Assistant to the Minister, whose task it is to search out superior prospects for the bench. The quality of such advisers is not always consistent.[104] There is often also a discontinuity when one adviser rather abruptly succeeds another. In the United Kingdom, permanent officials assisting the Lord Chancellor perform this task. Although the adoption of the British system might not be practicable in Canada, greater efforts should be made to perfect the system. The collection and collating of data, and the necessary consultation with chief justices, attorneys general, and others should not be left to one person. Often, the Minister should consult the Attorney General and Chief Justice of the province. The Committee found, in fact, a lack of consistency in appointing practices in different parts of the country amounting to "a chronic weakness".[105] In certain provinces appointments have been made without consulting either the Attorney General or the Chief Justice of the province and court concerned. Although such consultation is not technically required, it is highly desirable for broader constitutional considerations. The Chief Justice is aware of the specific needs of his Court and can make suggestions as to which of several rival candidates he would consider most advantageous for these purposes. Moreover, pursuant to subsection 92(14) of the *Constitution Act, 1867*,[106] the provincial attorneys general have broad responsibility for the administration of justice in the province. Obviously, if the process of selection is haphazard and the quality of judges is deficient, it will impair the Attorney General's ability to ensure that the administration of justice in the province is delivered adequately. This is especially so because appointments to provincially-established section 96 courts are made by the federal Crown.

Some of the other defects were that background data collected on prospective judges was insufficient and that there was a failure in many cases to consult with local law societies to determine whether a prospective appointee had charges pending against him or had been convicted of professional offences.[107]

It was found, particularly in British Columbia and Quebec, that judicial councils empowered to either initiate names for judgeships or strike committees for doing so did very good work. In such provinces, a clear differentiation could be made in the quality of judicial appointments before and after the councils were established. In provinces where such

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103 *Ibid.* at 40-1.
104 *Ibid.* at 41-2.
105 *Ibid.* at 51.
106 (U.K.), 30 & 31 Vict., c. 3 (formerly *British North America Act, 1867*).
107 *Report on the Appointment of Judges, supra,* note 58 at 45-6.

councils did not exist, it was recommended that they should be created. Moreover, in all jurisdictions, they should be granted a mandate to recommend names for judicial appointments on their own initiative. In provinces where there was no lay membership representing the general public interest on such councils, lay members should be added.[108]

At the federal level, an advisory committee on federal judicial appointments should be established in each province and territory to advise the Minister. The committee should consist of the Chief Justice, or his delegate, who would serve as chairman, one appointee chosen by the federal Minister of Justice and one by the provincial Attorney General, two lawyers, one appointed by the governing body of the legal profession and one by the Canadian Bar Association in each jurisdiction, and two lay members chosen by majority vote of the other members (with political office-holders and certain public officials excluded from consideration on grounds of possible bias).[109]

This broadly representative group would then serve for a maximum term of five years, with terms to be staggered to ensure continuity. When judicial vacancies are created, it would submit no fewer than three names to the Minister for each position, with the Minister making the final selection. Names from many sources, including those put forward by the Minister, would be considered.[110] Should the Minister reject all of the names provided, the committee would then prepare another list. It was hoped to establish a usage or convention that the Minister would not go outside the list, although the Minister would not be constitutionally bound by the committee's practices.[111] Once this system was in place, the National Committee of the Canadian Bar Association would no longer be required. A similar panel was recommended for Federal Court appointments and broad consultation with the Chief Justice of Canada and provincial attorneys general was recommended for the Supreme Court of Canada.

The recommendation to establish an advisory committee system of selection was inspired to some extent by the Missouri system in the United States, but without the "election" feature which was thought to be incompatible with the Canadian judicial tradition.[112] For the same reason, the scrutiny of prospective candidates by a parliamentary committee, on the model of the judiciary committee of the American Senate, was also rejected.[113]

The Missouri system has been very successful in those American jurisdictions where it has been implemented. It has operated well in thirty-five out of fifty states and in the District of Columbia and no state adopting it has ever returned to an alternative system of making appointments.[114]

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108 *Ibid.* at 13-4 and 68-9.
109 *Ibid.* at 66-7.
110 *Ibid.* at 64-7.
111 *Ibid.* at 67.
112 *Ibid.* at 23 and 64.
113 *Ibid.* at 64.
114 *Ibid.* at 23.

The Committee examined the modes of appointment in countries with broadly similar judicial systems and particularly countries with a strong "common law" tradition, such as Great Britain, the United States, Australia and New Zealand. As a result of this study, it recommended that, unlike the senatorial confirmation process in the United States, "Parliament should not play a role in the selection or appointment of federal judges".[115] A "legislative" confirmation process was alien to the Canadian tradition.

Not all the lawyers interviewed by the Committee agreed with this, although virtually all of the judges and attorneys general, and all but one of the former federal Ministers of Justice did. Many thought that an intensive parliamentary interrogation process — especially one of a partisan nature — would deter superior candidates. Among those who dissented, however, was Member of Parliament Svend Robinson, who believed that such a process could provide a valuable check on the appointment of judges who had negative attitudes on the rights of women or minority groups and could be a method of ensuring basic competence. Also criticized by some was the recommendation that a sitting member of the Supreme Court of Canada need not be reassessed when he or she was appointed Chief Justice. The 1986 hearings on President Reagan's appointment of Mr. Justice William Rehnquist to be Chief Justice of the United States Supreme Court suggested that a judge might serve capably on the bench of a court but, because of ideological or other factors, might not be a good candidate to lead that court and set the direction of judicial interpretation for the whole country for an entire generation.[116] As Canada now has a *Charter* and Supreme Court judges endowed with powers similar to those of the United States Supreme Court, perhaps there should be greater scrutiny of who is appointed Chief Justice, even if he is a sitting member. An examination of history clearly reveals that certain Supreme Court Justices are more suited to the job of Chief Justice than others.

III. The Division of Powers

A. *Peace, Order and Good Government*

Conflicting claims by the federal government and Newfoundland to the exploration and exploitation of the natural resources in the subsoil of the

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115 *Ibid.* at 64.

116 *See, e.g.*, Stuart Taylor, Jr., "President Asserts he will Withhold Rehnquist Memos; Cites Executive Privilege; Nominee for Chief Justice is questioned on Civil Rights and Restrictive Deeds", *New York Times* (1 August 1986) A1; *see also* "Racial Innuendos levelled at U.S. Justice Candidate" (Knight-Rider News Service), "More than 100 civil rights groups and women's organizations have opposed Rehnquist's nomination, saying that his 15-year record on the high court showed an antipathy to civil and individual rights", *Calgary Herald* (1 August 1986) A13; "Reagan Shuffles the Court and steers the brethren to the right", *Time* (30 June 1986) 10.

Hibernia area in the Atlantic Ocean was the subject of *Reference Re Newfoundland Continental Shelf*.[117] In an earlier dispute between Canada and British Columbia, continental shelf rights in the Pacific offshore had been awarded to Canada.[118] However, unlike Newfoundland, British Columbia had never been a self-governing Dominion. Part of Newfoundland's argument was, in fact, that as a former member of the international community, it had acquired rights over the shelf by force of customary international law and had brought them into Confederation in 1949 as "right appurtenant to its frontiers". In a prior provincial reference[119] on the same matter, the Newfoundland Court of Appeal found that the province did not have proprietary rights in the subsoil because, although at the relevant date there were rights to the subsoil under international law exercisable by coastal states, Newfoundland had not manifested the requisite intention to acquire them. In reaching this conclusion, the Court held that "[t]he acquisition of such rights is a matter of municipal law and must be accomplished by some constitutional act".[120] Newfoundland, in effect, was defeated by inaction.

In its unanimous unsigned opinion, the Supreme Court of Canada held that "[c]ontinental shelf rights are "in pith and substance, an extraterritorial manifestation of external sovereignty",[121] enuring to the federal Crown under peace, order and good government, unless it could be shown that Newfoundland acquired such rights before 1949 and still possessed them.

Could Newfoundland have acquired such rights? A powerful impetus was given to such offshore claims by President Truman's 1945 executive proclamation on the continental shelf[122] and the fact that Newfoundland did not join Canada until four years later. However, the Supreme Court of Canada found that the government of Newfoundland lacked capacity or status at the relevant time to acquire such rights, due to its self-governing powers being in abeyance because of economic difficulties:

> The Attorney-General of Newfoundland stresses that the Commission of Government was voluntarily submitted to by Newfoundland, and that self-government was only suspended. We accept both propositions, but they do not alter the situation that during the period of suspension Newfoundland did not even have internal sovereignty, much less external sovereignty. We think that the suspension of self-government necessarily suspended the external

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117 (1984), [1984], 1 S.C.R. 86, (*sub nom. Reference Re the Seabed and Subsoil of the Continental Shelf Offshore Newfoundland*) 5 D.L.R. (4th) 385.

118 *Reference Re Ownership of Off-Shore Mineral Rights* (1967), [1967] S.C.R. 792, 65 D.L.R. (2d) 353.

119 *Reference Re Mineral & Other Natural Resources of the Continental Shelf* (1983), 41 Nfld. & P.E.I.R. 271, 145 D.L.R. (3d) 9.

120 *Ibid.* at 295, 145 D.L.R. (3d) at 40.

121 *Supra*, note 117 at 128, 5 D.L.R. (4th) at 419.

122 *Proclamation by the President with respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf*, September 28, 1945, *reproduced in* (1946) 40 AM. INT'L L.J. (Supp.) 45.

> sovereignty of Newfoundland recognized in the *Balfour Declaration*. Any continental shelf rights available at international law between 1934 and 1949 therefore accrued to the Crown in the right of the United Kingdom, not the Crown in right of Newfoundland.[123]

In any event, the Terms of Union reflected the division of powers, and if such rights were possessed by Newfoundland in 1949 they would have passed to Canada. However, according to the Supreme Court of Canada it appears that such rights were not indisputably recognized before 1958.

In *Strait of Georgia*,[124] the Supreme Court of Canada decided that, despite its 1967 decision that the Maritime boundaries of the colony and province terminated at the common law low-water mark, the waters and submerged lands between British Columbia and Vancouver Island were part of the colony of British Columbia before it entered Confederation in 1871 and therefore still belonged to the province. Consequently, the natural resources of the seabed were the property of the province and not of the federal Crown. Unlike Newfoundland in the above case, British Columbia was able to satisfy the Court that the area in question was within its realm before it entered the Dominion. The constitutive instrument of the colony of British Columbia described its seaward boundary in 1858 as the "Pacific Ocean",[125] which in the Court's interpretation was the area west of Vancouver Island. Along with analogous provisions in the Oregon Treaty of 1846 and the 1866 statute for the union of Vancouver Island and British Columbia,[126] this persuaded the Court that all the lands and waters north of the mid-channel of the line separating Vancouver Island and the State of Washington belonged to the province.

Madame Justice Wilson (with whom Mr. Justice Ritchie joined in dissent) considered that the Court had confused "jurisdiction" with "ownership" in the relevant instruments. Those instruments might justify a claim to the former but not to the latter. Moreover, the province had failed to discharge the heavy onus of proving that provincial ownership did not end at the low-water mark, as set out in the 1967 reference. In addition, international law in 1871 would not have recognized the contentious area as "inland waters" which the province could bring into Confederation.

B. *Property and Civil Rights*

On May 15, 1969, a power contract was entered into between the Churchill Falls (Labrador) Corporation, a Dominion company, and Hydro-Quebec by which the latter agreed to purchase virtually all of the power produced at Churchill Falls for a period of forty years, renewable at the

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123 *Supra*, note 117 at 110, 5 D.L.R. (4th) at 406.

124 *Supra*, note 9.

125 *An Act to provide for the Government of British Columbia* (U.K.), 21 & 22 Vict., c. 99.

126 *The British Columbia Act*, 1866 (U.K.), 29 & 30 Vict., c. 67.

option of Hydro-Quebec for a further twenty-five years. In the mid-seventies, Newfoundland began to question this agreement and was particularly concerned about the small amount of power it could retain for its own consumption. Attempts to obtain better terms from Hydro-Quebec and the Quebec provincial government were unsuccessful. Accordingly, in 1980, the Newfoundland Parliament enacted *The Upper Churchill Water Rights Reversion Act*,[127] revesting in the province the water rights conveyed to the Churchill Falls (Labrador) Corporation and expropriating all of the latter's hydro-electric works.

In *Reference Re The Upper Churchill Water Rights Reversion Act*,[128] the Supreme Court of Canada agreed with the appellants that the contract involved property and civil rights outside the province. It reversed a judgment to the contrary by the Newfoundland Court of Appeal:[129]

> . . . Hydro-Quebec has the right under the Power Contract to receive delivery in Quebec of hydro-electric power and thereafter to dispose of it for use in Quebec or elsewhere as it may choose. If these facts are not sufficient for the purpose of the constitutional characterization of the Reversion Act, it may be noted in any event that ordinarily the rule is that rights under contracts are situate in the province or country where the action may be brought.[130]

The Court relied on two conflict of laws authorities in support of situations of rights where actions may be founded.[131] One unusual result of situating the rights in Quebec, of course, would be that although Newfoundland had no jurisdiction to alter the contractual rights, Quebec would have such a right.[132] Quebec could, presumably, unilaterally modify the contract. The question is raised of whether there is any merit in suggesting that certain "interprovincial" contracts be subject to federal jurisdiction.

The appellants had also argued that *The Upper Churchill Water Rights Reversion Act*,[133] which transferred their assets to the provincial government was unconstitutional.[134] The Act left them with the mere husk

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127 S.N. 1980, c. 40.

128 (1984), [1984], 1 S.C.R. 297, (*sub nom. Churchill Falls (Labrador) Corp.* v. *A.G. Newfoundland*), 8 D.L.R. (4th) 1.

129 *Reference Re Upper Churchill Water Rights Reversion Act, 1980* (1982), 36 Nfld. & P.E.I.R. 273, 134 D.L.R. (3d) 288.

130 *Supra*, note 128 at 334, 8 D.L.R. (4th) at 31-2.

131 *Ibid.* at 334, 8 D.L.R. (4th) at 32; the works referred to by the Court were J-G. Castel, CANADIAN CONFLICT OF LAWS, vol. 2 (Toronto: Butterworths, 1975) at 347, and A.V. Dicey and J.H.C. Morris, THE CONFLICT OF LAWS, vol. 2, 10th ed. (London: Stevens & Sons Ltd., 1980) at 533.

132 *See* R. Sullivan, Note, in J. E. Magnet, ed., CONSTITUTIONAL LAW OF CANADA, vol. 1, 2d ed. (Toronto: Carswell, 1982) 487.

133 S.N. 1980, c. 40.

134 From this standpoint, if the assets of a provincially-incorporated company are capable of being expropriated, why should a federally-incorporated company be immune from such action? It is untenable that a federally-incorporated company enjoy more constitutional protection than a provincially-incorporated counterpart, or for that matter a natural person.

of a corporate structure and the capacity to raise new capital and to issue shares. On this question, the Court held that in enacting *The Upper Churchill Water Rights Reversion Act*, the Newfoundland Parliament "did not contravene the constitutional strictures against interference with the essential status and powers of a federally-incorporated company".[135]

C. *The Administration of Justice*

The question of whether a provincially-established investigation[136] could inquire into a 1981 collision between two C.N.R. trains at Lac Bouchette, Quebec, was decided in favour of the province by a majority of the Quebec Court of Appeal in *Courtois* v. *Compagnie des Chemins de Fer Nationaux du Canada*.[137] In his dissent, Mr. Justice Dubé emphasized that an interprovincial railway came under exclusive federal jurisdiction pursuant to paragraph 92(10)(a) of the *Constitution Act, 1867*.[138] His judgment stressed that there should be a symetry between the powers of inquiry by the executive and the power to legislate by the respective legislatures.[139] However, the decision rendered by Mr. Justice Bisson for the majority is preferable since it implicitly takes into account the "aspect" theory, and not all aspects of the accident fall under federal law. Unlike the post office, armed forces and banks, railways are not, by their inherent nature, under federal jurisdiciton. While the accident could undoubtedly be investigated by the federal authorities, mere duplication by a provincial inquiry is not sufficient to invoke the doctrine of paramountcy.[140] And as Mr. Justice Bisson properly added, "[t]here is nothing which indicates that the investigation undertaken by the appellants is going to affect the respondent in areas where it comes exclusively within the jurisdiction of Parliament".[141]

The appointment of judges was the focus of *Re Saskatoon Criminal Defence Lawyers' Assoc.* v. *Government of Saskatchewan*.[142] The larger political background of this case involved a disagreement between the provincial Minister of Justice and his federal counterpart. The perception

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135 *Supra*, note 128 at 144, 8 D.L.R. (4th) at 26. In holding as it did, the Supreme Court of Canada overruled itself on an earlier decision, *see British Columbia Power Corp.* v. *A.G. British Columbia* (1963), 47 D.L.R. (2d) 633, 44 W.W.R. 65.

136 Pursuant to the *Occupational Safety and Health Act*, S.Q. 1979, c. 63.

137 (1983), [1983] C.A. 31, 5 D.L.R. (4th) 36.

138 (U.K.), 30 & 31 Vict., c. 3 (formerly *British North America Act, 1867*).

139 Lord Haldane (who was not cited in the case) made the same point in *Bonanza Creek* v. *R.*, when he said of the *Constitution Act, 1867*, generally, as regards to the division of powers, "the distribution under the new grant of executive authority in substance follows the distribution under the new grant of legislative powers". *See Bonanza Creek* v. *R.* (1916), [1916] 1 A.C. 566 at 580, 26 D.L.R. 273 at 281 (P.C.).

140 *Compare Multiple Access Ltd.* v. *McCutcheon* (1982), [1982], 2 S.C.R. 161, 138 D.L.R. (3d) 1 at 23.

141 *Supra*, note 137 at 41, 5 D.L.R. (4th) at 52.

142 (1984), 11 D.L.R. (4th) 239, [1984] 3 W.W.R. 707 (Sask. Q.B.).

of the Conservative provincial government, which was elected in 1982, was that federal judicial appointments to superior courts, as provided for under section 96, were almost always appointments of lawyers of Liberal party background. In order to forestall further appointments,[143] the provincial Cabinet, under delegated powers, issued five orders-in-council, the cumulative effect of which was to create vacancies in provincial Court of Appeal and Queen's Bench judgeships whenever judges of those forums died, resigned or retired. As a result, numerical composition of both courts was reduced, which provoked a rare confrontation between Chief Justice Bayda of the Court of Appeal and Minister of Justice Garry Lane. In a letter to Mr. Lane, Chief Justice Bayda termed the decision by the provincial executive to reduce the complement of his court as "draconian".[144] He added that as a result of the action some of his judges were working seventy hours per week. The above letter reflected the fact that by the order-in-council the Court of Appeal could be reduced from an establishment of seven to four members (including the Chief Justice), and the Chief Justice had become concerned about its capacity to handle its caseload effectively, especially since there were two recently vacant positions with little prospect of being filled in the immediate future.

