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# Injunctions and the Charter

## **Abstract**

In this short essay, Professor Sharpe outlines the challenge that faces the courts in fashioning suitable remedies in Charter litigation. In particular, he recommends that Canadian courts should look to the American experience and adopt it to the Canadian situation. He maintains that there is a constitutional mandate for the innovative and imaginative use of injunctive relief in Charter cases, especially in suits involving structural and institutional claims.

# INJUNCTIONS AND THE CHARTER

BY ROBERT J. SHARPE\*

*In this short essay, Professor Sharpe outlines the challenge that faces the courts in fashioning suitable remedies in Charter litigation. In particular, he recommends that Canadian courts should look to the American experience and adopt it to the Canadian situation. He maintains that there is a constitutional mandate for the innovative and imaginative use of injunctive relief in Charter cases, especially in suits involving structural and institutional claims.*

## I. INTRODUCTION

In recent years, the law of injunctions has been an area of growth and innovation. Judges have demonstrated a willingness to explore creative applications of the remedy. *Mareva* orders have been described by England's most notable modern judicial innovator as "the greatest piece of judicial law reform in my time."<sup>1</sup> *Mareva's* sibling, the *Anton Piller* order, has emerged as a powerful weapon against pirates, bootleggers and various other villains in the industrial property field. These and various other forms of pre-trial injunction provide immediate and drastic relief.<sup>2</sup> Unheard of ten years ago, they are powerful examples of the capacity of the courts to mould old remedies in response to the new exigencies of the day. Injunctions are also increasingly used in public law cases.<sup>3</sup> "Flouters" can no longer regard statutory penalties as a licence fee. Equity's most formidable weapon is regularly deployed to stop flagrant disregard for the law. The judge who proclaimed in 1924 that "[g]overnment by injunction is a thing abhorrent to the law of England and of this Province"<sup>4</sup> would be surprised to find that the old constraints have broken down. Equity now frequently acts to restrain the commission of crimes.

Many other examples could be provided to show that the discretionary remedy of injunction, given its flexibility and immediacy, will often be awarded by a court in unprecedented circumstances. Indeed,

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\* Professor of Law, University of Toronto. My colleagues Denise Réaume, Carol Rogerson and Katherine Swinton read an earlier draft of this essay. I am grateful for their helpful comments.

<sup>1</sup> Denning, *The Due Process of Law* (1980) at 134.

<sup>2</sup> For a general review, see Sharpe, *Injunctions and Specific Performance* (1983) ch. 2.

<sup>3</sup> *Id.* ch. 3

<sup>4</sup> *Robinson v. Adams* (1925), 56 O.L.R. 217, 1 D.L.R. 359 (C.A.) at 224 (O.L.R.) per Middleton J.A.

courts seem quite at ease when reforming the law of remedies to meet modern needs. To most judges, it is one thing to change the substantive definition of rights and wrongs, but quite another to find adequate remedies for recognized wrongs. While the former is seen as "making new law," the latter is regarded as falling squarely within the traditional judicial function. Remedial flexibility is the pride of equity and the common law. Judges do not see themselves as roving law reform commissions, entitled to identify new wrongs, but if a recognized wrong is identified, it is the very essence of the judicial function to provide the necessary remedy.

Even more significant than the award of injunctions in novel cases is a more subtle shift in attitude towards the fundamental principles governing the award of injunctions. Despite the continued use of the traditional language of pre-*Judicature Act* equity jurisprudence, modern courts are increasingly willing to base remedy selection on the actual advantages and disadvantages offered by possible remedial choices. While analysis and experience often yield expected results, the notion of a fixed hierarchy of remedies, applied generally to all cases, is disappearing. It is my observation and belief that courts are willing to re-examine concepts such as "irreparable harm," to respond to the concern for orders requiring supervision in the context of any given case, and to base remedy selection on a weighing of the costs and benefits of the available remedial options.<sup>5</sup> However, despite this openness to remedial flexibility and innovation, most Canadian lawyers and judges are probably dismayed by the injunctive adventures of their American brethren in constitutional cases.<sup>6</sup> Many have a difficult time imagining

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<sup>5</sup> This theme is developed at length, *supra* note 2.

