OPEN JUSTICE: THE CONSTITUTIONAL RIGHT TO ATTEND AND SPEAK ABOUT CRIMINAL PROCEEDINGS. By David M. Lepofsky. Butterworths, 1985. Pp. 368. ($65.00)

Mr. Lepofsky has written an interesting and useful contribution to the debate about the impact of the *Canadian Charter of Rights and Freedoms*[1] on Canadian society. He focuses on the difficult question of ensuring a fair trial in a democratic political system which depends on the media to supply its citizens with the information necessary to their participation in political activity. Because liberal democracies are founded on the belief that the collective good will be advanced through majority decision-making,[2] freedom of expression is fundamental to such a system. Subsection 2(b) of the *Charter* reflects the importance attached to freedom of expression.

The courts themselves are part of the political system. They are institutions about which the public must make decisions. There should be full reporting of their activities. However, as such notorious incidents as the murders of infants at the Hospital for Sick Children in Toronto show, publicity about criminal investigations can be inflammatory. Individuals can be tried and hung by the public long before setting foot in the courtroom. If an accused is to be presumed innocent, she must have a fair trial. If she has the right to a trial by jury, she must be tried by jurors unprejudiced by publicity, who will decide her fate according to the evidence presented during the trial. Subsection 11(d) of the *Charter* enshrines the right to a fair trial. The author calls the conflict between rights and freedoms protected by subsections 2(b) and 11(d), the "freedom of expression/criminal justice" issue.[3] The question raised concerns the extent to which Canadians should be free to speak about court proceedings in a legal system intended to treat accused with scrupulous fairness.

Canadians have always believed that they were free to speak their minds on most topics without constraint. Certainly, the ideology of our society tells us that freedom of speech and freedom of the media are fundamental to the functioning of our political system and distinguishes us from dictatorships of the right or left.[4] But reality is sometimes far

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

[2] *See generally* T. Emerson, THE SYSTEM OF FREEDOM OF EXPRESSION (New York: Random House, 1970) and A. Meiklejohn, FREE SPEECH AND ITS RELATION TO SELF GOVERNMENT (New York: Kennikat Press, 1948). The rationales for freedom of expression go beyond its role in democratic self-governance, *see* J.S. Mill, ON LIBERTY (1859) and T. Scanlon, *A Theory of Freedom of Expression* (1972) 1 PHILOSOPHY AND PUBLIC AFFAIRS 204.

[3] The author prefers this formulation to the more commonly heard "free press/free trial" because it, in his mind, captures the fact that there are more than two competing interests at stake. *See* chapter two, M. David Lepofsky, OPEN JUSTICE (Toronto: Butterworths, 1985) [hereinafter Lepofsky].

[4] *See, e.g., Reference Re Alberta Statutes* (1938), [1938] S.C.R. 100 especially 132-33, [1938] 2 D.L.R. 81 at 107 (*sub nom. Re Alberta Legislation*) and *Switzman* v. *Elbling* (1957), [1957] S.C.R. 285, 7 D.L.R. (2d) 337.

different from what we would like to believe. In Canada, speech is in fact extensively regulated. Traditionally, the courts have taken the view that freedom means what they rather sanctimoniously call "freedom governed by law".[5]

As Mr. Lepofsky persuasively demonstrates in chapter three of *Open Justice*, the Canadian courts generally have refused to address the important policy issues underlying freedom of expression, freedom of the media and the right to a fair trial.

> [T]he state . . . has wielded extensive power over the timing and content of expression relating to the criminal justice system in action. In discharging these powers Canadian courts often seem unaware or uninterested in the fact that in so doing they are contravening a value central to the Canadian democracy, namely freedom of expression.[6]

Thus, prior to the *Charter* the Canadian courts never reversed a verdict on appeal on the grounds of prejudicial publicity,[7] and the *Canadian Bill of Rights*[8] was almost never used to ensure an open trial.[9] As a result, Mr. Lepofsky concludes that, "in Canada prior to the *Charter*, free speech ends wherever the law, whether statute law or common law, places restrictions on its exercise".[10] Chapter three of this book seems to me to be a compelling refutation of the argument that Canadians were adequately protected against unreasonable restrictions of their freedoms of expression prior to the adoption of the *Charter of Rights*. Fundamental freedoms were curtailed and, when that happened, the courts chose to do little about it. However, the author does not show that the lack of legal protec-

