1989

A No-Frills Look at the Charter of Rights and Freedoms or How Politicians and Lawyers Hide Reality

Harry J. Glasbeek

Osgoode Hall Law School of York University

Follow this and additional works at: http://digitalcommons.osgoode.yorku.ca/scholarly_works

This work is licensed under a Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License.

Recommended Citation


This Article is brought to you for free and open access by the Faculty Scholarship at Osgoode Digital Commons. It has been accepted for inclusion in Articles & Book Chapters by an authorized administrator of Osgoode Digital Commons.
The proponents of the Charter of Rights and Freedoms are fighting a mighty battle to show that, despite what are disappointing results from their perspective, judicial review can, and will, be used to advance the causes of the disadvantaged and democracy. This forces them to make a series of incoherent and implausible arguments to rationalize what, to them, seem to be inconsistent and capricious decisions. Yet, if the Charter is put in its true political economic context, the courts look better. They turn out to be focussed and rational in their attempts to attain the objectives which that context demands. But, those objectives are not the protection of the underclasses or the perfection of democracy. The historical function of the judiciary has been to protect the status quo. The Charter was not meant to alter this. Armed with it, Canadian courts are better equipped than ever to protect the dominant classes.

* Professor of Law, Osgoode Hall Law School, York University.

This paper was originally presented as the seventh Annual Lecture in the Distinguished Scholars Programme on Access to Justice at the University of Windsor, February 22, 1989.
I. Introduction

An alternative title for this article could have been: A Real Rogues' Charter.

The Rogues' Charter was, of course, the characterization the Law Times\(^1\) gave to the legislation which bestowed legal personality upon companies whose investors' responsibility would be limited to the extent of their financial investment. While the development of capitalist relations of productions had made it a logical necessity to adapt the structure of the earlier joint stock corporations so that the accumulation and consolidation of many small capitals could be promoted, some pristine capitalists and liberal philosophers were appalled by the idea that people who might create harm to others — particularly to creditors — would be shielded from personal responsibility if their investment in the company did not cover the liability incurred by the company. This ran counter to their precepts of what a free market should be and to their idea of individuals as sovereign responsible actors. Their fear was that precisely the wrong kind of people would be inveigled into participating in market activity through the corporate form, people who did not have the moral fibre to help them understand their social as well as their legal obligations. As a result, it was thought possible that the very public welfare sought to be promoted by the creation of the new legal device — the company as a legal person with limited liability — would not be achieved. Worse still, harm might be inflicted by irresponsibly run companies and the wrong people would reap the benefits of the availability of this new legal instrument.\(^2\) Many observers, including me, would argue that these nineteenth century anxieties have turned out to be all too well-founded. Shareholders seldom assume responsibility for, and are seldom asked to bear the burden of, the serious economic, physical and environmental harm done by corporations in their pursuit of profit. Similarly, all too often the corporate form is used by individuals who think it will help them avoid the incidents of socially imposed responsibilities, such as the obligations arising under welfare and compensation schemes or the costs associated with minimum employment standard schemes.\(^3\)

\(^1\) *The Law Times*, 21 June, 1856.

\(^2\) The idea that there were 'right and wrong' kinds of people stemmed, of course, from the notion that, initially, only leading men were worthy of being the recipients of charters issued by the Crown to undertake adventures (such as those of the Hudson's Bay Company and the South Sea Company), as only they could be trusted to discharge the public responsibilities associated with these ventures. Thus it was appropriate for them to be richly rewarded if profits were made as a result of their acceptance of the obligations entailed in these quasi-public undertakings. The idea of seeking investment from the population at large, while one of the stated aims of the English companies' legislation of 1855, raised alarm among many of the leaders of a society still shot through with notions of noblesse oblige.

\(^3\) For an elaboration, see H.J. Glasbeek, "The Corporate Social Responsibility Movement — The Latest in Maginot Lines to Save Capitalism" (1988), 11 *Dal. H.L.J.* 363. Equating the Rogues' Charter and the *Charter of Rights*
So it is with the Charter of Rights and Freedoms. It has structural features which permit it to be used for purposes which differ sharply from those from which its proponents believe it was meant to be used. In particular, the Charter of Rights and Freedoms may lead to the abdication of the promotion of social good by those who should be held responsible for it — elected people and voters — and may be used for the benefit of those very kind of people who ought, given the stated purposes of the Charter, not to be able to use it at all — wealthy non-persons. Here I note that I chose the Rogues' Charter as a metaphor precisely because the very entities who obtained most of the advantages offered by that original Rogues' Charter are the ones who are likely to benefit most from the social irresponsibility induced by the Charter of Rights and Freedoms.4

In this paper I try to say why this has happened and will continue to happen. The argument is that if attention is paid (i), to the weakness of the basic arguments offered in support of the entrenchment of the Charter (ii), to the entrenchment process itself and (iii), to the outcomes of Charter of Rights and Freedoms' litigation, it will be seen how it has disappointed, and will continue to disappoint, those who expect social improvement and progress from the new constitutional guarantee of rights and freedoms.

I will begin by showing that the Charter of Rights and Freedoms has been sold as if it were a consumer product, a selling job which continues to this very day. Part of that selling is as misleading as most advertising is. In part it relies on assertions and assumptions about the qualities and nature of the judges and of the judiciary

---

as an institution. These arguments are often misconceived. A second section of this paper will concentrate on the structure of the Charter itself. The point made is that the Charter sets out to protect many kinds of rights and freedoms and that to fail to differentiate between them leads to distorted analysis and understanding. In particular, it is this which permits the very actors who ought not to benefit from the Charter's guarantees to use it with great success. Further, it will be argued that this failure to differentiate between the types of rights and freedoms in the Charter is associated with an historical approach to the Charter of Rights and Freedoms. This lack of historical perspective when interpreting and applying the Charter makes it much less useful than its proponents argue it will be because the vast bulk of the Canadian population is constituted by people who are disadvantaged by their history. Then I will raise the idea that the kind of Charter of Rights and Freedoms we got was a functional response to some of the difficulties created by a newly emerging set of political-economic circumstances and that this limits the possibilities of the Charter. The conclusion I reach is that the Charter is, at best, yet one more accommodative measure which erects barriers hindering the furtherance of democracy in Canada.  

II. The Selling of the Charter of Rights and Freedoms

What follows is a summary of the arguments made in support of the entrenchment of rights and freedoms in a constitutional document. It is a no-frills presentation and, therefore, leaves out many of the sophisticated and nuanced arguments made by the theoreticians engrossed in the vigorous political and intellectual debate which the Charter has spawned. But the no-frills approach is not, I believe, distorting of the main arguments on offer. They are to the following effect:

(i) There are certain rights and freedoms which are fundamental to Canadians which they must be able to enjoy without hindrance if individuals are to lead a sovereign, dignified existence, free from unwonted fetters;

(ii) As the untrammelled exercise of rights and freedoms will lead, inevitably, to collisions between different actors with varying priorities, capacities and impulses, constraints will have to be imposed on some actors and some activities. These restraints may take the form of legal duties and obligations created by the evolution

---


6 The study of the Charter of Rights and Freedoms is one of the few real growth industries in Canada. It outstrips, by far, the spurt of activity that law and economics scholarship spawned about a decade or so ago in the U.S.A and Canada. The Legal Resource Index, provided by Information Access Company, lists 483 entries indicating that a note or an article on the Charter has appeared in a journal included in the index (up to January 1989).
of judge-made rules or be the results of legislatively enacted norms of behaviour;

(iii) In either case, the law-makers may go too far. It is essential to the model that all individuals must be given as much liberty of action as possible. Hence, the fettering of the fundamental rights and freedoms of any individual to safeguard the rights and freedoms of others must be undertaken with great caution;

(iv) In the immediate past, that is, pre-Charter, the institution ultimately entrusted with the decision as to how much intervention with individuals' fundamental rights and freedoms could be tolerated was the legislature. It was deemed to be the sovereign institution. It could impose any rules it liked in respect of any subject-matter which was defined as being within its jurisdiction, provided always that the legislature followed the appropriate forms laid down for rule-making. The formal, legal constraints on the legislature, then, were jurisdictional and procedural. The arbiter of whether the legislature had violated these constraints was another branch of the state — the judiciary. Courts were not to pronounce on the contents and nature of the norms of behaviour sought to be imposed by the legislature. The courts did have some discretion in this regard, however, because, very often, there would be room for argument as to precisely what the legislature's jurisdictional authority was or what it was that a legislature had meant when it enacted a particular statute or created a particular agency. The courts' interpretative powers thus had given them some content-regulating power. But, it was the conventional understanding that this was a subterranean way of attacking the sovereignty of legislation: the power to alter the content and nature of legislatively-made law was not part of the judiciary's brief.

As this is a 'no frills' approach to the Charter and the legal system, I will not address the hoary argument that courts do not make law, that they merely find it and apply it to the neutrally-found facts as arising from the evidence put before them. This is not a serious argument. I teach torts. Anyone who has read, say, Donoghue v. Stevenson, [1932] A.C. 562 (H.L.), Hedley, Byrne & Co. Ltd v. Heller & Partners Ltd., [1964] A.C. 465 (H.L.), Lumley v. Gye (1853), 2 E & B. 216 or Cook v. Lewis, [1951] S.C.R. 830 (S.C.C.), should not be able to make the argument that courts do not make law and/or choose facts and maintain a straight face at the same time. I will return to the courts' continued ability to exercise the manipulative powers which inhere in the judicial exercise when they apply the Charter of Rights and Freedoms.

The argument here is a conceptual one. As the text notes, I am well aware that courts have manipulative tools — from the finding of facts through the selective use of rhetoric and precedent — which enable them to dismember legislation when they do not like its substance. That is, their power to undermine legislative authority has always been great. The significant point here, however, is that the courts have had to justify such activity by resorting to the claim that they were engaging in jurisdictional or procedural review or by assertions that they were merely using neutral techniques of interpretation of language. It is difficult to think of better evidence than this for the proposition that the supremacy of the legislature had been an accepted, indeed, embedded, legal and social artefact.
Furthermore, inasmuch as the courts upheld, enforced and created duties and obligations at common law, their rulings could be overturned by a legislature. This was done, and continues to be done, with some regularity. Indeed, pre-Charter, an essential component of our claim to be a democracy had been the argument that the final arbiter of what were the legal rights and duties of individuals in our society was the elected legislature, rather than any unelected body, even if it were as august an institution as the judiciary;

(v) Even though, in theory, a legislature had the *de jure* power to enact any law it liked within its jurisdictional authority, it was fettered by political understandings; there were non-legally binding conventions. In modern, pre-Charter, Canada this had come to mean that the legislature would have found it very difficult to abolish, by procedurally correctly passed legislation, the universal franchise and the normal electoral processes, in particular the rights of groups of citizens to form opposition parties. Amongst the many important conventions which it was understood legislators had to accord respect were the following: (i), that individuals should be able to use their property as they liked (ii), to believe in whatever they liked (iii), to abide by the religious tenets they preferred (iv), to associate with whomever they liked (v), to speak freely about any matter at all (or not to speak at all) (vi), to assemble for peaceful purposes, etc. While legislation could limit the scope of these spheres of political activity, legislators who did impose such fetters were expected to provide justifying reasons, acceptable to right-thinking people. Nonetheless, it was the legislature which could decide what would be acceptable to right-thinking people. The real limitation on legislative power to curb such conventional rights, then, was the level of electoral risk the legislators thought they were incurring; 

(vi) The danger to the conventions, that is, the political understandings which were thought to be basic to the societal consensus, was that legislatures might use their residual power to curtail them. Hence, the argument goes, the entrenchment of these political understandings and freedoms in the constitution was necessitated because they were of such profound importance to the Canadian polity that their fate could not be left to the caprices of elected

---

9 In the very case which paved the way for the judiciary to become a central political institution, the Supreme Court of Canada held that while such conventions were not an essential component of the foundation of our legal polity, they were very nearly so; they had a quasi-constitutional character; *Re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753. While no one in the legal world quite understood what, in legal terms, this meant, leading to the usual pedantic debates, the politicians were not left in any doubt as to what the Supreme Court was suggesting: they would ignore the conventions at their peril. Unquestionably, this holding had a major impact on the ensuing political wheeling and dealing. For a more extensive analysis, see H.J. Glasbeek & M. Mandel, "The Legalization of Politics in Advanced Capitalism: The Canadian Charter of Rights and Freedoms" (1984), 2 *Socialist Studies* 84; see also the discussion in the text at nn. 75-79.
representatives. A government ought not to feel free, just because it had a momentary majority, to limit the scope of entitlements which ought to be recognized as fundamental rights and freedoms. Thus it is that, since the entrenchment of the Charter in the constitution, such attempted limitations are to be subjected to review by an independent institution — the judiciary. While the entrenching document does provide that a legislature can still limit the entrenched rights and freedoms, it must now provide justifications which satisfy courts, rather than a majority of the electorate whose approval it will have to seek at some future, unspecified, date. That is, the courts are, by definition, no longer bound to accept an otherwise properly enacted law as a legitimate exercise in democracy. They are to look beyond the immediate desires and goals of legislatures or beyond those of the majority of the public. Because the entrenched rights and freedoms are now, formally, the paramount tenets of our polity, the courts are charged, much as trustees are on behalf of some identifiable beneficiary, to be the final guardians of society's welfare. By defining the scope and extent of the entrenched rights, courts also will be defining the welfare to which the Canadian people ought to aspire and to which they are entitled.

The logic of this reasoning also ought to mean that, as judicial rulings in respect of disputes brought to the courts also lead to the setting of social norms, courts also ought to be subjected to the restrictions found in the Charter of Rights and Freedoms. But, the judges of whether or not the common law courts have exceeded the permissible boundaries by their rulings would be other judges. This creates something of a difficulty, which so far has been solved by holding that the courts are in a special position. The important point for our present purposes is that it is unquestioned that judicial review of legislative conduct is the linch-pin of the new Canadian constitutional arrangement. Its proponents argue that it has been chosen for this task because it is the best means available by which to promote Canadians’ right to sovereign, dignified lives, free of

10 Section 1 reads: "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

11 The Supreme Court of Canada has sought to avoid the problem by holding that judges are not state officials. In so doing, a bizarre form of argument was used by McIntyre, J., in Retail, Wholesale and Department Store Union (R.W.D.S.U.), Loc. 580 v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573, 600: "While in political science terms it is probably acceptable to treat the courts as one of the three fundamental branches of Government, that is, legislative, executive, and judicial, I cannot equate for the purposes of Charter application the order of a court with an element of governmental action." The Supreme Court of Canada, no doubt recognizing the speciousness of its argument, did throw Charter proponents a bone. It suggested that when judges apply the common law in disputes between private citizens, they should do so with the spirit of the Charter in their minds. What this will come to mean is anyone's guess. The more extreme proponents of the Charter of Rights and Freedoms see this as an abdication of judicial responsibility. Beatty,
The argument is that this is being done to perfect our democratic system of government;

(vii) The 1982 Constitution Act did not purport to change Canada's institutional framework. To the contrary. We are still to honour the monarchy. Canada is still to be a federal nation with each of the provincial and the federal legislatures capable of exercising the plenary powers with which they are invested, by the British North America Act and by subsequent amendments. The notion that elected governments are the supreme governors of the country, that is, the notion of parliamentary democracy, is still held out to be the cornerstone of the political system. Yet, subjecting governmental decision-making — because it might affect certain rights and freedoms — to judicial review does change the system, precisely because the rights and freedoms which are to be subjected to judicial control are identified as the supporting pillars of the Canadian political edifice. Inasmuch as Canada wanted to retain its claim to be a parliamentary democracy (one in which the electorate governs through its chosen representatives and the agencies they oversee), some limit on judicial review of legislation had to be imposed to make the Charter saleable;

(viii) For this reason, section 33 was inserted into the Charter of Rights and Freedoms. The intended effect of this 'notwithstanding' clause is that a legislature can always ensure that it retains the sovereignty it had enjoyed prior to the advent of the Charter by providing specifically that judicial review is not to be binding on it, even if, in a court's opinion, the legislators have improperly "Constitutional Conceits: The Coercive Authority of the Courts" (1987), 37 U.T.L.J. 183, has argued that the Charter's dictates must apply to all decision-makers. A puzzle as to how this is to be enforced against judges is left lying around; for another elaborate attempt to make this argument, but, one which ultimately fails to convince because of its lack of connection to real life, see Slattery, "The Charter's Relevance to Private Litigation: Does Dolphin Deliver?" (1987), 32 McGill L.J. 905.