<sup>6</sup> But not all Canadian judges react this way. Most notably, see the following extra-judicial comment by Dickson J. (as he then was), *The Public Responsibility of Lawyers* (1983), 13 Man. L.J. 175 at 187:

The remedial powers contained in s. 24 of the *Charter* will also offer a test of the creativity of the legal mind. The section provides that anyone whose rights and freedoms have been infringed or denied may apply to the court to obtain such remedy as the court considers appropriate and just in the circumstances. The outer limits of s. 24 have yet to be tested but American experience teaches us that the remedial [*sic*] aspects of constitutional rights litigation will often be the most difficult and most important. In a very real sense the 1954 decision by the United States Supreme Court in *Brown v. Board of Education of Topeka* that racially segregated schools were a denial of equal protection of the laws was the easy part. Almost thirty years later problems of how to enforce desegregation are still being sorted out. Similarly, American judges have been expected to run railroads and preside over state prison systems. Where the vindication of constitutional rights simply involves the nullification of past wrongs, the remedial options are quite straight forward. But where positive action is needed to correct the denial of constitutional rights, the remedial questions become more vexing. The protection of equality rights is especially amenable to such complexities, so that the coming into force of s. 15 of the *Charter* in 1985 may provide further perplexity in the fashioning of remedies.

Canadian judges redrawing electoral boundaries or running school boards, prisons and mental hospitals. The American willingness to issue such injunctions is deplored as excessive judicial activism, indicative of a disregard for the natural and proper institutional limits of the judicial function.

As with most things Canadian, a central issue in Charter litigation is the applicability of the American experience and case-law. Similarities can readily be identified in the respective political cultures; the Charter clearly pushes our legal system closer to that of the United States, its language is strongly influenced by the American example, and the elaboration of the rights guaranteed will be enriched by the wealth of American judicial experience and scholarly writing. But important differences remain, not the least of which is the obvious fact that the entrenchment of rights in the Canadian Constitution has come at a very different point in our legal and political development. The challenge is to assimilate 200 years of American experience and relate it to our own aspirations for the development of human rights.

In the remedial area, it is particularly important that Canadians be prepared to regard the American example as a process which has unfolded over time. The task will be to focus on the present situation and needs in Canada. Just as it would be a mistake to embrace entirely modern American remedial practices, it would be wrong to reject them wholesale. A timid response would be inconsistent with the contemporary trend of remedial innovation in Canada and unwarranted in light of the text of the Charter itself. Charter cases are likely to present new remedial challenges and courts must not shy away from the task of meeting those challenges.

The early indications suggest that Canadian courts will respond positively to the Charter's invitation to "make law."<sup>7</sup> This essay considers in a preliminary way whether there is a constitutional mandate for remedial innovation in this same spirit. I contend that, as courts embark upon the enterprise of elaborating the guarantees of the Charter, they should remain faithful to their traditional attitude of ensuring a remedy where there is a wrong. This should be the case even if its logical conclusion will be to require them to engage in unfamiliar practices.

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<sup>7</sup> At the time of writing, the Supreme Court of Canada has decided three Charter cases: *Law Society of Upper Canada v. Skapinker* (1984), 9 D.L.R. (4th) 161, 8 C.R.R. 193; *Quebec Association of Protestant School Boards v. A.G. Que* (1984), 9 C.R.R. 133; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, 11 D.L.R. (4th) 641, striking down legislation in the latter two.

## II. THE AMERICAN EXPERIENCE

### A. *Models of Constitutional Injunctions*

In his important monograph, *The Civil Rights Injunction*, Owen Fiss identifies three models of constitutional injunction. Each model corresponds with an evolutionary phase in American constitutional litigation. The first and most familiar is the preventative injunction. This model operates as a kind of scaled-down criminal statute, prohibiting named parties from engaging in defined behaviour which has been found to violate a constitutional principle or guarantee. Similar decrees are common in the realm of private law. As remedial decrees, they are relatively uncontroversial in the constitutional setting. The second model is the reparative injunction. This too has its parallel in the private law mandatory injunction. Like its private law cousin, it requires that positive steps be taken by the defendant to repair the effects of past wrongs or to carry out some affirmative legal duty. In the constitutional setting, the reparative injunction is typically designed to correct the effects of past wrongs, often in cases of racial discrimination.