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[5] *James* v. *Commonwealth* (1936), [1936] A.C. 578 at 627 *per* Lord Wright, quoted in *Reference Re Alberta Statutes*, *supra*, note 3 at 133, [1938] 2 D.L.R. 81 at 107. *See also Boucher* v. *R.* (1950), [1951] S.C.R. 265 especially 279, [1950] 1 D.L.R. 657 at 668, *per* Rinfret C.J. dissenting. This idea was reiterated by the Ontario Court of Appeal in *R.* v. *Zundel* (23 January 1987) [unreported] at 26, where the Court states:

> A "right" is defined positively as what one can do. A "freedom", on the other hand, is defined by determining first the area which is regulated. The freedom is then what exists in the unregulated area — a sphere of activity within which all acts are permissible. It is a residual area in which all acts are free of specific legal regulation and the individual is free to choose.

[6] Lepofsky, *supra*, note 3 at 53. In chapters three and five, the author discusses the constitutionality of such *Criminal Code* provisions as ss. 162(1), 246.6(4), 442, 457.2, 467.1, 470(2) and 576.1; ss. 17 and 38 of the *Young Offenders Act*, 1980-81-82-83, S.C., c. 110 *as amended* and common law doctrines such as *sub judice* contempt. It is impossible to go into the details of all these constraints in this piece, so I will talk generally about constraints on speech about court proceedings.

[7] *Ibid.* at 19-20.

[8] *Canadian Bill of Rights*, S.C. 1960, c. 44, *reprinted in* R.S.C. 1970, App. III.

[9] Lepofsky, *supra*, note 3 at 44-47. *See also Re F.P. Publications (Western) Ltd. and The Queen* (1980), 2 Man. L.R. (2d) 1, 108 D.L.R. (3d) 153 (C.A.) which, according to the author, is the only reported decision where one of the judges (Huband J.A.) used the *Bill of Rights* to review the right of the public to attend at trial.

[10] Lepofsky, *ibid.* at 91. The author uses the present tense in this sentence even though the *Charter* era should be different.

tion for speech rights resulted in serious inhibition of freedom of expression necessary to the electoral process or in abusive court proceedings.

With the adoption of the *Charter*, the approach of the Canadian courts to the definition of rights should change. The *Charter* represents a radical break with the past. It introduces a new vocabulary into the debate about the appropriate ambit of freedom in Canada. The rights and freedoms enshrined in the *Charter* are defined in the most vague and abstract terms. "Freedom of expression" or "the right to a fair trial" are not self-evident or self-defining concepts. The debate about their content is essentially a political debate because it is about the kind of society in which we, as Canadians, want to live. Only through involving a maximum number of people in the debate about the content of these concepts will we be able to develop a consensus on the shape of Canadian society that will be able to sustain any degree of legitimacy. However, the irony of the *Charter* is that this document which radically changes the vocabulary of the political debate about the kind of society we want to live in, also legalizes the debate by granting enormous powers to the courts to determine whether laws violate the rights and freedoms enumerated in the *Charter* and whether the violations are justifiable under section 1. Thus, the debate which requires the greatest degree of participation in order to legitimate its conclusions, has to take place in a forum which is elitist and not subject to popular scrutiny in regular elections.[11] The judicial system is politicized by the *Charter* while the political process is judicialized. Will this self-contradictory process result in any greater freedom for ordinary citizens?

Without ever acknowledging the importance of this question, Mr. Lepofsky argues that the *Charter* should and will change the solution adopted by the judicial system to resolve the freedom of expression/criminal justice issue. In chapter four the author describes the way in which the American judicial system has tried to maximize the freedom of the media to report on trials by using other devices, such as changes of venue and challenges to jurors, to ensure that the accused receives a fair trial. In chapter five he argues that the *Charter* ought to diminish the differences in protection afforded to free speech and public access to trials by the American and Canadian systems. The author feels that the American solution is preferable to the Canadian balancing of the interests in conflict because it allows for greater access to the courts and greater freedom to discuss the activities of the courts. This admiring view of American law has not yet found favour in our courts,[12] although experience in other democratic societies is considered by the courts to be very relevant.[13]

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[11] Courts are elitist in the sense that judges come from a very small segment of society. *See generally* A. Petter, *The Politics of the Charter* (1986) 8 SUP. CT. L. REV. 473.