12 The latest attempt at amendment of the Constitution is the Meech Lake Accord. While it is beyond the scope of this paper to examine this Accord, one thing is crystal clear: it was included with the minimum of citizen participation, echoing the assertion made in the text at n. 5. This has given rise to occasional comments. Jim Coutts wrote that “throughout the 19 1/2 hour secret meeting, there were problems in coming to grips with basic concepts. . . . Let's not attack the dedication of the participants, but let's make it clear they cannot dissolve Canada without a fight. And let's not be fooled by an all-night session that pretends to adopt fundamental concepts of what a country is.”; Sid Handleman showed his concern with the process when he wrote: “Eleven first ministers have rushed headlong into an agreement that even they admit is fuzzy and incapable of exact interpretation. They have not asked for our consent. Ontario's David Peterson arrogantly promises us a full debate in the fall — presumably following an election.” Toronto Star, 7 June 1987, B3. This does raise the issue of how serious our commitment to democracy is, and, by extension, how yet another elite means of political decision-making — the judiciary armed with the Charter — could possibly lead to more democracy. For a reassurance
infringed guaranteed rights and freedoms. The political risk of such infringement by legislation enacted under the aegis of section 33 is to be borne directly by parliamentarians;

Here I interrupt the flow of the rude summary of arguments made by Charter proponents to make an editorial point.

In theory, it could be said that, as a consequence of the insertion of section 33, the nature of our parliamentary democracy has not been altered. But this, of course, would ignore the fact that, in the new context — the Charter context — it will require much more political courage for legislators to use section 33 than it did for them to pass legislation in potential conflict with one of the constraining, but non-binding, conventions in pre-Charter days. That is, it has been understood from the beginning that section 33 is only likely to be used in exceptional circumstances.\(^\text{13}\) This means that the imposition of judicial control over elected assemblies and their agencies has made, and had been intended to make,\(^\text{14}\) a

\(^{13}\) It is, after all, the essence of the Charter proponents' argument that it was all too easy for governments to override what these proponents deem to be fundamental rights and freedoms. It would hardly make sense to claim to have protected such rights and freedoms if s. 33 was thought to leave the legislatures with as much freedom to curb fundamental rights and freedoms as they ever had. This was freely admitted by Charter proponents; see Strayer, "Life Under the Canadian Charter: Adjusting the Balance between Legislatures and Courts", [1988] Public Law 347, 353: "It was certainly the assumption of those governments which agreed to [s.33] in 1981 that it would be used rarely, and then only where a particular judicial decision had created problems of governance of such a nature that a government would be able to justify at least a temporary override of normal Charter guarantees." Strayer was Assistant-Deputy Minister of Justice during the constitution-making process, and played a prominent part in it. See also, Wilson J., who attributes the rare use of s.33 to the fact that it amounts to political suicide by a government; see her "The Making of a Constitution: Approaches to Judicial Interpretation", [1988] Public Law 370, 375; see also P. Russell, "The Effect of a Charter of Rights on the Policy-Making Role of Canadian Courts" (1982), 25 Can. Pub. Admin. 1. Early on, Quebec felt betrayed by the constitutional processes. It passed legislation saying that it was "notwithstanding" all of its legislation. This use of s.33, the democracy-guaranteeing provision of the Charter, by an elected government which, we have every reason to believe, was reflecting its people's bitterness with the negotiation processes, was held to be unconstitutional by a federally appointed Quebec Court of Appeal which argued that the use of s.33 had to be serious, one which showed a true concern with the \textit{a priori} inviolability of the Charter rights; \textit{Alliance des Professeurs de Montréal v. Le Procureur Général du Québec et Le Procureur Général du Canada}, [1985] C.S. 1272. This approach was rejected by the Supreme Court of Canada in \textit{Ford v. Quebec}, [1988] 2 S.C.R. 712, \textit{Devine v. Quebec}, [1988] 2 S.C.R. 790, but it does indicate that governments are not meant to use s.33 lightly.

\(^{14}\) The Quebec government, once again, has used the notwithstanding provision to defend an immensely popular law which had been thrown out by the
difference to what had been deemed to be the cornerstone of Canada’s political system: democracy via a system of parliamentary sovereignty. The introduction of the Charter of Rights and Freedoms into the Constitution, then, did require justification. A selling job had to be done, and done in a specific manner: the Charter had to be shown to further the goals and objectives of a parliamentary democracy as they had been understood in pre-Charter days. I now return to the arguments of Charter proponents.

(ix) One of the things which, it is claimed, shows that the entrustment of the nature and scope of fundamental rights and freedoms to the judiciary reflects our democratic experiences is that an overwhelming number of the electorate were, and remain, in favour of the entrenchment of the Charter of Rights and Freedoms. Public opinion polls taken during the entrenchment processes showed that, in 1980, 91 percent, and later, as the public debate heated up in 1981, 84 percent of the population, supported the concept of constitutionally guaranteed rights.\(^5\) In this context, it is not surprising that there were very few politicians who spoke against the Charter. The inference that proponents of the Charter would like to be drawn\(^6\) is that, if a majority of both the people and the political elite actually favoured its introduction, the charge that the entrenchment of the Charter was not democratic in nature cannot be true;

(x) In any event, these proponents argue, even if the Charter’s promotion of judicial review of government activity does connote a change in constitutional arrangements, it is a change compatible with our existing practices.

In a pluralistic society such as Canada there are many kinds of disputes and many mechanisms for dispute resolution. The

---


6 No serious commentator is bold enough to argue explicitly that just because a majority of the public and the politicians like the Charter this means that its entrenchment constituted a legitimate way to transfer institutional power in Canadian society. After all — as we know — the essence of the argument of Charter proponents is that the Charter is there to protect individuals against majoritarian views. To rely on majority support as a way to legitimate the document itself, therefore, is something of a logical contradiction. Yet, while the ‘opinion poll’ argument is not made in intellectual milieux, it is important to note that public opinion polls were taken and were frequently cited during the entrenchment process; see Thomas Wells, supra note 12.
Canadian judiciary always has had a prominent, indeed a preeminent, role as a dispute-settling institution. For instance, one of the inherent difficulties for any federal system, and particularly so for Canada with its two founding nations, is the on-going dispute over power between the federal and the provincial governments and between the provincial governments inter se. These tensions raise some of the most vital issues of democracy we have to confront, inasmuch as they go to the scope of the relative autonomy of localized groups within the larger whole. In Canada, judicial review of the federal constitutional arrangements has been the legitimate, and legitimated, way of resolving these kinds of problems when exercises in political power and bargaining have failed to do so. The courts have been deemed to be, and have been respected as, appropriate allocators and guardians of democratic rights sought to be preserved through the federal system. The limited transference of power to the judiciary entailed in the entrenchment of the Charter can thus be said to be compatible with accepted practices in Canada, practices which are acceptable because the courts are well-equipped to deal with these kinds of disputes;

(xii) Courts bring two things to decision-making which the electoral or any other participatory political processes do not: neutrality and reasoned decision-making. A decision is the result of a debate between rival claimants who are able to put their best arguments forward because there are known criteria on which judges rely to make their decisions. This rational, adversary system puts constraints on the judges because they have to abide by existing criteria and show that they have done so. While everyone recognizes that there is some measure of discretion when courts interpret and apply these criteria, the necessity to give reasons within a bounded context will restrain judges from acting capriciously, that is, restrain them from basing their decisions merely on their own political values and beliefs. This, plus the fact that the disputing parties decide for themselves which arguments and what evidence they want to bring forth in support of their claim, makes the judicial decision-making acceptable to the disputing parties (although the losers are often unhappy about the actual result) and to the public at large.\(^{17}\) This makes it appropriate for courts to determine how disputations about basic rights ought to be settled. Moreover, this description of the adjudicative system points to another positive aspect of the enshrinement of the Charter;

(xiii) The Charter of Rights and Freedoms has given individual citizens the power to claim, directly, that they are to be the beneficiaries of values which are fundamental to our political system. A means has been provided to raise the level of participation and quality of political discourse in a way that mass political processes do not permit. This is an advance for the political community which

---

is Canada. The courts are an appropriate forum in which to give content and specificity to the rights which are fundamental to Canadian society because the judges have no electoral, nor material, stake in making choices one way or another between claimants and rights. From their "above-the-fray" position they can adjudicate on the scope the rights in question ought to have, using as a basis for decision-making the known shared political values and aims of society. While, from time to time, it may be difficult for judges to determine whether one interpretation of the scope and effect of an entrenched right is more acceptable than another, it is clear that, given that the named rights and freedoms have been entrenched because their furtherance is crucial to the achievement of the goals of a liberal democracy, each individual has been granted as much right to self-determination as it is convenient to give in a societal context. Far from detracting from democratic practices, then, the specification of the scope and the enforcement of the Charter's rights and freedoms by the judiciary will lend support to them, indeed enhance them, by (i), creating a greater consciousness of what rights can properly be claimed in a true democracy and by (ii), fortifying the claims of people whose democratic right to have their views and interests protected might be lost in the cruder world of electoral mass politics, the device we relied on pre-Charter to achieve the same aims.

These, then, are the main lines of arguments which Charter advocates offer in support of the entrenchment of rights and freedoms which has given judicial review a new political significance in Canada. Not all proponents use all of the arguments listed. Indeed, many would not want to be cast in the position of having to defend some of the arguments. For instance, as already noted, and as will be shown again below, it requires little sophistication to see through the argument that judges are limited by logically created boundaries arising from well-established criteria for decision-making. But, this does not mean that people who would not make this argument themselves are not happy to profit from the fact that it is made. The listed arguments are advocates' arguments. This is what it is important to understand: the people who make these arguments are advocates. All of the arguments listed are made by people who are trying to show that the entrenchment of rights and freedoms is justified in a nation-state which perceives and represents itself as a liberal democracy. Those who do not agree with all of the arguments of their fellow advocates/sellers of this idea are nonetheless content to receive the parasitic benefit conferred upon them by the mere fact that these other arguments are made.18 Advocates

18 This is a common enough phenomenon in legal political discourse. Take, for instance, the seemingly endless fault-no fault debates in respect of personal injury compensation. Insurance companies are very happy to let lawyers make all the public running with their claims of superiority for the adversary
are not very particular as to how the case they want to win is won. This, in large part, explains why it is that some of the arguments listed are made at all. None are convincing; most are barely plausible. Let us consider them.

(a) The argument that Canadian dissidents and minorities needed this kind of protection

There was no apprehension that the fundamental rights and freedoms now found in section 2 of the Charter were in peril at the time the entrenchment process was in train. While the Charter proponents argued that no government should be in a position to remove the right to freedom of speech, the right to political and religious beliefs, the right to associate, etc., no one said that Canadian governments presented, or were likely to present, a clear and present danger to these rights. There were some mutterings about the invocation of the War Measures Act in Quebec during the FLQ crisis, but, in the event, the entrenchment of the Charter did not include provisions which repealed the existing War Measures Act.19 Note that the Charter does specifically provide that the universal franchise and the right to vote for a new government in given periods is not to be attacked by a government, but leaves it open for parliament to refuse to dissolve itself in times of crisis.20 That is, the pre-Charter position was not changed in any substantial way because it was not plausible to argue that democratic, electoral rights were in imminent danger. Rather, the Charter sellers had to reach back to some of Canada’s more shameful moments, such

---

19 The War Measures Act is now repealed but it has been replaced by something which potentially seems to give very wide sweeping governmental powers which might, should the new provisions be invoked, seriously abrogate the entrenched rights and freedoms in the Charter, see Val Sears, “Coping with Crises; Will New Law Work?”, Toronto Star, 27 March 1988, B1.

20 S. 4(1), (2), Charter of Rights and Freedoms.
as the war-time mistreatment of Japanese-Canadians. While this did strike a satisfying righteous note, it did not constitute a very convincing argument. After all, the United States had treated their people of Japanese descent and origin in much the same way as did Canada, and yet the United States already had a fully-fledged Bill of Rights at that time.\(^\text{21}\) Moreover, while the Charter advocates never tired of using the Japanese-Canadian example, none of them were forthcoming as to what kind of redress (if any) should be offered to the victims and their successors.\(^\text{22}\) The fact that the Japanese-Canadians example was nothing but a hook on which to hang the Charter, and a not very firm one at that, thus was made transparently clear to all who wished to look. In addition, while Charter sellers were beating their breasts over our reprehensible past they never suggested that they no longer shared the up-to-then commonly professed belief that Canada was already one of the freest countries on the globe. This was not just an averment by smug politicians at banquets; it was part of the conventionally received wisdom, so much so that it was not questioned by serious legal scholars. Thus, Hogg wrote that “[it is a fact, however, that in Canada — as in the United Kingdom, Australia and New Zealand — civil liberties are better respected than in most other countries.”\(^\text{23}\)

To underscore further the shallowness of their stance, note that, while arguing for Charter protection of individuals and disempowered groups, none of the Charter sellers was suggesting that it was quite possible that entities which never had had any right to avail themselves of political freedoms, precisely because they were just that — entities — would now be able to do so. Yet, this was not unforeseeable nor, indeed, unforeseen, by Charter proponents. For instance Mr. McMurtry, the then Attorney-General of Ontario, a man who was to take much of the kudos for the constitutional deal eventually struck at the infamous kitchen meeting


\(^{22}\) But the rhetoric used by the sellers of the Charter may well have helped the Japanese-Canadians’ cause to get recognition and compensation. In 1988, some 7 years after the public debates in which the national shame was invoked, the Japanese-Canadians were able to obtain a settlement they felt they could accept from the federal government.

\(^{23}\) Constitutional Law of Canada (1977), 418. Or see McIntyre J.’s comment on the T.V. programme “W5”, on 14 December, 1988: “If you had gone to the ordinary layman in the street ten years before the Charter was even spoken about, listed the rights that we were going to have and ask him if he was in favour of it, he would have been horrified to think that he didn’t already have those rights.”
in November of 1981, waited for that deal to have been made before he made this clear. At a meeting of the elite of the corporate bar of Toronto and its clientèle he told his audience not to be anxious about the Charter because the newly declared freedoms would not give consumers and workers an edge in the battle against the corporate world. Rather, Mr. McMurtry pointed out, while the Charter bestowed rights on individuals “our courts would not engage in such a narrow and mean-spirited interpretation as to deny the protection of the Charter to corporate entities.” At the same meeting a panel of lawyers, dissecting the provisions of the Charter of Rights and Freedoms, argued that “with some liberal interpretations... the rights’ code might give corporations greater legal protection from a number of restrictive laws.” Nothing could be clearer.

The advocates of the Charter told their story in much the same way that a car manufacturer tells its story: “Here is a car; it can go at certain speeds; it compares favourably with other like automobiles; it has special design features; we suggest it may give you status (sometimes with the opposite sex, sometimes just status) and we, who bring you this car, will look after you and it and respect you forever.” Seldom do automobile manufacturers explain that the car could have been made safer if different metal had been used, if it had been built differently, if it had less protuberances inside, or if it had a gas tank which was not placed as close to the rear of the car as it was. Rarely do they acknowledge that their car really is not different to other competing cars in respect of important features such as engine design and capacity, or that it has no real spare tire, or that, in the past, their manufacturers’ warranties often have fallen far short of the promises held out, etc. The Charter proponents did not, like car manufacturers do not, tell everything they knew or could have been expected to know.