Mr. Justice Wimmer found that the relevant orders-in-council fell within the constitutional authority of the province pursuant to subsection 92(14), since the fixing of the number of judges on superior courts came under that section.[145] While the reduction on the Court of Appeal could not be legally challenged and the reduced complement of judges would have to stand, the reduction at the Queen's Bench level could be challenged on different grounds. Subsection 7.1(3) of the *Queen's Bench Act*[146] required the Lieutenant Governor-in-Council (which, of course, had issued the contentious orders) to ensure that at least one judge resided at, *inter alia*, Estevan and Yorkton, where vacancies had occurred. The Court held that "[b]ecause no judge can be made to change his or her place of residence from that initially prescribed, the present situation, if the recent Orders in Council are allowed to stand, is that the number has been reduced below the statutory minimum."[147] With the provincial Attorney General responsible for the "administration of justice in the province" including the constitution of courts under subsection 92(14), and the federal Crown responsible for appointments to superior courts under section 96, the above-noted case is a graphic illustration that co-operative federalism does

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143 And perhaps in anticipation of the federal Conservative victory of September, 1984, which would remedy this situation by replacing the party in power.

144 "It is my sincere hope and prayer (but not entirely my expectation)", the Chief Justice indicated in his letter of January 11, 1984, "that the impact will be, in the end, but a temporary hobbling of the court's operations and not one of irreversible damage to the administration of justice in the province — or one that will leave a permanent scar upon this institution." *See The [Regina] Leader Post* (21 September, 1984) A3.

145 *Supra*, note 142 at 245, [1984] 3 W.W.R. at 714.

146 R.S.S. 1978, c. Q-1.

147 *Supra*, note 142 at 247, [1984] 3 W.W.R. at 717.

not always prevail. The case was under appeal[148] when the federal election of September 4, 1984, took place and appointments to the mentioned vacancies were made only subsequently.[149]

The government of New Brunswick's proposal to create a new criminal court with provincially-appointed judges who would be invested, by virtue of a parliamentary amendment of the *Criminal Code*,[150] with exclusive jurisdiction to try all indictable offences, was found to be unconstitutional by a unanimous decision of the Supreme Court of Canada. It held that this interferred with the Governor General's appointing power as provided for by section 96.[151] In the provincial reference appealed from,[152] the New Brunswick Court of Appeal had upheld the validity of the proposed court on the ground that although the province could not vest judicial power embracing superior court jurisdiction in a provincially-appointed court, this case was different because it would be the federal Parliament which was doing so by amending the *Criminal Code*.[153] The New Brunswick tribunal also rejected the argument that there was a core of exclusive criminal jurisdiction inherent in superior courts by virtue of section 96, jurisdiction which cannot be conferred upon an inferior court administered by provincial appointees.[154] The Supreme Court of Canada decided that the proposal was flawed by colourability on both sides. Parliament could not impose on provincial statutory tribunals the jurisdiction of superior courts to try indictable offences and New Brunswick could not exercise an appointing power in respect of courts with section 96 jurisdiction "under colour of legislation in relation to the constitution, maintenance and organization of courts with criminal jurisdiction".[155] An added policy reason against the change was that it was

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148 According to Mark Brayford, counsel for the plaintiffs, at the Court of Appeal hearing on September 20, 1984, questions arose about costs and "mootness", since the general election was not concluded and the vacancies had been restored to the respective courts. It was therefore decided not to proceed with the appeal. Consequently, there is no Court of Appeal judgment.

149 A short time later, two Regina lawyers, Marjorie Gerwing and Thomas Wakeling, were appointed to the Court of Appeal and a number of appointments were made to the Court of Queen's Bench, including appointments to the irregularly unfilled seats at Estevan and Yorkton. Because of his dispute with the Minister of Justice, D.E. Gauley, Q.C., counsel for the defendants, asked Chief Justice Bayda to step down, but the latter, after consulting his colleagues, declined to do so since he had corresponded with the Attorney General as administrator of the Court and not as Chief Justice, and did not consider he had prejudiced the matter in a legal sense. This information was communicated to the writer.

150 R.S.C. 1970, c. C-34.

151 *McEvoy* v. *A.G. New Brunswick* (1983), [1983] 1 S.C.R. 704, 148 D.L.R. (3d) 25.

152 *Re Court of Unified Criminal Jurisdiction* (1981), 36 N.B.R. (2d) 609, (*sub nom. Reference Re Establishment of a Unified Criminal Court of New Brunswick*) 127 D.L.R. (3d) 214.

153 R.S.C. 1970, c. C-34.

154 *Supra*, note 152, at 619, 127 D.L.R. (3d) at 222.

155 *Supra*, note 151 at 721, 148 D.L.R. (3d) at 38.

preferable to have independent superior court judges vested with power to try indictable offences.[156]

D. *Prosecutorial Powers*

Having characterized subsections 8(a), 9(1) and section 26 of the *Food and Drug Act*[157] as pith and substance criminal legislation, the question before the Supreme Court of Canada in *R.* v. *Wetmore*[158] was whether the provinces could exclusively prosecute offenders pursuant to subsection 92(14), or whether the federal government could prosecute under subsection 91(27). The lower courts in British Columbia uniformly found against the validity of federal prosecutorial powers when the subject matter was "criminal law", holding that section 2 of the *Criminal Code*[159] was ineffective in authorizing the Attorney General of Canada to institute proceedings under subsection 91(27).[160] In a very short majority judgment, Chief Justice Laskin emphasized that there was confusion between the *Criminal Code* provision[161] and criminal law, stating "[i]t is only prescriptions under the former that assign prosecutorial authority to the provincial Attorney General. Moreover, the assignment has depended and continues to depend on federal enactment."[162] Its short judgment truly has revolutionary implications; and it is suprising, in view of the universality of the subject matter, that it was rendered as late as October 1983.

In his dissent, Mr. Justice Dickson (as he then was) described the power to initiate and conduct criminal prosecution as a central aspect of provincial criminal justice falling under subsection 92(14). Section 2 of the *Criminal Code*,[163] which seems to confer on the provinces power to prosecute in the criminal law area is, insofar as it does this, directed to subsection 92(14) and is to that extent *ultra vires*. In respect of areas other than criminal law, subsection 92(14) does not strip the federal government of enforcement authority, since exclusive provincial jurisdiction under subsection 91(27) relates only to criminal law. Moreover, important policy considerations militated in favour of provincial prosecutorial power in the criminal area:

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156 *Ibid.* at 720, 148 D.L.R. (3d) at 38.

157 R.S.C. 1970, c. F-27.

158 (1983), [1983] 2 S.C.R. 284, 2 D.L.R. (4th) 577, *rev'g* (*sub nom. A.G. Canada* v. *Wetmore Co. Ct. J.*) 32 B.C.L.R. 283, (*sub nom. Re R. and Kripps Pharmacy Ltd.*) 129 D.L.R. (3d) 566 (C.A.), *aff'g* 26 B.C.L.R. 15, 119 D.L.R. (3d) 569 (S.C.), *aff'g* 114 D.L.R. (3d) 457, [1980] 6 W.W.R. 577 (Co. Ct.) [hereinafter *Wetmore*].

159 R.S.C. 1970, c. C-34, *as am.* Bill C-18, *Criminal Law Amendment Act, 1985*, 1st Sess., 33d Parl. 1984-85 (assented to 20 June 1985) [c. 19], cl. 2(1).

160 *Supra*, note 158.

161 R.S.C. 1970, c. C-34, s. 2, *as am.* Bill C-18, *Criminal Law Amendment Act, 1985*, 1st Sess., 33d Parl. 1984-85 (assented to 20 June 1985) [c. 19], cl. 2(1).

162 *Supra*, note 158, [1983] 2 S.C.R. at 287, 2 D.L.R. (4th) at 580.

163 R.S.C. 1970, c. C-34, *as am.* Bill C-18, *Criminal Law Amendment Act, 1985*, 1st Sess., 33d Parl. 1984-85 (assented to 20 June 1985) [c. 19], cl. 2(1).

> The ultimate decision as to whether or not to prosecute a particular individual and, if so, in respect of which offences, is one which requires a careful weighing of a multitude of local considerations, including the seriousness of the conduct in the light of community norms, the likely impact on the individual of bringing a prosecution, the likely benefit to the community of doing so, the likelihood of a recurrence of the conduct, and the availability of alternative courses of action, for example, diversion or special rehabilitation programs. Assessing these factors obviously requires an understanding of conditions prevalent in the community in which the criminal conduct occurred.[164]

With respect, Mr. Justice Dickson's dissenting judgment seems preferable to the majority judgment. In criminal prosecutions, there are strong policy reasons why discretion should be exercised locally. These do not exist in prosecutions which usually have extra-provincial ramifications, such as certain *Competition Act*[165] offences pursuant to subsection 91(2), which in essence are subject to criminal sanctions. If Chief Justice Laskin is correct in asserting that provincial jurisdiction to prosecute depends not on subsection 92(14) but on subsection 91(27) together with the "delegated power" in subsection 2(2) of the *Criminal Code*,[166] there is nothing to prevent Parliament from repealing the delegation and centralizing the prosecution of all criminal offences. Provincial prosecutorial powers have been confidently wielded by local authorities since 1867 and were thought by many before *Wetmore* to flow exclusively from subsection 92(14).

In *A.G. Canada* v. *Canadian National Transp., Ltd.*,[167] decided on the same basis as *Wetmore*, Chief Justice Laskin held that until the *Criminal Code* was enacted in the 1890's,[168] provincial prosecutorial powers depended on section 129[169] (which continued pre-Confederation local powers to prosecute), and later, when subsection 2(2) of the *Criminal Code* was enacted, the local authority shifted to that provision.[170] He also reiterated his views on the exclusivity of federal powers over criminal prosecutions, holding that the federal Crown could enforce paragraph 32(1)(c) of the *Combines Investigation Act*[171] (respecting conspiracies to reduce competition) even if the mentioned subsection were unadulterated criminal law. In his concurring judgment, Mr. Justice Dickson (as he then was) was of the opinion that subsection 2(2) depended on both the subsection 91(27) power and the trade and commerce power in subsection 91(2), holding that either the provinces or the federal government could pros-

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164 *Supra*, note 157, [1983] 2 S.C.R. at 306, 2 D.L.R. (4th) at 594.

165 R.S.C. 1970, c. C-23.

166 R.S.C. 1970, c. C-34, *as am.* Bill C-18, *Criminal Law Amendment Act, 1985*, 1st Sess., 33d Parl. 1984-85 (assented to 20 June 1985) [c. 19], cl. 2(1).

167 (1983), [1983] 2 S.C.R. 206, 3 D.L.R. (4th) 16.

168 *The Criminal Code, 1892*, S.C. 1892, c. 29.

169 *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3 (formerly *British North America Act, 1867*).

170 R.S.C. 1970, c. C-34, *as am.* Bill C-18, *Criminal Law Amendment Act, 1985*, 1st Sess., 33d Parl. 1984-85 (assented to 20 June 1985) [c. 19], cl. 2(1).

171 R.S.C. 1970, c. C-23.

ecute, the former under subsection 92(14) since the subject matter of the prosecution was "criminal law", and the latter strictly under subsection 91(2).

E. *Paramountcy*

In *Chiasson* v. *R.*,[172] the Supreme Court of Canada unanimously adopted the lower court decision of Mr. Justice La Forest (as he then was) of the New Brunswick Court of Appeal,[173] that there was no operating inconsistency between subsection 50(1) of the *Fish and Wildlife Act*[174] and subsection 84(2) of the *Criminal Code*,[175] and that both could stand. This resulted in the decision that the conviction of the appellant, who was charged under the provincial statute, was not rendered ineffective by the doctrine of federal paramountcy. The provincial subsection prohibited the handling of a firearm "without due care and attention"[176] when a defendant was hunting, while the *Criminal Code* provision made it an offence to use firearms in "a careless manner" or "without reasonable precautions for the safety" of others.[177] There are, of course, at least two theories of paramountcy. Is the field occupied by the federal power when a federal law merely duplicates the provincial one (as in this case), or must there be an actual conflict or operating inconsistency in the sense that the federal statute prescribes "A" and the provincial one prescribes "B", with incompatibility in operation resulting? The authorities are now clear that where, as in the present case, both statutes direct or prohibit essentially the same thing, the result is harmony and not conflict, and that, although in the philosophical sense the federal power may have "occupied the field", paramountcy does not apply.

IV. The Canadian Charter of Rights and Freedoms

A. *Modifiers of the Constitution: Sections 1, 33, 38, 41, 42, 43*

1. *The Amending Power*

Prior to 1982, Canada had no general domestic amending formula in its Constitution. Consequently, it had to seek amendments, at least in areas pertaining to the division of powers, from the British Parliament at West-

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172 (1984), [1984], 1 S.C.R. 266, 8 D.L.R. (4th) 767.
173 *R.* v. *Chiasson* (1982), 39 N.B.R. (2d) 631, 135 D.L.R. (3d) 499.
174 S.N.B. 1980, c. F-14.1.
175 R.S.C. 1970, c. C-34.
176 *Fish and Wildlife Act*, S.N.B. 1980, c. F-14.1, s. 50(1).
177 R.S.C. 1970, c. C-34, s. 84(2), *as am.* S.C. 1976-77, c. 53, s. 3.

minster.[178] Perhaps the absence of a domestic amending formula prompted the courts at times to exercise wide discretion, thus informally amending the Constitution. The work on the Privy Council of Lords Watson and Haldane, which so significantly eroded the federal power over "peace, order and good government", may have been attributable to a shared perception that the Canadian Constitution as written was too centralist[179] and also that it was difficult to change by other methods.

The *Constitution Act, 1982*[180] now contains three different amending formulas. The general amending formula in subsection 38(1) requires resolutions by both the Senate and the House of Commons followed by affirming resolutions of legislative assemblies representing two-thirds (seven) of the provinces having at least one-half of the population of the combined provinces. No province has an individual veto under this subsection, but if both Ontario and Quebec dissented, the population threshold could not be met. Subsection 38(3) provides that a new amendment derogating from a province's legislative powers, proprietary rights or other rights or privileges, shall not have effect in that province when a majority of the members in the legislature had expressed its dissent thereto by resolution. This provision entrenches the provincial constitutional status quo, but it also adds an element of inflexibility to the already difficult process of securing amendments. In those rare cases where seven provinces with the necessary aggregate population agree to change, an affected province can still opt out. This raises the question of whether or not amendments apply uniformly across the country as a whole.

Under section 41, certain sensitive matters are excluded from the ambit of the general amending formula, requiring instead the consent of both Houses of Parliament and provincial unanimity for change. Such matters include the office of the Queen, the Governor General and lieutenant governors, provincial senatorial representation, the use of the English or French language (subject to section 43), the composition of the Supreme Court of Canada and, *per abundantia cautela*, any amendment of the amendment procedure itself.[181] Granted that amendments must reflect a broad consensus in the country, must the consensus embrace *every* province? The threshold here seems much too high, even in regards to the matters referred to in section 41. For instance, if it were ever desired at some future time to replace the monarch by a Canadian head of State, a reluctant province could block the reform indefinitely.

For purposes of clarity, section 42 sets out certain matters which can be amended only by the general amending formula in subsection 38(1).

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178 This would also be the case where institutions like the Senate were concerned, which reflect both central and local interests. *See Reference Re Authority of Parliament in Relation to the Upper House, supra,* note 45.

179 *See, e.g.,* Lord Haldane, *The Work for the Empire of the Judicial Committee of the Privy Council* (1921-23) 1 CAMBRIDGE L.J. 143 at 150.

180 Being Schedule B of the *Canada Act* (U.K.), 1982, c. 11.

181 This evidently gives a veto to every province since the consent of all of the provinces is required for such an amendment.

These include the principle of proportionate representation of the provinces in the House of Commons, the powers of the Senate, the extension of the existing provinces into the territories or the establishment of new provinces. Provincehood for the Yukon or the Northwest Territories would thus become much more difficult than was the acquisition of provincial status by Newfoundland in 1949, when, fearing Quebec's opposition, Prime Minister St. Laurent did not formally consult the provinces.[182] Section 43 declares that where a proposed amendment applies to one or more, but not all, provinces, it can be made by a resolution of the Senate and House of Commons and of the legislative assembly of each province to which it applies. Accordingly, a province could become officially bilingual by the adoption of resolutions to that effect by both the Senate and House of Commons and by adoption by its own legislative assembly.[183]

2. *The Section 33 Override*

Pursuant to the "notwithstanding" clause in section 33, Parliament and the provincial legislatures can override, in their laws, *Charter* provisions on fundamental freedoms,[184] legal rights[185] and equality rights.[186] In effect this clause was the result of a compromise reached on November 5, 1981, on the part of the federal government and certain provinces, the *quid pro quo* being the entrenchment of the *Charter*.[187] The compromise reflected a disagreement between those favouring legislative supremacy and those favouring entrenchment of the *Charter* and resort to the courts. In the first category were leaders as dissimilar in other ways as premiers Blakeney of Saskatchewan and Lyon of Manitoba, and in the second were premiers Davis of Ontario and Hatfield of New Brunswick and, of course, Prime Minister Trudeau. The legislative override preserved the ordinary operation of the *Charter* by providing in subsection 33(3) that when the override was employed, the relevant declaration would cease to have effect after five years, after which it would have to be re-enacted to retain its vigour. It might thus be characterized as an exceptional measure. This

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182 P. Gérin-Lajoie, CONSTITUTIONAL AMENDMENT IN CANADA (Toronto: University of Toronto, 1950) at 125.

183 Official bilingualism in New Brunswick was entrenched by such *Charter* provisions as subsections 16(2), 17(2), 18(2), 19(2) and 20(2). These subsections cover the "official" status of the English and French languages, access to legislative and governmental institutions in either language, the use of both languages in the debates and proceedings of the provincial legislature, the keeping of its statutes, records and journals in bilingual versions, and the use of either language in the courts. The provincial provisions closely parallel those which affect, *mutatis mutandis*, official bilingualism at the federal level.

184 S. 2.

185 Ss. 7-14.

186 S. 15.

187 R. Romanow, *'Reworking the Miracle': The Constitutional Accord 1981* (1982) 8 QUEEN'S L.J. 74 at 92-9.

raises the question of whether an omnibus provincial declaration inserting the "notwithstanding" clause in respect of section 2 and sections 7 to 15 in all or a large number of provincial statutes is constitutionally valid.

On June 23, 1982, the National Assembly of Quebec adopted *Bill 62*[188] which inserted the "notwithstanding" clause in all past and current laws up until the date of the enactment of the bill. In addition, the Assembly inserted the same derogation clause in all new laws *seriatim*.

In *Alliance des Professeurs de Montréal* v. *A.G. Quebec*,[189] Chief Justice Deschênes of the Quebec Superior Court found that despite the exhaustive derogation of rights which would otherwise apply, *Bill 62* was constitutionally valid. Sweeping as it was, the Quebec "override" complied with all of the necessary conditions of section 33, it being (1) an express declaration; (2) concerning Acts therein described; (3) concerning a given provision in section 2 or sections 7 to 15 of the *Charter*; and (4) for a specified period (or in the absence of a stated time limitation for a duration of five years, after which it could presumably be re-enacted). If an "omnibus" declaration respecting all statutes were to be found unconstitutional, the legislature could accomplish the same purpose merely by inserting declarations in each statute individually. It was obvious that in enacting *Bill 62*, the separatist government of Quebec was symbolically rejecting a *Charter* it had no part in making.