The third model, the structural injunction, Fiss calls a "truly unique legal instrument."<sup>8</sup> Although he admits that it has as distant cousins decrees reorganizing railways or ordering divestitures on anti-trust grounds, its distinctive feature is that it amounts to "a declaration that henceforth the court will *direct* or *manage* the reconstruction of the social institution, in order to bring it into conformity with the Constitution."<sup>9</sup> By issuing structural injunctions, judges immerse themselves in the details of the organization and administration of important public agencies. Decrees of this kind are not issued except as a last resort. It is only where preventative or reparative measures fail to bring about the state of affairs promised by the Constitution, that judges will jump the usual institutional barriers and become, in effect, school board trustees,<sup>10</sup> prison wardens<sup>11</sup> and hospital administrators.<sup>12</sup> Only when the agency in question has failed to live up to its constitutional obligations, will the injunction be justified. However, when such institutions do fail, Fiss argues that the courts have no real choice but to

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<sup>8</sup> Fiss, *The Civil Rights Injunction* (1978) at 8.

<sup>9</sup> *Id.* at 37.

<sup>10</sup> *Infra* note 17.

<sup>11</sup> See, eg., Robbins and Buser, *Punitive Conditions of Prison Confinement: An Analysis of Pugh v. Locke and Federal Court Supervision of State Penal Administration under the Eighth Amendment* (1977), 29 Stan. L. Rev. 893.

<sup>12</sup> See, eg., Note, *The Wyatt Case: Implementation of a Judicial Decree Ordering Institutional Change* (1975), 84 Yale L.J. 1338.

interfere.

There can be little doubt as to the availability and appropriateness of prohibitive injunctions to restrain the enforcement of unconstitutional laws or practices.<sup>13</sup> Such orders were a feature of pre-Charter law in Canada and will surely continue to provide appropriate remedial relief for unconstitutional action. More controversial are orders which mandate a positive course of action, designed to bring about a state of affairs in compliance with constitutional guarantees. In such cases, the court steps beyond merely striking down or stopping an unconstitutional law or practice and engages in reparative measures required to remedy the effects of past wrongs. In the private law area, mandatory relief is seen as more difficult to justify than a negative order, primarily because of problems in defining the actual obligation, and because such orders carry the risk that the court may be undertaking a continuing supervisory role. If the defendant is recalcitrant, the court may find itself faced with the choice of either backing down and allowing the wrong to go unremedied or becoming immersed in the details of the defendant's activity and having to entertain repeated applications for enforcement. In the American constitutional experience, this has meant courts' involvement in the "structural" reform of powerful public agencies seemingly incapable of constitutional behaviour.

### B. *The Evolution of Structural Injunctions*

I certainly do not suggest that it would be appropriate to decree a "structural" injunction as the first response to a constitutional violation. Judges and courts suffer obvious institutional disadvantages when engaging in this sort of activity. It is important to emphasize that American courts do not issue structural injunctions except as a last resort. In the modern water-shed constitutional decision of *Brown v.*

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<sup>13</sup> Applications for injunctive relief before trial pose special problems not discussed in this essay. Courts will be reluctant to issue injunctions which would restrain the enforcement or implementation of legislation before the merits of the case have been fully explored: see, e.g., *Morgentaler v. Ackroyd* (1983), 42 O.R. (2d) 659, 150 D.L.R. (3d) 59 (Ont. H. Ct.); *Gould v. A.G. Can.* (unreported, F.C.A., Aug. 31, 1984; aff'd S.C.C. Sept. 4, 1984). However, there is no absolute bar to interlocutory relief in constitutional cases: see, e.g., *Black v. Law Society of Alberta*, [1983] 3 W.W.R. 7, 144 D.L.R. (3d) 439 (Alta. Q.B.); *Hammerstein v. B.C. Coast Vegetable Marketing Board et al.* (1962), 37 D.L.R. (2d) 153 (B.C.C.A.); *Home Oil Distributors Ltd. et al. v. A.G.B.C.*, [1939] 1 W.W.R. 666, 1 D.L.R. 573 (B.C.C.A.) aff'd, [1940] S.C.R. 444, 2 D.L.R. 609. Interlocutory injunctions have also been awarded where officials appear to have exceeded statutory powers: see, e.g., *MacLean v. Liquor Licence Board of Ontario* (1975), 9 O.R. (2d) 597, 61 D.L.R. (3d) 237 (Div. Ct.). There is a long line of authority which in effect states the rule that an injunction cannot be issued against the Crown but that does not preclude an injunction restraining a minister or crown servant from implementing legislation shown to be *ultra vires*: see Sharpe, *supra* note 2, at para. 362.