24 As reported in the Globe and Mail, 6 February 1982, A12. The same article pointed out that when the Charter of Rights and Freedoms was being debated before a parliamentary committee more than a year before this meeting of corporate lawyers, Mr. Chrétien and his Justice officials had stressed the point that the wording of the proposed Charter was designed to benefit only individuals. As far as it is known, Mr. McMurtry did not raise his view to the contrary at that time. Opponents of the Charter had seen the potential for corporations but their voice was not heard so clearly; see R.A. Hasson “How to Hand Weapons to Your Enemies — The Charter of Rights Fiasco” (June 1982), No.5 Steelshots. Professor Hasson warned that the Charter would be an instrument readily available to corporations who would unquestionably use it more successfully than any other group. He has been proven to be all too right. The fact that opponents found it hard to be heard points to one of the more serious flaws in the Charter proponents’ arguments. While Professor Hasson’s voice was not stilled by repressive governmental action, it found it hard to reach an audience because the means of speech are controlled by a few private groups who can constrain freedom of speech without risk; see Glasbeek, “Entrenchment of Freedom of Speech for the Press — Fettering of Freedom of Speech of the People” in Anisman & Linden (eds.) The Media, the Courts and the Charter (1986) 101.
None of this means, of course, that the argument that it was wise to entrench political rights and freedoms in order to protect them from capricious, would-be totalitarian, legislators is devoid of merit. It does mean that no one was willing to confront this issue directly because this would have necessitated proffering evidence about the likelihood of the emergence of totalitarianism. In turn, this would have raised the issue as to how it could be argued that an elected majority, ready to thwart the existing social consensus in a radical way, would be prevented from doing so by judicial review. That is, if we had been asked to imagine a headstrong government willing to ignore the citizenry, how could we have been asked to imagine that this same anti-democratic, oppressive regime would pay respect to the judiciary? After all, are there not many modern examples of countries in which the government uses its power regardless of so-called legal constraints? The point here is that while the selling of the Charter relied on raising the spectre of totalitarianism, the public could not be permitted to feel that Canadian totalitarianism could ever reach a stage where the judiciary might be subjugated. And this was how the selling campaign was run: it used past events to show the capacity for nasty legislative and executive conduct, permitting the suggestion that over-zealous or evil legislators and officers might seek to act in similar ways again, but that the palpable difference would be that, this time, armed with a Charter of Rights and Freedoms, the judiciary would be there to protect the hapless victims. Note here that it is much easier to make this argument in respect of an incident such as the oppression of the Japanese-Canadians than it is about a FLQ-type crisis. This is so because the former relates to the curtailment of precious rights and freedoms of a small identifiable part of the population, whereas, in the second situation, everyone’s rights and freedoms would be abrogated. It is more politically astute and easier to ask the public to imagine a government which might stray a little and, therefore, can be contained by willing, good men (judges are mostly men) than it is to suggest that well-meaning people, with moral suasion as their only means of enforcement, could constrain a government which acts in a truly martial, totalitarian way.

In sum, the necessity for entrenchment because of the fear of majoritarian attacks on essential democratic rights was never argued out fully. At best, this part of the Charter proponents’ argument was one of half-truths whose subliminal messages were to act on the public’s unburdened imagination.

(b) The argument that to charge a judiciary with these new obligations is not anti-democratic because a majority of the people support this idea

While this argument has not been relied upon heavily by elite proponents of the Charter of Rights and Freedoms, nonetheless it was permitted to further the perception that entrenchment was (and is) a “good” thing. The fact that the polls showed strong public support for the enshrinement of the Charter was, after all, some
indication of popular approval. Yet, it is hard to imagine that the polls could have shown anything other than this. The Charter was offered to the public as giving something precious — rights and freedoms — to the population. It would have been very surprising if, when asked a question such as: “Do you want fundamental rights?”, the population would have said “Hell, no”. That the superficial and beguiling way\textsuperscript{25} the question was put to a population, which played no direct part in the constitution-making process, led to a misleading set of poll results, can be gleaned from the fact that a study done after the Charter had been enshrined shows that the vast majority of Canadians still have no idea what the Charter's contents are, how it is working or how it could possibly work. The study done by a group led by Professor Russell shows that 90\% of English Canadians and 70\% of French Canadians say they have heard of the Charter. A substantial majority of each group think the Charter “is a good thing for Canada”. But most appeared to have little knowledge as to what is in the Charter.\textsuperscript{26} The argument offered here is not that people would not have wanted the Charter if they had understood more of its ramifications and implications. We will never know. But, let us speculate, as Professor Petter did. He asked what would have happened if people had been addressed in the following way:\textsuperscript{27}

Suppose tomorrow it were announced that a Political Entitlements Tribunal would be established; that the Tribunal would be given sweeping powers to curtail the activities of modern government in the name of protecting such vaguely expressed entitlements as “liberty”, “equality” and “fundamental justice”; that the Tribunal would be staffed by nine, white, affluent lawyers, seven of whom would be men, all of whom would be beyond middle age; that members of the Tribunal would retain office until the age of seventy-five and would be politically accountable to no one; and that the cost of bringing a claim before the Tribunal would likely exceed one quarter of a million dollars.

Petter asked, rhetorically: “What would one’s reaction to such a proposal be?”. Or, alternatively, let us say that, when asking people about their support for the Charter, the respondents had been told that Prime Minister Trudeau only wanted to enshrine the Charter to subjugate Quebec’s aspirations. There might have well been startlingly different results in Quebec as opposed to those obtained in English Canada. These speculations make it clear that the Charter

\textsuperscript{25} As summed up by the Globe & Mail, Oct. 22, 29, Nov. 10, 1981, the demonstrated support for the Charter was the result of a survey in which, “Canadians were asked whether they supported a bill of rights which would ‘provide individual Canadians with protection against unfair treatment by any level of government in Canada’”.


was not an idea which was democratically debated by the citizenry of this country. The majoritarian support claimed for it is not based on any reliable evidence.

(c) The argument that judges have the ability to deal with difficult questions and that they will be informed by the Charter’s clearly spelled-out goals

It is a commonplace that the language of the Charter is malleable. As Wilson J. has written:

[T]he protected rights are enumerated in a brief written document and they are couched in broad and contestable terms such as “liberty”, “security” and “equality”. These are concepts upon which libraries have been written, kings have been beheaded and revolutions have been waged. It would therefore be a considerable understatement to say that fundamental human rights are “open-textured”.  

More vivid imagery was used by Peter Russell when talking about phrases such as freedom of conscience, freedom of expression, the right to liberty, the right to equal benefit of the law without discrimination:

I think of these phrases as limp balloons which the constitution-makers have handed to the judiciary; the judges must now decide how much air to blow into them.

The argument that this presents no problem is not very convincing. The claim that common law methodology has always asked judges to cope with plastic and vague precepts and phraseology and that they have done this very well does not merit serious analysis. The realists in the 1930’s made, and the critical legal scholars to-day make, a meal out of the incoherence of judicial methodology. Inasmuch as the argument is that we have always entrusted our judges with constitutional issues arising out of federalism’s problems and that they have done this well as, say, opposed to dealing with such issues as what is ‘reasonably foreseeable’ in torts’ cases, it can also be dismissed. In the first place, even if true, it is not a useful argument. As Wilson J. has pointed out, when dealing with s. 91-92 matters, courts are not asked to say that legislatures are behaving in a manner which is acceptable to the fundamental values of Canadian society. Rather, they are to decide whether one legislature, as opposed to some other, is the appropriate institution to deal with a legislative matter. They are not required to say that no legislature can pass a particular law. While courts have frequently thwarted the democratic aspirations of distinct groupings of Canadians when adjudicating on s.91-92 matters, the courts’ role, therefore, has not been overtly anti-democratic. The judiciary’s legitimacy is not called into question when exercising this kind of constitutional discretion on the basis that it should not be involved

28 Supra note 13, 372.
29 Supra note 26, 394.
30 Supra note 13, 370-71.
in such exercises at all. Even so, courts have been severely criticized because of the way they have exercised their discretion in that area. Thus, it is not even true that they do this task well. For instance, Monahan has shown that the major characteristic of the Supreme Court of Canada’s involvement in constitutional adjudication in pre-

Charter
days was incoherence arising out of vague, inarticulate and differing visions of federalism.31

This brings us back to the centre of the problem. If we leave decision-making about rights and freedoms, which are said to be fundamental to our political system, to the courts, we must be assured that there are mechanisms which discipline judicial reasoning. In their absence, the argument that an unaccountable élite has been left in charge of determining our basic political rights would be a compelling one.

This problem is not a new one. The judiciary has always been aware of the need to be perceived as rendering impartial decisions:

If the law is evidently partial and unjust, it will mask nothing, legitimise nothing, contribute nothing to any class’s hegemony.32

Sometimes judges have admitted that they have a great deal of leeway when making decisions. Talking about the Charter’s predecessor, the Canadian Bill of Rights, Laskin C.J. wrote:

There may be differences about the scope of the discretion, but there cannot be any dispute about its existence. As I said at the beginning of my remarks, each judge puts his own questions and supplies his own answers and, in yielding ground to institutional considerations, he does so according to his own assessment of what they demand.33

The danger such admissions present to the judiciary as an institution, especially with the advent of the Charter, is plain. Thus it is that judges have been at pains to say that they are aware of the centrality of their new roles, but that Canadians need not fear that judges will abuse their power. Sometimes they tell us that they do not have as much flexibility as some people might think; on other occasions, and more credibly, they tell us that they will constrain themselves prudentially. Their personal whims and inclinations will give way to the signals which emanate from the well-established political consensus of Canadian society.34 As a result there is general agreement that the courts should approach the Charter from a

34 That the judges are conscious of their new importance is revealed by many of their statements. While they profess to be awed by their new responsibility, there is also a good deal of indication that they are enjoying their new centrality. For instance, in a celebration of the Charter of Rights on the CTV programme “W5”, aired on December 14, 1986, Dickson C.J. said that he was “willing to challenge anything that stands in the way of the Charter’s realization” and that “the coming years will undoubtedly see the Supreme Court play a major role in shaping the legal, moral and social
pursuasive point of view. This interpretive approach has gained the
imprimatur of most leading commentators, as well as of the
contours of our country. I am confident our court is strong, healthy, ready
to meet the challenges and responsibilities awaiting it.” During the same
programme, when asked whether the public was over-rating the significance
of the Charter, Dickson replied: “I don’t think it’s possible to answer that
at this time. I think it’s too early. We have great expectations…” On the
other hand, Lamer J. seemed to want to indicate that it would be wrong
for people to think that the justices love the new power they have been
given. “I can assure you I don’t find anything pleasant about it…. It’s
part of being a judge. It is like asking a surgeon if he is comfortable cutting
somebody’s leg off. He says ‘Well, I just do it. I get used to it.’” Winnipeg
Free Press, 14 April 1987, 16. But, in the Globe & Mail, April 11, 1987,
A1, D1, the same justice was quoted as having said: “I compare these times
with the day after Pasteur’s discovery. It’s that fundamental. Even if we
keep repeating that the Charter has not changed that much, it has changed
a whole equation. I wish to God I were a law student being called to the
Bar next year.” The Supreme Court of Canada justices’ awareness that they
may have some discretion and that this may be perceived as being a bad
thing is also clear from their statements. Some of them argue that they
can suppress their personal feelings, others admit that they come into play.
In public, at least, nearly all of them suggest that there is no serious problem.
Mr. Justice Sopinka, some time after his appointment, rejected the idea that
judicial appointments in Canada should be made after a confirmation process
mirroring that of the United States. His point was that it would be
embarrassing and silly to subject nominees to the questions about such high
profile issues as abortion, capital punishment and homosexuality. The Toronto
to wrest these ideas of bias from a prospective judge when he or she is
expected to decide free of them”. He apparently believes that judges can
rise above their predilections. On the day his appointment was announced,
in response to the question above whether it was his Progressive Conservative
party connections which had led to his appointment Sopinka said that he
could not be politically typed because he had associated with all kinds of
political groupings. He noted that he had also represented members of the
Liberal Party. This notion of the width of the Canadian political spectrum
tells us something about the judiciary’s understanding of Canada’s political
profile. Sometimes the justices admit that their values creep into decision-
making, but they are relatively confident they can do so without Canadians
having to worry. Chouinard J., in the “W5” programme cited above, said:
“There is no doubt about that. It will be difficult sometimes, perhaps, when
the time comes to pass, for lack of a better word, what I will call a moral
judgment on the reasonableness of a piece of legislation … that will be
a sort of a moral judgment that we will have to pass…. One has feelings
about these things.” Lamer J., in the same programme, said: “I am called
on to make value judgments, and I am not going to make value judgments
with somebody else’s values. I am going to make those judgments with
my values. I think they are good.” La Forest J. in the same programme,
did note the difficulties this might present: “This will inevitably create an
ongoing debate among people. You know they respect us up to a point
and I hope that we continue to be respected in terms of our honesty and
conscientiousness in arriving at these decisions. But obviously there are people
who will not necessarily agree with us. We can be out of tune with society.”

35 Eg., P.W. Hogg, “The Charter of Rights and American Theories of Inter-
judiciary. Thus, in the very first case to reach the Supreme Court of Canada, Estey J. stated that "narrow and technical interpretation" which could "stunt the growth of the law and hence the community it serves" would not be acceptable to the judiciary when dealing with the Charter of Rights and Freedoms. In the Big M case, Dickson C.J. set out that this rejection of a narrow approach meant that a purposive approach was to be used. He was building on his own decision in Hunter v. Southam Inc. All of these passages have been frequently, indeed slavishly, cited in subsequent decisions.

The purposive interpretative approach appears to be defined by juxtaposing it to other possible approaches. It is contrasted with formalism, the reading of the words of a text as if they had intrinsic meaning. It also rejects the idea that the private views of a judge should permit her to make her decision first and then tailor her reasoning to justify it later. That is, what is expected is that the judge, as a member of her community, will look for the essentially agreed-upon political morality which gives the text which she has to interpret an acceptable meaning. While it is understood that, as a matter of legal logic, this may not yield only one possible result in any one case, it is assumed that the range of results will be perceived as legitimate by the public, thereby legitimating the decision-makers who bring them to the population.

The questions raised are: (i) are the courts, in fact, capable of using methodologies which can be said to amount to a purposive approach in this way? and (ii) is the discretion embedded in such an approach so large that courts are, in fact, left with a wide range of choices when making decisions, enabling them to give their personal biases sway?

In a very fine article, Peck has shown, in considerable detail, how open-ended the language of the Charter really is. His analysis of the cases shows that the Supreme Court of Canada has been able to choose liberally amongst the rich menu of both alternative modes of interpretation and sources of interpretation available to them. For instance, as part of Peck’s discussion of the celebrated decision in Oakes, he points out that the courts decided to put the onus of showing the reasonableness of the interfering legislation in issue on the government. While this fits in with the notion that the Charter is there to protect the citizenry from the government, Peck notes that neither legal nor political logic mandated that the burden of proof should be allocated in this way. Further, in determining whether the legislative instrument in question is proportionate as required by the tests devised in Oakes, the courts will have to determine the object of the legislation in question. This is known to be a bedevilling task, one which the courts have not

---

discharged with distinction over time. As part of the Oakes exercise, the courts also may have to determine what other legislation might better have achieved this hard-to-find goal, as well as the extent of the detriment individuals affected by the legislation will suffer, as compared to the good effect it might have on other people, perhaps a vast majority of the people. In sum, an investigation into social facts is to be undertaken and the courts might well be one of the least competent institutions we have to conduct such inquiries.40

That is, courts using a purposive approach will be burdened by difficult tasks which they have never discharged with distinction. Without replicating Peck’s argument in full, it is useful to look at a few examples to illustrate how judges have done thus far. The argument is that they have used a variety of approaches. If this tells us nothing else, it will undermine the claim that there is a professionally generated set of disciplining rules which constrain the courts when making decisions under the Charter of Rights and Freedoms, or an approach, whether it be called a purposive approach or something else, which seriously narrows the results which courts can legitimately reach.

Item: With Dickson C.J., in Big M, courts have rejected the notion that a formalistic interpretation of the text of the Charter should be employed.

Item: In Therens41, a driver was stopped by the police and asked to provide a blood sample at a police station. He complied. He had not been advised of his right to counsel, nor had he asked for a lawyer. LeDain J. held that he had been detained and had been denied the right to counsel guaranteed by the Charter. LeDain J. made it plain that he came to his conclusion by reading the Charter purposively.

Item: LeDain J. held that the freedom to associate did not include the right to strike.42 In part, his reasoning depended on the fact that, in guaranteeing “freedom of association”, the Charter did not refer to the right to strike although it could have done so explicitly. An uncharitable analyst might characterize this approach as the kind of narrow reading of a text which has been castigated as formalistic.

Item: McIntyre J., in the same right to strike cases, also held that, as freedom to associate did not specifically include the right to strike, it was not meant to be included. This reading, which might

be seen as formalistic, was supplemented by an explicitly purposive reading to the effect that freedom of association could only exist to enhance the rights of individuals which individuals could exercise lawfully as such.\textsuperscript{43} In this respect, he used a similar approach, a purposive one, to that used by Dickson C.J. and Wilson J., the dissentients in these cases. But they concluded that the right to strike was meant to be included lest the purpose for which workers normally associate would be negated. Are these flatly contradictory conclusions not symptomatic of how untrue it is to argue that a purposive reading will yield a range of different, but equally acceptable, results?

\textbf{Item:} Dickson C.J., in the right to strike cases, held that the legislature might be justified in restricting the right to strike of workers in some situations. In the \textit{Saskatchewan Dairy Workers} case he held that the effect of the strike on third parties was detrimental enough to justify the government’s back-to-work legislation. The fact that the employers and the affected segment of the public largely overlapped was of no concern to him. He was not interested in piercing the corporate veil of the co-operative, the third party disadvantaged by the strike. Wilson J., his fellow dissentent, chided him for this narrow approach. That is, in her view, it seems as if Dickson C.J.’s reasoning was both acceptably purposive \textit{and} unacceptably formalistic.