The general abrogation of *Charter* guarantees which would apply was, however, too much for the Quebec Court of Appeal, which reversed the lower court judgment. In a highly theoretical judgment, the Court found that, according to its language, section 33 envisaged a specific override aimed at a given provision, or several given provisions, and that an "omnibus" override was unconstitutional. Section 33 was a means by which legislatures and governments could make exceptions to rights and should therefore be construed narrowly because of the high value society and the legal system place on liberty. The Court seems to be saying that freedom of speech, assembly, thought and conscience are logically prior rights on which other rights and freedoms depend. The "omnibus" provisions curtail debate because, contrary to what is required by section 33, citizens lack information on which specific provisions are overridden and which rights or freedoms are affected. The nexus between the statutory provision and the right or freedom curtailed by the override is unclear. The procedure, therefore, deprives the citizen of precise information which nurtures democratic debate and indirectly deprives the community of freedom of speech and the right to debate public issues in an informed fashion. The Court also criticized the absolute nature of the exercise of the override, since the subversion of rights and freedoms it affects is incompatible with a liberal democratic society. Nevertheless, to return to Chief Justice Deschênes's judgment, although it would be a much more

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188 *An Act Respecting the Constitution Act, 1982*, S.Q. 1982, c. 21.

189 (1983), 5 D.L.R. (4th) 157, 9 C.C.C. (3d) 268, *rev'd* (1985), [1985] C.A. 376, 21 D.L.R. (4th) 354.

labourious process, it would still be possible for a research assistant in the legislative assembly to examine statutes and attach overrides to provisions in Acts individually, conforming to the Court of Appeal's criteria. This would in effect accomplish in a more specific and detailed fashion what the forum found unconstitutional.

A troubling thought is that, with the *Charter*, "fundamental freedoms" such as freedom of speech or association derive their legal vigour from the *Charter* and thus can be overridden.[190] If the override were applied extensively, the government which was responsible could even claim constitutional justification for the limitations on freedom on the basis that "special circumstances" required the temporary suspension of liberties. Subsection 33(1) provides a justification for arbitrary action and serious consideration should be given to its repeal. It provides a justification for arbitrary governmental action which did not exist before and, in the very nature of things, the justification will be directed to the majority which sustains the government in power rather than vulnerable minorities whose rights need protection.

In 1986, Saskatchewan became the second province to use the override provision. Faced with a strike of provincial government employees, Premier Devine's Progressive Conservative government inserted a "notwithstanding" clause under subsection 33(1) in subsection 9(1) of its *Saskatchewan Government Employees' Union Dispute Settlement Act*.[191] This subsection ordered provincial civil servants back to work and imposed a contract. The clause related specifically to the "freedom of association" provision in subsection 2(d), foreclosing a legal appeal to that *Charter* provision by the Union. Minister of Justice Sid Dutchak has the following to say in a letter to the Regina *Leader-Post*:

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[190] It should be remembered that the override in subsection 33(1) applies to "fundamental freedoms" in section 2, to the guarantee of "life, liberty and security of the person" in section 7, and to "equality rights" in section 15, all of which are ordinarily regarded as basic or fundamental rights in written constitutions. A problem with the override, accordingly, is that it envisages the legislative nullification of *fundamental* rights. Are rights really *fundamental* if they can be so readily abrogated? It should be apparent that to the extent that the override operates, *pro tanto*, the rights and freedoms it nullifies are unentrenched. Chief Justice Subba Rao of the Supreme Court of India held in *Golaknath* v. *State of Punjab* (AIR 1967 SC 1643) that even the formal amending power was incapable of derogating from fundamental rights in the Indian Constitution because of their very basic nature — in a sense any democratic constitution presupposes them as well as declaring them in its text. A later Supreme Court, however, overruled *Golaknath* in *Kesavananda Bharati* v. *The State of Kerala* (AIR 1973 SC 1461). Both cases were accompanied by great controversy (*see* P. Jaganmohan Reddy, *A Constitution: What it is and What it Signifies*, in V. Venkataramanaiah, ed., ESSAYS ON CONSTITUTIONAL LAW (New Delhi: Concept Publishing Co., 1986) at 184-6.

[191] S.S. 1984-85-86, c. 111, s. 9(1). Subsection 9(2) of the statute inserted a similar "notwithstanding" clause under section 44 of *The Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1, overriding section 6 of the *Code* in relation to "freedom of association".

> I see nothing wrong, from the point of view of law or policy, in using subsection 33(1) as a pre-emptive measure. Of course, every use of subsection 33(1) is pre-emptive in the sense that it forecloses judicial review under the *Charter* in respect of the provision of the *Charter* referred to in the "notwithstanding" declaration. That is the very purpose of the clause.[192]

Although the Union was initially eager to legally challenge the exercise of the override, it took no action.[193] There has been some suggestion that the override should not be used pre-emptively but should be used only "to overturn absurd or socially unacceptable legal decisions".[194] As well, the override could conceivably be challenged legally under section 1 of the *Charter* for not being a "reasonable limit", but there seems to be little textual justification for this.[195]

3. *Section 1*

Section 1 of the *Charter* is the sole, formal, express limit to the rights and freedoms contained in the *Charter*. It acknowledges the *Charter*'s entrenched guarantee of rights and freedoms "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". Constituting a "complete code" of limitations on *Charter* rights, as Professor Magnet says, "it enjoins courts from creating further judicial limitations burdening *Charter* rights".[196]

In *R.* v. *Cadeddu*, Mr. Justice Potts described how section 1 operates in relation to *Charter* rights:

> A party alleging that his rights have been violated must establish a *prima facie* violation of the right. Of course, at this stage it is open to the opposing party to show that no such *prima facie* violation exists. Once, however, the court is satisfied that what has occurred is an apparent infringement of the wording of the right, the onus shifts to the Crown to demonstrate that there exists a reasonable limit on the right, prescribed by law, that can be justified in a free and democratic society.[197]

Whereas other constitutional courts may restrictively interpret rights in the process of applying them (for example, by a "balancing" test), Canadian courts can interpret the rights and freedoms initially in their utmost breadth. If a limitation is then required in practice, the courts may rely on section 1. Although it oversimplifies the issue, it may be said that section 1

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192 S. Dutchak, "Letter to the Editor", *The [Regina] Leader-Post* (14 February 1986) A7.

193 J. Mortin, "Back-to-Work Order Puts Devine in History Books", [*Saskatoon*] *Star-Phoenix* (5 February 1986) A3.

194 S. Dutchak, *supra,* note 192. *E.g.*, holding "medicare" unconstitutional.

195 *Supra,* note 193.

196 J.E. Magnet, CONSTITUTIONAL LAW OF CANADA, vol. 2, 2d ed. (Toronto: Carswell, 1985) at 862.

197 (1982), 40 O.R. (2d) 128 at 138, (sub nom. *Re Cadeddu and the Queen*) 4 C.C.C. (3d) 97 at 107-8 (H.C.).

tempers individual rights and freedoms by subjecting them to the common good. It mediates between individual rights and collective rights. Specific applications of section 1 are discussed below.

B. *Section 2: Fundamental Freedoms*

2. Everyone has the following fundamental freedoms:
   (a) freedom of conscience and religion;
   (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
   (c) freedom of peaceful assembly; and
   (d) freedom of association.

1. *Freedom of Conscience and Religion*

To date the most important case on freedom of religion decided on *Charter* grounds is *R.* v. *Big M Drug Mart Ltd.*,[198] where a unanimous Supreme Court of Canada found that the *Lord's Day Act*[199] (especially section 4, which prohibited doing any work on Sunday, the Lord's Day, except work in certain restricted categories) was unconstitutional for violating subsection 2(a) and consequently was of no force and effect by reason of subsection 52(1) of the *Constitution Act, 1982*. In a similar challenge in the early sixties,[200] the Supreme Court of Canada had declined to find that this same legislation contravened "freedom of religion" in subsection 1(c) of the *Canadian Bill of Rights*.[201] In the latter case, Mr. Justice Ritchie had held that the *Bill of Rights* did not deal with "human rights and fundamental freedoms" in any abstract sense, but sought to preserve them in the form in which they existed in 1960, which was immediately before the Bill was enacted and long after the *Lord's Day Act*[202] was first proclaimed into force. He held that it was the *effect* rather than the presumably religious purpose of the statute, which must prevail, and he could find nothing affecting religious liberty in what was essentially weekly day-of-rest legislation. Mr. Justice Cartwright (as he then was) held, in dissent, that "the purpose and the effect of the *Lord's Day Act* are to compel, under the penal sanctions of the Criminal law, the observance of Sunday as a religious holy day by all the inhabitants of Canada; that this is an infringement of religious freedom I do not doubt".[203] However, on becoming Chief Justice, Cartwright C.J.C. relented in his dissenting judgment in *R.* v. *Drybones*,[204] questioning whether it was "the intention

198 (1985), [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321 [hereinafter *Big M*].
199 R.S.C. 1970, c. L-13.
200 *Robertson* v. *R.* (1963), [1963] S.C.R. 651, 41 D.L.R. (2d) 485 [hereinafter *Robertson*].
201 S.C. 1960, c. 44, *reprinted in* R.S.C. 1970, App. III.
202 R.S.C. 1970, c. L-13.
203 *Robertson*, *supra*, note 200 at 660.
204 (1969), [1970] S.C.R. 282, 9 D.L.R. (3d) 473.

of Parliament to confer the power and impose the responsibility upon the courts of declaring inoperative any provision in a Statute of Canada although expressed in clear and unequivocal terms".[205] In the unequal battle that would ensue thereafter between human rights and parliamentary sovereignty, the latter was the clear victor.

In repudiating his own earlier dissent in *Robertson*,[206] Chief Justice Cartwright gave weight to the fact that courts were instructed in section 2 of the *Bill of Rights* merely "to construe and apply" statutes so as not to "abrogate, abridge or infringe" the rights or freedoms set out.[207] In the event of an outright, irresolvable conflict, obviously the legislation could not be construed in such a way as to conform to the expressed rights and freedoms; hence, the contradictory will of Parliament, which is "supreme", would prevail.

The position with regard to the *Charter* is fundamentally different. Unlike those in the *Bill of Rights*, the rights and freedoms in the *Charter* are not statutory but entrenched, and the supremacy provision in subsection 52(1) relates not to "construing and applying" but requires that any inconsistent law is, to the extent of the inconsistency, of no force or effect. Chief Justice Dickson summarizes the distinction nicely in the *Big M* case by characterizing the effect of the language of the *Bill of Rights* as "declaratory" and that of the *Charter* as "imperative".[208]

The Chief Justice held that "both purpose and effect are relevant in determining constitutionality, either an unconstitutional purpose or an unconstitutional effect can invalidate legislation".[209] The *Charter* sets a standard for *present* as well as *future* legislation and the meaning of freedom of conscience and religion is not limited in degree to what Canadians enjoyed prior to the proclamation of the *Charter*. The true purpose of the *Lord's Day Act*[210] is to compel the observance of the Christian Sabbath and this infringes unacceptably on the freedoms of other religious communities. The guarantee in subsection 2(a) prevents the government "from compelling individuals to perform or abstain from performing otherwise harmless acts because of the religious significance of those acts to others".[211] The grounds that had been argued for saving the legislation under section 1 are that its provisions are "reasonable limits" because observing the day of rest of the Christian majority is the most practical, or because "everyone accepts the need and value of a universal day of rest".[212] The purpose is basically flawed, however, and this vitiates the legislation in such a way that it cannot be validated by section 1.

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205 *Ibid.* at 287, 9 D.L.R. (3d) at 476.
206 *Supra,* note 200.
207 *Supra,* note 204 at 288, 9 D.L.R. (3d) at 476-7.
208 *Supra,* note 198, at 342-3, 18 D.L.R. (4th) at 358-9.
209 *Ibid.* at 331, 18 D.L.R. (4th) at 350.
210 R.S.C. 1970, c. L-13.
211 *Supra,* note 198 at 350, 18 D.L.R. (4th) at 364.
212 *Ibid.* at 352-3, 18 D.L.R. (4th) at 366.

In her concurring opinion, Madame Justice Wilson emphasized the effect, rather than the purpose, of the legislation:

> [O]ne can agree with Dickson J. . . . that in enacting the *Lord's Day Act* "[t]he arm of the state requires all to remember the Lord's day of the Christians and to keep it holy", and that "[t]he protection of one religion and the concomitant non-protection of others imports disparate impact destructive of the religious freedom of the collectivity". Accordingly, the Act infringes upon the freedom of conscience and religion guaranteed in s. 2(a) of the *Charter*. This is not, however, because the statute was enacted for this *purpose* but because it has this *effect*. In my view, so long as a statute has such an actual or potential effect on an entrenched right, it does not matter what the purpose behind the enactment was.[213]

In a curious way, Madame Justice Wilson seems to agree with Mr. Justice Ritchie in *Robertson*,[214] although she defines the effects differently.

In *R.* v. *Videoflicks*,[215] Mr. Justice Tarnopolsky had before him not a statute with a presumptively religious purpose or effect, but the Ontario *Retail Business Holidays Act*.[216] Paragraph 1(1)(a) of the Act provided for a number of "holidays" some of which had religious significance whereas others did not. Section 2 prohibited the offering for sale or the selling of goods on "holidays" which included Sundays. Mr. Justice Tarnopolsky held that the disparate impact of the statutory holiday on different religious groups had to be considered. The appellant, Nortown Foods, was owned by orthodox Jews whose religion required them to be closed on Saturday. With respect to that appellant, the appeal was allowed and the conviction quashed, since in *their* case section 1 of the statute is inconsistent with subsection 2(a) of the *Charter* and is therefore of no force and effect. For other religious groups, who ordinarily observed Sunday, there was no conflict between religious belief and legal prescription and their appeals were dismissed. Consequently, the statutory provision challenged was not invalid absolutely, but rather it was of no force or effect in the case of those religious groups on whom it had an adverse impact.

2. *Freedom of Thought, Belief, Opinion and Expression, Including Freedom of the Press and Other Media of Communication*

In *Re Ontario Film and Video Appreciation Society and Ontario Board of Censors*,[217] the High Court of Ontario held that, although not technically invalid, the film censorship scheme set out in the provincial *Theatres Act*[218] was not "prescribed by law". Such a finding was neces-

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213 *Ibid.* at 361, 18 D.L.R. (4th) at 372-3.

214 *Supra*, note 200.

215 (1984), 48 O.R. (2d) 395, 14 D.L.R. (4th) 10 (C.A.).

216 R.S.O. 1980, c. 453.

217 (1983), 41 O.R. (2d) 583, 147 D.L.R. (3d) 58, *aff'd* (1984), 45 O.R. (2d) 80, 5 D.L.R. (4th) 766 (C.A.).

218 R.S.O. 1980, c. 498, ss. 3(2)(a), (b).

sary before the Court was able to determine whether there existed a "reasonable limit" on freedom of expression in subsection 2(b).

As the Court stated:

> There are no reasonable limits contained in the statute or the regulations. The standards and the pamphlets utilized by the Ontario Board of Censors do contain certain information upon which a film-maker may get some indication of how his film will be judged. However, the board is not bound by these standards. They have no legislative or legal force of any kind. Hence, since they do not qualify as law, they cannot be employed so as to justify any limitation on expression, pursuant to s. 1 of the Charter.[219]

Although film classification is not unconstitutional *per se*, the valid legal standards under which it is accomplished must have enough precision to enable film-makers and counsel to make an informed evaluation of whether a film, or parts of it, will be subjected to censorship.

In *National Citizens' Coalition Inc.* v. *A.G. Canada*,[220] limitations in federal election legislation prohibiting political parties or persons who are not candidates from incurring election expenses during a campaign, or which forbade advertisements or posters either promoting or opposing a candidate or party unless authorized by a *bona fide* candidate or party, were held to be unconstitutional. These restrictions violated "freedom of expression" and were not "reasonable limits" under section 1. The legislation reflected a concern by parliamentarians that the absence of spending limits for third parties after a federal election writ was issued gave an unconscionable advantage to the wealthy, but this concern was not sufficient to limit a "fundamental freedom". Mr. Justice Medhurst found the repugnant provisions of the *Canada Elections Act*[221] inconsistent with subsection 2(b) of the *Charter* and to that extent of no force or effect. Moreover, he could not justify the legislation on the basis of it constituting a "reasonable limit":

> [T]he limitation must be considered for the protection of a real value to society and not simply to reduce or restrain criticism no matter how unfair such criticism may be. It has been said that the true test of free expression to a society is whether it can tolerate criticism of its fundamental values and institutions. A limitation to the fundamental freedom of expression should be assessed on the basis that if it is not permitted then harm will be caused to other values in society. This requires, as has been said, a balancing of the respective interests of society and of the individual.[222]

This decision, which was never appealed, was rendered in June 1984, shortly before the federal election. It is indicative of the high value that is placed on freedom of political expression. If citizens could not raise the

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219 *Supra*, note 217, 41 O.R. (2d) at 592, 147 D.L.R. (3d) at 67.

220 (1984), 11 D.L.R. (4th) 481, [1984] 5 W.W.R. (Alta. Q.B.).

221 R.S.C. 1970 (1st Supp.), c. 14, ss. 70.1(1), 72, *as am.* S.C. 1973-74-75, c. 51, s. 12, S.C. 1980-81-82-83, c. 164, s. 15.

222 *Supra*, note 220 at 496, [1984] 5 W.W.R. at 453.

money and insert advertisements in the media during an election campaign or confront candidates in the manner the legislation prohibited, or for that matter, ask impertinent and embarrassing questions, there would indeed be a suppressive effect on the whole political process. Parliament was trying to "kill a gnat with a sledge hammer".

Would the protection afforded to political speech under the *Charter* also be available to commercial speech? In *Re Klein and Law Society of Upper Canada*,[223] the Law Society's rules prohibiting fee advertising had been breached and the questions arose whether such rules clashed with subsection 2(b). The Court held that although "freedom of expression" furthered political debate in a democratic society, there was no similar paramount interest to be protected in "pure commercial speech" and, therefore, *Charter* protection for such speech was unavailable.

3. *Freedom of Peaceful Assembly and Freedom of Association*

The ambit of "freedom of association" in subsection 2(d) of the *Charter* was defined in widely different terms by the Alberta and Saskatchewan Courts of Appeal,[224] with the result that ultimately the Supreme Court of Canada will either have to adopt one of these divergent definitions or propound its own.

In *Retail, Wholesale, & Department Store Union, Locals 544, 496, 635 and 955* v. *Saskatchewan*, the Saskatchewan Court of Appeal held that subsection 7(c) of *The Dairy Workers (Maintenance of Operations) Act*,[225] which prohibited dairy employees from striking, violated subsection 2(d) of the *Charter* by derogating from freedom of association. Following Chief Justice Bayda's reasoning, freedom "connotes a sphere of activity residual in nature . . . within which all acts are permissible: what is regulated and not permissible is outside the sphere".[226] But what is it that lies within the "sphere" or core of "freedom of association"? According to Chief Justice Bayda, this is a very important consideration since "[t]he boundaries of the unregulated area — the sphere of activity within which the freedom reigns unfettered — once defined, are entrenched".[227] Individuals can perform in association any act they can perform alone, as long as they do not inflict injury on others. Where the intent is to inflict injury, the act is prohibited; where the intent is not to inflict injury, one enters the inner core of "freedom of association" which is not susceptible to State regulation or derogation. In this case the object was not to injure but to engage in association to compel an employer to agree to terms and conditions of

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223 (1985), 50 O.R. (2d) 118, 16 D.L.R. (4th) 489 (H.C.).