*Board of Education*,<sup>14</sup> the Supreme Court rejected the “separate but equal” doctrine and held that the practice of maintaining racially segregated schools violated the equal protection guarantee of the 14th Amendment. Initially, the Court merely proclaimed the right it found, and required re-argument on remedy. Although the Court clearly saw the right to be protected, it perceived from the start that the elaboration of appropriate remedial measures would be a delicate and difficult task. A negative decree, prohibiting school boards from operating racially segregated schools, was plainly not enough. The effects of past discrimination were such that a mere prohibition against future discrimination would be insufficient. The effects of the past had to be attacked: some form of positive action was called for. Thus, in *Brown v. Board (II)*<sup>15</sup> the Court fashioned a remedy to meet the right which had been found. The Court explicitly drew upon the traditions of equity:

In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power.<sup>16</sup>

This initial response was cautiously innovative. School boards were required to submit plans for approval. The courts would retain jurisdiction to review these plans, but the onus to make school administration comply with the demands of the constitution rested with the school boards.

The decision represented a departure from the traditional model of “one-shot, once-and-for-all” adjudication in which the court does not expect to be called upon to make further decisions or orders upon final judgment. While the Court explicitly refrained from engaging in school reform on its own motion, it equally explicitly retained a supervisory role to ensure the defendants lived up to their positive obligations. It was only after years of delay by local boards that the Court resorted to more intrusive means. In a 1971 decision,<sup>17</sup> the Court dealt with a case in which, despite lengthy and protracted proceedings, the schools in the defendant’s district remained segregated. The Board’s plan was rejected as inadequate and the Court appointed its own expert to design an appropriate plan for desegregation, including busing. Further plans were also invited from minority members of the school board and from

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<sup>14</sup> 347 U.S. 483, 74 S.Ct. 686 (1954).

<sup>15</sup> 349 U.S. 294, 74 S.Ct. 753 (1955).

<sup>16</sup> *Id.* at 300 (U.S.).

<sup>17</sup> *Swann v. Charlotte-Mecklenburg Bd. of Education*, 402 U.S. 1, 91 S.Ct. 1267 (1971).

the Department of Health Education and Welfare. Ultimately, the Court accepted its own expert's plan and ordered the implementation by injunction. Despite the novelty of this "structural" decree, the court used the language of traditional equity jurisprudence to justify its action:

If school authorities fail in their affirmative obligations under these holdings, judicial authority may be invoked. Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.<sup>18</sup>

It is significant that traditional language is used to justify non-traditional behaviour. Can orders of this kind be justified as a logical or appropriate extension of traditional principles? Should similar measures be taken by Canadian courts?

### III. THE CIVIL RIGHTS INJUNCTION IN CANADA

In this section, I will isolate the distinctive features of the civil rights injunction which make it unfamiliar, identify the concerns which underlie these unfamiliar features, and suggest the type of inquiry which needs to be undertaken.

#### A. *Procedural Limitations*

Injunctive orders are often made in class actions and respond to the constitutional demands of groups rather than individuals: they are aimed more at practices and policies than at specific officials or institutions.<sup>19</sup> When a court requires the integration of the schools for an entire district, it is responding to the constitutional claim of an entire segment of the public. Similarly, when a court determines that compliance with the constitutional rights of such a group cannot be achieved by direct order against a specific individual or institution and demands judicial involvement with the internal structure of the institution, it will become immersed in the detailed implementation of the standards and policies decreed. This is a marked departure from the traditional model of litigation in which courts adjudicate individual complaints, and provide the aggrieved individual with a specific and limited remedy against a named defendant. Two issues present themselves. Will restrictive class action rules preclude suits of this kind in Canada? Will Canadian courts see it fit to depart from the traditional model of litigation?

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<sup>18</sup> *Id.* at 15 (U.S.).

<sup>19</sup> McDowell, *Equity and the Constitution* (1982) is particularly troubled by this feature of the civil rights injunction.