\textbf{Item:} \textit{Southam} and \textit{Big M} are the classic purposive reading cases. In coming to the view that both privacy and religious freedom were fundamental rights offended by governmental action in those cases, the Supreme Court of Canada stressed the historically recognized importance of those rights to \textit{human beings}.\textsuperscript{44} Nowhere in the argument in \textit{Southam} is there anything which suggests that privacy might not be applicable to corporations, as opposed to human beings. Yet, in the United States, the Supreme Court already had held that privacy and confidentiality are not notions which apply to the financial records of corporations.\textsuperscript{45} Is the alluding to history but not reading it in context the essence of the purposive interpretation approach? Was it purposive to extend these rights to legal, but non-human, persons, or was it a formalistic reading of a text which does not make it clear that words like “individual” and “person” might have variegated meanings?

\textsuperscript{43} In \textit{Andrews v. Law Society of British Columbia}, [1989] 1 S.C.R. 143. McIntyre J. specifically refers to his reasoning in the right to strike cases as being of the same nature as that which Dickson C.J. described as purposive in \textit{Big M}, supra note 37.

\textsuperscript{44} In \textit{Southam}, supra note 38, it was stated that the purpose of the Charter is to protect “the public’s interest” (at p. 652), and “the right of the individual” (at p. 653). In \textit{Big M}, supra note 37, Dickson C.J. said that religious freedom is “founded in respect for the inherent dignity and inviolable rights of the human person” (353).

Item: In *Southam*, the purposive reading by the Supreme Court of Canada led it to the conclusion that the government had violated the privacy right of the corporation when it tried to compel it to give up its documents without obtaining proper approval from an independent reviewer. In *Hufsky*\(^46\), the Supreme Court of Canada held that the random checking by the police of motor vehicle drivers and then compelling the detained drivers to produce their licenses and insurance policies was not an invasion of privacy of the kind that was meant to be protected by s. 8 of the *Charter*. The Supreme Court of Canada gave no reason whatsoever as to why this interference with a human being was not as much an invasion of privacy as the conduct affecting a corporation which was found to offend s.8 in *Southam*.

Item: In *Canadian Union of Postal Workers*\(^47\), an Alberta Court of Queen's Bench held that the searching of employees, of their belongings and of their lockers by their governmental employer, Canada Post, without obtaining proper approval from anyone, did not constitute an unacceptable invasion of privacy as the public interest demanded that such precautions be taken in respect of letters and parcels entrusted to Canada Post. This seemed to be a purposive reasoning, but the court also found that, unlike the corporation in *Southam*, a trade union was too distinct from a human being to have standing to complain about *Charter* violations.

Item: In *Reference Re s. 94 (2) of the Motor Vehicle Act*\(^48\) the Supreme Court of Canada gave as one of its reasons for not looking at the debates surrounding the drafting of the *Charter* that it was too difficult to discern the intent and purpose of a particular provision in that way, although in this case there was, in fact, not much doubt about what the drafters had intended. Was this a formalistic or a purposive reading? A better reason given by the Court for the approach it took was that to look back to the drafters' intentions would result in the *Charter*’s provision being frozen in time, incapable of being moulded to social circumstances which did not pertain at the time of enshrinement. This reason for refusing to look at the drafters’ intentions clearly left room for a purposive approach to be used in the future. In the case before it, the Supreme Court of Canada had to give the phrase “principles of fundamental justice”, found in s.7, meaning. Using what the Court obviously deems to be a purposive interpretative approach, the rest of the *Charter* was looked at to do this. As the legal rights found in s. 8-13 already granted procedural rights, it was held that s. 7 *must* be seeking to grant substantive safeguards, although the history of the section indicated otherwise. The Court, therefore, concluded that the phrase “principles of fundamental justice” was to be given a substantive

---


\(^47\) *Canadian Union of Postal Workers, Calgary Local No. 710, Canadian Union of Postal Workers and David Weale, v. Canada Post Corporation* (1987), 53 Alta. L.R. 121 (Q.B).

meaning. But, the problem which remained was that what was involved in the notion “substantive rights” was not revealed anywhere in the Charter. This did not phase the Court. It held that the principles of fundamental justice could be found by reference to “the basic tenets of our legal system.” In the case before the Court, the legislative attempt to punish persons who did not have the requisite intent to do harm was held to be a violation of s.7. The fact that there was a public interest in having unlicensed drivers, whether or not they knew about their lack of a license, off the road, could not justify such a breach. Presumably this basic tenet of the legal system — that there must be a requisite intent in these kinds of cases — was something which the judiciary could find by reference to the aggregate of pronouncements, decisions and practices of judges over time. Presumably these were more easily discoverable than the intent, spirit and purposes of legislators who wrote the Charter so recently and/or, presumably, reliance on the well-established judicial tenets was less likely to freeze the interpretation of the Charter than was reliance on the Charter’s drafters’ intent.

Item: In Vaillancourt, it was decided that the old felony-murder rule offended s. 7 of the Charter because it denied life, liberty and security of the person without the Crown having to establish mens rea. The principles of fundamental justice were violated by this rule. That is, the “basic tenets of the legal system” were violated, even though courts had created the felony-murder rule in question and had upheld it for generations.

In the right to strike cases, the Supreme Court of Canada had argued that one of the reasons that freedom of association did not include the right to strike was that no such right had been established by the judges over time.

Does any of this suggest that finding the “basic tenets of our legal system” is easier than discovering the meaning of “principles of fundamental justice”? Does it help to say that the Supreme Court of Canada has been reading the Charter purposively in these cases?

Item: In two recent contempt of court cases, the Supreme Court of Canada held that the issuance of an injunction by a judge to prevent a contempt of court was the act of a government official which could be subjected to judicial scrutiny under the Charter of Rights and Freedoms. In Dolphin, it was decided that the granting of an injunction by a judge to restrain an interference with commercial relations was not the act of a governmental official subject to judicial review under the Charter of Rights and Freedoms. Are

49 Id., per Lamer J., 550.
52 Supra note 11.
such purposive readings likely to lead to minor, tolerable inconsistencies, or might they bring the administration of justice into disrepute?

Item: In the two contempt of court cases, part of the reasoning was that the phrase "rule of law" in the Charter's preamble had to be interpreted in such a way as to colour the application of the real provisions of the Charter of Rights and Freedoms. The preamble, of course, is a statement of the intent of the drafters, not thought to be very useful by the Supreme Court of Canada in the Reference the Motor Vehicle Act case and by courts when interpreting mere statutes. In any event, the "rule of law" phrase is part of a longer sentence in the Charter's preamble, a sentence which, in full, reads: "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law."53 As far as can be gauged, the Supreme Court of Canada was not troubled by this part of the preamble when, in reading "freedom of conscience and religion" purposively in Big M, it found that a statute which forced stores to close on God's day of rest violated the Charter.

The point of all this is not that the differing kinds of reasoning used by the courts and the results reached cannot be rationalized. Lawyers are good at that. They might argue that there are a range of reading techniques which make sense and that judges can choose between them without doing violence to the notion that there is a set of internally generated professional interpretative tools which discipline the judiciary. In addition to this argument, or as an alternative to it, lawyers might reason that the selection of a formalistic, or a selective historical reading, or any other such intellectually barren approach, are just tools which allow judges to give a purposive reading to the Charter. But, these kinds of explanations are not satisfactory. Inasmuch as they are posited on the argument that the interpretation mechanisms leave the judges free to choose between, say, reading the text by ignoring the drafters' known intentions (Reference Motor Vehicle case), relying on the drafters' intention as stated in the preamble (contempt of court cases) or ignoring the drafters' intention as stated in the preamble (Big M), reading it purposively so as to give a privacy right to all persons, including corporations (Southam), reading it purposively so as to deny a privacy right to a real person (Hufsky), using "expressio-unius" type reading to deny workers the right to strike, reading the text broadly, so as to include citizenship as a protected ground, even though it is not listed in s.15 (Andrews)54, reading the text purposively by relying on the French version rather than the English version (Collins)55, etc., it is clear that, by preferring

53 Emphasis added.
54 Supra note 43.
one technique over another, differing results with contrasting impacts may be reached by different judges on any one set of facts. This is fatal to the proponents of the Charter who want to argue that the judges are subject to a set of internally generated professional rules which will hold them accountable, precisely because, given the acceptability of all of these readings, there is no sensible way to say that one result is better than another without using external criteria.

A similar difficulty is left by the other explanation on offer. Inasmuch as it is reasoned that courts are trying to get to a particular result because of their understanding of the Charter's purpose and that, in order to do this, they select amongst the interpretative techniques available, the question remains: how do judges decide what kind of a result is warranted or, more directly, what constitutes a defensible purposive reading? There is nothing in the Charter which assists in this regard. The ugly spectre is raised: an unaccountable elite might make it up as it goes along. Hence, the argument becomes that courts get or should get their direction from their understanding of the nation's political consensus. What will inform judges in developing this understanding? It is only if an answer to this question can be given which shows that the indications and criteria judges use, or should use, resonate with our democratic institutions and aspirations and with our agreed-upon views on basic rights and freedoms, that the critique that leaving decision-making about fundamental political issues to judges is anti-democratic, can be rejected. Unsurprisingly, many directives as to what criteria the courts should use are offered. I will content myself by referring, briefly, to what I believe are the three most interesting and complete efforts.

Beatty argues that courts have an obligation to ensure certain substantive outcomes on the basis that certain kinds of existing disadvantages connote a lack of respect for the dignity of individuals which no truly democratically just society, such as Canada, can continue to tolerate. Thus, according to him, mandatory retirement is clearly wrong, as is the failure to give all workers the same kind of collective bargaining rights as all others. He further argues that, inasmuch as courts fail to reach such results, their decisions will be wrong, rather than merely a less desirable outcome than others which might have been reasonably reached by the courts on the facts. Monahan has argued that courts should read the Charter not to provide substantive rights but so as to give the Canadian people more participatory rights. In this way their influence will be greater and our democratic practices enhanced. Intriguingly, our most undemocratic institution is to help perfect

---

56 As Wilson J. noted in her article “Approaches to Judicial Review,” supra note 13, 373. “What are judges to do? How should judges exercise their power to make the Constitution? . . . While parliamentary supremacy is far from dead, it is certainly severely wounded”.

those institutions which, notionally, are designed to let people participate in decision-making but which have failed to deliver the goods. Wilson J. has suggested that the judges should try to put themselves into the position of the least advantaged of our society and then purposively read the Charter to take these people's needs into account. These are very sophisticated arguments and I hope that this summary does not do them too great an injustice, even though its brevity necessarily leads to distortion. In the end, however, inasmuch as they are prescriptions for judges as to how they are to read the Charter lest, in the absence of adherence to some such prescription, the courts will become uncontrolled usurpers of such democratic institutions as we have and, thereby, erect barriers to the development of a better democracy, they are unsatisfactory.

This is so, because:

i) Over the centuries, courts have never behaved in a manner which suggests that they could, or would ever want to, do any of the things recommended by these theorists;

ii) Thus far, armed with the Charter, the courts have not read the Charter so as to give Beatty, Monahan or Wilson much hope that their vision, or anything like it, has been taken up by the judiciary. It is largely due to this that Charter proponents have made so much of the promising language in cases like Morgentaler and Andrews and of some of the dissents in other cases;

iii) No matter which of these visions of how the Charter should be read is accepted by courts — if any — as Bakan notes, it will involve them in making political decisions. The criteria to make substantive outcomes fit Beatty's view of a world which pays the right amount of respect to all individuals are not self-suggesting, nor are those which will help courts to discern what kinds of procedural rights will enhance participatory political rights to perfect a particular kind of democracy. Amongst other problems with the latter argument, there is no agreed-upon definition of democracy; like s.2 Charter rights, democracy is an open-textured idea. As for viewing the world through the eyes of the disadvantaged, it is difficult to believe that enough of them will be able to get access often

58 Supra note 4.
59 Supra note 13, 375 et seq. For a more sophisticated working-out of this position, see Minow, "The Supreme Court 1986 Term; Foreward: Justice Engendered" (1987), 101 Harv. L.R. 10.
60 For the best critical analysis of these theories of Charter interpretation and potential, an analysis which reveals that, no matter how sophisticated these theorists' work is, eventually it has to admit that judges are going to have to make political choices and that only exhortation is available to ensure that they will stay within the confines which the theorists claim will stop them from being usurpers of our democratic rights, see, Joel Bakan, "Constitutional Arguments: Interpretation and Legitimacy in Canadian Constitutional Thought" (1989), 27 Osgoode Hall L.J. 123; "Partiality and Legitimacy in Constitutional Theory", Paper presented at Uni. of Toronto Legal Theory Workshop, Nov. 1, 1988; “Book Review Monahan and Beaty” (unpublished, available on request).
enough to be heard, or that judges will be able to transcend the views, attitudes and ideology which their alliance with, and often membership of, the dominant classes has given them. While it is hardly worth spending any time on the proposition that judges, especially at the superior court levels, come from the ranks of those who serve the wealthy and may be expected to share their vision of society, a brief reference to a recent study by Michael Ornstein is warranted. He undertook a large survey of the ideology of segments of the Canadian population. One of the segments was constituted by senior partners of the largest Canadian law firms ranked by size. The practice of these law firms was largely corporate law. Some of the questions put to the respondents through the survey were designed to elicit the depth of civil libertarianism of the respondents. The lawyers' group was one of the two most anti-civil libertarian groups in respect of each of the questions put in this context. Thus, lawyers, when compared to big business executives, to small business leaders, to federal, state, and municipal elected politicians and civil servants, and to trade union leaders, were the group: (i) most opposed to legislation which would support homosexuals against discrimination; and (ii) most opposed to legislation which would eliminate existing provincial censor boards. They comprised the second most opposed group (after municipal civil servants) to the abolition of the War Measures Act. Finally, lawyers ranked only behind big business and small business people in their desire for more cut-backs in social welfare programmes and in their support for the existing (mal-) distribution of wealth.

While the ideology of senior partners in large corporate-type law firms is not determinative of the social attitudes of all lawyers, it is likely that appellate judges have more in common with these kinds of lawyers than they have with the popular sectors of society. A variety of studies has shown that appellate court judges have had close ties and relations with the dominant political parties, have never been trial judges, that is, have come straight out of practice to the superior court benches and, until recently, that for every

61 Petter has made the very good point that one of the difficulties created by the Charter is that only rich people can afford to fight judicial battles consistently through to the exalted height of appellate courts. As a result, a disproportionate number of rich people, and corporations, will have their cases heard by the superior courts. As a consequence, the wealthy's view of the world will come to be seen (by a judiciary which already is inclined this way), as the “natural” perspective on the way the world is; see supra note 45.

62 Ornstein, id., 141, writes that “the term [ideology] is used ... to denote an ensemble of political attitudes which, taken together, define the relationship among capital, the working class, and the state.”
three people appointed to the Supreme Court of Canada, two have come from the corporate-commercial side of practice for every one who came from the criminal-civil libertarian side. Moreover, the ideology of the profession is very much that of the élite of the profession. Without question that élite is to be found in the blue ribbon corporate law firms. Elsewhere, Reuben Hasson and I have shown how the blue ribbon law firms' views are reflected in, and pervade, legal education and how they set much of the agenda for academic research. In sum, it is somewhat naive to believe that judges will be able to internalize the views of the nature of Canadian society offered them by the disadvantaged on the rare occasions on which they come before the superior courts, especially as the poor and the oppressed often will be asking for something unusual: the upholding of protective legislation and/or the establishment of positive measures. Judges are not only inclined to share the concerns of the wealthy but they are also wedded to the creed of the individual rather than that of the collective; they feel more comfortable striking down legislation, rather than upholding it and creating positive schemes (even if they felt they had that kind of jurisdiction). The proof is in the pudding. While social welfare claimants have not yet reached the Supreme Court of Canada, Reuben Hasson has shown how badly they have fared at trial and lower appellate court levels.

The crux of the argument, then, is that the very way that the Charter proponents defend the shifting of decision-making power from somewhat accountable institutions, such as legislatures, to the democratically unaccountable judiciary, is harmful to their case.

64 See Dennis Olsen, The State Elite, (1980), ch.3. It is very likely growing knowledge of these data which has led to the agitation aimed at finding better ways of appointing judges to the Supreme Court of Canada. The advent of the Charter, and the need to legitimate the decision-making which it is to yield, present problems if the public perceives the judiciary as coming from the ranks of the élite.