224 (1985), 39 Sask. R. 193, 19 D.L.R. (4th) 609, Brownridge J.A. dissenting [hereinafter *Retail Store*]; *Reference Re Compulsory Arbitration* (1984), 57 Alta. R. 268, 16 D.L.R. (4th) 359.

225 S.S. 1983-84, c. D-1.1.

226 *Retail Store, supra,* note 224 at 198, 19 D.L.R. (4th) at 616.

227 *Ibid.* at 201, 19 D.L.R. (4th) at 619.

employment. Consequently, the employees were exercising their "freedom of association" in its protected core and were unwarrantably interferred with by the provincial government's back-to-work legislation which, to the extent of the inconsistency with the asserted freedom, is of no force or effect.

The Alberta Court of Appeal held, conversely, that a prohibition on lockouts and strikes in provincial legislation[228] did not constitute a denial of "freedom of association" within subsection 2(d). The common thread running through the statutes being examined was "the imposition of compulsory interest arbitration".[229]

Mr. Justice Belzil, dissenting in part, differed from Chief Justice Bayda in *Retail Store* by regarding collective bargaining as a negotiation process involving two equal subjects of the State — the union and the employer. In his opinion, the *Charter* is silent and neutral in such a situation, adding that it was "simply unthinkable that a charter for the equal protection of the rights and freedoms of all citizens should guarantee to one citizen an inviolable right to harm another, or enlarge the freedom of one citizen to the detriment of the freedom of the other".[230] Accordingly, the right to strike is not a "fundamental freedom". It was conferred at a certain historical moment of positive law of the State and, consequently, it can be regulated, limited or abolished by the same process.

4. *Section 6: Mobility Rights*

The right of citizens of Canada to enter, remain in and leave Canada is entrenched in subsection 6(1) of the *Charter*. Subsection 6(2) enables citizens and permanent residents to move to and take up residence in any province and to pursue a livelihood in any province, although paragraph 6(3)(a), *inter alia*, subjects such persons to provincial "laws or practices of general application" except those that invidiously discriminate on the basis of present and past residence.

In *Allman* v. *Commissioner of Northwest Territories*,[231] the important issue arose as to whether a jurisdiction within the federation could impose a three-year residency requirement on those moving from outside before they would have the right to vote in a plebiscite. In this case the government was holding the plebiscite for information purposes only and it concerned the possible future division of the Territories. It was held by Mr. Justice Belzil for a unanimous Court of Apeal that although the *Plebiscite*

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228 *Public Service Employee Relations Act*, R.S.A. 1980, c. P-33, s. 93(1), *as am. Labour Statute Amendment Act, 1983*, S.A., c. 34, s. 5; *Labour Relations Act*, R.S.A. 1980, c. L-1, s. 117.1(2), *as am. Labour Statutes Amendment Act, 1983*, S.A., c. 34, s. 28; *Police Officers Collective Bargaining Act*, S.A. 1983, c. P-12.05.

229 *Reference Re Compulsory Arbitration, supra*, note 224 at 271, 16 D.L.R. (4th) at 362.

230 *Ibid.* at 288-9, 16 D.L.R. (4th) at 388. If Bayda C.J.S. is correct in his interpretation, it would follow that no "harm" would result.

231 (1983), [1984] N.W.T.R. 65, 8 D.L.R. (4th) 230 (C.A.).

Ordinance[232] discriminated as between long-term and short-term residents of the Territories, there was no impairment of mobility rights.

Another important case, *Le Groupe d'éléveurs de l'est de l'Ontario* v. *Canadian Chicken Marketing Agency*,[233] involved federal regulations[234] providing for the allocation of marketing quotas to Ontario chicken producers, the entitlement being limited to those engaged in the interprovincial marketing of their produce as of a specified date. Ontario chicken producers who did not qualify for quotas argued that by preventing them from selling their produce in Quebec, the relevant regulations offended paragraph 6(2)(b) of the *Charter* which guarantees to citizens the right to gain a livelihood in any province. Mr. Justice Strayer held, however, that the marketing scheme was constitutionally valid since the guaranteed right of gaining a livelihood in other provinces was made subject to "laws of general application" in paragraph 6(3)(a). Although such laws discriminated in allocating quotas, they restricted "equally persons not so qualified whether they are or were residents of Ontario".[235] He found that the quotas were issued "without any particular reference to the residence of the producer".[236] While discrimination existed under the marketing scheme, it applied equally to residents and non-residents of the province and did not single out residents of other provinces for invidious treatment.

A related question arose before the Supreme Court of Canada in *The Law Society of Upper Canada* v. *Skapinker*[237] because of the requirement in subsection 28(c) of the *Law Society Act*[238] that required members of the Bar to be Canadian citizens. The question here, as Mr. Justice Estey emphasized for the Court, was not whether it was in the interest of the community to require citizenship as a pre-condition for membership in the Bar, but simply whether subsection 28(c) was inconsistent with the mobility provisions in paragraph 6(2)(b) of the *Charter*. The case involved an American citizen and member of the Massachusetts Bar who was otherwise qualified and wished to join the Ontario Bar.

One of the vexing questions presented in this appeal was whether the right "to pursue the gaining of a livelihood in any province", described in paragraph 6(2)(b), was a separate and distinct right to work divorced from the mobility provisions in which it is found. If the subsection confers on permanent residents a right to gain a livelihood (or right-to-work) *simpliciter*, the position of the appellant would have been much strengthened. Moreover, the absence of words denoting "movement" in paragraph

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232 O.N.W.T. 1981 (3d sess.), c. 13.

233 (1984), [1985] 1 F.C. 280, 14 D.L.R. (4th) 151 (T.D.).

234 *Canadian Chicken Marketing Agency Delegation of Quota Order*, S.O.R./79-535, *Canadian Chicken Marketing Quota Regulations*, S.O.R./79-559, *as am.* S.O.R./82-859, s. 1 (these Regulations were adopted pursuant to sections 17 and 18 of the *Farm Products Marketing Agencies Act*, S.C. 1970-71-72, c. 65.

235 *Supra*, note 233 at 322, 14 D.L.R. (4th) at 180.

236 *Ibid.*

237 (1984), [1984] 1 S.C.R. 357, 9 D.L.R. (4th) 161.

238 R.S.O. 1980, c. 233.

6(2)(b) would have tended to reinforce the foregoing reading. However, the Supreme Court of Canada held that the provision could not be divorced from its context. The right is not merely one to work in another province, but to *move* to another province unimpeded by artificial barriers and to work there subject to satisfying the requirements which in this case were those of the *Law Society Act*.[239] Mr. Justice Estey stated that paragraph 6(2)(b) "does not avail [the appellant] of an independent constitutional right to work as a lawyer in the province of residence so as to override the provincial legislation".[240]

In speaking for a unanimous Court, Mr. Justice Estey emphasized the difficult interpretative task the tribunal had now embarked upon, a task which required reconciliation, constitutionally, of the interests of the individual and the community, and of the present and the future:

> 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": *Constitution Act, 1982*, s. 52. 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. Flexibility must be balanced with certainty. The future must, to the extent foreseeably possible, be accommodated in the present. The *Charter* is designed and adopted to guide and serve the Canadian community for a long time. Narrow and technical interpretation, if not modulated by a sense of the unknowns of the future, can stunt the growth of the law and hence the community it serves.[241]

The literal and technical interpretation that is appropriate for *The Line Fence Act*[242] will not do for a living Constitution; it can only be hoped that the above statement will serve as a lodestar for future constitutional craftsmanship.

5. *Section 7: Life, Liberty and Security of the Person*

(a) *The Prerogative Power*

(i) *The Cruise Missile Case: The Federal Court of Appeal*

In *Operation Dismantle Inc.* v. *R.*,[243] one of the most momentous cases decided so far on the *Charter*, the Supreme Court of Canada held that the words "within the authority of Parliament" in paragraph 32(1)(a) rendered justiciable decisions of the cabinet or prerogative acts of government, even where no statute had actually been enacted. The decision will

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239 R.S.O. 1980, c. 233.

240 *Supra*, note 237 at 382-3, 9 D.L.R. (4th) at 181.

241 *Ibid.* at 366, 9 D.L.R. (4th) at 168.

242 R.S.S. 1978, c. L-17.

243 (1985), [1985] 1 S.C.R. 441, 18 D.L.R. (4th) 481, *aff'g* [1983] 1 F.C. 745, 3 D.L.R. (4th) 193 (C.A.), *rev'g* [1983] 1 F.C. 429 (T.D.) [hereinafter *Operation Dismantle*].

potentially have a far-reaching effect, since it subjects to the words of the *Charter* both provincial and federal government policy decisions, even where no law is in contention.

The plaintiffs, who were a coalition of organizations and unions dedicated to peace and disarmament, argued that the Canadian government's permission to allow the United States to test a cruise missile on Canadian soil posed a threat, under section 7, to the "lives" and "security of the person" of all Canadians. They claimed that it did this by increasing the risk of nuclear conflict. Accordingly, the plaintiffs were asking the court for injunctive relief and damages, along with a declaration that the decision to permit the testing was unconstitutional.

At the Trial Division of the Federal Court, on the preliminary question of whether the appellant's statement of claim disclosed no reasonable cause of action and should be struck out, Mr. Justice Cattanach considered that there was at least "a scintilla" of merit in the case and it should proceed.[244] However, the Federal Court of Appeal decided unanimously to allow the Crown's appeal, striking out the statement of claim and dismissing the plaintiffs' action.[245]

As the judges of the Federal Court of Appeal emphasized (and the Supreme Court of Canada agreed with them on this point), there was a need for the plaintiffs not only to prove deprivation of "life" or "security of the person" but also to prove that the relevant cabinet decision had contravened "fundamental justice", and this burden had not been met. Indeed, since cabinet decisions are confidential and privileged, it was inordinately difficult for the appellants to show that the decision was arbitrary or derogated from fundamental justice.

In the Federal Court of Appeal, Mr. Justice Pratte adopted the more restrictive approach of the European Commission of Human Rights, which construed the identical words "liberty and security of the person" in Article 5 of the *European Convention on Human Rights*[246] as an integral whole, referring to "freedom from arrest and detention and to protection against arbitrary interference with that liberty".[247] Read in such a fashion, the only "security" to which the term in section 7 of the *Charter* referred to was security against arbitrary arrest or detention. A possible interpretative problem here is that the security right referred to by Mr. Justice Pratte is, arguably, already covered by sections 9 and 10 of the *Charter*. Consequently, if the sole meaning of "liberty" and "security" read together is the rather narrow meaning ascribed to them, they would appear to be superfluous and redundant in the overall context of the *Charter*.

It was submitted by the federal government that the exercise of the royal prerogative did not fall within the authority of Parliament, pursuant to

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244 *Ibid.*, [1983] 1 F.C. 429.

245 *Ibid.*, [1983] 1 F.C. 745, 3 D.L.R. (4th) 193.

246 *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950 (in force 3 September 1953), Europ. T.S. No. 5.

247 *Supra*, note 243, [1983] 1 F.C. at 752-3, 3 D.L.R. (4th) at 200.

section 32, but was a source of power independent of that authority. In rejecting the argument, Mr. Justice Ryan emphasized Parliament's competence to legislate in relation to treaty-making and defence, possibly setting out limiting conditions for the exercise of the prerogative in those areas. In that sense, the prerogative is "within the authority of Parliament",[248] so that if a violation of *Charter* provisions could be shown in relation to its exercise, it would be possible to argue that the impugned prerogative act would be of no force or effect. The appellants were arguing that if the Cabinet had acted in complete good faith, the decision taken was wrong on policy grounds, with the result that life and security were undermined. But policy considerations of this kind, Mr. Justice Ryan argued, were dependent on a vast range of factors and were therefore not susceptible to competent adjudication by a court. Accordingly, the statement of claim was struck. Since the statement could not be amended or reformulated to disclose a triable cause of action, the action was dismissed.

For his part, Mr. Justice Le Dain also agreed that cabinet decisions were, in principle, subject to the *Charter*. However, he dismissed the plaintiffs' contention that the availability and testing of cruise missiles increased the risk of war on the basis that it was not justiciable. In matters of foreign policy, the ascertainment and evaluation of facts on which such policy is based is peculiarly within the purview of the executive. The executive not only has a constitutional duty to execute such policy, it is better equipped than any court to formulate it. Practical considerations of the separation-of-powers dictate that, in this area, courts should defer to the State. In his opinion, such a matter is "not susceptible of adjudication by a court. It involves factors, considerations and imponderables, many of which are inaccessible to a court or of a nature which a court is incapable of evaluating or weighing."[249]

Finally, Mr. Justice Le Dain referred to the failure of the plaintiffs to show government non-compliance with the principles of "fundamental justice" which was essential to establish a violation of section 7. He took no position, however, on the question of whether "fundamental justice" denoted only "procedural requirements" or whether they set "substantive requirements" or standards of justice. Whatever interpretation one may put on the words "fundamental justice", the plaintiffs had failed to make a case on either a procedural or substantive basis.

Adopting a novel interpretation of section 7, Mr. Justice Marceau emphasized that its essential purpose was to forestall arbitrary action by public authorities. Construing the English text with the aid of the French text, he held that section 7 constitutionalized guarantees against arbitrary action affecting the citizens "in their person", and that only a *single* right was involved. The heading "garanties juridiques" in the French text carried with it the implication that one right, in the nature of a guarantee,

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248 *Ibid.* at 756, 3 D.L.R. (4th) at 203.
249 *Ibid.* at 764-5, 3 D.L.R. (4th) at 210.

was involved; not three separate rights. When the section was properly construed, the plaintiffs had to demonstrate the official arbitrariness of the decision complained of and they had failed to do so. Consequently, he held that:

> There is nothing arbitrary in that decision, and no one suggests that it was made without regard to any principle of fundamental justice. It follows from this that the plaintiff's criticism has no legal basis, that their statement of claim discloses no verifiable ground of challenge. There is accordingly no cause of action.[250]

In Mr. Justice Hugesson's opinion, the rights referred to in section 7 are not absolute. From one point of view, death, imprisonment and insecurity (the antonyms of the "rights" mentioned) may result from valid judicial process and hence are empirical or juridical facts. In addition to the deprivation of rights it must be shown that their deprivation violates fundamental justice. This is what the plaintiffs had failed to do. Moreover, the plaintiffs' interpretation of the *Charter*'s reach was too broad. Section 32 affords protection "against direct interference by domestic governments in Canada".[251] The threat complained of, however, arises from the response of "foreign powers" to the testing of the missiles, and so lacks the essential State nexus in Canada to receive protection.

(ii) *The Cruise Missile Case Before the Supreme Court of Canada*

While agreeing that decisions of the federal Cabinet were reviewable pursuant to section 32, the two concurring judgments in the Supreme Court of Canada were also in accord that the appeal should be dismissed with costs on the basis that the plaintiffs had failed to show any violation of their *Charter* rights under section 7.

For the majority, Chief Justice Dickson emphasized the necessity for the plaintiffs to establish an actual causal link between the challenged actions of the federal government and the infringement of *Charter* rights under section 7. In brief, the increased threat of nuclear war supposedly created by the respondents was too hypothetical and speculative. Turning as it did on too many intangible factors and assumptions, it failed to provide a persuasive causal nexus between the challenged exercise of the prerogative power and the allegedly increased risk to life and personal security.

On examining the plaintiff's statement of claim, Chief Justice Dickson observed:

> [A]ll of its allegations, including the ultimate assertion of an increased likelihood of nuclear war, are premised on assumptions and hypotheses about how independent and sovereign nations, operating in an international arena of

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250 *Ibid.* at 775, 3 D.L.R. (4th) at 218.
251 *Ibid.* at 785, 3 D.L.R. (4th) at 227.

> radical uncertainty, and continually changing circumstances, will react to the Canadian government's decision to permit the testing of the cruise missile.[252]

In the absence of hard evidence that the federal Cabinet's decision would result in the anticipated consequences, Chief Justice Dickson continued "it is simply not possible for a court, even with the best available evidence, to do more than speculate upon the likelihood of the federal cabinet's decision to test the cruise missile resulting in an increased threat of nuclear war".[253] Although the Chief Justice acknowledged that a declaratory judgment had a preventative function, and no actual harm need have arisen before it was rendered, he stated that it must nevertheless be based on "more than mere hypothetical consequences; there must be a cognizable threat to a legal interest before the courts will entertain the use of its process as a preventive measure".[254]

The analytical approach adopted by Madame Justice Wilson involved two phases. In her words, "[t]he first step is to determine who as a constitutional matter has the decision-making power; the second is to determine the scope (if any) of judicial review of the exercise of that power".[255] Parliament has exclusive legislative jurisdiction in relation to defence under, *inter alia*, subsection 91(7) of the Constitution. If the question were merely one of the advisability or soundness of the government's action, the court would not entertain a legal challenge to the wisdom of the action. However, if there is an arguable issue that the plaintiffs' *Charter* rights under section 7 are violated, a totally different question arises. In such a case, the plaintiffs are entiled to such relief as the court may grant under subsection 24(1) of the *Charter*.

In order to illustrate her distinction, Madame Justice Wilson contrasts two hypothetical situations. Assume someone challenges the federal government's right to conscript him for military service during wartime, arguing that it potentially violates his *Charter* rights under section 7. In such a case, the courts would presumably uphold conscription as a necessity during wartime, even though it threatened life or security of the person, since it was a "reasonable limit" prescribed by law under section 1 which modifies *Charter* rights in their broadest extension. By contrast, if a "target" group protested that the government had decided to use them for the experimental testing of a deadly nerve gas, such an action would presumably not survive judicial review under the *Charter* in any circumstances.

Whether one regards a section 7 right as "procedural" or "substantive" in nature, no such rights are absolute. One's right to "liberty" must be accommodated to the corresponding rights of others, regardless of how it is construed or defined. The *Charter* itself "postulates the inter-relation

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252 *Supra*, note 243, [1985] 1 S.C.R. at 454, 18 D.L.R. (4th) at 490.
253 *Ibid.*
254 *Ibid.* at 457, 18 D.L.R. (4th) at 492.
255 *Ibid.* at 471, 18 D.L.R. (4th) at 503.

of individuals in society all of whom have the same right".[256] Also to be considered in this context is the political reality of the modern State. A lower speed limit could enhance life and personal security, but that does not demonstrate a duty on the State to impose such a limit. Madame Justice Wilson agrees with Mr. Justice Le Dain (as he then was) that the essence of the plaintiffs' case is that the government's permission to test will increase the risk of nuclear war. Such a risk in itself, however, would not constitute a breach of section 7. Possible governmental actions may be fraught with danger for the lives and security of citizens, but that does not mean that all such actions are invariably subject to restraint under the *Charter*. Although a declaration of war increases risk, it would surely be regarded as a prerogative act which did not violate section 7. Testing the cruise missile with a live warhead targeted in a densely populated area, conversely, would arguably breach the section. Applying this reasoning in the case under appeal, Madame Justice Wilson concluded that "the facts alleged in the statement of claim, even if they could be shown to be true, could not in my opinion constitute a violation of s. 7".[257]

Despite the fact that the plaintiffs lost their ultimate appeal before the Supreme Court of Canada, the result is surely one of the most remarkable and far-reaching in the jurisprudence of any democratic country. When the *Charter* was adopted, few would have prophesied that its provisions could be invoked to impeach prerogative acts of provincial and federal governments in addition to statutes. As the above case demonstrates, however, there are evidentiary difficulties involved in challenging these types of decisions. The remedy of nullifying prerogative acts of government is of an extraordinary nature and the courts will probably only allow such actions discreetly and circumspectly. Nevertheless, the availability of such an action is very attractive in a democratic society. In the rather exceptional circumstances in which it is likely to be entertained, it affords one more mechanism, in an era of "big government", to make political bodies more responsive to their democratic constituencies.