[12] *Re Global Communications Ltd. and A.G. Canada* (1984), 44 O.R. 609 at 625, (*sub nom. Re Smith*) 5 D.L.R. (4th) 634 at 651 (C.A.).

[13] *See, e.g., Canadian Newspaper Co.* v. *A.G. Canada* (1985), 49 O.R. (2d) 557, 16 D.L.R. (4th) 642 (C.A.).

Section 1 of the *Charter* is central to the determination of the constitutionality of restrictions imposed on free speech about court proceedings by the *Criminal Code*.[14] The courts have adopted an expansive definition of freedom of expression[15] and it seems obvious that prohibition of the publication of evidence and contempt proceedings to punish discussion of the court system, violate section 2 of the *Charter*. Thus, the keystone of Mr. Lepofsky's argument is the method he proposes for the interpretation of section 1, in particular the method that should be used to define terms such as "reasonable limits . . . demonstrably justified in a free and democratic society".

The author suggests that there are three possible approaches to the interpretation of section 1 of the *Charter*, two of which he quite rightly rejects: complete judicial deference to Parliament and unlimited judicial discretion. The first is rejected because it would lead to nullification of the *Charter*. Judges would simply have to assume that any infringement of the rights and freedoms enumerated in the *Charter* is justified because it was enacted by Parliament. The second is rejected because it would result in untrammelled judicial activism as the courts rewrite laws to suit their independent assessment of the means necessary to attain legitimate social goals. I don't know of anyone who advocates total abdication of jurisdiction or total usurpation of the legislative function, and the author does not refer to any writings or cases supporting these views. By setting up these straw arguments, he attempts to make his own approach appear reasonable. However, the real issue is what degree of intervention is appropriate. The author proposes what he calls the "strict constructionist" approach. The purpose of this proposed method is to provide "a principled, structured, and practically-workable interpretation" of the "vague and open textured"[16] terms one finds in section 1 of the *Charter*.

Assuming that the violation of a *Charter* right or freedom is imposed by a valid law, the first step involves identifying the purpose or objective which the law under attack seeks to achieve.[17] The objective or policy must be the actual purpose of the governmental action at the time the impugned law was adopted. *Ex post facto* justifications are not relevant.[18] The second step requires an appraisal of the reasonableness of the means chosen to achieve the objective. A reasonable limit is one which enables the government to achieve its objective and which, at the same time, violates the *Charter* freedom as little as possible, if at all. If the same goal can be achieved through means which do not violate the *Charter*,

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[14] *Criminal Code*, R.S.C. 1970, c. C-34.

[15] *Retail, Wholesale and Department Store Union, Local 580* v. *Dolphin Delivery Ltd.* (1986), [1986] 2 S.C.R. 573, [1987] 1 W.W.R. 577.

[16] Lepofsky, *supra*, note 3 at 184.

[17] The method proposed by the author resembles that proposed by the Supreme Court of Canada in *R.* v. *Oakes* (1986), [1986] 1 S.C.R. 103, although the Chief Justice does not separate the first and last steps.

[18] Lepofsky, *supra*, note 3 at 190.

then the law is not reasonable. Once it is shown that the means are rationally connected to the objective and that the effects of the means are proportional to the objective,[19] the author states the final step is to determine whether

> [the] objective or goal is so important or compelling that its attainment justifies suppression of the threatened constitutional right in a society which wishes to remain free and democratic.[20]

The author defers consideration of this issue to the end of the analysis because "it involves the difficult task of sizing up competing social values, rights and claims [and] forces a reviewing court to make difficult value choices".[21] It is preferable to avoid such difficult issues when the constitutionality of the *Charter* infringement can be decided on other grounds. Presumably, this is because the difficult value choice will be controversial and require decisions that, at times, come perilously close to usurping the legislative responsibilities of Parliament.