I suggest that if the nature of the rights guaranteed by the Charter is considered, the potential for broadly based injunction orders in the civil rights context is obvious. While present class action rules have proved inadequate in the consumer law area,<sup>20</sup> they are untried and untested in the civil rights context.<sup>21</sup> Suits for declaratory or injunctive relief on behalf of a group which asserts a common constitutional claim do not involve the sort of individuation of right and remedy encountered in the consumer area.<sup>22</sup> If more complex rules are called for, the remedy guarantee of section 24 may require the judicial elaboration of special standards for class actions in the constitutional context. Certain Charter guarantees would be best dealt with on a class basis. Minority language education rights in section 23 are explicitly framed on a collective basis as they apply "wherever . . . the number of children . . . is sufficient to warrant" the expenditure of public funds. If the claim of one citizen depends upon the existence of a similar claim by others, the entire class claim ought to be dealt with in one law suit. But even if the procedure of class action is not available, the result of a successful suit by one individual asserting minority language education rights would necessarily be a remedy for the entire group. This reasoning will also apply to equality rights: the claim of one individual will often be closely bound to like claims by others and class action treatment will often be appropriate. If the state has imposed discriminatory laws or practices, constitutional challenges by their very nature determine the interests of entire groups. As with minority language education rights, the result of a successful suit by one litigant is often a remedy to benefit an entire class. I suggest, therefore, that class adjudication is appropriate. Moreover, even if the class action is unavailable or not used, cases requiring complex affirmative remedial measures are bound to be requested.<sup>23</sup>

### B. *Supervision and Adequacy of Alternate Remedies*

A more obvious concern regarding the civil rights injunction is that such decrees ignore the traditional avoidance of orders demanding

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<sup>20</sup> *Naken v. General Motors of Canada Ltd.* (1983), 32 C.P.C. 138, 144 D.L.R. (3d) 385 (S.C.C.).

<sup>21</sup> Ont. Law Reform Comm., 1 *Report on Class Actions* (1982) at 219-26.

<sup>22</sup> *Id.* referring to the liberal treatment afforded such suits in the United States.

<sup>23</sup> Nor would it be surprising to see the courts grant injunctions which impose wide obligations. In the past, our courts have not hesitated to enforce decrees against unnamed defendants, and in labour disputes, decrees directed at unnamed officers, servants and agents of the defendant, or even against any person having notice of the order, are not at all uncommon; see Sharp, *supra* note 2 at paras. 516-517. Again, although this falls short of the structural injunction, it does show that our courts have been willing to part, when necessary and convenient, from the traditional model of an injunction in favour of a named plaintiff directed against a named defendant.

continuous supervision. However, traditional formulations of the supervision rule overstate the case: courts have always been willing to issue decrees which carry the risk of continuing involvement where it is necessary to achieve remedial satisfaction.<sup>24</sup> In the context of private law litigation, on more than one occasion, courts have expressed the supervision concern in terms of cost-benefit analysis:<sup>25</sup> the risk of increased expenditure of judicial resources is weighed against the advantages an injunction offers in remedial terms. In many cases, that cost or risk of cost will be so significant that the court will be deterred from making a complex decree. Where other means are not available to provide an adequate remedy, the courts have been willing to make the effort.<sup>26</sup>

It would be astonishing for a court to decline a constitutional remedy on the grounds that, although best suited to bring about compliance with the Constitution, it would be too expensive. The traditional dislike for orders requiring supervision is based upon the assumption that the dominant model is one-shot, final decree litigation: scarce judicial resources should not be squandered on the remedial phase of a single case. It is clear, however, that such litigation is not as predominant as it once was. Lengthy trials are becoming the rule rather than the exception. The added burden of repeated applications to the court at the enforcement stage is relatively less significant. In many areas, final decrees are inappropriate or impossible. If complex commercial cases requiring lengthy trials and involving judicial supervision of receivership orders are not to be rejected as being too costly a drain on judicial resources, neither should similarly costly decrees in the constitutional sphere.

Other aspects of the supervision concern are, however, more serious. By issuing decrees which require performance of complex or vaguely defined tasks, the court puts its authority on the line. There is bound to be a risk of non-compliance. Traditional equity jurisprudence avoided this: "Equity's view is that of a wise parent dealing with his children; it is best not to issue orders unless you can be absolutely sure of effecting compliance."<sup>27</sup> This line of argument, however, presupposes a choice of remedies. The court naturally declines a remedial option which carries the risk of difficult enforcement when another risk-free option will be more or less adequate.