(b) *Procedural versus Substantive Due Process*

The question of whether the term "fundamental justice" in section 7 of the *Charter* denotes merely "procedural fairness" or "natural justice" in the administrative law sense, or whether it goes further, allowing courts to inquire into the content or merits of legislation, was undecided at the time the *Charter* was promulgated in April 1982.

Spokespersons for the Department of Justice before the Special Joint Committee of the Constitution were strongly inclinded to take a more restrictive view of section 7.[258] Drafters of the *Charter* apparently prefer-

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256 *Ibid.* at 488, 18 D.L.R. (4th) at 516.

257 *Ibid.* at 491, 18 D.L.R. (4th) at 519.

258 Canada, *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, No. 46 at 32-43 (27 January 1981).

red the phrase "fundamental justice" to the American term "due process of law" with its arguably substantive connotations. The norm was procedural fairness rather than substantive justice.[259] This view was in accord with the interpretation of the phrase "the principles of fundamental justice" by Chief Justice Fauteux in *Duke* v. *R.* According to the late Chief Justice, "the tribunal . . . must act fairly, without bias, and in a judicial temper, and must give [the accused] the opportunity adequately to state his case".[260]

The important issue was raised in a provincial reference case[261] which dealt with the validity of subsection 94(2) of the British Columbia *Motor Vehicle Act*.[262] That subsection created an absolute liability offence for driving with a suspended licence, which was punishable by imprisonment of not less than seven days and not more than six months. Even if an accused were to show that he drove without any knowledge that his licence had been suspended he would still be subject to a mandatory prison term of at least seven days.

In the *per curiam opinion*, the Court unequivocally adopted a "substantive" approach:

> The Constitution Act, in our opinion, has added a new dimension to the role of the courts; the courts have been given constitutional jurisdiction to look at not only the vires of the legislation and whether the procedural safeguards

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259 *See* P.W. Hogg, CONSTITUTIONAL LAW OF CANADA, 2d ed. (Toronto: Carswell, 1985) at 747. In *Den* v. *The Hoboken Land and Improvement Co.*, 15 L. Ed. 372 (1856) (U.S.S.C.), Curtis J. said that the words "due process of law" were meant to have the same meaning as "by law of the hand" in the *Magna Carta*. He said that the phrase was a restraint on all three branches of government. Congress could not make any process "due process". One of the classical formulations of the American doctrine of substantive due process emerged from Peckham J.'s majority decision in *Lochner* v. *City of New York*, 198 U.S. 45 (1905), with its memorable dissent by Mr. Justice Holmes. Peckham J. held that a New York statute limiting hours of work in bakeries to ten per day or sixty per week under the "police power" for health reasons unconstitutionally interfered with "liberty" of contract under the Fourteenth Amendment. Peckham J. inquired into the fairness, reasonableness and appropriateness of the statute and these were not, in the context, matters of "procedure". In his dissent, Holmes J. charged that the majority were making a fetish out of liberty, and there was, in fact, no such thing as unconstrained liberty. The Fourteenth Amendment, he added, did not enact Mr. Herbert Spencer's *Social Status* (Spencer was a great English nineteenth century proponent of *laissez-faire*). His position, emphasizing judicial restraint, was to allow social experimentation by states unless there was a flagrant breach of the Bill of Rights. In *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379 (1937), after its long reign, substantive due process was finally dethroned by Hughes C.J. who held that "liberty" had been artificially expanded into "freedom of contract", only to re-emerge in the U.S. Supreme Court's self-generated "right of privacy" in *Griswold* v. *Connecticut*, 381 U.S. 479 (1965) and *Roe* v. *Wade*, 410 U.S. 113 (1973).

260 (1972), [1972] S.C.R. 917, 28 L.D.R. (3d) 129; *see also* S.A. De Smith, JUDICIAL REVIEW OF ADMINISTRATIVE ACTION, 4th ed. by J.M. Evans (London: Stevens, 1980) at 156.

261 *Supra*, note 4.

262 R.S.B.C. 1979, c. 288, *as am.* S.B.C. 1982, c. 36, s. 19.

> required by natural justice are present but to go further and consider the content of the legislation.[263]

The Court then employed the test developed by Mr. Justice Dickson (as he then was) in *R.* v. *City of Sault Ste. Marie*,[264] which divided offences into three categories: (1) *mens rea* offences; (2) strict liability offences; and (3) absolute liability offences. In the first category, the state of mind or intention, knowledge or recklessness of the accused must be proven as an ingredient of liability. In the second, it is not necessary for the prosecution to prove *mens rea* since proof of the prohibited act imports the offence, but the accused may still escape liability if he can show that, as a reasonable man, he took all reasonable care. Finally, in absolute liability offences it is not open to the accused to exculpate himself by showing that he was without fault.

In this case, the Court found that the motor vehicle offence set out in subsection 94(2) was an "absolute liability offence" since the accused's lack of knowledge of the suspension of his driver's licence was irrelevant. Once the facts were proven by the prosecution he would receive a mandatory jail term of at least seven days:

> With these considerations in mind the meaning to be given to the phrase "principles of fundamental justice" is that it is not restricted to matters of procedure but extends to substantive law and that the courts are therefore called upon, in construing the provisions of s. 7 of the Charter, to have regard to the content of the legislation.[265]

The Court then decided that subsection 94(2) infringed section 7 of the *Charter*. The Court held that the provision in subsection 94(2) was simply too sweeping to be salvaged as a "reasonable limit prescribed by law" under section 1 on the grounds that "the defendant [is given] no opportunity to prove that his action was due to an honest and reasonable mistake of fact or that he acted without guilty intent".[266] Although not entirely clear from the opinion, it is probable that if the offence had been drafted as a "strict liability" rather than an "absolute liability" offence, the hurdles imposed by sections 7 and 1 might have been overcome.[267]

The decision was unanimously upheld by the Supreme Court of Canada,[268] and despite the cautious phrasing of Mr. Justice Lamer's majority judgment, there is no doubt that the Court considered that section 7 possessed an important "substantive" element. However, Mr. Justice Lamer noted the undesirability of the court evolving into a judicial "super-legislature" overriding the will of Parliament, provincial legislatures and

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263 *Supra*, note 4, 42 B.C.L.R. at 367, 147 D.L.R. (3d) at 542.

264 (1978), [1978] 2 S.C.R. 1299, 85 D.L.R. (3d) 161.

265 *Supra*, note 4, 42 B.C.L.R. at 371, 147 D.L.R.(3d) at 546.

266 *Ibid.* at 372, 147 D.L.R. (3d) at 547.

267 Certain legislation creating absolute liability offences, such as pollution offences, will not *per se* violate section 7 of the *Charter.*

268 *Supra*, note 4, [1985] 2 S.C.R. 486, [1986] 1 W.W.R. 481.

the electorate. He also notes that Canadian judges should not uncritically adopt the American substantive/procedural dichotomy because of such distinctive features in the *Charter* as sections 1, 33 and 52.

Approaching section 7 through a purposive analysis, Mr. Justice Lamer insists on reading the "life, liberty and security of the person" interests to be protected in conjunction with the qualifier "and not to be deprived thereof except in accordance with the principles of fundamental justice". He rejects the procedural or "natural justice" interpretation given to the latter phrase by the Attorney General of British Columbia:

> To do so would strip the protected interests of much, if not most, of their content and leave the "right" to life, liberty and security of the person in a sorely emaciated state. Such a result would be inconsistent with the broad, affirmative language in which those rights are expressed and equally inconsistent with the approach adopted by this Court toward the interpretation of *Charter* rights in *Law Society of Upper Canada* v. *Skapinker* . . . and *Hunter* v. *Southam Inc.*[269]

According to Mr. Justice Lamer, the term "principles of fundamental justice" is not a right but a qualifier of the right not to be deprived of life, liberty and security of the person; its function is to set the "parameters of that right".[270] He goes on to state that sections 8 to 14 of the *Charter* are specific illustrations of the right to life, liberty and security of the person in violation of the principles of fundamental justice. Many of the principles of fundamental justice are procedural in nature, but such principles are not limited to procedural guarantees. Whether a given principle falls within the category of "fundamental justice" depends on an "analysis of the nature, sources, *rationale* and essential role of that principle within the judicial process and in our legal system, as it evolves".[271] An exhaustive or enumerative definition of the term is therefore not possible.

It is clear from his detailed and painstaking analysis that while Mr. Justice Lamer has sought to avoid the nuances and ambiguities of the American substantive/procedural dichotomy, he has not shorn section 7 of the "substantive" element attributed to it by the British Columbia Court of Appeal.

Mr. Justice Lamer found that the combination of imprisonment and absolute liability in subsection 94(2) of the *Motor Vehicle Act*[272] violated section 7 of the *Charter*. Accordingly, he held that the province had not demonstrated that the provision was justifiable under section 1. In order to rid the roads of bad drivers, the government of British Columbia had argued that the risk of imprisoning a few innocent persons along with the guilty is a reasonable limit in a free and democratic society. Mr. Justice Lamer suggests, however, that if the offence had been defined as one of

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269 *Ibid.* at 501-2, [1986] 1 W.W.R. at 494-5.
270 *Ibid.* at 512, [1986] 1 W.W.R. at 504.
271 *Ibid.* at 513, [1986] 1 W.W.R. at 505.
272 R.S.B.C. 1979, c. 288, *as am.* S.B.C. 1982, c. 36, s. 19.

"strict liability" rather than "absolute liability" and if it had therefore been open to a defence of "due diligence", the only consequence of its success would have been to let those who were not culpable go free.

In rejecting the "procedural due process" interpretation of the words "fundamental justice" in section 7, Mr. Justice Lamer emphasized the immense difficulty of ascertaining the collective intention, if any, of a body of drafters with a multiplicity of members. Since the intention of the *Charter* might be conflicting or undiscoverable, or not adapted to developing new needs, the Court would have to determine the intention for itself, without necessarily being guided by the alleged intention of the *Charter*'s drafters.

In her concurring judgment, Madame Justice Wilson agreed with Mr. Justice Lamer's interpretation of the phrase "in accordance with the principles of fundamental justice" in section 7, in the light of sections 8 to 14. She asserted that these provisions are self-standing and independent of section 7. She was not ready to equate those important words from section 7 with "unreasonableness or arbitrariness or tardiness" as used in the latter sections, departing also from the majority opinion in not regarding "fundamental justice" merely as a qualifier of the rights mentioned in section 7. Madame Justice Wilson sees in the requirement for observing the principles of fundamental justice a limit on legislative powers so that the section 7 right can only be limited if it is done in accordance with fundamental justice; and even so, it must still meet the test of section 1. As to what those "fundamental principles" may be, she does not find the dichotomy between substance and procedure to be helpful. In effect, she observes that the line is a very narrow one and in certain instances there may be both a procedural and substantive aspect, such as in subsection 11(d) of the *Charter* regarding the presumption of innocence. Like Mr. Justice Lamer, Madame Justice Wilson does not attempt an exhaustive definition of the "principles of fundamental justice", but limits the phrase to those "basic, bedrock principles that underpin a system".[273] The "rule of law" acknowledged in the *Charter*'s preamble is built on more than procedure. It embraces basic rights.

As for subsection 94(2), Madame Justice Wilson held that there was a disproportion between the sentence and the offence; mandatory imprisonment "for an offence committed unknowingly and unwittingly and after the exercise of due diligence is grossly excessive and inhumane".[274] The sanction here offends the principles of fundamental justice and, to the extent of the inconsistency, is of no force or effect. As well, the guaranteed right in section 7 which is subject *only* to limits which are reasonable and justifiable in a free and democratic society cannot be taken away by the violation of a "fundamental" principle.

Although the language of both judgments carefully attempts to avoid the connotations of American "substantive due process" jurisprudence,

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[273] *Supra*, note 4, [1985] 2 S.C.R. at 530, [1986] 1 W.W.R. at 518.
[274] *Ibid.* at 530, [1986] 1 W.W.R. at 521.

one may ask, finally, whether the result does not amount to the same thing. Though they may differ somewhat in their interpretations, both agree that section 7 comprehends both procedural and substantive elements. When examining a statutory provision, courts can, in proper cases, consider its content as well as any procedural aspect. If the line, as Madame Justice Wilson concedes, is difficult to draw, it will be drawn differently by different judges. The discussion underscores the importance of the shifting composition of the court, and hence the appointive power, in setting the direction of the court.

(c) *Administrative Tribunals*

In *Singh* v. *Minister of Employment and Immigration*,[275] the Minister had made a determination that the appellants, who were Sikhs, were not entitled to "Convention refugee" status pursuant to section 45 of the *Immigration Act, 1976*.[276] "Convention refugees" were defined in subsection 2(1) of the Act, *inter alia*, as "any person who, by reason of a well-founded fear of persecution for reasons of . . . political opinion, (a) is outside the country of his nationality and is unable or, by reason of such fear, is unwilling to avail himself of the protection of that country". Six of the appellants were citizens of India and, because of their political beliefs and their association with the Akali Dal Party, feared persecution by Indian authorities should they return to India. Under subsection 71(1) of the Act, the Immigration Appeal Board had refused to allow the application to proceed because it was not of the view that it was "more likely than not" that the applicants could establish their claim. The scheme envisaged by sections 45 to 58 and sections 70 and 71 of the statute did not provide for an oral hearing in the case of an appeal, nor was there an opportunity for a refugee claimant to state his case and become cognizant of the case he had to meet.

The two concurring judgments of the Supreme Court of Canada set aside the decisions of the Immigration Appeal Board and the Federal Court of Appeal and required the Board to conduct a redetermination on the merits of the appellants' claim for refugee status. The limitations on administrative appeals set out in the scheme of the Act were too restrictive, violating either section 7 of the *Charter* or subsection 2(e) of the *Bill of Rights*.

The two concurring judgments are particularly interesting in that Mr. Justice Beetz relies on the *Bill of Rights* which, although it appears as a matter of practice to have been superseded by the *Charter*, was never repealed and operates conjointly to protect human rights in Canada.

Mr. Justice Beetz refrained from expressing any views on whether section 7 of the *Charter* afforded protection to persons in the appellants'

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275 (1985), [1985] 1 S.C.R. 177, 17 D.L.R. (4th) 422 [hereinafter *Singh*].
276 S.C. 1976-77, c. 52.

situation against a threat of deprivation of life, liberty and security of the person by *foreign* governments. He and his two colleagues preferred instead to invoke subsection 2(e) of the *Bill of Rights* which afforded a person "the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations". According to Mr. Justice Beetz, the failure of the appellants to receive a full oral hearing during any stage of the proceedings was a critical deficiency:

> They have actually been heard by the one official who has nothing to say in the matter, a senior immigration officer. But they have been heard neither by the Refugee Status Advisory Committee, who could advise the Minister, neither by the Minister, who had the power to decide and who dismissed their claim, nor by the Immigration Appeal Board which did not allow their application to proceed and which determined, finally, that they are not Convention refugees.[277]

In what may be considered the more cautious of the two opinions, Mr. Justice Beetz observed further that:

> [T]hreats to life or liberty by a foreign power are relevant, not with respect to the applicability of the *Canadian Bill of Rights*, but with respect to the type of hearing which is warranted in the circumstances. In my opinion, nothing will pass muster short of at least one full oral hearing before adjudication on the merits.[278]

For the faction of the Court which applied section 7 of the *Charter*, Madame Justice Wilson emphasized that the appellants were not asserting rights to enter and remain in Canada analogous to those in subsection 6(1) of the *Charter*, but were asserting only the limited rights available to persons found to be "Convention refugees". In general, aliens have no right to enter or remain in Canada unless it is conferred by statute.[279]

Even if one accepts the "single right" theory, articulated by Mr. Justice Marceau in *Operation Dismantle*,[280] the single "right" has three elements: "life, liberty, and security of the person". Although appellants may not be deprived of "life" or "liberty" if they return to India, an expansive reading of "security of the person" suggests that it encompasses "freedom from the threat of physical punishment or suffering as well as freedom from such punishment itself".[281] A Convention refugee has a right under section 55 of the *Immigration Act, 1976* not to "be removed from Canada to a country where his life or freedom would be threatened".[282] To deny such a right would deprive the appellants of security of

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277 *Supra*, note 275 at 229, 17 D.L.R. (4th) at 434.

278 *Ibid.* at 231, 17 D.L.R. (4th) at 435.

279 *See*, e.g., *Prata* v. *Minister of Manpower and Immigration* (1975), [1976] 1 S.C.R. 376, 52 D.L.R. 383.

280 *Supra*, note 243, [1983] 1 F.C. 745, 3 D.L.R. (4th) 193 (C.A.).

281 *Singh, supra*, note 275 at 207, 17 D.L.R. (4th) at 460.

282 S.C. 1976-77, c. 52.

the person within the meaning of section 7, provided, of course, that they can make out their claim to be "Convention refugees".

Although the absence of an oral hearing is not inconsistent with fundamental justice in every case, where a serious issue of credibility is involved, "fundamental justice requires that credibility be determined on the basis of an oral hearing".[283] The defect in the present procedure is that, despite the Crown's contention that the procedure was non-adversarial, it was in fact highly adversarial with the Minister, as adversary, "waiting in the wings".[284] At the same time, the other adversaries (the appellants) were deprived entirely of an adequate hearing and unable to persuade the Minister that his determination was wrong. It might be that in some situations they could not even ascertain what the relevant facts behind the Minister's decision were.

In attempting to salvage the legislation under section 1, the Crown had stressed the considerable inconvenience that granting a potentially very large number of people the right to an oral hearing would cause. To find for the appellants would result in "an unreasonable burden on the Board's resources".[285] However, this consideration did not find favour with Madame Justice Wilson:

> No doubt considerable time and money can be saved by adopting administrative procedures which ignore the principles of fundamental justice but such an argument, in my view, misses the point of the exercise under s. 1. The principles of natural justice and procedural fairness which have long been espoused by our courts, and the constitutional entrenchment of the principles of fundamental justice in s. 7, implicitly recognize that a balance of administrative convenience does not override the need to adhere to these principles.[286]

Pursuant to subsections 24(1) and 52(1) of the Constitution, subsection 71(1) of the *Immigration Act, 1976*[287] which restricts the Board's power to allow hearings is contrary to fundamental justice as set out in section 7. It is therefore of no force and effect to the extent of the inconsistency. It was determined that all seven cases be remanded for a hearing by the Board on their merits in accordance with the principles of fundamental justice.