66 R.A. Hasson, supra note 24. As to the question of creating positive programmes, the issue is rarely confronted by courts. But, in a recent aside, the Court of Appeal of Ontario comprised by some of the more progressive members of the court, offered an insight into the general approach of courts: “Public funding of day care facilities is a social problem which is beyond the reach of the court,” per Dubin A.C.J.O., writing on behalf of himself, Houlden and Tarnopolsky J.J.A. in Regina v. King (1988), 50 D.L.R. (4th) 564, 569.

67 Underlining the point made earlier in the text that the most common vision of the world which will be presented to the judges will be that of the wealthier segments of our population, see supra note 61.

The anti-people, anti-progressive and what is, from the Charter proponents' perspective, the incoherent nature of the decision-making which has characterized the jurisprudence thus far, draws unwelcome attention to the fact that the Charter has been promoted by advocates and sellers as opposed to rational and objective appraisers, and that it is unlikely that the judiciary will be transformed into an agency which enhances democracy and which protects the weak from the strong. The reason that the Charter proponents have to confront these unpleasant facts is that their selling and defending of the Charter and of the judicial methodologies which are to be used to interpret it have ignored that:

(a) the enshrinement of the Charter had a specific political history; and

(b) the judiciary has an historic role to play, one to which it should be expected to be faithful as it goes about the task of interpreting the Charter. Not paying attention to this is all the more surprising because the Supreme Court of Canada showed how conscious it was of its political role during the constitution-making process which led to the enactment of the Charter of Rights and Freedoms.

Once it is recognized that, while the judiciary does have a role to play, it is not one which is geared at creating a better, gentler and kinder and more democratic world, the decision-making which has emerged does become coherent. That is, it turns out that, just as the Charter proponents claim, but cannot prove because of the yardstick they use, judges are not such poor craftspeople and they engage in the capricious venting of their personal biases less often than many critics claim. Paradoxically, it was the portrayal of the judiciary as an agent for change when it became armed with the Charter of Rights and Freedoms which has created, and continues to create, most of the difficulties for the Charter's proponents' arguments. The next section of the paper sets out to demonstrate that the judiciary, as an institution, understands that the Charter has at least one specific political purpose. Further, the idea will be to show that the judiciary's decisions in other areas can be viewed as consistent with the courts' traditional role of defending capitalist relations of production. That is, there is purposive reading out there, but the purposes pursued are not the ones which Charter proponents identify.

III. The Contents of the Charter

(a) Language Rights

While there were many factors which led to the enshrinement of the Charter of Rights and Freedoms, there is no doubt that a very, if not the most, important impetus was the need felt by the federal government to end the threat posed by Quebec nationalism.

69 For a listing, see Glasbeek and Mandel, supra note 9.
As Weiler noted:

[S]ecuring minority language rights was the principle motivation for Prime Minister Trudeau’s making the Charter the centrepiece of his project for constitutional renewal of Canadian federalism.\textsuperscript{70}

And Russell wrote:

The political purposes of the Charter can be thought of as falling into two general categories. These two kinds of purposes are ... closely related, although analytically distinct. The first has to do with national unity and the Charter’s capacity to offset, if not reverse, the centrifugal forces which some believe threaten the survival of Canada as a unified country. This national unity function of the Charter is most relevant to explaining why politicians, especially those who led the federal government, pushed so hard for a Charter.\textsuperscript{71}

The Quiet Revolution caused Canada, and more directly the dominant political economic groups in Canada, the anglophone business elite, to have to face an increasing number of militant demands by Quebec’s French-speaking majority. Francophone Quebecers were disadvantaged in their economic and their working life. Overwhelmingly they constituted the non-propertied portion of the population. The demands for change which were encouraged as the Quiet Revolution took hold were, therefore, not just linguistic rights as such\textsuperscript{72}, but also cultural preservation claims as well as social and economic demands. It was the strategy of Trudeau which was to emerge as the dominant means with which to counter these trends.

It was his idea that English Canada should accept that French was one of the two founding languages, equal in all respects to English. This meant that the federal government and the anglo-

\textsuperscript{70} Supra note 15, 55.


\textsuperscript{72} Although there was a great danger to the survival of the French language in both Quebec and in Canada generally; see Beaugot, “A Demographic View on Canadian Language Policy” (1979), 5 Can. Pub. Policy 16; Vaillancourt, “La Charte de la langue Francaise du Quebec”, (1978) 4 Can. Pub. Policy 284. See also Mandel, supra note 71. For anyone who doubts how radical the movement for change was, it is worth referring to “The Second Front”, The Report of Marcel Pepin, National President to the Convention of the CNTU, Oct. 13, 1968, which vigorously attacked capitalist relations of production, and to the manifesto of working class independistes who wanted a different world altogether, “Ne Comptons Que Sur Nos Propres Moyens/We Can Rely Only on Our Own Means”; see Black Rose Books Editorial Collective, Québec Labour (2nd ed) (1975), 9.
provinces should accord French speaking minorities under their jurisdiction the right to use their language in the fullest sense possible, that is, in their dealings with governments, the courts and, where numbers warranted it, in educational settings. The trade-off would be that the English minority in Quebec would be given similar rights. That is, Trudeau sought to characterize, and succeeded in having a majority of political leaders accept the characterization of, the Quebec "problem" as one which was not primarily concerned with national aspirations, but rather as a much more narrow one, one which had to do with the preservation of the French language in Quebec and in Canada.

The difficulty with the Trudeau strategy was that, while the federal government could implement it, and did, by protecting francophones in the courts and in federal government bureaucracies, the provinces were not bound to do so. Constitutional amendment was needed. This became all the more urgent after the Parti Quebecois came to power and began its drive for independence. To head this off, the federal government was joined by the political leaderships of all the provinces. They worked hard to achieve the defeat of the PQ's referendum on sovereign association. The major political promise made to the Quebecois to persuade them to vote "No" was that they would be offered a new constitutional arrangement, one in which Quebec's aspirations would be better defined and respected than ever before. After the defeat of the referendum, however, politicians, other than the Trudeau Liberals, lost a great deal of interest in the constitutional process.

In order to deliver, the federal government deliberately tied the obtaining of an enshrined Charter of Rights and Freedoms to the patriation and amendment of the Constitution. It was felt that provincial leaderships could not be seen to object to the enshrinement of a Charter of Rights. Milne found a secret memorandum prepared for the federal negotiators' use at the constitutional conferences. It read as follows:

The strategy on the People's Package is really very simple. The federal positions on the issues within the package are clearly very popular with the Canadian public and should be presented on television in the most favourable light possible. The Premiers who are opposed should be put on the defensive very quickly and should be made to appear that they prefer to trust politicians rather than impartial and non-partisan courts in the protection of the basic rights of citizens in a democratic society. It is evident that the Canadian people prefer their rights protected by judges rather than by politicians.

73 D. Milne, The New Canadian Constitution (1982), 221-2. This echoed the strategy set out by Trudeau as early as 1967 in a speech given to the Canadian Bar Association and as set out in his own writing, Federalism and the French Canadians (1968), 54-58.

74 The People's Package referred to what is now the Charter. This seductive title is indicative of the nature of the strategem.
Embedded in the People's Package, which it was hoped would be irresistible, were a series of provisions on minority language rights which set out the federal government's strategy on the issue which, by itself, might not have been very attractive. That is, the use of the constitutionalization of rights was integral to the plan designed to ward off the nationalist movement in Quebec.

The courts have understood this from the beginning. Indeed, they played a crucial part in furthering the tactics devised by the federalist forces. In *Re Resolution to Amend the Constitution*\(^7^5\), the Supreme Court of Canada was asked whether or not the federal government, as a matter of law, unilaterally could ask the U.K. Parliament to amend the Canadian constitution. The Supreme Court of Canada obviously had to answer that question and it answered it: “Yes”. But the court also did something quite unprecedented: it answered the question as to whether or not there was a convention requiring agreement by the provinces to any such federal request. That it was unusual for the court to indulge itself in answering this kind of question can be seen from some of the academic commentary it produced by the likes of Hogg who wrote that the Supreme Court of Canada acted “outside its legal function and to facilitate the political outcome”.\(^7^6\) In the result, a majority of the Supreme Court of Canada held that there was a convention requiring the federal government to obtain provincial approval but that all that was required was that a substantial majority of the provinces support the federal government’s decision. This had an immense impact on the dealing and wheeling which was to take place immediately afterwards.\(^7^7\) For the purposes of this discussion, all that is important is that the Court did not say specifically that it was necessary for Quebec to be part of the substantial majority for the federal government’s proposed course of action to be constitutionally valid. Quebec was treated as a province just like any other. This, of course, was the essence of the minority language rights’ strategy offered by the Trudeau government: no province should be able to act as a sovereign entity any more than any other province. Indeed, when Quebec came back to the court to make the argument that, whatever substantial majority meant, it required that any such majority should include Quebec, an argument of some historical force given the foundation of Canada and Quebec, the Supreme Court of Canada rejected this reasoning.\(^7^8\)

(i) The Supreme Court of Canada played a vital political role in a constitutional process which was to give it immensely greater judicial review power than it ever had had before. Ironically, one

\(^7^5\) *Supra* note 9.


\(^7^7\) See Glasbeek and Mandel, *supra* note 9; see Hogg, *supra* note 76, 323;


\(^7^8\) *Re Attorney-General Quebec and Attorney-General Canada* (1982), 140 D.L.R. (3d) 385 (S.C.C.).
of the reasons later to be offered for granting it such new powers was that it was not a political actor subject to the whims and wills of occasional majorities;

(ii) The Supreme Court of Canada was a central political actor in a constitutional process which was geared at supporting a status quo which was highly contentious in Quebec. In so doing, the Supreme Court of Canada was supportive of the political programme associated with a powerful élite.  

Unsurprisingly, once the Charter was enshrined, the courts were pivotal in nailing down the federalist, anti-Quebec nationalism circumstance it had helped create.

Section 23 of the Charter of Rights and Freedoms is a most detailed section, one which was deliberately written to controvert Quebec’s Bill 101, a Charter of French Language Rights, which had been aimed at controlling the language of education in Quebec. Not only is s. 23 not subject to s. 33, making it clear that minority language rights were the focus of the constitution-making process, but it is not abstractly written as are other supposed fundamental rights and freedoms in the Charter such as, say, “freedom of religion”. That is, the judiciary was given rather specific instructions as to how it ought to interpret minority language rights. The judges took their cue very well.

In the Quebec Protestant School Board’s case, the Supreme Court of Canada held that Bill 101’s limitations on English-language education rights offended the Charter. The Court did not accept Quebec’s argument that a limitation on (contrast denial of) the language of education rights of English-speaking people was a reasonable one in a free and democratic society such as Quebec. It felt that, having found a s. 23 violation, it did not have to consider s. 1 of the Charter. It read Bill 101 not as a limitation on an entrenched right, but as a denial thereof, and, therefore, indefensible. Both the result in the case and the tenor of the Court’s opinion showed that the Court was adhering closely to the plan devised to keep Quebec, as a province with a large English minority, within the confines of Canada. Other decisions reflected the same approach. For instance, the Manitoba French minority which had been unable to win anything by way of language rights for 90 years, was able to obtain a favourable decision, one which fitted in with the notion that it was appropriate to compel Quebec to treat its anglophones well, as long as English provinces with French minorities were treated similarly.

---

79 This was not, of course, the first time that the courts had shown their willingness to help tame the national aspirations of Quebec; see Attorney-General Quebec v. Blaikie (1979), 101 D.L.R. (3d) 394 (S.C.C).


81 Reference Re Language Rights under the Manitoba Act, 1870 (1985), 19 D.L.R. (4th) 1 (S.C.C.). The decision was remarkable for the judicial methodology used. The Supreme Court of Canada found that the unilingual Manitoba laws were invalid because they did not abide by the Charter of Rights and Freedoms’ requirements. As this would have created instant chaos, the
More recently, the Supreme Court of Canada has held that the Quebec law which prohibits use of commercial signs in English offended the *Charter of Rights and Freedoms*. Again, the Court had to assert that Quebec’s majority, which might win the day in a democratic sovereign nation, could not be respected as long as Quebec was a province like any other in Canada. The nature and the extent of the political fallout of that decision cannot be gauged yet, but it is already significant. For a while, the apparent quiescence of the Quebec separation movement had allowed the Supreme Court of Canada to become more “practical” in its reading of language rights. It had come to rely on rather narrow textual readings to avert political inconvenience to some of the provinces, while urging them to set their houses up better so as to protect French minority language rights. But, that kind of self-satisfied lenience could not be extended when it was the English minority in Quebec which was the claimant that its language rights were being oppressed by a French majority, as was the case in the commercial signs’ case. The Supreme Court of Canada returned to the plan which it had helped devise.

---

83 In response to the decision, s. 33 was used by a reluctant Bourassa government so that a bill which decreed that English commercial signs could be controlled would be beyond the reach of the *Charter*. This has created a backlash with two main strands to it. First, Quebec’s willingness to challenge the *Charter*-imposed language policy has given rise to the fear that, after all, the policies which seemed to have worked so well for a while may not last the course. National, rather than mere language aspirations, are still shown to be very strong, strong enough to have to be respected by a Liberal Party Premier whose government had shown itself to be quite happy with the language policies embedded in the *Charter*, supplemented by the “distinct society” phraseology of the Meech Lake Accord. If that “distinct society” phrase comes to be perceived as an empty one, Quebec’s nationalist forces are likely to be given a boost. The second reaction is that the use of s. 33 forced upon the Bourassa government was seen not only as a reaffirmation of Quebec’s cantankerousness, but also as a resurgence of democratic impulses which are not to be tolerated. Calls for repeal of s. 33 abound; *supra* note 14. Recourse to the *Charter* is said to be enough of a democratic right, especially when such democratic rights are sought to be exercised by the people of Quebec.
85 See M. Mandel *supra* note 71, for this particular insight and, indeed, for the best legal discussion of the language rights’ issue available. The discussion in the text relies heavily on it.
In sum, the courts have played a major part in the implementation of state strategies in respect of the Quebec language rights' issue at a time when it has been extremely difficult for elected politicians, acting within serious jurisdictional limitations, to be effective. When applying the Charter in respect of language rights, the courts have acted in tandem with the federalist state and against the Quebec state. The courts have not acted as an agent independent of the state, as an institution inserted between the people and the state to protect the former from the latter. The decision in the language rights' cases make the claim that the judiciary armed with the Charter will always act as a guarantor of rights and freedoms of individuals who are oppressed by the state a somewhat dubious one. Whatever one's position on the Quebec and language issues, it is foolish to portray the courts as actors whose only interest is the protection of minorities overwhelmed by the state. This can only be true if the English minority and the Quebec state are isolated as the issue; it is not true if the French-speaking Quebecois and the federal state are treated as the combatants.

(b) Legal Rules

This category of rights and freedoms found in the Charter is the most litigated one. The legal rules provisions in the Charter concern themselves largely with procedural matters which affect the criminal law process. The easy-to-discern objective of these rules is that people who are the subject of criminal investigation and processes should be protected from over-zealous prosecutorial forces and insensitive tribunals and courts. This, of course, is far from unimportant. A society which treats all its citizens with the respect which ought to be accorded to free, sovereign individuals, even those suspected of having transgressed laws devised to protect other individuals' freedoms, is a better society than one which does not. Inasmuch as the Charter furthers this objective, its proponents have reason to believe that a judiciary, armed with the Charter, can bring about a more civil and better society. And, on the face of it, our courts have read the legal rules provisions of the Charter in such a way as to boost that belief.

The courts have been supportive of the rights of prisoners and parolees. They have held that these people should be entitled to legal counsel in situations where this right previously had not been accorded them. The Supreme Court of Canada granted a right to hearings with better procedures to refugees. Courts have expanded the protections to be afforded to suspects by throwing out cases in which there had been undue delay in bringing them

---

to trial\textsuperscript{90}, or where the manner in which evidence was obtained is considered to be offensive to our social tenets. There are many examples of this: a confession obtained from a person who was extremely drunk was tossed out even though the court believed her confession to be reliable.\textsuperscript{91} In another case, it was suggested that for the police to apply a choke-hold to ensure that someone would not swallow a drug \textit{might} well be a violation of the \textit{Charter of Rights and Freedoms}.\textsuperscript{92} The failure to offer a detained suspect the opportunity to telephone a lawyer has been held to be unacceptable behaviour.\textsuperscript{93} The court has also struck down legislation which provided a very high minimum jail sentence; it held that such inflexibility did not permit of a humanistic approach which balances the wrong done against the personal characteristics of the convicted person.\textsuperscript{94} The Supreme Court of Canada also has extended the protection attached to incriminating evidence an accused was forced to give when appearing as a witness in a previous proceeding\textsuperscript{95}; and so forth.