It is not clear to me why the author calls this approach strict constructionism. As I understand it, construction means "the manner of understanding words"[22] or the interpretation of a text. The adjective "strict"stresses the necessity of adhering to the meaning of the words. The approach proposed by the author to the analysis of the constitutionality of an impugned law entails more than simply interpreting the texts of the *Charter* and of the impugned law. Each step in the analysis involves the application of criteria such as "reasonableness" or "demonstrably justified" which are extremely vague and open-ended. A decision by a court that the means used to attain a purpose are reasonable will always be open to challenge. Certainly, the analysis is structured into steps but the steps do not in themselves provide any effective guidance to the courts. At each step in the analysis, the room for judicial discretion is great and the difficulty of proving that the law in question is or is not reasonable and demonstrably justified, very real.

The conclusions of the author show that this analytic method does not, in itself, provide self-legitimating answers to the real dilemmas created by the conflict amongst competing interests in the realm of criminal justice. Mr. Lepofsky argues that:

> Each statutory and common law rule considered collides with the Charter's free expression guarantee. Each, unless narrowed or restructured, imposes

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[19] *R.* v. *Oakes*, *supra*, note 14 at 139. I am using the language from this decision to stress the similarities between the two approaches.

[20] Lepofsky, *supra*, note 3 at 192.

[21] *Ibid.* at 193.

[22] WEBSTER'S DELUXE UNABRIDGED DCICTIONARY (2d ed.). *See also* BLACK'S LAW DICTIONARY (5th ed.): "Strict (or literal) construction is construction of a statute or other instrument according to its letter, which recognizes nothing that is not expressed, takes the language used in its exact and technical meaning, and admits no equitable considerations or implications."

> limits on free speech which are not reasonable and demonstrably justified in a free and democratic society.[23]

He analyzes the constraints on freedom of expression and freedom of speech imposed by the *Criminal Code*, the *Young Offenders Act* and the common law and concludes that all of them require reworking under the *Charter*.[24] He justifies this conclusion by arguing that freedom of expression must have priority because it "is a necessary prerequisite of a democratic system of government".[25] Thus restriction of speech, because it is about criminal proceedings, is an example of an extreme violation of subsection 2(b) of the *Charter*. It is content-based and interferes with discussion by the public and the press about the activities of government, of which the courts are part. As such, the restrictions interfere with the functioning of the democratic system and reduce the ability of the public to ensure that the government, in general, and the courts, in particular, are acting properly.

Some of the conclusions reached by the author are very persuasive. For example, the common law rule of *sub judice* contempt has been used to prevent public commentary on the court system.[26] The rule is vague and uncertain and it is almost impossible for anyone to know whether a planned publication constitutes contempt. Try explaining why the portrayal of the courts as instruments of the corporate elite is contemptuous,[27] while a cartoon showing a trial judge taking perverse pleasure at repeated viewings of a film which was submitted in evidence at an obscenity trial is not.[28] The exercise is self-defeating. In a post-*Charter* ruling, the Quebec Superior Court held that freedom of the press must give way to the right to a fair trial, and used *sub judice* contempt to punish a broadcast about a trial, even though a trial judge had ruled, during the trial about which the broadcast spoke, that the broadcast had not prejudiced the accused's right to a fair trial.[29] However, the conclusion that *sub judice* contempt violates the *Charter* is compelling because this offence appears to serve no interest other than protecting the courts from criticism. The offence is *intended* to stifle speech about a government institution. The author's conclusion does not derive its legitimacy from the method proposed by the author but, rather, from the lack of justification for such an offence in a democratic society.

The case *Re Global Communications Ltd. and A.G. Canada*[30] illustrates the point that the analytical or interpretative method used to deter-

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[23] Lepofsky, *supra*, note 3 at 201.

[24] *See supra*, note 5.

[25] Lepofsky, *supra*, note 3 at 217.

[26] *Re Ouellet (No. 1)* (1976), 28 C.C.C. 338, 67 D.L.R. (3d) 73 (Que. Sup. Ct.).