The *Singh* case is of potentially immense significance in terms of requiring the very large number of administrative boards and tribunals to conduct hearings on the basis of fundamental justice as the concept is articulated either in section 7 of the *Charter* or subsection 2(e) of the *Bill of Rights*. Even in the case of those temporarily present in the country, mere administrative convenience does not nullify the mandates of "fundamental justice". A full oral hearing will most likely not be required in every case, but it will be required in more important ones, particularly where a serious

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283 *Singh, supra,* note 275 at 214, 17 D.L.R. (4th) at 465.
284 *Ibid.* at 215, 17 D.L.R. (4th) at 465.
285 *Ibid.* at 218, 17 D.L.R. (4th) at 468.
286 *Ibid.* at 218-9, 17 D.L.R. (4th) at 469.
287 S.C. 1976-77, c. 52.

issue of credibility arises. It is probable that even in other cases, tribunals and boards will be more conscious of the need to give full and candid reasons for their decisions and allow appellants to make full written submissions with respect to them. *Audi alteram partem* is acquiring new vigour in Canadian law as a result of the *Singh* decision.

In *Keyowski* v. *R.*,[288] the accused was charged with both criminal negligence in the operation of a motor vehicle and impaired driving following an accident in which two young bicyclists were killed. There had been two trials in which neither jury was able to reach a verdict in spite of additional evidence having been adduced by the Crown at the second. A date was set for yet a third trial. Mr. Justice McIntyre found, however, that in view of all the circumstances, it would be an "abuse of process" to try the accused once more.[289] Substantially more witnesses had been called at the second trial, the Crown was represented by experienced counsel and it was unlikely that the course of justice would be enhanced by further proceedings. As Mr. Justice McIntyre notes in his judgment, some considered that the majority opinion of Mr. Justice Pigeon in the pre-*Charter* case of *Rourke* v. *R.*[290] represented the death knell of the doctrine of "abuse of process" in Canada. However, it is apparent that the present judgment indicates otherwise.

(d) *Property*

A right to property is not contained in section 7 or anywhere else in the *Charter*. In *Re Fisherman's Wharf Ltd.*,[291] Mr. Justice Dickson of the New Brunswick Court of Queen's Bench found that "security of the person" embraced certain proprietary rights. Although his judgment was affirmed on appeal, no reference was made in the appeal judgment to this *Charter* issue. If property is to be protected in addition to "life, liberty and security of the person" it would seem that a formal amendment would be required for this purpose, presumably by adding a mention to this effect following "security of the person" in section 7. However, should a guarantee of property rights be added to the Constitution, the guarantee might perhaps become overwhelmingly powerful in relation to other rights. Property enjoys substantial informal protection now.[292]

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288 (1986), [1986] 4 W.W.R. 140 (Sask. Q.B.).

289 "Abuse of process" is encompassed in the term "fundamental justice" in section 7. In the case at bar, counsel for the accused had established, to the Court's satisfaction, that a third trial would be an "abuse of process".

290 (1977), [1978] 1 S.C.R. 1021, 76 D.L.R. (3d) 193.

291 (1982), 40 N.B.R. (2d) 42, 135 D.L.R. (3d) 307, *aff'd* 44, N.B.R. (2d) 201, 144 D.L.R. (3d) 21 (C.A.).

292 There are informal guarantees of proprietary rights existing at present, such as the activities of powerful lobbies representing diverse interests in Ottawa and in the provincial capitals. An interesting point could also be made about the level of public ownership in different sectors of the Canadian economy in relation to the United States, for example, in the railways, airlines, communication industries and in the petroleum and other mineral industries. With respect to the United States, an inference arises that the

(e) *Abortion*

Eventually, the issue of whether the right to "life" in section 7 includes the life of an unborn foetus will have to be decided at the highest level. In *Borowski* v. *A.G. Canada*,[293] Mr. Justice Matheson decided that the pronoun "everyone" in section 7 did not include a foetus, which reflects the common law position that for most purposes legal personality begins with birth. A contrary finding could have rendered section 251 of the *Criminal Code*,[294] which allows therapeutic abortions upon obtaining the consent of a hospital committee, of no force or effect. This Saskatchewan Queen's Bench ruling has recently been argued before the provincial Court of Appeal[295] and will, no doubt, be decided finally by the Supreme Court of Canada.

6. *Other Legal Rights*

(a) *Section 8: Search or Seizure*

Section 8, which is a new provision not contained in the *Bill of Rights*, affords protection to "everyone" "against unreasonable search or seizure". At the present time the most important case on that provision is *Hunter* v. *Southam Inc.*,[296] in which the Supreme Court of Canada held that subsections 10(1) and (3) of the *Combines Investigation Act*[297] were of no force or effect. The appellants had made no submissions that even if the contemplated "searches" were "unreasonable" under section 8, they might be justifiable as a "reasonable limit" under section 1. As a result, the Court did not consider it necessary to rule on the application of section 1 in this case.

Subsections 10(1) and (3) authorized the Director of Investigation Research, or his agents, on production of a certificate from a member of the Restrictive Trade Practices Commission (RTPC), to enter any premises where he believed relevant evidence on matters inquired into might exist and to copy or take away any documentary material of an evidentiary

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entrenchment of property rights in the Fifth and Fourteenth Amendments may undermine any effort at nationalization. It must be remembered, however, that there may be less of a disposition towards public ownership in the United States.

293 (1983), 29 Sask. R. 16, 4 D.L.R. (4th) 112 (Q.B.).

294 R.S.C. 1970, c. C-34, *as am. Criminal Law Amendment Act*, S.C. 1974-75-76, c. 93, s. 22.1.

295 As of January 1987, the decision in the *Borowski* appeal, which was heard in December 1985, had not yet been rendered by the Saskatchewan Court of Appeal; on the original appeal, *see* "Court Reserves Abortion Decision", *The (Vancouver) Sun* (19 December 1985) A7.

296 (1984), [1984] 2 S.C.R. 145, 11 D.L.R. (4th) 641, *aff'g* 24 Alta. L.R. (2d) 307, 147 D.L.R. (3d) 420 (C.A.), *rev'g* 20 Alta. L.R. (2d) 144, 136 D.L.R. (3d) 133 (Q.B.).

297 R.S.C. 1970, c. C-23, *as am.* Bill C-91, *Competition Act* (being Part 2 of *An Act to establish the Competition Tribunal and to amend the Combines Investigation Act and the Bank Act and other Acts in consequence thereof*, 1st Sess., 33d Parl., 1984-85-86 [assented to 27 June 1986]), cl. 24 [now the *Competition Act*].

nature that he came upon. The authority was exceedingly broad; therefore, if it were held to be valid, it would allow extensive searches.

The appellants were officers of the Combines Investigation Branch of the Bureau of Competition Policy and the defendants were newspaper proprietors. When the officers commenced their search, they said they wished to see "every file" at the *Edmonton Journal*'s premises "except files in the newsroom, but including all files belonging to the publisher, J. Patrick O'Callaghan".[298] Except for what was stated in the broad terms contained in the authorization to search, they refused to say who had initiated the inquiry, under what section of the Act the inquiry had been begun, or what the subject-matter was. The newspaper company then applied for an interim injunction, arguing that the search was "unreasonable" under section 8.

At first instance, Mr. Justice Cavanagh held that on "balance of convenience" the injunction should be refused:

> If the search goes ahead and is subsequently held to have been unauthorized in law, if nothing incriminating has been found, the plaintiff will have had return of its documents and will have a claim in damages for invasion of privacy. If, however, something incriminating is found, if that incriminates the plaintiff, the plaintiff will certainly be damaged thereby but it would not be the kind of damage for which it could obtain compensation.[299]

On appeal, however, a unanimous five judge panel of the Alberta Court of Appeal[300] held subsection 10(3), and by implication subsection 10(1), to be inconsistent with section 8 of the *Charter* and therefore of no force or effect.

When the question came before the Supreme Court of Canada, Mr. Justice Dickson (now Chief Justice of the Court) adopted a teleological approach to the provision. What was its purpose? It was intended to guarantee, within the limits of reason, the rights and freedoms it enshrined. It did not authorize governmental action but constrained it. Therefore, when assessing the constitutional validity of search and seizure, it was appropriate to inquire into whether the subject of the search was "reasonable" or "unreasonable", rather than focus on governmental objectives.

A balance of interest (or "balance of convenience") test will not serve here, since the purpose of section 8 is "to protect individuals from unjustified State intrusions upon their privacy".[301] A balance of convenience test is performed *after* the search, whereas preventive measures are required to forestall an "unreasonable" search violative of individual privacy. Where it is feasible, on showing probable cause, a valid search warrant should be obtained as a pre-condition for a search and seizure. The

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298 *Supra*, note 296, [1984] 2 S.C.R. at 150, 11 D.L.R. (4th) at 645.
299 *Supra*, note 296, 20 Alta. L.R. (2d) at 155-6, 136 D.L.R. (3d) at 144.
300 *Supra*, note 296, 24 Alta. L.R. (2d) 307, 147 D.L.R. (3d) 420.
301 *Supra*, note 296, [1984] 2 S.C.R. at 160, 11 D.L.R. (4th) at 653.

provision being challenged, empowering a member of the RTPC to authorize a search and seizure, unacceptably mixes investigatory and judicial functions. The member who must pass on the appropriateness of a proposed search lacks "the neutrality and detachment necessary to assess whether the evidence reveals . . . [that] the interests of the individual must constitutionally give way to those of the state".[302] The person granting such authority is not acting judicially.

The appellants had argued that even if subsections 10(1) and (3) did not specify a standard consistent with section 8, the Court could, by "reading down", incorporate the proper standard into those provisions. The Court rejected this argument on the ground that "the overt inconsistency with s. 8 manifested by the lack of a neutral and detached arbiter renders the appellants' submissions on reading in appropriate standards for issuing a warrant purely academic".[303] Even if this were not so, the courts, as guardians of the Constitution and of individual rights, must ensure that, when enacting statutes, legislative bodies include safeguards meeting the appropriate standards. However, they should not be fixed with the responsibility of rendering "legislative lacunae constitutional".[304]

The new amendments to the *Competition Act*[305] have removed these unconstitutional search and seizure provisions replacing them with measures that more appropriately delineate the judicial and investigatory functions.

(b) *Writs of Assistance*

Writs of assistance are search warrants empowering their holders to search for evidence of a specified kind, but with no place or time indicated. In effect, they are permanent search warrants authorized under four federal statutes[306] and can be held and used by designated persons, usually members of the Royal Canadian Mounted Police, until the issuing authority withdraws them. A strong argument can be made against the "reasonableness" of such writs under section 8, but no decision at the Supreme Court of Canada level has yet found them unconstitutional. Two lower court decisions have diverged on their validity.[307]

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302 *Ibid.* at 164, 11 D.L.R. (4th) at 656.

303 *Ibid.* at 168, 11 D.L.R. (4th) at 659; on "reading down", *see McKay* v. *R.* (1965), [1965] S.C.R. 798, 53 D.L.R. (2d) 532.

304 *Hunter* v. *Southam Inc., ibid.* at 169, 11 D.L.R. (4th) at 659.

305 Bill C-91, *Competition Act* (being Part 2 of *An Act to establish the Competition Tribunal and to amend the Combines Investigation Act and the Bank Act and other Acts in consequence Othereof,* 1st Sess., 33d Parl., 1984-85-86 [assented to 27 June 1986]), cl. 24. For a thorough discussion of the amendments and the developments leading up to their implementation, *see* G. Kaiser & I. Nielsen-Jones, *Recent Developments in Canadian Law: Competition Law,* 18 OTTAWA L. REV., 401 at 457–61 and 498–500.

306 *Customs Act,* R.S.C. 1970, c. C-40, s. 145; *Excise Act,* R.S.C. 1970, c. E-12, s. 78; *Food and Drugs Act,* R.S.C. 1970, c. F-27, s. 37(3); *Narcotics Control Act,* R.S.C. 1970, c. N-1, s. 10(3).

307 Writs of Assistance were held invalid in *R.* v. *Noble* (1984), 48 O.R. (2d) 643, 14 D.L.R. (4th) 216 (C.A.); but were held valid in *R.* v. *Hamiel* (1984), 14 C.C.C. (3d) 338, 13 D.L.R. (4th) 275 (B.C.C.A.).

7. *Section 9: Arbitrary Detention and Imprisonment*

Section 9 of the *Charter* is similar to subsection 2(a) of the *Bill of Rights*. Section 9 provides that "[e]veryone has the right not to be arbitrarily detained or imprisoned", while subsection 2(a) of the *Bill of Rights* prohibits construing or applying laws so as to "authorize or effect the arbitrary detention, imprisonment or exile of any persons". The "exile" provision in subsection 2(a) is not carried forward in section 9, and hence would not be "entrenched" under section 9. However, as Professor Hogg notes, "exile would be prohibited by subsection 6(1)" of the *Charter*.[308] He also mentions *Levitz* v. *Ryan*[309] which interpreted "arbitrary" detention and imprisonment in subsection 2(a) of the *Bill of Rights* as referring to an "unreasonable or capricious" standard and which defined the term "arbitrary" as "without reference to an adequate determining principle or standard".[310] In *Re Mitchell and The Queen*,[311] Mr. Justice Linden emphasized that even detailed statutory procedures might not be free from arbitrariness. Consequently, the procedure for detention or incarceration "must be scrutinized in order to determine whether it is arbitrary in the sense of being capricious, unreasonable, or unjustifiable".[312]

In *Re Moore and The Queen*,[313] Mr. Justice Ewaschuk concluded that a sentence of indeterminate detention pursuant to section 688 of the *Criminal Code*,[314] the purpose of which is partly punitive, but mainly to protect the public, did not violate section 9 of the *Charter*. He declared that:

> [T]he legislative criteria for finding a person a dangerous offender is perhaps the most detailed and demanding in the *Criminal Code*. Furthermore, the residual discretion not to make the finding adds to rather than derogates from the statutory criterion. Moreover, the availability of this discretion does not give a court licence to be unprincipled and capricious. Instead, it recognizes that not all dangerous offenders are alike . . . and where there is a probability of cure, preventive detention may not be required.[315]

In *R.* v. *Konechy*,[316] Mr. Justice Lambert defined "arbitrary" under section 9 as a sentence of imprisonment "required by statute without regard to the circumstances of the commission of the offence or the

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308 *See* CONSTITUTIONAL LAW OF CANADA, *supra*, note 259 at 755.

309 (1972), [1972] 3 O.R. 783, 9 C.C.C. (2d) 182 (C.A.).

310 *Supra*, note 259 at 755.

311 (1983), 42 O.R. (2d) 481, 6 C.C.C. (3d) 193 (H.C.).

312 *Ibid.* at 498, 6 C.C.C. (3d) at 210.

313 (1984), 45 O.R. (2d) 3, 6 D.L.R. (4th) 294 (H.C.).

314 R.S.C. 1970, c. C-34, *as am. Criminal Law Amendment Act, 1977*, S.C. 1976-77, c. 53, s. 14.

315 *Supra*, note 313 at 10-11, 6 D.L.R. (4th) at 302.

316 (1983), 6 D.L.R. (4th) 350, [1984] 2 W.W.R. 481 (B.C.C.A.), a motion for leave to appeal to S.C.C. dismissed, 55 N.R. 156, 25 M.V.R. 132n.

regard to the circumstances of the commission of the offence or the personal circumstances of the offender, and without a reasoned application of the legal principles of sentencing".[317] He referred to a hypothetical situation where a judge, as a measure of general deterrence, was resolved to disregard the circumstances of the offender, including remorse or rehabilitation, and impose a sentence of seven days imprisonment for first offenders who drove while under suspension. Similarly, he depicted other hypothetical situations where two identical offenders would receive different sentences for committing identical crimes in identical circumstances, or would receive the same sentence for committing the same crime in vastly different circumstances.

In *Belliveau* v. *R.*,[318] the plaintiff was first sentenced in 1977 to seven years imprisonment, but was released in 1982 on mandatory supervision subject to section 15 of the *Parole Act*.[319] The *Parole Act* provides, *inter alia*, for re-incarceration and loss of remission should the inmate commit an additional offence. Under subsection 15(3) an inmate is also given the choice of remaining in the institution to complete his sentence. After being charged with trafficking in a narcotic, the plaintiff was convicted and returned to custody, whereupon the National Parole Board revoked his mandatory supervision with no credit of remission. The prisoner, representing himself, challenged the constitutionality of the entire mandatory remission system on *Charter* grounds. As Mr. Justice Dubé said: "The prisoner has a choice as to accepting mandatory supervision or remaining incarcerated to the end of his sentence. Prisoners resent that choice. They strongly feel that their remission period should be free of correctional control. They resent even more the loss of remission for breach of condition."[320] In upholding the constitutional validity of the system, Mr. Justice Dubé emphasized that the discretion of parole officers is not unfettered; rather, they "must act fairly, reasonably. They cannot re-incarcerate a prisoner and take away his remission without good cause."[321] However, while under mandatory supervision, the commission of another crime triggers the application of the *Parole Act*.[322] In such a case, the plaintiff is not "arbitrarily" detained or imprisoned.

8. *Section 10: Rights on Arrest or Detention*

The interrelated provisions of this section circumscribe the legal right to arrest or detain by police and others:

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317 *Ibid.* at 361, [1984] 2 W.W.R. at 492.

318 (1984), [1984] 2 F.C. 384, 10 D.L.R. (4th) 293 (T.D.).

319 R.S.C. 1970, c. P-2, *as am. Criminal Law Amendment Act, 1977*, S.C. 1976-77, c. 53, s. 28.

320 *Supra*, note 318, at 392, 10 D.L.R. (4th) at 299.

321 *Ibid.* at 395, 10 D.L.R. (4th) at 302.

322 R.S.C. 1970, c. P-2, *as am. Criminal Law Amendment Act, 1977*, S.C. 1976-77, c. 53, s. 28.

(b) to retain and instruct counsel without delay and to be informed of that right; and
(c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

In *R.* v. *Therens*,[323] the accused motorist was requested by the police to provide a sample of his breath pursuant to subsection 235(1) of the *Criminal Code*.[324] In complying with the demand by the officer to accompany him to the police station for the breathalyzer test, the accused was found to be "detained" within the meaning of section 10 and thus should have been informed without delay of his right to retain and instruct counsel pursuant to subsection 10(b). In failing to do this, the police violated the accused's rights. By somewhat divergent routes, a majority of the Court held that since the breathalyzer evidence had been obtained in a way which infringed the *Charter*, it should be excluded at trial. To admit it would bring the administration of justice into disrepute in accordance with subsection 24(2) of the *Charter*.

In their dissent, Mr. Justice McIntyre and Mr. Justice Le Dain did not consider that the admission of the evidence would, under these circumstances, bring the administration of justice into disrepute. In their opinion, the triggering of the exclusionary clause in subsection 24(2) was not automatic. Previously, in *Chromiak* v. *R.*,[325] the Supreme Court of Canada had held that submission to a breathalyzer test at the roadside did not constitute "detention", the motorist having co-operated with the police. The police, therefore, could rely on *Chromiak* and assume that the accused did not have the right asserted. Under *those* circumstances the minority concluded that the obtaining of evidence did not tarnish the administration of justice. The line between voluntary compliance with the police and detention is, of course, a fine one.