It is clear that, while not doing so all that elegantly\textsuperscript{96}, courts have been at pains to expand the area of protection to individuals who might suffer from over-reaching by the forces of prosecution.

\textsuperscript{91} Clarkson \textit{v.} \textit{R.}, [1986] 1 S.C.R. 383. But, note that this case might well have led to the same result in pre-\textit{Charter} days; see Pohoretsky \textit{v.} \textit{R.} [1987] 1 S.C.R. 945 for a similar holding.
\textsuperscript{92} Collins \textit{v.} \textit{R.}, [1987] 1 S.C.R. 265. The uncertainty about the actual holding suggested in the text is due to the fact that, as in many of these cases, the Supreme Court of Canada did not decide the case on the merits, sending it back to trial for more fact-finding. Further, the Supreme Court of Canada cited, without positive or negative comment on the outcome in the case, \textit{R. v. Cohen} (1983), 33 C.R. (3d) 151 (B.C.C.A.), in which the application of a choke-hold was held not to be a violation of s.24 of the \textit{Charter}.
\textsuperscript{96} As argued in n. 92, the actual holding in \textit{Collins} was not all that illuminating. Moreover, the reasoning and tests formulated by the Court also left a lot to be desired; see infra, n. 101. Similarly, in Dubois, id., the Supreme Court of Canada was forced into arguing that its decision was warranted despite an apparent Supreme Court of Canada decision (\textit{R. v. Brown} (No. 2), [1963] S.C.R. VI) to the contrary. The Court said that one could not tell what the Supreme Court of Canada truly had meant on the earlier occasion. In \textit{R. v. Corbett}, [1988] 1 S.C.R. 670, the Court was both illiberal in its interpretation and inelegant. The issue was whether prior convictions could be used to attack the credibility of an accused person. The Supreme Court of Canada split into many pieces. Two of the justices held that a trial judge had discretion under the provision which entitled such cross-examination of a witness and that the provision, therefore, did not offend the \textit{Charter of Rights and Freedoms}, in particular s. 11(d); two judges held that a trial judge had no discretion but that, nonetheless, the provision permitting such cross-examination did not offend the \textit{Charter of Rights and Freedoms}’ s.11(d); one justice held that the trial judge had discretion as to whether or not to allow such an attack and that he had exercised it wrongly and, therefore, the issue of constitutionality did not arise; another judge decided, in a two-
Yet, the deeper implications of these decisions should not be all that comforting to the proponents of the Charter. Consider:

(i) These kinds of cases are quintessentially ones in which the individual is pitted against the potential oppressor, the state. The state is clearly identified as the villain. This, of course, harmonizes nicely with the Charter proponents’ general argument to the effect that the judiciary, empowered by the Charter, can act as a buffer between the potential tyranny of the majority which controls state power and dissident, non-conformist individuals and minorities. This notion of the Court as protector is further bolstered by the fact that many of the suspected and accused people who seek the protection of the legal rules found in these sections of the Charter do belong to the classes of the disadvantaged and the oppressed of our society.

But, the argument should not sway us. After all, to protect these individuals in this kind of setting is not quite the same thing as protecting Jehovah Witnesses, Dukhobors, Japanese-Canadians and Indépendistes from the tyranny of the state. It was those kind of people who were suffering the political oppression which formed the centre of the argument made by the Charter proponents who claimed that non-conformers and dissidents should be protected from state power. Indeed, it would have been politically foolish for those advocates to claim that the Charter was necessitated by our coercive police forces. As it was, prosecutors and police commissions objected to what they termed the Americanization of our law and order system. They predicted that they would be impeded in their efforts to protect persons and their property. The argument was that experienced criminals would be able to fetter investigations and prosecutions by reliance on barren, technical arguments.

This argument, was, and is, much used in the United States by opponents of the exclusionary rule fashioned under its Bill of Rights. Consequently, massive efforts have been made to show that the U.S. exclusionary rule’s procedural safeguards have not interfered with the catching and convicting of criminals. While the evidence is somewhat contentious, on balance it seems that the exclusionary rule has had little impact on the number of prosecutions brought; nor has it led to a substantial change in the success rate of the

---

97 For a review of the studies, see Morisette, “The Exclusion of Evidence under the Canadian Charter of Rights and Freedoms: What to Do and What not to Do” (1984), 29 McGill L.J. 521. Morisette relies on an article by B. Canon, infra n. 98, for his summation.
motions to suppress evidence because it was obtained in violation of the United States' Bill of Rights. This, of course, suggests that, while the language of rights in the criminal process cases may be much more civil libertarian than it used to be, the practices and results are not likely to be all that different to those in the bad old days, the pre-Charter days. If this is true, the argument that the courts' positive approach to legal rules is a real breakthrough is to be questioned. It may only be a symbolic breakthrough. It may say: "We are a society which wants to look as if we are not totalitarian." (ii) But the impression remains that the existence of the Charter's legal rules and the courts' willingness to read them so as to provide better procedural protections to suspected and accused persons indicates that the judiciary acts as a buffer against state oppression. This impression gets a boost from another quarter. These cases and the results in them give lawyers the feeling that they are central

---

98 B. Canon, "Ideology and Reality in the Debate over the Exclusionary Rule: A Conservative Argument for its Retention" (1982), 23 S. Texas Law J. 559, cites several studies to this effect. In a study of victimless crimes the Institute for Law and Social Research showed that only 2% of the cases examined led to a dropping of a prosecution because it was thought that the exclusionary rule would make it futile. In a similar study by the Californian Bureau of Criminal Statistics, in only 2.3% of the cases were charges dropped because the prosecuting forces thought there were search and seizure problems. Note also that the Controller-General conducted a study, cited by Canon, which showed that charges were dropped in a mere 4/10th of 1% of the total number of cases in the survey because of exclusionary rule problems. This same study also showed that in only 1.3% of the cases was there a successful suppression motion at trial and, in 50% of those, the defendant was convicted on the evidence that remained. Canon goes on to argue for the retention of the exclusionary rule because it hardly affects conviction rates and it legitimates the police, a point which has significance for the argument in the text.

99 In a recent case involving our secret service forces, the Federal Court denied the right of a suspect to have access to files which might exist and which might have a damaging effect on his life. This was justified by reference to the needs of the secret service. Of course, the applicant had made Charter arguments. The fact that they failed raises the spectre of their futility. Muldoon J., wrote that: "In light of six years' of rhetoric and jurisprudence about the Charter, some Canadians may shudder to realize that the security needs of a free and democratic society are, in a few basic essentials, much the same as those which totalitarian societies arrogate unto themselves. Utter secrecy, subject to certain checks, in security intelligence matters is one. That necessary degree of secrecy is so much more fissiparous in freedom and democracy than it is under the stifling oppression of a totalitarian régime, and it is therefore objectively justifiable in terms of paragraph 46(1)(b) of the Privacy Act. What no doubt distinguishes this free and democratic society from those which are less or not at all so, are the right to apply for, and obtain the results of, the Privacy Commissioner's investigation, and the right to apply to this Court for a review." Note that the holding is that the court application will necessarily fail. Is this the difference between true totalitarianism and our system? See Zangeneh v. C.S.I.S. (21 April, 1988), Ottawa T-2162-87 (Fed.Ct.).
to the battle of liberalism and liberty in our society. They are champions of the oppressed. Thus, not only have they been given a new set of arguments and a means to add to their income, the Charter has imbued them with the feeling that they have been recognized as vital political agents. Their articulate support for the Charter and judicial review is thereby assured. As the Charter is part of the legal system, and practising lawyers are the experts of that legal system, their support is of great significance to the public perception of the Charter. It is of some interest here to note that the courts have done their best to reinforce the notion that lawyers are crucial to Charter politics. Thus, while it is yet far from clear as to when the obtaining of evidence is so offensive to the Charter’s edicts that it ought to be excluded from the trier of facts’ consideration, it has been made clear by the courts that the denial of access to a lawyer (unless a suspect or accused consciously has waived her right to counsel), will lead to the exclusion of evidence.

(iii) Neither the police, nor the public, can be certain as to when the conduct of investigators will violate the Charter. But, however badly they feel about this, it is likely to be more of a shock to them to learn that the primary focus of the courts’ ruling on this question is not the protection of suspected or accused persons from

100 An additional boost is given to Charter proponents because it is by far and away the most progressive members of the profession who are engaged in this work. See text nn. 62-65. As a result an upside down effect is achieved, a regrettably predictable consequence when political battles are brought into the courts. The upside down effect is that it is progressive lawyers who help identify the state as the villain, even though their clientele groups are the ones who have the most to gain by enlisting the state as an ally. This is also true of non-criminal legal aid workers of all kinds. Their clienteles often are denied entitlement by rigid low level bureaucracies. Lawyers can now attack them for violating Charter provisions in the application of benefit-creating schemes. Again, the state, more than before, is identified as the enemy, although the benefit schemes in issue, more often than not, are necessitated by the actions of private property owners. See the discussion in the text, nn. 125-135.

101 See Collins, supra note 92 in which it was held that courts are to balance the following vague and incommensurable factors: What kind of evidence was obtained? What Charter right was infringed? Was the Charter violation serious, technical, flagrant, committed in good faith? Did the circumstances warrant the action taken or were other means available? Was the offence with which the accused is charged serious? Was the evidence essential to substantiate the charge? Are other remedies than exclusion available? Lamer J.’s judgment seemed to suggest that, if the violation of the Charter yielded real evidence, exclusion would seldom be required to preserve the integrity of the administration of justice. The indeterminacy, the lack of logic and, in the end, the very unclear enunciation of a commitment to ensure safeguards for suspected and accused persons, despite the rich rhetoric espousing such a commitment, has drawn some pointed critiques; see, e.g., R.J. Delisle, “Collins: An Unjustified Distinction” (1987), 56 C.R. (3d) 216. Manninen supra note 93; Baig v. The Queen (1987), 37 C.C.C. (3d) 181 (S.C.C.).
the forces of prosecution. The Supreme Court of Canada has held that the tests to determine whether or not evidence ought to be excluded because it offends the integrity of the administration of justice are designed to ensure that courts do not lose their legitimacy by permitting just any violation of the Charter (unless it is a denial of access to a lawyer) to lead to an acquittal. Manifestly, judges are conscious of the need to maintain public support, a consciousness which, no doubt, has been deepened by their new visibility in these and other Charter-generated cases. At the same time, they feel confident enough of their new pride of place to use the Charter to arrogate more power to themselves. Many of the decisions which Charter proponents might want to portray as the successful erection of barriers against the potential of state oppression, such as the setting aside of harsh minimum penalties, do not necessarily mean that they intend penalties to be less severe than those contemplated by the legislature. Rather, what the courts did decide was that the legislatures should be prevented from being so emphatic; what was contrary to the Charter was not to leave the discretion to set the penalty to the courts. Thus, while this may result in lower penalties than the legislation mandated in some cases, it might not do so very often. This is also true of the much-hailed decision in Vaillancourt. As a result of the abolition of the felony-murder rule, from now on manslaughter convictions will be registered rather than convictions for murder in these kinds of cases. But, this does not mean that the penalty may not be as great as it ever was. That is, the courts will be substituting their sanctioning power for that of the state. It takes a leap of faith to believe that this will lead to more humane treatment of convicted persons. The impression created — that the courts are legitimate monitors of the police, that they stand between the state and the disadvantaged — however, is of great value to Charter and judicial review proponents.

(iv) How misleading this impression truly is can be seen from the final point to be made in this section. What the Charter’s legal rules provisions do not lead to, no matter how much Charter proponents talk about the courts’ increased protection of the disadvantaged from the evils practised by the ugly state, is a change in what kinds of crimes the state will prosecute. Overwhelmingly, we remain interested in prosecuting those crimes involving personal violence and the integrity of property which are committed by people who have no property. The crimes of the rich are largely ignored.

103 Collins, supra note 92, where, see supra note 101, an impossible-to-apply set of criteria were spelled out to achieve this purpose.

104 What follows relies on yet another insight obtained from reading M. Mandel, supra note 71.


The function of criminal law and its enforcement as a disciplinary force by which to educate the population into an acceptance of the economic and political status quo107 is not challenged by the Charter provisions. There is nothing in the Charter, or its interpretation, which compels the state to allocate the resources spent on criminal investigation and prosecution any differently than it already does.108 That is, there is nothing in the Charter which tells us that we should beef up the puny law and order efforts which we make now to combat the wrongful conduct which leads to slaughter in the workplace109, the rape of our environment110, the damage done to the consumers by the knowing manufacture of shoddily made goods111, and by anti-competitive and deceptive business practices, the economic costs of which are staggering112, and so forth.

In sum, on the face of it, the courts’ efforts in respect of the legal rules’ provisions seem to reflect the justificatory arguments made by Charter proponents. Moreover, this category of Charter applications permits the courts to hold themselves out as an institution independent of the state, ready to ward it off on behalf of the downtrodden. In concrete terms, however, the outcomes cannot be said to herald a revolutionary change, indeed, not even

107 For the best exposition of this function of criminal law, see M. Foucault, Discipline and Punish: The Birth of the Prison (1979).
108 The only real exception to this general statement on the effect of the Charter on this issue may be Morgentaler (1988), 44 D.L.R. (4th) 385 (S.C.C.). But, even this requires qualification. Whatever else motivated the judges to come to the decision they did, one thing is clear: the criminal law provision which prohibited abortions (except in certain specific circumstances) was completely unenforceable in Canada. The public knew it, the politicians knew it, and most of all, the judiciary knew it. Attempts to prosecute Dr. Morgentaler had failed consistently in Canada. Juries just simply refused to convict. This was very embarrassing for the courts, undermining the legitimacy of the law and those courts which tried to insist that an unpopular law should be enforced. From this perspective, the Supreme Court of Canada’s decision to the effect that the criminal law relating to abortion was in violation of the Charter was a useful face-saving device. Here it is important to note that the Court did not say that abortion could not be criminalized, but simply that it had been done badly. It left the hot potato as to whether or not abortion should be a criminal offence in the lap of the legislature.
110 The unpopularity of environmental pollution and workplace suffering has forced the Law Reform Commission of Canada which in 1976, in Our Criminal Law, recommended that we should not consider criminalizing this kind of conduct, to come out with a diametrically opposed view; see “Workplace Pollution”, L.R.C.C. Working Paper No. 53 (1986) and “Crimes Against the Environment”, L.R.C.C. Working Paper No. 44 (1985).
111 The Dalkon-Shield, the Ford Pinto are merely spectacular examples of a multitude of such activities.
a change which suggests that we are a better society. The same kind of people are still the subject of state investigation and prosecution; the same number of unemployed, semi-employed, racially different and native peoples are convicted and jailed. The wealthy are in no greater peril than ever they were; indeed, as Southam showed, they may be even safer. If there is a change, it is a symbolic one and, most importantly, it is one which gives the courts more legitimacy to carry out the functions described in the next section.

(c) Section 2 Rights

Section 2 rights and freedoms can be characterized as giving rights to individuals as such. That is, they are abstract in the sense of treating individuals as atoms in society. They are rights which will protect these individuals, these atoms, from intervention by the larger society to which they belong and from undue trespasses on them by other individuals, by other atoms. Further, as these rights and freedoms are to be guaranteed, legal enforcement of them has had to be assured.

This characterization of the rights and freedoms in s. 2 means that all individuals possess them, no matter what their history or class position is. As Hobsbawm noted, all individuals are to be regarded "like people who have bought a ticket at a standard price to a movie: never mind who they are, they have the same right to a seat." To liberal proponents of the Charter, this signifies that all individuals can be protected equally from state oppression. More, it means that when disadvantaged people make their claims for better treatment they are able to do so on the basis of the same universal guarantee of rights which permit the "haves" of this world to justify their position. That is, their claims cannot be resisted on some a priori moral-political claims of justifiable differences. From this perspective, the Charter is treated as a welcome breakthrough by its liberal proponents.

Even though this reasoning is attractive, the outcomes thus far are disconcerting to those who want to rely on it. It is difficult to show that the Charter has contributed to Canadians' political-legals rights enunciated in s. 2 in any substantive way. For instance, there is no particular reason to believe that Canadians now have more free speech rights than they did before the Charter of Rights and Freedoms was enshrined. In particular, have Canadians won the right to more public space in which to exercise this right? Have the owners of the mass communication media given up the almost total monopoly they have had for a long time on news and opinion dissemination in this country? On the other hand, it is true that

113 E. Hobsbawm, Worlds of Labour, Further Studies in the History of Labour (1984); Ch. 17, "Labour and Human Rights", 303. The rest of this section draws heavily on this marvellous essay.