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<sup>24</sup> *Id.* especially at paras. 26-49, 558-576.

<sup>25</sup> See, *eg.*, *Tanenbaum v. W.J. Bell Paper Co.*, [1956] O.R. 278, 4 D.L.R. (2d) 177 (H.C.) at 307 (O.R.) per Gale J.; *C.H. Giles & Co. v. Morris*, [1972] 1 W.L.R. 307, 1 All E.R. 960 (Ch. D.) at 318 (W.L.R.) per Megarry J.

<sup>26</sup> For examples see the cases cited in Sharpe, *supra* note 2, at paras. 26-49, 558-576.

<sup>27</sup> Hanbury and Maudsley, *Modern Equity* (11th ed., 1981) at 54.

This point is related to the inadequacy of the common law remedy standard. Equitable relief has been seen as an exceptional extraordinary measure to be employed only when damages are inadequate. In my view, there are still good reasons for retaining this traditional preference for damages in many substantive contexts.<sup>28</sup> However, as with the supervision concern, the traditional formulation is overstated. Close scrutiny reveals that in some areas damages are plainly not the presumptive remedy. The best example is the use of injunctions to protect property where the coincidence of the substantive right and the nature of the remedial protection afforded by an injunction is strong enough to make injunctions the presumptive remedy.<sup>29</sup>

Damages represent an attempt to translate the effects of a wrong into monetary terms so as to compensate the innocent party. The courts do not ordinarily force a property owner who suffers the effects of a nuisance or trespass to accept money compensation. It is difficult to imagine that constitutional rights would be treated with less solicitude. Damages may be appropriate to redress past transgressions,<sup>30</sup> but in cases involving systematic, ongoing constitutional wrongs, damages seem particularly inapt. If prohibitive or declaratory orders fail, the injunction would seem to be the only remedy at all possible.

It is unacceptable to apply standards which emerge from situations where the court has a choice between the presumptive remedy of damages, which more or less do the job, and an injunction which will require an increased expenditure of judicial resources. Indeed, there is something offensive about a principle which would require a citizen to be satisfied with a less appropriate remedy for a constitutional wrong because an injunction is too costly or too risky. The injunction option may put the authority of the court on the line, but this cannot be avoided. The authority of the court *is* on the line: it has found a constitutional violation and is required by the Constitution to provide a remedy. The court would surely lose more credit by pretending defeat on traditional grounds, not geared to the demands of modern constitutional litigation, than by doing its best to ensure constitutional guarantees are respected.<sup>31</sup>

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<sup>28</sup> See Sharpe, *supra* note 2.

<sup>29</sup> *Id.* ch. 4. Another example is the *prima facie* right to an injunction to enforce a negative covenant: see, *id.* ch. 9.

<sup>30</sup> For a thorough discussion, see Pilkington, *Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms* (1984), 62 Can. Bar Rev. 517.

<sup>31</sup> There may, however, be costs and risks of a kind peculiar to the constitutional sphere which the courts will want to consider. For example, some remedial measures — busing in the context of American desegregations come to mind — may impose burdens on innocent third par-

An important related concern is that of institutional competence. To come to grips fully with the appropriateness of reparative or structural injunctions, it would be necessary to consider the relative advantages and disadvantages of relying on courts to implement measures of social reform.<sup>32</sup> But even if the courts suffer significant institutional disadvantages in this area, they may still have to act as a last resort. In other words, Canadian courts will have to fill the void if it is found that the institutions best able to implement measures required by the Constitution fail to act.

### C. *Legitimacy of the Civil Rights Injunction*

All of this, of course, assumes the legitimacy of the court's elaboration of the constitutional guarantee in the first place. My discussion of remedies assumes that a substantive constitutional right has been threatened or violated; it focuses upon the court's choice of remedial devices to achieve enforcement. It is not always easy to distinguish questions of right from questions of remedy. Courts do not mechanically decide rights without considering possible remedial conundrums. The prospect of the need for an "activist" remedy might dissuade the court from proclaiming the right in the first place.<sup>33</sup> I would argue, however, that discrete questions of remedial choice do arise and that the courts should avoid concealing remedial fears by compromising rights.