Therens is a very important precedent since it imports a *Miranda*-like rule into police investigative procedures in Canada. On the warning that is required, the United States Supreme Court said:

> Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning.[326]

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323 (1985), [1985] 1 S.C.R. 613, 18 D.L.R. (4th) 655 [hereinafter *Therens*].
324 R.S.C. 1970, c. C-34, *as am. Criminal Law Amendment Act, 1975*, S.C. 1974-75-76, s. 16(1).
325 (1979), [1980] 1 S.C.R. 471, 102 D.L.R. (3d) 368 [hereinafter *Chromiak*].
326 *Miranda* v. *Arizona*, 384 U.S. 436 at 444-5 (1966).

9. *Section 11: Fair Process*

Section 11 specifies in detail the rights of a person to fair process upon being charged with an offence. Subsection 11(a) provides that those charged have the right to be informed without unreasonable delay of the specific offence. In *R.* v. *Goreham*,[327] the accused, who was charged with "exceeding the prima facie [speed] limit" was discharged in the lower court because the specificity with which the offence was described was insufficient to meet the standard in subsection 11(a). However, on a stated case, the Appeal Division of the Nova Scotia Supreme Court held that the charge had given the respondent sufficient information to meet the requirements of the provision. The reference to "prima facie limit" meant simply that the provincial speed limit was eighty kilometers per hour, unless otherwise posted.

The question of what constitutes "unreasonable delay" in the subsection will depend on a number of matters, such as the gravity and complexity of the offence, the time needed for investigation, the reason for delay and whether the accused had been prejudiced thereby. In *R.* v. *Thompson*,[328] the British Columbia Court of Appeal held that an accused who had been involved in an accident resulting in a fatality in September 1981 could not invoke subsection 11(a). The accused had been interviewed by police in July 1982, after which she was charged with dangerous driving in September 1982. However, she had not been informed of this charge until January 1983. The accused had realized that she was under investigation and the delay in informing her was allegedly to prevent her suffering distress over the holiday season in 1982. Having regard to the nature of the offence and all of the circumstances, the trial date in April 1983, at which time both counsel were ready to proceed, was held not to be unreasonable. Moreover, the accused could not show that she had been prejudiced by the delay.

Subsection 11(b) requires that a person charged with "an offence" be tried "within a reasonable time". Again, the standard of reasonableness will depend on a wide range of factors. In *R.* v. *Donald*,[329] it was held that a delay of two years between the time that the accused was charged with a narcotics offence and the time of his trial was not of such a "shocking nature" that it would lead the Court to infer that the accused's rights under subsection 11(b) were violated. In *R.* v. *Stapleton*,[330] the Appeal Division of the Nova Scotia Supreme Court reversed a lower court judgment dismissing a charge of extortion where the accused had not been tried for one year. The Court held that there "was no evidence that counsel were responsible for the delay or that the respondent had been prejudiced in any way. The sole cause of the delay was the fact that the Supreme Court terms

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327 *R.* v. *Goreham* (1984), 64 N.S.R. (2d) 68, 10 D.L.R. (4th) 143 (S.C.A.D.).
328 (1983), 48 B.C.L.R. 169, (*sub nom. Re R. and Thompson*) 3 D.L.R. (4th) 642.
329 (1983), 5 D.L.R. (4th) 382, 9 C.C.C. (3d) 574 (B.C.C.A.).
330 (1983), 62 N.S.R. (2d) 316, 6 D.L.R. (4th) 191.

did not take place until the Spring."[331] In *Re Regina and Beason*,[332] the Ontario Court of Appeal held that a delay of more than four years in bringing the accused to trial on a simple theft charge was *prima facie* excessive, requiring an examination of the reasons for the delay. A balancing test was used in the case. The Crown's failure to provide adequate courtroom facilities weighs against it, while the accused's failure to appear, even through mistakes or inadvertance, weighs against him. This case had been adjourned three times because of lack of court space and twice because of the Crown Attorney's absence. The charge was a relatively simple one and the investigation should not have consumed a great deal of time. Taking into account all of these circumstances, Mr. Justice Martin held that subsection 11(d) had been contravened.

On the other hand, in *Re Kott and The Queen*,[333] where there had been a delay of six years between the laying of the information and the drafting of the indictment in a case of conspiracy to commit fraud under several sections of the *Criminal Code*, the Quebec Court of Appeal held that subsection 11(b) had not been violated. The alleged fraud involved roughly four and a half million dollars and was extremely complex. As well, some of the delay in this case had elapsed before the *Charter* came into force.

With regard to the question of retroactivity, although he did not formally consider it, Mr. Justice Lajoie mentioned the argument by counsel that the *Charter* should nevertheless apply to the delay because subsection 11(b) implemented a pre-existing legal principle.[334] If this argument were accepted, counsel would presumably have to differentiate in future cases between those *Charter* sections which did and those which did not enshrine existing legal principles as of April 1982. For example, it might be argued that section 8, prohibiting unreasonable search or seizure or subsection 19(b), guaranteeing a right to retain and instruct counsel without delay, do not enshrine pre-existing legal principles.

In *R.* v. *Boron*,[335] Mr. Justice Ewaschuk ruled that the time to be

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331 *Ibid.* at 317, 6 D.L.R. (4th) at 192.

332 (1983), 43 O.R. (2d) 65, 1 D.L.R. (4th) 218.

333 (1983), 1 D.L.R. (4th) 736, 7 C.C.C.(3d) 317, motion for leave to appeal to S.C.C. refused [1983] 2 S.C.R. ix, 51 N.R. 159.

334 *Compare* the statement of Osborne J. in *R.* v. *Mills* (1983), 40 O.R. (2d) 112 at 123-4, (*sub nom. Re Mills and The Queen*) 144 D.L.R. (3d) 422 at 435 (H.C.), aff'd 43 O.R. (2d) 631, 2 D.L.R. (4th) 576 (C.A.), *aff'd* [1986] 1 S.C.R. 863, 29 D.L.R. (4th) 161, that subsection 11(b) creates a new right not equated with any other common law right: "Any pre-*Charter* delay, is relevant only to the extent that it is to be assessed with post-*Charter* delay, and weighed in the light of that post-*Charter* delay, on the general issue of whether the accused has been denied his right to a trial within a reasonable time." *But see* Lamer J.'s dissenting opinion, [1986] 1 S.C.R. 863, 29 D.L.R. (4th) 161 and particularly his comments at 948-50, 29 D.L.R. (4th) at 241-3.

335 (1983), 43 O.R. (2d) 623, 3 D.L.R. (4th) 238 (H.C.). Mr. Justice Ewaschuk was of the opinion that some of his brethren were zealous to overrule, on *Charter* grounds, the Supreme Court of Canada's ruling in *Rourke* v. *R.*, *supra*, note 290, which held that delay by the Crown before laying a charge "did not in itself constitute grounds for dismissing a charge on the basis of abuse of process". *See* 43 O.R.(2d) at 627, 3 D.L.R. (4th) at 242.

considered in order to ascertain whether the "reasonable time" standard had been breached was not from the time of the commission of the offence but rather from the laying of the charge. In certain regulatory offences, the infraction may only come to light a considerable time after its occurrence and in some cases the accused may abscond. Referrring to the judgment of Mr. Justice Maher in *R.* v. *Dahlem*,[336] wherein the latter held that the time between the commission of the offence and the preferring of charges may be taken into consideration, Mr. Justice Ewaschuk held that this contradicted the plain words of subsection 11(b) and should not be followed. With the lower courts divided, however, a conclusive resolution of the issue must await determination by higher authority.

Subsection 11(c) prohibits self-incrimination whereby persons charged with an offence are "not to be compelled to be a witness in proceedings against that person in respect of the offence". In *R.* v. *Wooten*,[337] the important issue arose of whether proceedings where persons were compelled to testify before an immigration board were "civil" in nature, and whether in such a case a witness could invoke subsection 11(c). The relevance of subsection 11(c) in the criminal process is clear; however, its application to proceedings which are not or may not necessarily be criminal is less certain. Mr. Justice Macdonald concluded that subsection 11(c) had no application to the case at bar since the "inquiry itself was not a 'criminal or penal proceeding'".[338] It might otherwise be argued, however, that administrative tribunals are often able to impose penalties which are just as severe as criminal sanctions although they are not formally recognized as being "penal". It might not be improper to regard them as "penal" in substance, if not in form, and to extend the protection of subsection 11(c) to witnesses compelled to give testimony before them. In *Re Eagle Disposal Sys. Ltd. and Minister of the Environment*,[339] the making of an order to clean up certain premises after a charge had been laid against the owner was held not to trigger subsection 11(c) since the order was made by an independent agent administering an Act for a public purpose and was not made to further an investigation in the sense of breaching subsection 11(c).

Subsection 11(d) enshrines in the *Charter* the hallowed right of the presumption of innocence. Any person charged with an offence has the right "to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal".

In *R.* v. *Oakes*,[340] one of the most significant cases to date on self-incrimination, the Supreme Court of Canada unanimously held that the "reverse onus" provision in section 8 of the *Narcotic Control Act*,[341]

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336 (1983), 25 Sask. R. 10, [1983] W.C.D. 130 (Q.B.).
337 (1983), 5 D.L.R. (4th) 371, 9 C.C.C. (3d) 513 (B.C.S.C.).
338 *Ibid.* at 376, 9 C.C.C. (3d) at 517.
339 (1983) 44 O.R. (2d) 518, 5 D.L.R. (4th) 70 (H.C.).
340 (1986), [1986] 1 S.C.R. 103, 24 C.C.C. (3d) 321.
341 R.S.C. 1970, c. N-1.

displacing the normal burden of proof by the Crown and requiring an accused to prove, on a balance of probabilities, that he or she was not in possession of a narcotic for the purpose of trafficking, violated the presumption of innocence in subsection 11(d). Chief Justice Dickson defined the requirements of subsection 11(d) as follows:

> First, an individual must be proven guilty beyond a reasonable doubt. Second, it is the State which must bear the burden of proof. As Lamer J. stated in *Dubois v. The Queen*. . . :
>
> > Section 11(d) imposes upon the Crown the burden of proving the accused's guilt beyond a reasonable doubt as well as that of making out the case against the accused before he or she need respond, either by testifying or calling other evidence.
>
> Third, criminal prosecutions must be carried out in accordance with lawful procedures and fairness. The latter part of s. 11(d), which requires the proof of guilt "according to law in a fair and public hearing by an independent and impartial tribunal", underlines the importance of this procedural requirement.[342]

After an extensive review of Canadian and other authorities, many of which had found reverse onus clauses unconstitutional, Chief Justice Dickson referred to the "rational connection" test. This test is sometimes cited to uphold reverse onus clauses where there is a rational nexus between a basic fact and a presumed fact: "A basic fact may rationally tend to prove a presumed fact, but not prove its existence beyond a reasonable doubt. An accused person could therefore be convicted despite the presence of a reasonable doubt. This would violate the presumption of innocence."[343] The Chief Justice held that the test was not appropriate in the context of subsection 11(d). However, he added that the "rational connection test" could be applied at a later stage in connection with section 1 of the *Charter*.

Chief Justice Dickson then went on to consider the application of section 1, laying down some valuable general principles. Two criteria must be met to establish that a limit is reasonable and "demonstrably justified in a free and democratic society": (1) the objective which limits a *Charter* right must be sufficiently important to warrant overriding a constitutionally protected right or freedom"; and (2) once the sufficiency of the objective has been established, the means chosen must be reasonable and demonstrably justified. This latter criterion involves a proportionality test, which will vary with the circumstances, in which the courts must balance individual, social and group interests. Even if the first two criteria are met, the severity of the deleterious effects of a measure on individuals or groups may render it unjustifiable under section 1.

In the context of the case under consideration, Parliament's interest in curbing drug traffic was a "substantial and pressing" objective. However,

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342 *Supra*, note 340 at 121, 24 C.C.C. (3d) at 334-5.
343 *Ibid.* at 134, 24 C.C.C. (3d) at 344.

when one considers the means employed and applies the proportionality test, section 8 of the Act lacks internal rationality. As Chief Justice Dickson reasoned, "it would be irrational to infer that a person had an intent to traffic on the basis of his or her possession of a very small quantity of narcotics".[344] Since there are no limits governing the presumption, it may produce results which defy both rationality and fairness.

Subsection 11(e) provides that persons charged with "an offence" shall not be denied reasonable bail without just cause and subsection 11(f) enshrines the right to trial by jury for offences punishable by imprisonment for five years or more.[345]

Section 526.1 of the *Criminal Code*[346] provides that where an accused elects trial by judge and jury, but fails to appear for trial without lawful excuse, he loses his right to a jury trial and may be tried by a judge or magistrate alone. In *R.* v. *Crate*,[347] the accused was charged with rape, was granted judicial interim release, but failed to appear for his trial as scheduled. Faced with the prospect of being tried by judge alone, the accused then applied to the Court of Queen's Bench for an order, pursuant to section 24 of the *Charter*, declaring that section 526.1 violated subsection 11(f) of the *Charter*. The application was refused, whereupon the accused requested the Court of Appeal to rule that section 526.1 was not a reasonable limitation upon subsection 11(f) of the *Charter* which could be demonstrably justified in a free and democratic society. The Court held that while subsection 11(f) confers a right to trial by jury, it does not require such trials. It is sufficient if the accused has a choice. After electing to be tried by judge and jury, he can even re-elect to be tried by judge alone. As Mr. Justice Lieberman declared, "[i]t is our firm opinion that s. 11(f) of the *Charter* is not violated by what is tantamount to a deemed re-election under s. 526.1 of the *Code*".[348] Moreover, any limitation on subsection 11(f) of the *Charter* imposed by section 526.1 is demonstrably justified in a free and democratic society. Upon having called on the State to empanel a jury, and on his fellow citizens to serve on it, the accused cannot impose that duty on them a second time unless he meets the requirements of section 526.1.

In *R.* v. *Langevin*,[349] the Ontario Court of Appeal held that an accused had no right to a jury trial on a hearing for him to be declared a "dangerous offender" pursuant to section 689 of the *Criminal Code*,[350] because in those circumstances he has already been convicted and is therefore no longer charged with an offence.

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344 *Ibid.* at 142, 24 C.C.C. (3d) at 350.

345 With the exception of cases tried under military law by a military tribunal.

346 R..S.C. 1970, c. C-34, *as am.* S.C. 1974-75-76, s. 65, Bill C-18, *Criminal Law Amendment Act, 1985*, 1st Sess., 33d Parl., 1984-85 [c. 19], cl. 122.

347 (1983), 57 Alta. R. 354, 1 D.L.R. (4th) 149 (C.A.).

348 *Ibid.* at 356, 1 D.L.R. (4th) at 152.

349 (1984), 45 O.R. (2d) 705, 8 D.L.R. (4th) 485.

350 R.S.C. 1970, c. C-34.

Subsection 11(g) entrenches a guarantee against retroactivity. To be punishable, any culpable act or omission must at the relevant time have been an offence under Canadian or international law, or be criminal according to the general principles of law recognized by the community of nations. The last phrase obviously does not refer to "international law", which is mentioned earlier. It seems rather to refer to an inductive test embracing those acts which although not criminal according to Canadian or international law, are criminal by consensus of national penal laws throughout the international community.

Subsection 11(h) prohibits double-jeopardy, but only if the accused is finally acquitted or finally found guilty and punished for the offence. In *R.* v. *Wigglesworth*,[351] Mr. Justice Cameron distinguished between para-military disciplinary offences and criminal offences by holding that a member of the Royal Canadian Mounted Police who had mistreated a prisoner and had been convicted of a disciplinary infraction could be tried again for assault under the *Criminal Code* in accordance with subsection 11(h). Although arising from the same set of facts, the offences were actually distinct. One offence is disciplinary in nature, arising from professional misconduct, while the other is criminal in character. By analogy, it might be argued that many service offences committed by the military, such as those tried summarily by commanding officers under the *National Defence Act*,[352] are "administrative" in nature and thus would not preclude further "criminal" proceedings.

Subsection 11(h) provides that persons charged and finally found guilty and punished must not be tried or punished for the offence again. In *R.* v. *T.R. (No. 2)*,[353] Mr. Justice McDonald was faced with an application by the Crown to have the accused tried in the ordinary courts when she had already been found guilty of the delinquency of manslaughter under the *Juvenile Delinquents Act*.[354] When the juvenile invoked subsection 11(h), the Court took a conjunctive approach. She had, indeed, finally been found guilty, but had she been punished as required by subsection 11(h)?[355] The Court found three characteristics of punishment: (1) imposition of a term of imprisonment or a fine, (2) the experiencing of pain or other unpleasant consequences, and (3) a degree of stigmatization. Involuntary confinement of the juvenile could be considered punishment only if all three of the foregoing elements co-existed. Mere deprivation of liberty is not punishment unless it involves pain and stigmatization. In this case the juvenile was confined, but only "in order to obtain treatment for her as a good parent would try to do".[356] Her treatment did not produce pain or unpleas-

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351 (1984), 31 Sask. R. 153, 7 D.L.R. (4th) 361 (C.A.), motion for leave to appeal to S.C.C. granted [1984] 1 S.C.R. xiv, 55 N.R. 235.

352 R.S.C. 1970, c. N-4.

353 (1984), 51 Alta. R. 63, 7 D.L.R. (4th) 263 (Q.B.).

354 R.S.C. 1970, c. J-3, *as rep. Young Offenders Act*, S.C. 1980-81-82-83, c. 110.

355 *Supra*, note 350 at 68, 7 D.L.R. (4th) at 268.

356 *Ibid.* at 69, 7 D.L.R. (4th) at 271.

ant consequences and there had been no publicity which would lead to stigmatization. Accordingly, she had not been punished for the "offence" and subsection 11(h) had not been violated.

Mr. Justice McDonald's definition of punishment which excludes involuntary confinement effected for a benign purpose is not entirely convincing. Ingenious as his cumulative definition of punishment may be, a confined juvenile would surely desire to be elsewhere. It is difficult to appreciate why coercive restrictions on physical movement, however benign the purpose, are not "punishment".

Finally, subsection 11(i) provides that where a punishment is varied between the commission of the offence and the time of sentencing, the accused is entitled to the benefit of the lesser punishment. For example, if capital punishment were to be restored in Canada, an accused who had committed capital homicide before its re-imposition and was sentenced afterwards would be entitled to the present less severe punishment, which is life imprisonment.

10. *Section 12: Cruel and Unusual Treatment and Punishment*

Section 12 prohibits the infliction of "cruel and unusual treatment or punishment". Of great interest will be the approach that the Supreme Court of Canada takes to the possible restoration of capital punishment in Canada, either by way of a reference under section 55 of the *Supreme Court Act*[357] or through a case on appeal. In *Miller* v. *R.*,[358] the Court held that a mandatory sentence of death was not cruel and unusual punishment under subsection 2(b) of the *Bill of Rights*, but the entrenched *Charter* provision could well be interpreted differently. It is noteworthy that in the foregoing case, Mr. Justice McIntyre (now a Justice of the Supreme Court of Canada) dissented while sitting on the British Columbia Court of Appeal.[359] He would have held the death penalty inoperative by reason of subsection 2(b). In *Furman* v. *Georgia*,[360] the United States Supreme Court held the capital penalty imposed by Georgia to be cruel and unusual because it degraded human beings and could potentially be imposed arbitrarily and capriciously. However, in *Gregg* v. *Georgia*,[361] the same Court decided that a redrafted state law imposing the death penalty, but with procedural safeguards, did not violate the cruel and unusual standard of the Eighth and Fourteenth Amendments.