114 See Glasbeek, supra note 24, where the effect of this monopoly on the exercise of freedom of speech in Canada is discussed.
some censoring boards have been curtailed\textsuperscript{115} and that Nazis have been able to attack restrictive legislation seeking to inhibit the propagation of hatred.\textsuperscript{116} It is also true that the corporate sector has been enabled to attack legislative efforts to restrict advertising; the effects of these attacks are still incalculable.\textsuperscript{117} Similarly, while it is still a matter of serious legal contention as to whether or not a trade union can raise funds for political purposes, a right which was not challenged before the advent of the Chartier\textsuperscript{118}, there is no doubt that bodies such as the National Citizens Coalition now have the freedom to express themselves on political issues, free that is from the would-be restrictions of electoral financing legislation.\textsuperscript{119} Or, in another sphere, there seems to be no evidence that Canadians enjoy more freedom of religion than they ever did. Certainly, one group of serious people whose religion dictated that their children should undergo a non-conformist school experience were denied this right to exercise their strongly and sincerely held religious preference.\textsuperscript{120} Is this anti-religious freedom holding offset by the fact that a corporation's freedom to open a store on Sunday was upheld by a purposive reading of the same phrase, "freedom

\textsuperscript{115} Re Ontario Film and Video Appreciation Society and Ontario Board of Censors (1983), 5 D.L.R. (4th) 766 (Ont. C.A.).


\textsuperscript{117} Irwin Toy Ltd v. Attorney-General of Quebec (1986), 32 D.L.R. (4th) 641 (Que. C.A.) leave to appeal to S.C.C. granted. The tobacco industry is gearing up to use s.2 arguments so that it will be left free to express itself in respect of the dangerous drug it sells. While the tobacco industry is far from popular and will be facing an uphill battle in the courts which are well aware that the tide is running against the smoking of tobacco, it has been handed a powerful argument by the Supreme Court of Canada's decision in Ford v. Attorney General Quebec, supra note 13, to the effect that commercial speech is protected by s.2. This is one of the inherent dangers of judicial politics: the rhetoric used as a manipulative tool in one case is available to quite differently placed persons in another case. This is inevitable in a forum where class and history, that is, real contexts, are more often ignored than not. After this lecture was given, the Supreme Court of Canada handed down its decision in Att. Gen. of Quebec v. Irwin Toy (1989), 58 D.L.R. (4th) 577. Again, commercial expression was held to be Charter-protected expression. The legislation violating the freedom of expression was held to be a justifiable violation by the slimmest of majorities (3:2). This supports the argument made above.

\textsuperscript{118} At the moment, a union seems to have the upper hand in one such piece of litigation, see Lavigne v. O.P.S.E.U., (1989) 67 O.R. (2d) 536 (C.A.) but the matter has not been finalized. The Supreme Court of Canada is yet to speak. Further, the Ontario Court of Appeal decision is based on the fact that what a union did was a matter of private law. This is both contentious in law and, more significantly, politically undesirable from a union's perspective.


of religion" by the Supreme Court of Canada? Or, on yet another front, neither the workers' right to associate, nor their freedom of speech when it takes the form of picketing, have been enhanced by the Charter of Rights.

Not only is it hard to see, then, how Canadians' political rights and freedoms have been enhanced by the courts' readings of s.2, but the courts' reasoning appears to be incoherent if viewed from the perspective of Charter proponents and of those who believe that judges are constrained by some form of internal logic. But, the results reached are explicable as consistent, purposive readings if the Charter is not seen as a document whose single purpose it is to advance rights, in the sense of liberal individual rights, but rather as being part of a political economy in which the emphasis is on individualistic rights of the universal, abstract kind as a means to an end, namely, the maintenance of power by the wealth-owning members of the private sector. This requires some elaboration.

The rights and freedoms found in s.2 are essentially 18th century rights, evolving out of the political revolutions in France and the United States. Up to then, claims of rights had been associated with specific claims of rights, such as the right to hunt, or to use land in common, or the right to be awarded "a convenient proportion of wages". The last phrase comes from the Statute of Apprentices of Elizabeth I. That statute was very restrictive in that it wanted to banish idleness and to punish the refusal by workers to work for masters who needed them. On the other hand, it also guaranteed a certain amount of income and job security to workers. From a contemporary perspective, these rights are likely to be deemed to be inferior to the abstract rights included in s.2 of the Charter of Rights and Freedoms because they do not assume, as do the Charter ones, that all individuals are equal, that all individuals are sovereign beings. Indeed, these pre-eighteenth century rights assumed the contrary. But, they were concrete rights.

This simple point has been made to confront an issue of some importance. Section 2 of the Charter of Rights and Freedoms contains no concrete rights at all. It might have been decided to insert such rights in it. After all, it is possible to give people both abstract rights, which reflect our desire to treat all individuals as de jure equals, and concrete ones, which would help make them actually equal. This is not such a radical thought for our kind of polity. For instance, in 1944, President Roosevelt's State of the Union Message to Congress contained an Economic Bill of Rights. Its text is worth reproducing in full because it affirms the necessity of concrete rights to make abstract rights useful:

>This Republic had its beginning, and grew to its present strength, under the protection of certain inalienable political rights — among

121 I refer here to Big M, supra note 37.
122 See, Dolphin, supra note 11, and the right strike cases, supra note 42.
123 I must reiterate that this part of the presentation is based on E. Hobsbawn, supra note 113.
them the right of free speech, free press, free worship, trial by jury, freedom from unreasonable searches and seizures. They were our rights to life and liberty.

As our Nation has grown in size and stature, however — as our industrial economy expanded — these political rights proved inadequate to assure us equality in the pursuit of happiness. We have come to a clear realization of the fact that true individual freedom cannot exist without economic security and independence. 'Necessitous men are not freemen.' People who are hungry and out of a job are the stuff of which dictatorships are made.

In our day these economic truths have become accepted as self-evident. We have accepted, so to speak, a second Bill of Rights under which a new basis of security and prosperity can be established for all—regardless of station, race, or creed.

Among these are —

The right to a useful and remunerative job in the industries, or shops or farms or mines of the Nation;

The right to earn enough to provide adequate food and clothing and recreation;

The right of every farmer to raise and sell his products at a return which will give him and his family a decent living;

The right of every businessman, large and small, to trade in an atmosphere of freedom from unfair competition and domination by monopolies at home or abroad;

The right of every family to a decent home;

The right to adequate medical care and the opportunity to achieve and enjoy good health;

The right to adequate protection from the economic fears of old age, sickness, accident and unemployment;

The right to a good education.

All of these rights spell security. And after this war is won we must be prepared to move forward, in the implementation of these rights, to new goals of human happiness and well-being.¹²⁴ (Emphasis added).

There was no serious suggestion that we should have something as radical as the 1944 American Economic Bill of Rights during Canada’s constitution-making processes. In fact, the opposite oc-

¹²⁴ As reported in New York Times, Jan. 12, 1944, 11. It is often noted that many socialist countries have bills of rights but have terrible records in respect of what we consider to be important freedoms such as freedom of speech, freedom of association, and the like, that is, in respect of s.2 kinds of rights. While this appears to be true, it also ought to be noted that in many of these countries those bill of rights documents also contain concrete rights, such as a right to a living, a right to a proper retirement income, a right to a particular level of maternity and paternity benefits, and the like. For an interesting discussion as to how this has aided to diminish certain aspects of inequality and discrimination in those countries, see Gerald A. Horne, “Human Rights in United States and Socialist Constitutional Law and Practice” (1987), Vol. 1 No. 1, Nature, Society and Thought, 95.
curred. At the very time that Canadians were being told that they
would be freer than ever before, that the state was eager to give
them more abstract rights and freedoms which would recognize
the sovereignty of individuals and which would protect that sover-
eignty from the oppressive state, that very same state was furiously
engaged in attacking the concrete rights of people, especially those
of disadvantaged ones, which had been won through political
struggles fought over a long time. This is not the place to go into
detail, but, in contemporary Canada, the workers' right to bargain
collectively is being undermined, welfare programmes are under
threat, as are universal education and health programmes. How
can we account for this strange mix of civil libertarian bounty (the
Charter) and economic brutality? Does it have implications for our
understanding of the Charter's enshrinement? Some speculative
offerings follow.

Canada enjoyed a long bout of prosperity in the post-World War
II period. While inequality persisted, a more comfortable living for
more Canadians than ever before was provided. A Keynesian-type
social welfare net had been established by the late 1960's.125 This
provided a degree of satisfaction with existing institutions and
politics. On the whole, the state was fulfilling the contradictory
functions of supporting private property owners' need to accumulate
and the correlative requirement that the state make such accum-
ulation legitimate to non-property owners, very well. But, the long
period of economic success began to end in the 1970's.

Since then, a new scheme of arrangement between capital and
labour has been developing.126 The ensuing convulsions have
imposed great suffering on vast sectors of the population. The task
of legitimating this is becoming increasingly difficult. The inherent,
but long dormant, danger that the property-less might use their
voting power to change the nature of the economic restructuring
(which includes state and private attacks on trade unions' and social
welfare recipients' rights and the state's positive support for in-
creasing capital mobility) is brought closer to the surface by these
pressures. In this context, the enshrinement of a liberal document
such as the Charter of Rights and Freedoms can be seen to have
been extremely functional. The argument here is not that the
constitutionalization of abstract rights was part of a coolly thought-
out plan to avoid the difficulties of the surfacing class conflict.
The clamour for a Charter of Rights and Freedoms antedated this
new economic period; moreover, similar enshrinements had taken
place elsewhere, in quite different contexts. Rather, the point is
that the Charter, with the attendant increased judicial review it brings,

125 For an elaboration of the nature of the period of prosperity and of the
development of the social welfare net, see Glasbeek, “Labour Relations
Policy and Law as Mechanisms of Adjustment” (1987), 25 Osgoode Hall
L.J. 179.

126 See Drache and Glasbeek, “The New Fordism — Capital's Offensive;
L.J. 517.
is extremely functional to help legitimate the ongoing economic struggle between the Canadian classes. It permits an argument to be made which, given the prestige of the courts and the fact that the Charter was sold on the basis that governments are not to be trusted, has much appeal. This argument is that if people feel bruised or disadvantaged, there is a political-legal route to take, one which does not depend on numbers (the one respect in which the property-less have an advantage in political terms over property owners) but which relies on rational, objective reasons, which will be listened to, and adjudicated upon, by unbiased tribunals. The idea is to reinforce the notion that the problems of the property-less are caused by an unresponsive and oppressive state which must be curtailed. To overcome this problem, there is no longer any need to change the order of things by vote, by force; if something is truly wrong, courts will fix it bloodlessly. If this deflection of politics can be achieved, it will be functional from the point of view of the few, the property owners, as their position will not be subjected as much as it might be to the vicissitudes of direct and indirect political struggles in the electoral sphere. Further, the courts can be counted on to treat the claims of the disadvantaged against the state in such a way as to bolster the rights of the wealth-owners. It is in the nature of judiciary as an institution to do this. Let me briefly support these assertions. The Charter, itself, makes it clear that the rights and freedoms in it must be claimed against the state. If, as it is argued here, the source of potential political difficulties for the propertied classes is that, in the one-person, one-vote sphere, the property-less might force the state to take up the cudgels in their fight against the property owners if the property owners' power come to be seen as the cause of the problems of the working classes, it is extremely useful to have the state identified as the enemy.

127 See s. 32. Despite much of the academic writing to the effect that the Charter should apply to the conduct of private sector actors, it is clearly not its intent. The people who have made the argument include: Gibson, "The Charter of Rights and the Private Sector, (1982/83), 12 Man. L.J. 213; Manning — Rights, Freedoms and the Courts (1983); Slattery, "The Charter of Rights and Freedoms — Does it Bind Private Persons?" (1985), 63 Can. Bar Rev. 148; W.R. Lederman, “Democratic Parliaments, Independent Courts and the Canadian Charter of Rights and Freedoms,” (1985), 11 Queen's L.J. 1. The best argument that there is for the proposition that the Charter will apply to the private sector is that the private/public distinction is, as a matter of abstract logic, impossible to maintain. This is true. But, the point is that the belief that there is, and ought to be, such a distinction will enure private sector actors from much of the Charter's potential applications. As usual, the liberal proponents of the Charter assume that because an argument is plausible (here that the public and the private could be seen as points on a spectrum rather than two discrete spheres) it will be successfully made. Once again, political reality is ignored. While occasionally the difficulty of maintaining the distinction will cause some private sector conduct to be subjugated to the Charter's strictures, this will be the exception, not the rule. But, each and every such isolated decision will sustain the Charter proponents' optimism for a little while longer.
In this sense, the *Charter* is a clear "plus". But, not only are the courts told by the *Charter* to accept this as a starting point, their history and pre-disposition fit them ideally to achieve the goal of the protection of the wealth-owing classes. It has been their traditional role to help carve out private property rights, to defend them and to perpetuate them, as well as the contractual rights allied with this protection and maintenance of private property. They have treated the ownership of private property as a natural right.

The question of how it came to be that some people, a very few, own most of Canada's assets\(^\text{128}\), has not been an issue for the courts. The carving-out and defending of property rights, which permit some individuals to exclude all others from the benefits of that property, is not conceived of as public, state-like intervention with the freedoms and rights of individuals. For the courts, people either have property rights or not; to have property or not to have it is a natural attribute of individuals, like having two arms, rather than one; for judicial purposes their individuality is unaffected. Thus, in any contractual contest which comes to the courts, say, a dispute about an employment issue, they have not been concerned with the fact that one party had far more economic power than the other when they entered into their binding arrangement. They have treated the contracting parties as *de jure* equals, permitting the worst kinds of oppression.\(^\text{129}\) When workers formed trade unions to ensure some *de facto* equality, the courts saw their mission plainly: it was to squash trade unionism.

Thus, moving contentious political issues to the judicial forum, where the principle of the sacrosanct nature of private property and of the private-public distinction have been unquestioned for a couple of centuries, is functional for property owners at this stage of our economic and political restructuring. The proof is in the pudding. When a case comes to the courts which leaves no doubt whatsoever that private property and contract rights are under attack, typically when collective labour confronts capital directly, our courts have read the *Charter* very purposively, if its real purpose is defined as it is in this part of the argument. This explains the importance placed on the maintenance of the private/public distinction in *Dolphin*.\(^\text{130}\) It explains why, in the right to strike cases, the judges saw no difficulty in holding the line where they did. The courts had never accepted the right to strike. Changes in the world, arising out of the state's need to mediate fierce capital-labour conflicts, had forced them to accept it as permissible conduct (contrast:  

---

\(^{128}\) Osberg, *Economic Inequality in Canada* (1981), has shown that the richest 10% of Canadians own 57% of Canada's total personal wealth, while the poorest 40% of Canadians own 1% of Canada's total personal wealth.


\(^{130}\) Supra note 11.
conduct which is an inviolable right) in limited circumstances. If a legislature wishes to take away the "permit" it has granted, the courts can be relied upon to support it.

Another way of looking at the functionality of the enshrinement of the Charter is by taking a glance at a cherished aspect of the Charter proponents' argument. The Charter, and particularly its s. 2 provisions (as well as the rights found in section 15), is seen as the way by which minorities can assert their now universalized rights and freedoms. The proponents of this argument do not seem to have much doubt as to what a list of minorities would look like. It would include the racially, ethnically and nationally different, differently-abled persons, the old, the young, women as a gender, or single and/or aged women, single mothers, the unemployed, welfare recipients, and so forth. While it is manifest that racial, ethnic, gender and age differences, create differences in attitudes, hopes and aspirations in their own right, it is possible that these differences are not as important as are the attitudes, hopes and aspirations which are shared as goals and needs by these groups. There is a considerable body of sociological literature which supports this possibility. Breton's work, for instance, shows that when two social classes are in conflict and one is fairly ethnically or racially homogeneous and the other is not, ethnicity or race will work to the advantage of the former.

In Canada this means that the anglo-saxon property-owning classes will be advantaged. The working classes will tend to be divided between those who belong to the same group as the employing one, that is, anglo-saxon or British, and other groupings. The anglo-saxon workers' exploitation will not be as marked as those of a different racial or ethnic background. This gives them a reason to have a discriminatory attitude towards new immigrants. Amongst the latter, each separate group may have similar reasons for resisting new migrants of a particular type, as each of these exploited groups' job security and incomes will be more or less threatened by new competition of certain types of immigrants. That is, the dominant economic group, employers, does not have to be racially or ethnically discriminatory or sexist. The system will work for it: workers will become, more or less, sexist, xenophobic or racist.