[27] *R.* v. *Murphy* (1969), 1 N.B.R. (2d) 297, 4 D.L.R. (3d) 289 (S.C.A.D.).

[28] *R.* v. *Edmonton Sun Publishing Ltd.* (1981), 62 C.C.C. (2d) 318, 16 Alta. L.R. (2d) 246 (Q.B.).

[29] *R.* v. *Vairo* (1982), 4 C.C.C. (3d) 274, 147 D.L.R. (3d) 547 (Que. Sup. Ct.).

[30] *Supra*, note 10.

mine the ambit of section 1 does not in itself lead to persuasive conclusions. This case involved a challenge by a television network of a ban on the publication of evidence presented at the extradition hearing of Cathy Smith. Smith eventually pleaded guilty to criminal charges arising out of her involvement in the death by drugs of the actor, John Belushi. The ban was ordered by the Justice at the extradition hearing under section 457.1 of the *Criminal Code*. This section requires that the Justice prohibit publication of evidence, if the accused so requests, until the hearing is completed and the accused is either discharged or ordered to stand trial. If the accused is ordered to stand trial, the ban lasts until the trial is ended.

The order obviously violates the freedom of the press enshrined in section 2 of the *Charter*. Mr. Lepofsky argues that section 457.2 should be struck down because it violates section 2 by restricting freedom of the press and therefore the freedom of Canadians to form and express opinions about the functioning of the court system which should be subject to democratic scrutiny as part of our government. The author agrees that the section has a laudable objective. It is intended to protect the accused's right to a fair trial by ensuring that no prejudicial publicity will taint the process. However, the author argues that the violation of section 2 of the *Charter* is not reasonably and demonstrably justified because the freedoms of speech and of the press are vital to our democracy and the right to a fair trial can be adequately protected through other means, such as rigorous jury selection and an order for a change in venue.

The argument is superficially appealing. Mr. Lepofsky rightly points out in chapter two that the interests which are in conflict are many, and the objective must be to maximize the protection provided all of the interests. But why should the freedom of a television network take priority over the right of an accused to a fair trial? The ringing invocation of the role of free expression in a democratic system is not persuasive. A section 457.2 order does not prevent the media from reporting abuses of power and procedure by a judge or Crown prosecutor. It prohibits only the publication of evidence presented during the hearing. The media can continue to report about the hearing. In addition, the order is merely temporary. If the public really needs to find out about the evidence, it will be able to do so once the accused is discharged or the trial is completed. The order does not deny access to the courtroom. Thus, the media are free to attend the hearing and report on the evidence presented as soon as it is clear that its publication will not prejudice the trial.

Given that the media could publish reports about the extradition hearing once the order was lifted, why were the media so anxious to challenge the ban? The media in Canada are sincerely concerned with protecting their freedom to report and are rightly vigilant. But they are also interested in making money by expanding their audience. The death of John Belushi was a sad and sordid affair.[31] It did not involve any great

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[31] *See* B. Woodward, WIRED: THE SHORT LIFE AND FAST TIMES OF JOHN BELUSHI (New York: Simon and Schuster, 1984). The success of this book suggests that the media did not really have to publish this story right away to inform the public.

affairs of state. The future of democracy was not at stake. It involved a number of well-known personalities and revealed much about casual use of drugs and casual sex amongst those that the American star system consumes so ruthlessly in its desire to provide a product to the entertainment-consuming public. That public loves to hear about stars, not because it needs information to participate in democratic decision-making, but because it lives vicariously through tales about the lives of the famous, published in respectable and not so respectable media. The reason for challenging such a ban is that the public wants to read or hear about the sordid details of the life and death of an overpaid actor immediately. It won't be interested in two months, when some new story monopolizes attention. The story won't sell newspapers, or attract viewers, when the order is lifted.[32]

Why should the thirst for revelation of the sordid details of the lives of stars take priority over the right of the accused to a fair trial? The accused has a lot at stake. Her freedom is in jeopardy. Her right to circulate freely and to participate fully in society may be withdrawn because she is accused of committing a criminal offence. The expulsion of someone from society is a grave penalty and should only be carried out when it is clearly shown that the accused merits such treatment. In Canada, the legal system has not allowed extensive challenges to potential jury members, sequestration of the jury and changes of venue. Why should we adopt the American approach when the author has not shown that the limits Canadian society has traditionally imposed on freedom of expression and freedom of the media have extensively stifled free speech and the search for truth?