To date, cases[362] that have considered section 12 have held, *inter alia*, that sentences of indeterminate detention for dangerous offenders under

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357 R.S.C. 1970, c. S-19.

358 (1976), [1977] 2 S.C.R. 680, [1976] 5 W.W.R. 711, *aff'g* (1975), 63 D.L.R. (3d) 193, [1975] 6 W.W.R. 1 (B.C.C.A.).

359 *Ibid.*, 63 D.L.R. (3d) 199, [1975] 6 W.W.R. 1.

360 408 U.S. 238 (1972).

361 428 U.S. 153 (1976).

362 *R.* v. *Langevin, supra,* note 349; *R.* v. *Belliveau, supra,* note 318.

the *Criminal Code*[363] as well as the system of mandatory supervision of released inmates under the *Parole Act*,[364] along with its incidents, do not violate section 12.

11. *Section 13: Self-incrimination*

Section 13 prohibits self-incrimination in the sense that testimony of an incriminating nature tendered by a witness in former proceedings may not be used against him or her in fresh proceedings, except in cases such as perjury.

The most important case decided on this section to date is *Dubois* v. *R.*[365] The Supreme Court of Canada held that where an accused had testified in a first trial taking place before the *Charter* came into force, incriminating evidence given at that trial was not admissible against him at a later trial, the date of which was after the *Charter* had been promulgated. At the first trial, the appellant admitted that he had killed the deceased but alleged certain circumstances in justification. His conviction was successfully appealed and a new trial was ordered on grounds of misdirection. At the new trial, the accused neither testified nor called evidence. However, over his objections, the prosecution read in the accused's testimony from the first trial. He was again convicted and again appealed, asserting his rights under section 13.

For the majority, Mr. Justice Lamer underlined the importance of interpreting the diverse sections of the *Charter* as an inter-related system:

> To allow the prosecution to use, as part of its case, the accused's previous testimony would, in effect, allow the Crown to do indirectly what it is estopped from doing directly by s. 11(c), i.e. to compel the accused to testify. It would also permit an indirect violation of the right of the accused to be presumed innocent and remain silent until proven guilty by the prosecution, as guaranteed by s. 11(d) of the *Charter*. Our constitutional *Charter* must be construed as a system where "Every component contributes to the meaning as a whole, and the whole gives meaning to its parts".[366]

He held further that section 13 operates at the second proceedings and that it is immaterial whether the evidence is given voluntarily or under compulsion. The Crown had argued that, on a literal reading, the challenged evidence must have been incriminating in both the first proceedings *and* in the second proceedings. Mr. Justice Lamer, however, rejected this argument, stating that "the literal approach defeats the nature and purpose of the section and furthermore leads to absurdity. When such is the case, the literal approach should not prevail unless the language used is of 'absolute

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363 R.S.C. 1970, c. C-34.

364 R.S.C. 1970, c. P-2, *as am. Criminal Law Amendment Act, 1977*, S.C. 1976-77, c. 53, s. 28.

365 (1985), [1985] 2 S.C.R. 350, 23 D.L.R. (4th) 503, *rev'g* 40 Alta. R. 325, 69 C.C.C. (2d) 494 (C.A.).

366 *Ibid.*, [1985] 2 S.C.R. at 365, 23 D.L.R. (4th) at 528.

intractability', which is not the case here."[367] The incriminating nature of the evidence must be evaluated, therefore, in the second proceedings.

12. *Section 14: Right to an Interpreter*

Section 14 entitles a witness or party "in any proceedings who does not understand or speak the language" of the proceedings, or who is deaf, to have the assistance of an interpreter.

In *R.* v. *Petrovic*,[368] the accused, who was of Serbo-Croatian origin, was convicted of assault causing bodily harm contrary to section 245.1 of the *Criminal Code*,[369] and received a sentence of five years imprisonment. The interpreter had translated only part of the sentencing proceedings. A police constable, fluent in Slavic languages, swore that the appellant could fully comprehend English; although the latter swore that he neither spoke nor understood the language. It was held that a court should not be zealous in denying a party his rights to an interpreter under section 14:

> A person may be able to communicate in a language for general purposes while not possessing sufficient comprehension or fluency to face a trial with its ominous consequences without the assistance of a qualified interpreter. Even if that person speaks broken English or French and understands simple communications, the right constitutionally protected by s. 14 of the Charter is not removed.[370]

Since only the sentence proceedings were tainted by lack of full translation during the trial, the remedy granted under subsection 24(1) of the *Charter* was the varying of the sentence, not the quashing of the conviction. To the extent that an accused lacks translation services, of course, it may be said that he or she is not "present" at the trial as is his or her right.

In *Sadjade* v. *R.*, the Supreme Court of Canada declared, tersely, that the "[a]ppellant's request to be provided with the services of an interpreter was categorically rejected, which amounted to an error of law".[371] The Court reversed the judgment of the Quebec Court of Appeal[372] and ordered a new trial. The appellant was a Canadian citizen of Iranian origin. He knew English well, but French only poorly. The Court had denied him the services of a French interpreter to translate those parts of the evidence given in that language. The trial judge had noted that the accused was represented by counsel, leading the Court of Appeal to infer that the trial judge had meant that counsel could interpret for the accused. The Supreme Court of Canada found that this was manifestly inadequate in light of section 14 of the *Charter*.

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367 *Ibid.* at 363, 23 D.L.R. (4th) at 526-7.
368 (1984), 47 O.R. (2d) 97, 10 D.L.R. (4th) 697 (C.A.).
369 R.S.C. 1970, c. C-34.
370 *Supra,* note 368 at 104, 10 D.L.R. (4th) at 704-5.
371 (1983), [1983] 2 S.C.R. 361 at 361, 7 C.C.C. (3d) 97 at 97, *rev'g* 136 D.L.R. (3d) 605, 67 C.C.C. (2d) 189 (Que. C.A.).
372 136 D.L.R. (3d) 605, 67 C.C.C. (2d) 189 (Que. C.A.).

13. *Section 15: Equality Rights*

With its multiple provisions, section 15 paves the way for a more egalitarian society by conferring on "every individual" equality "before and under the law" and the right to "equal protection" and "equal benefit" of law without discrimination based on a number of sensitive criteria and also without discrimination in a more general sense, as seen in *Andrews* v. *Law Soc'y of British Columbia*.[373] Subsection 32(2), which is now spent, provides that "section 15 shall not have effect until three years after this section comes into force" (that was until 17 April, 1985). Because of the delay, which was largely to enable attorneys general throughout the country to ensure that statutory provisions in their respective jurisdictions conformed to section 15, by either repealing or reformulating those that did not, there have not as yet been a large number of high level cases reported on equality rights.

Andrews is an interesting example of *Charter* interpretation of egalitarian rights and provides a sharp contrast to *Law Soc'y of Upper Canada* v. *Skapinker*.[374] The petitioner Andrews was an otherwise qualified British subject and permanent resident of Canada who was refused admission to the British Columbia Bar because he was not a Canadian citizen as required by subsection 42(a) of the *Barristers and Solicitors Act*.[375] He appealed this refusal on the ground that the citizenship requirement violated the *Charter*. The chambers judge at first instance dismissed Andrew's application holding that no statute was contrary to section 15 unless it drew an irrational distinction between individuals on the basis of an irrelevant personal characteristic.[376] The requirement of citizenship was not unduly burdensome. Moreover, citizenship could be acquired after a period of residence in Canada during which applicants could obtain a knowledge of the country.

On appeal, Madame Justice McLachlin rejected the definition of discrimination as drawing distinctions between persons on irrational grounds because it entailed that "provided a reason, however objectionable, can be assigned to the distinction, discrimination is not established".[377] The statutory requirement that barristers be citizens deprived the appellant of "equal benefit of the law" under section 15 since, as a non-citizen, he was treated differently from citizens. However, that alone did not establish a violation of section 15 because it must also be shown that the provision was discriminatory in the sense that "it is unfair or unreasonable, having regard to the purposes it serves and effect it has on those who are

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373 (1986), 2 B.C.L.R. (2d) 305, [1986] 4 W.W.R. 242 (C.A.), *rev'g* 66 B.C.L.R. 363, 22 D.L.R. (4th) 9 (S.C.) [hereinafter *Andrews*].

374 *Supra*, note 237. *See* previous discussion on section 6 mobility rights.

375 R.S.B.C. 1979, c. 26.

376 *Supra*, note 373, 66 B.C.L.R. 363, 22 D.L.R. (4th) 9 (S.C.).

377 *Ibid.*, 28 B.C.L.R. (2d) at 317, [1986] 4 W.W.R. at 254.

treated unequally".[378] The appellant had to establish this on a balance of probabilities.

Madame Justice McLachlin then examined the goals purportedly served by requiring applicants for the Bar to be citizens. They included: (1) citizenship "ensures a familiarity with Canadian institutions and customs"; (2) it "implies a commitment to Canadian society"; and (3) "[l]awyers play a fundamental role in the Canadian system of democratic government and as such should be citizens".[379] None of these grounds were found to be persuasive. With regard to (1), citizens who are natural-born might reside abroad and not be cognizant of Canadian institutions or customs. Moreover, citizenship does not in itself ensure that citizens are committed to Canadian society —they may or may not be — and the commitment can be satisfied by requiring applicants who are aliens to take the oath of allegiance, which they may do. With respect to the proposition that lawyers perform a state or government function, while it is true that lawyers are "officers of the court", some work in courts and some do not, and those who do may represent the Crown or act against it. Law is, moreover, a private profession. There is no justification here for requiring lawyers to be Canadian citizens. Having rejected the justifications for the citizenship requirement, Madame Justice McLachlin found that by denying the appellant admission to the Bar, section 15 was violated:

> [T]he requirement is clearly prejudicial to the appellant and those similarly placed. Having met all the other requirements for the admission to the bar, the appellant is nevertheless unable to gain admission to practise because he is not yet a Canadian citizen. I find that the appellant has discharged the onus upon him of showing that the requirement of citizenship for admission to the practice of law is unreasonable or unfair.[380]

Applying the tests for section 1 as set out in *R.* v. *Oakes*,[381] Madame Justice McLachlin found that the citizenship requirement was not sufficiently important to override the appellant's constitutionally protected right to equality. Alternatively, if the citizenship requirement was to ensure familiarity with Canadian institutions and a commitment to Canadian society, this requirement had not been demonstrably justified and was not a "reasonable limit" on the section 15 right to equal benefit of the law.

14. *Section 28*

In the United States, classification on the grounds of sex has never been subjected to strict scrutiny by the courts, unlike such categories as

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378 *Ibid.* at 317, [1986] 4 W.W.R. at 255.
379 *Ibid.* at 318, [1986] 4 W.W.R. at 255.
380 *Ibid.* at 321-2, [1986] 4 W.W.R. at 259.
381 *Supra*, note 340.

"race" or "national origin".[382] The United States Supreme Court has developed an intermediate scrutiny test for sexual classifications. This test falls somewhere between strict scrutiny and the lower-level rational basis test which is applied to economic classifications, a version of which Chief Justice Laskin used in *Reference Re Anti-Inflation Act*.[383] The reinforcement of the prohibition against sexual discrimination in section 15 by section 28, with its powerful *non obstante* clause: "Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons" suggests that the test applied in Canada will be of the highest order.

15. *Sections 25 and 35*

The first formal amendments to the new Constitution[384] were proclaimed on June 21, 1984, by instrument under the Great Seal following resolutions by both Houses of Parliament and the legislative assemblies of at least two-thirds of the provinces having the aggregate population required by subsection 38(1) of the *Constitution Act, 1982*.

The amendments, *inter alia*, made clear that existing or future-acquired rights or freedoms, by way of land claims agreements, fell within the purview of section 25 of the *Charter* and section 35 of the *Constitution Act, 1982*. An additional provision[385] promised to convene a constitutional conference to which representatives of the aboriginal peoples of Canada would be invited before any amendment was made to subsection 91(24) of the Constitution ("Indians and lands reserved for the Indians").

The proclamation, in part, provided for the repeal of section 37.1 of the *Constitution Act, 1982*, as of April 18, 1987, when the section's provisions, which provided for the holding of constitutional conferences (including conferences with agenda items on matters affecting the aboriginal peoples of Canada), would be spent.

The most important operative part of the proclamation is as follows:

> 1. Paragraph 25(b) of the Constitution Act, 1982 is repealed and the following substituted therefor:
>
> > "(b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired."
>
> 2. Section 35 of the Constitution Act, 1982 is amended by adding thereto the following subsections:

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382 *See*, e.g., *Brown* v. *Board of Educ.*, 347 U.S. 483 (1954), which deals with racial discrimination, and *Craig* v. *Boren*, 429 U.S. 190 (1976), which deals with sexual discrimination. *See also U.S.* v. *Carolene Prod. Co.*, 304 U.S. 144 (138), where Stone J. (as he then was) first propounds his "rational basis" test for economic classifications.

383 (1976), [1976] 2 S.C.R. 373, 68 D.L.R. (3d) 452.

384 *Proclamation Amending the Constitution of Canada*, 118 Canada Gazette Pt. 1 (1984), 5238. Quebec did not participate in the amending process.

385 S.35.1.

"(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons."

3. The said Act is further amended by adding thereto, immediately after section 35 thereof, the following section:

"35.1 The government of Canada and the provincial governments are committed to the principle that, before any amendment is made to Class 24 of section 91 of the Constitution Act, 1867, to section 25 of this Act or to this Part,

(a) a constitutional conference that includes in its agenda an item relating to the proposed amendment, composed of the Prime Minister of Canada and the first ministers of the provinces, will be convened by the Prime Minister of Canada; and

(b) the Prime Minister of Canada will invite representatives of the aboriginal peoples of Canada to participate in the discussions on that item."[386]

IV. CONCLUSION

At the beginning of this survey, Thomas Berger's qualified optimism regarding the significance of the addition of the *Charter* to the Canadian public law was contrasted with Professor Ison's more pessimistic view. Berger foresees the *Charter* as a valuable protector of women, minorities, aboriginal peoples as well as being, possibly, the harbinger of a more tolerant and liberal-minded spirit in the country as a whole. On the other hand, Ison decries the possible deformation of the Supreme Court of Canada into a super-legislature resulting in the "judicialization of public policy", a task for which the tribunal is not prepared by either knowledge or experience.

Which of the two is more correct remains yet to be seen. In its initial interpretative mission, the Supreme Court of Canada has exhibited vigour, determination and foresight, and has endeavoured valiantly to give the broad terms of the *Charter* meaningful content. With its new membership, the Court is showing a cohesion and direction which it lacked under Chief Justice Laskin, who always had to contend with a powerful conservative bloc and who was often forced to dissent.

The danger that Professor Ison refers to can best be documented by two recent cases already discussed. In *Operation Dismantle*[387] the Supreme Court of Canada conceded, in principle, that prerogative powers

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386 *Proclamation Amending the Constitution of Canada,* 118 Canada Gazette Pt. 1 (1984), 5238 at 5239-40.

387 *Supra,* note 243.

could be subjected to judicial review, while in *Motor Vehicle Act*[388] it found the term "fundamental justice" in section 7 of the *Charter* to embrace what might be called a "substantive" element, enabling the Court to examine the merits or content of legislation. The Court thereby rejected the opposing view voiced by officials in the Department of Justice that the contentious term was limited to procedural due process. The Court was careful when doing so to emphasize that it did not intend to adopt all of the connotations of "substantive due process" as developed by the United States Supreme Court. However, it is obvious that a bench of prevalently conservative disposition enquiring into the exercise of prerogative powers and subjecting their contents or merits to critical re-examination would come to different conclusions than would a bench of a more liberal disposition. The question that Professor Ison seems to be asking is whether a "politicized" tribunal performing such a role on issues of public policy in Canada is appropriate. Should such tasks not be left largely to legislative bodies? These questions are worth pondering.

Accordingly, the courts, and particularly the Supreme Court of Canada at the apex of the judicial hierarchy, have acceded to great power by a combination of subsection 52(1), which declares the Constitution to be "the supreme law of Canada" and a rigid amending formula which will tend to insulate decisions at the highest level from change by amendment. Since 1982, much of the Supreme Court of Canada's energy has been devoted to *Charter* questions. There may be some merit in the contention that, in the future, the Court will be increasingly preoccupied with *Charter* issues, leaving provincial courts of appeal as forums of last resort, in a practical sense, in private law matters. The omission of a guarantee of a right to property in section 7 of the *Charter* may reinforce this tendency, since if it had been incorporated, more private law controversies would surely end up in the Supreme Court of Canada. Because of the Court's heavy caseload, the question of whether we need an intermediate tribunal of *general* jurisdiction which could ease its burden is raised.

In coming years, the Supreme Court, and courts generally, will no doubt consider highly important public policy issues. Many incendiary issues have been regarded in the past as matters of public policy for the legislatures rather than questions of law for the courts.[389] Questions are

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388 *Supra*, note 4.

389 *E.g.*, the possible restoration of capital punishment; right-to-life versus freedom-of-choice in abortion; equal pay for work of equal value by women; what constitutes discrimination against homosexuals or how sexual harassment in the workplace is to be defined; the nature and definition of aboriginal rights; the frontiers of dissent, including dissent by those who profess different lifestyles, or by vulnerable religious or ethnic minorities; the validity of language legislation under section 23 of the *Charter;* what meaning is to be given to denominational educational rights, and what numbers are needed by the children of the English minority in Quebec or the French-speaking minorities in other provinces to establish schools for those language groups; the scope and manner of exercise of powers by all kinds of administrative tribunals, and the capacity of the State to assume extraordinary powers in peacetime or wartime emergencies. A whole host of

bound to arise, consequently, about whether elected governments or appointed and politically non-responsible courts are better forums to answer such questions. How compatible with democratic decision-making is this new system? In the United States, courts have long entertained such questions, but within a constitutional framework which conceded the United States Supreme Court's importance from its beginning. In Canada, the *Charter* and subsection 52(1) are being grafted onto a parliamentary system in which the legislatures were formerly supreme. Difficult adjustments are therefore necessary. Chief Justice Dickson has warned that judges must not become legislators, evincing sensitivity from the bench for the separation-of-powers, and perhaps the courts will avoid confrontations with the executive and legislature by adopting an attitude of self-restraint.

In the above context, it need hardly be emphasized that we should endeavour to find the best judges obtainable. The need for revised appointing procedures is manifest. Judges should be chosen on grounds of merit and not because of party loyalty (although merit and partisanship are not incompatible). Where political considerations weigh heavily in the appointing process, too many good candidates with the inappropriate political credentials are overlooked. Equally important is the safeguarding and extension of the principle of judicial independence to provincially-appointed tribunals and administrative agencies deciding legal issues in order to insulate them from political pressures in their important new functions.

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hitherto relatively unfamiliar issues of mixed law and public policy will confront the courts. How, for example, is "liberty" in section 7 to be reconciled with "equality" in sections 15 and 28?