It hardly need be repeated that the legitimacy of the "activist" decisions of recent years in the United States is contested by many on substantive as well as remedial grounds. Injunction orders which read like statutes or which amount to the assertion of judicial control over important public institutions are but one feature of a more complex pattern of judicial behaviour which has come under close scrutiny.<sup>34</sup> Judicial law-making is attacked as undemocratic and as a usurpation of the legislative function. There is a very lively debate between those who seek to justify and even extend judicial review and those who seek to restrain and confine the courts. I do not propose to examine or enter

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ties which should be weighed. Where the court perceives that there is likely to be resistance, the remedy may be moulded to take this into account, as in the case of the "all deliberate speed" qualification to the *Brown v. Board* decree. For an interesting discussion of these issues, see Gerwitz, *Remedies and Resistance* (1983), 92 Yale L.J. 585.

<sup>32</sup> For an interesting American approach, see Komesar, *Taking Institutions Seriously: Introduction To A Strategy For Constitutional Analysis* (1984), 51 U. Chi. L. Rev. 366.

<sup>33</sup> See, eg., Sharpe, *supra* note 2, at para. 408, discussing this point in the context of nuisance cases.

<sup>34</sup> See, eg., McDowell, *supra* note 19; Berger, *Government by Judiciary* (1977).

that debate here. However, I do suggest that even a relatively restrained and modest theory of judicial review will support the mandating of affirmative measures by the courts. This theory of judicial review focuses on the need to protect "discrete and insular minorities" from the political impotence which would result from unbounded majoritarianism.<sup>35</sup> An active judicial role to protect fundamental rights and to nurture the interests of minorities and the politically impotent is justified as being necessary to the healthy operation of a democratic system in a complex modern state. The courts become an instrument of government both to counterbalance the brute force of the majority and to make democracy more effective.

This type of process-oriented justification for the substantive content of constitutional adjudication supports the legitimacy of remedial measures which "legislate" in the sense that they require positive action. The interests of minorities and the politically powerless can hardly be protected if the court refuses to do more than act in a negative way, only striking down measures which constitute an illegitimate attack on such interests. Affirmative measures may be required, particularly where the constitution makes affirmative promises, as in the case of minority language rights.<sup>36</sup> The literal words of the Charter make a strong textual case for judicial activism in the remedial area. The Equal Protection Amendment to the American Constitution was accompanied by a grant of legislative power. Not only were the States forbidden from legislating in a manner inconsistent with the principles of the 14th Amendment, but Congress was expressly given the powers to enact positive measures to bring about the promise of equality. The drafters of the Charter formulated a quite different scheme. Section 31 expressly states that "nothing in this Charter extends the legislative powers of any body or authority." Legislative power remains where it was before the Charter's enactment, albeit limited, but nowhere focused on one level of government or enhanced in a manner designed to support positive legislative measures which would enforce Charter guarantees. Arguably, this feature of the Charter, coupled with the remedy guarantee of section 24, provides further justification for an active judicial role, including the award of remedies which require positive steps to be taken.

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<sup>35</sup> *United States v. Carolene Products Co.* 304 U.S. 144, 58 S.Ct. 778 at 152-3 note 4 (U.S.) (1938); Ely, *Democracy and Distrust* (1980).

<sup>36</sup> Bender argues that the text of the Charter is more explicit than the U.S. Constitution in making affirmative guarantees: see *The Canadian Charter of Rights and Freedoms and the United States Bill of Rights: A Comparison* (1983), 28 McGill L. J. 811.

#### IV. CONCLUSION

In dealing with minority language education rights and equality rights in particular, the courts will be asked to mandate affirmative measures. This will require the provision of certain services and facilities and the positive repair of past wrongs. It is not impossible to imagine a similar judicial role in the context of prisons or mental hospitals if systematic violation of Charter rights is found. Orders of this kind do involve the courts in a continuing relationship with the concerned parties and institutions. It is hoped, of course, that legislators and administrators will respond willingly and positively to the demands of the Charter. The institutional advantages clearly favour this response as opposed to one which relies too heavily upon courts and judges. However, if those institutional advantages and resources are not deployed in a manner consistent with the Constitution, I suggest that there is little choice. To remain faithful to the text and spirit of the Charter and to the Canadian tradition of remedial flexibility, the courts will have to act.