My point is not that Mr. Lepofsky's conclusion is wrong. His opinion that freedom of expression should be given priority over the right to a fair trial represents a possible consensus on the appropriate balancing of rights under the *Charter*. However, nothing in his "strict constructionist" approach compels one to agree with his conclusion. The method which he proposes is infinitely malleable and can be used to justify other weighings of interests in conflict when a judge must decide whether to ban publication of evidence or the name of the accused. I am sure I could make good arguments in favour of upholding each of the *Criminal Code* provisions challenged in this book.

The reason why the method proposed does not resolve the issue of the appropriate scope for the rights and freedoms enshrined in the *Charter* is that this issue is fundamentally a philosophical and political issue. Mr. Lepofsky tries to treat the question as a purely *legal* issue which can be resolved through the interpretation of legal texts. The author acknowl-

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[32] The paucity of references to the vast American literature on the First Amendment and the much smaller Canadian literature on the *Charter* suggests to me that the author does view these issues as purely legal, to be resolved through analysis of the caselaw.

edges that terms like "fundamental justice" are extremely vague.[33] He criticizes such formulations as the "clear and present danger" test and the "balancing"test as boiler plate expressions which obscure the thought processes at work.[34] He is very critical about the confused, obscure and superficial reasoning of the courts.[35] However, he refuses to acknowledge one of the most important reasons why the American courts have not successfully defined the criteria or tests for delineating rights and why the Canadian courts have to struggle with the *Charter*. The issues involved are inherently difficult, controversial and political. They cannot be transformed easily into purely legal issues.

The Canadian courts have no choice but to interpret and apply the *Charter of Rights* as best they can. They are faced with a thankless task, but it is doubtful that the *Charter* will be abrogated in the near future.[36] Judges have to develop a method of constitutional interpretation which will enable them to define and protect the rights and freedoms enshrined therein. They will only be successful in this task if they are extremely sensitive to the political nature of their new role. They will have to ensure that the lawyers representing the parties involved in constitutional disputes bring the necessary information before the courts. A Canadian version of the Brandeis brief, which discusses the issues as thoroughly as possible, must become a routine part of every important constitutional case. If not, judges will not be able to ground their decision in social reality and any decision they make will necessarily be controversial, because a legalistic approach to *Charter* interpretation will not carry the kind of legitimacy which is necessary to compel general support for the decisions rendered.

Mr. Lepofsky has described the dilemmas facing the courts as they try to define the appropriate mix of speech rights and guarantees of a fair trial for our criminal justice system. He is undoubtedly right in saying that we need to seriously rethink our current approach to the regulation of speech about court proceedings. Unfortunately, his method does not provide any compelling way to pick one of the possible mixes of rights and freedoms from amongst which the courts must choose, in the name of Canadian society as a whole. He demonstrates that the Canadian courts were not very concerned with protecting fundamental rights and freedoms prior to the *Charter* but he does not show that this lack of concern deprived Canadians of access to information necessary to their participation in democratic political debate or allowed the judicial system to regularly abuse its procedures and unjustly convict or acquit accused. Ringing words about democracy and freedom should not replace rigorous and thorough analysis of actual social problems. Lawyers, who have been entrusted with the task of litigating the *Charter*, should not mistake the

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[33] Lepofsky, *supra*, note 3 at 303.

[34] *Ibid.* at 316.

[35] *Ibid.* at 285. The author severly criticizes the reasoning in *R.* v. *Banville* (1983), 3 C.C.C. (3d) 312, 145 D.L.R. (3d) 595 and *Re Global Communications Ltd. and A.G. Canada*, *supra*, note 10.

[36] There are those who argue for its abrogation. *See* R. Fulford, "The Charter of Wrongs", *Saturday Night* (December 1986) 7.

world as it appears in the cases for the real lives of real Canadians who, after all, are the ones whom, according to the politicians who adopted it, the *Charter* is intended to protect.

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