---


133 Filson, "Class and Ethnic Differences in Canadians' Attitudes to Native People's Rights and Immigration" (1983), 20 Canadian Rev. of Society and Anthropology (4). Filson shows, for instance, how farmers' antipathy towards native groups is far greater than that of working class people of all kinds. The latter clearly do not feel threatened by affirmative action for native peoples. A majority of working class people support it; the farmers do
In short, if the minorities are constituted, at least in large part, to serve the existing economic system, then, inasmuch as they are disadvantaged in our society, the best way to overcome their problems would be to use tactics which diminish the significance of these economically imposed distinctions. Such a politics of coalition would emphasize that the so-called minorities constitute a majority; electoral politics, then, would become a very potent weapon, precisely because the wealth-owners are the real minority in our society. This is hardly a revelation. In 1865, John A. MacDonald wrote:

> The rights of the minority must be protected, and the rich are always fewer in number than the poor.

The means to coalesce the so-called minorities into a politically effective majority are not readily at hand. Material conditions have grouped them into antagonistic fragments. It is clear, therefore, that the institutional politics of the Charter, which requires them to make appeals as discrete, often opposed, interest groups and which identifies the state as the instrument of their oppression, rather than the private owners of wealth, will make it more difficult to overcome the barrier to coalition politics.

In addition, a major negative feature of the concentration on the legal rather than the political is that it detracts from the militance of the disadvantaged and from the possibility of creating solidarity movements. In particular, to get the state to act on your behalf against private power or to pressure the private sector directly, requires grassroot organization. Above all, numbers are needed. The greater the number and variety of participants the better. The contrary is true of legal politics. It is conducted via technocratic representation, i.e. lawyers, who only demand fund-raising from their clientele, not advice, not meetings, marches or votes. A victory in the courts may still leave a broke and apathetic rump organization behind, one not capable of moving forward any further. And victories are rare. It is sometimes thought that a defeat in the courts may help fuel political organization. This is a roundabout and costly way of creating a militant political grouping. Thus, while the Charter and judicial review are not essential to advanced capitalism's needs, they are certainly functional in helping maintain the inequality on which capitalism thrives.

---

not. Filson draws out many such examples of differential attitudes relating to immigration and to racial characteristics. The bottom line is that the economic basics play a major, probably a determinative, role in creating positive or negative attitudes towards people of different groupings. The differences inherent in characteristics, such as ethnicity, race and gender are not paramount, although they do have some significance in their own right.

134 Osberg, supra note 128.
135 As cited in Walter Stewart, But Not in Canada! (1983), 76. This may go a long way towards explaining why so many lawyers and intellectuals who serve this minority, and more often than not, belong to it, are such fierce proponents and sellers of the Charter. While I do not doubt their sincerity, it is unquestionably bolstered by their material interest.
(d) Equality Rights

The inclusion of section 15 (and of section 28) in the Charter is, perhaps, the most hopeful aspect of the constitutionalization of Canadians' rights and freedoms. This is so because it suggests that inequality will no longer be tolerated in Canada. This might be the best answer to the argument made herein to the effect that the Charter, as a classic liberal document, cannot deliver a truly democratic society. After all, once something like true economic equality is achieved (i), access to the courts will be more equally available to all who feel oppressed by the state and (ii), the state will no longer feel the need to favour one group rather than any other, because no one group will be in a better position than any other to bully the state by threatening to withdraw its economic support for the state. This vision of a society where something like real economic equality would ensure a truly free society is not a novel one. Thomas More\textsuperscript{136} advocated it as, of course, do Marxists. More pertinently it was thought to be the basis of republican democracy and government by the likes of Benjamin Franklin, Thomas Jefferson and James Madison.\textsuperscript{137} De Tocqueville\textsuperscript{138} recognized that equality of condition, as opposed to equality of opportunity, was a necessary condition for democracy because it made possible the love of independence which individuals needed to make democracy work, because it eliminated the natural consequence of inequality, namely, that the rich should rule society for their own benefit, and because it is only when there is relative economic equality that everyone's property is safe and there is no longer any need for the rich to coerce the poor people, nor is there any continued need for the poor to revolt against the rich. It is well understood, then, that something like real democracy is more possible when equality of economic conditions prevails. Arguably section 15 of the Charter of Rights and Freedoms suggests that it

\textsuperscript{136} In his Utopia (1973) 46-47, More wrote: “I don’t see how you can ever get any real justice or prosperity so long as there is private property, and everything is judged in terms of money—unless you consider it just for the worst people to have the best living conditions, or unless you are prepared to call a country prosperous in which all the wealth is owned by a tiny minority . . . while everyone else is simply miserable.” In a similar vein, The Episcopal Commission for Social Affairs for the Canadian Conference of Catholic Bishops wrote in their Ethical Reflections on the Economic Crisis (1984): “These patterns of domination and inequality are likely to further intensify as the “survival of the fittest” doctrine is applied more rigorously to the economic order. While these theories partly explain the rules that govern the animal world, they are in our view morally unacceptable as a “rule of life” for the human community.”


\textsuperscript{138} Democracy in America (1954).
was this kind of world to which our constitution-makers aspired in 1981-82.

At this juncture, it is of some interest to point out that the section with this potential was the result of the only real democratic participation by people who felt disadvantaged in the constitution-making process, namely, women. The story of the mass organization political efforts made by women to get male politicians to understand the need for better treatment of disadvantaged groups, such as women, is well-known. Indeed, part of the impetus for this political agitation was the Supreme Court of Canada’s particularly callous treatment of women in two famous cases, Bliss and Lavell. Pal and Morton have argued that women, faced with these disasters, realized that neither the existing Bill of Rights, nor judicial interpretation of the common law, could be counted on to help them achieve their goals. This motivated them to get the kind of provision that eventually was embodied in section 15. By then, it was clear to one and all that women really had been scandalously treated by the courts. This helped politicians accept the need for such a section. If nothing else, this was a clear demonstration that when so-called minority groups decide to pool their resources they have a great deal of political leverage, something which tends to be forgotten when arguments are made that minorities are inevitably fragmented, have contradictory interests and can never be served very well by the political process. This point is made here to underscore the argument made in the previous section.

The early interpretation of section 15 did not yield anything like the outcomes hoped for by its proponents. In particular, the courts overwhelmingly read section 15 in a formalistic manner, that is, in a manner which was congruent with liberal notions of equality. This meant that anyone who complained of a distinction would have a right to come forward. As much of the law in existence which overtly distinguished between groups in this way tended to benefit disadvantaged groups, miserly as these benefits might have been, judicial open season was declared on these schemes. Petter has noted that, very often, precisely the “wrong” kind of people were able to use the Charter. He shows that, in age discrimination cases, the applicants were usually people who opposed mandatory retirement because they were well-situated professional types, whereas the vast bulk of the population, workers and would-be entrants into the paid workforce, benefit from mandatory retirement schemes. He further records that, at the time of writing, “of the first thirty-five sex discrimination cases . . . twenty-five — over 70% — . . . [were] brought by male plaintiffs. Of the eleven cases in

---

which sexual equality claims...succeeded, seven...over 65%...involved male claimants”. In addition, it is important to remember that people who get a s.15 decision in their favour, do not necessarily obtain a positive result. The legislature may react by eliminating or changing the benefit scheme which gave rise to the “discrimination”. The court winners may still get nothing; worse, so may the formerly assisted disadvantaged minority group.

Because the courts were prepared to give standing to such formalistic views of equality, all sorts of people and groups were able to make claims, including the corporate sector, although, in the end, these kinds of claims did not succeed very well. Women, who were hoping for so much from the introduction of section 15, did not gain very much at all. In addition to some of the losses

143 Some of these perverse decisions are: Attorney General of Nova Scotia v. Phillips (1986), 34 D.L.R. (4th) 633 and Reference Re Family Benefits Act (N.S.), Section 5 (1986) 75 N.S.R. (2d) 338, (benefits for poor women offended s.15 because men did not get them); Shewchuk v. Ricard (1986), 24 C.R.R. 45 (differentiation between natural mothers and fathers offended s.15 but saved by s.1); Re McVicar and Superintendent of Family and Child Services, [1987] 3 W.W. R. 176 (s.15 requires that a natural father’s, as well as a natural mother’s, consent be obtained by adopting parents, no matter how impractical this is). For a full discussion of these and like cases, see Petter, supra note 142 and J. Fudge, “The Public/Private Distinction: The Possibilities of and the Limits to the Use of Charter Litigation to Further Feminist Struggles” (1987), 25 Osgoode Hall L.J. 485.

144 See Silano v. B.C. (Govt.), [1987] 5 W.W. R. 739 (B.C.S.C.); Shacter v. The Queen (1988), 88 C.L.L.C. 14,021 (Ont. H. Ct.) was hailed as a victory by many women activist lawyers. But, in that case, the court said that, while it would like to see an advantage given by the statute to adopted parents’ extended to natural parents, thereby avoiding the discrimination found to exist under the legislative scheme, it accepted the fact that the government might very well decide to eliminate the benefit for all parents, or diminish the benefit entitlement of adoptive parents so that it became equal to that created for natural parents, or to fashion a compromise somewhere in between. This emphasizes one of the difficulties of having Charter victories translated into concrete gains: someone must still allocate some public expenditure to a disadvantaged group; courts do not do that.

145 See, e.g., Re Aluminium Company of Canada Ltd and the Queen (1986), 29 D.L.R. (4th) 429. One of the most dangerous attacks of this kind has been on the workers’ compensation schemes which pre-empt torts’ actions. For nearly the whole of this century workers’ compensation has served workers relatively well, well that is in comparison to the anti-workers’ torts’ system which pre-existed it. In recent times, lawyers, who think of themselves as progressive actors (Beatty and Kopyto), have sought to bring actions arguing that the equality provisions of the Charter make the lack of access to the courts by workers injured in the workplace unconstitutional. So far they seem to be failing, but it is not for want of trying; Reference Re Workers’ Compensation Act (Nfld.) (1988), 67 Nfld. & P.E.I.R. 16 (Nfld. C.A.). Since this was written, the Supreme Court of Canada has upheld the validity of the pre-emptive nature of workers’ compensation legislation; Re Workers’ Compensation Act, 1983 (Nfld.), [1989] 1 S.C.R. 922.
they suffered in respect of family benefits they had obtained and
having to fight actions to protect what, as disadvantaged people,
they had won, they lost ground in relation to protective legislation
which, after much struggle, had been passed to protect women in
sexual violence or victimization cases, because courts would not. It is not surprising, therefore, that when Morgentaler was handed
down it was seen as an absolute triumph, even though it did not
guarantee any positive concrete outcome.

At this stage, the results of s.15 litigation were depressing. This
was all the more true because, in order to try to make winning
arguments, disadvantaged groups, such as women, frequently had
to make arguments which were antithetical to their ultimate goals.
Thus, in the case of Tomen women teachers made an argument
that an all female trade union in the educational system was justified
because women had suffered from systemic discrimination and
needed to exercise solidarity to overcome the effects of this long-
lasting discrimination. This argument of principle is vital to people
seeking equality. Unfortunately, to win the case, the female union
also had to rely on the argument that the Charter should not apply
to it because its association was a private, contractual one and,
therefore, not subject to the Charter. As it is the maintenance of
the private/public distinction which has led to much of the difficulties
created for women (as well as those of other non-propertied minority
groups for different reasons), the position forced upon the female
teachers in this case, and the one accepted by the court as
determinative of the issue before it, was hardly progressive.

---

146 The infamous decision, Re Seaboyer and the Queen; Re Gayme and the
Queen (1987), 61 O.R. (2d) 290 (C.A.), is the low mark of decision-making
in this area; see J. Fudge, supra note 143. For a good and hard-hitting
analysis of social welfare cases, some of which have been discussed as
equality cases in the text, see R.A. Hasson supra note 68.

case there are troubling reports as to the apparent failure of the decision
to being about much by way of improved access to abortion; see Toronto
Star, Jan. 28, 1989, A4. Moreover, as noted, supra note 108, the useful
symbolic aspect of the decision may be lost yet, should the legislature decide
to criminalize abortions, even to a small extent. This case is a good illustration
of the argument that a 'victory' in the courts does not translate into a
positive programme for the 'winners' without more.

148 Re Tomen and Federation of Women Teachers' Association of Ontario (1987),
61 O.R. (2d) 489 (Ont. H. Ct.).

149 For the importance of the distinction of public and private to the continued
discrimination against women see J. Fudge supra note 143 and the literature
cited there. A similar argument was forced upon the unions in the Lavigne
case where, in part, the union was forced to make the argument that the
selling of labour for the purposes of entering into collective agreements
was the same kind of activity as that of the buying and selling of paper
clips. At the Court of Appeal level, where the union won, Lavigne v. O.P.S.E.U.
supra note 118, it was held that it should win because what trade unions
did, as a matter of fund-raising, was a matter subject to private contractual
arrangements, not a concern of public interest law. This ignores the history
and class position of workers. As noted earlier, the idea that private contract-
In February of 1989, however, the Supreme Court of Canada handed down its decision in *Andrews*. That decision has already attracted much attention. It has made it clear that a formalistic way of looking at section 15 is no longer to be tolerated by the courts. The Supreme Court of Canada accepted the argument made by LEAF which had intervened in the case. In brief, that argument was that the unequal treatment of equals could lead to the perpetuation of inequality. But, while the language found in the decision is welcome, it is by no means certain that the decision will yield the kinds of results that will help disadvantaged Canadians because s.15 will become the touchstone which, finally, will make *Charter* proponents feel and look good. The major holdings of the Supreme Court of Canada were:

(i) The grounds enumerated in s.15 are not to be the only proscribed grounds of discrimination which will lead to a finding that there has been a violation of s.15. The ambit of protection is to be extended to include grounds of an analogous nature. What this will mean is not yet clear. The Court indicated that discrimination based solely on the basis of association with a group will rarely escape the strictures of s.15, especially if the distinction resembled one of the explicitly forbidden ones in s.15. Thus, in *Andrews* itself, citizenship being a personal characteristic, not unlike that of race, was to be heeded as a proscribed ground of discrimination just like it. The Court hinted that it might even go beyond such clearly analogous situations, but, in typical judicial fashion, gave no inkling how far they, as judges, would be willing to go. The Supreme Court of Canada did say, however, that it would not be right to extend s.15 so that all dissimilar treatment of individuals would be considered offensive discrimination. Leaving aside the vagueness of the reasoning, the willingness to restrict s.15 to analogous situations to the ones listed is a positive aspect of this decision. It ought to eliminate the claims to equality (or make them much more difficult) made by corporations such as *Alcan* and arguments such as that the failure to give workers access to the courts to sue in torts is an invidious form of discrimination. So far, so good; some of the damage done by s. 15 might be prevented in the future.

(ii) The courts are no longer to be satisfied if the law treats similarly situated people alike. Rather, the courts are to determine whether

making is not a prime cause of inequality and oppression is detrimental to the working classes. *Tomen* is on appeal and may be reversed. But, the fact that the public/private dichotomy persists will not be, only whether or not the line was properly drawn in this case. The same argument applies to *Lavigne*.

150 *Supra* note 43.
151 *Supra* note 145.
152 The same treatment of all Indians, or of all women, will not mean that the treatment is not discriminatory. It should be instructive for *Charter* proponents to note how long it has taken courts to understand what the rest of the world has understood for years, namely that neither the results in *Bliss* or *Lavell supra* note 140, are tolerable to our community. Indeed,
the socio-economic context in which s.15 applicants find themselves causes them to be disadvantaged by equal treatment because they start from an unequal base. The claimants will not have to show that the law is specifically aimed to hurt them. The crucial question is how a court is to decide whether or not such systemic discrimination exists. McIntyre J. gave a good indication as to how this is to be done. He tells us how it is that systemic discrimination came to be in a free and democratic society such as Canada:

Discrimination as referred to in section 15 of the Charter must be understood in the context of pre-Charter history. ... With the steady increase in population from the earliest days of European emigration into Canada with the consequential growth of industry, agriculture and commerce and the vast increase in national wealth which followed, many social problems developed. The contact of the European immigrant with the indigenous population, the steady increase in immigration bringing those of neither French nor British background, and in more recent years the greatly expanded role of women in all forms of industrial, commercial and professional activity led to much inequality and many forms of discrimination.

(p. 16 of advance sheets of this judgment)

McIntyre J. implicitly places primary responsibility for systemic discrimination on the private ordering system, on the market. He notes that the relatively recent Human Rights Codes were designed to offset the continuing and more overt forms of discriminatory practices engaged in by private actors. He also points out that these Codes have been ineffective, and are likely to remain so, because they all have created exemptions or defences, including the bona fide occupational requirement one, which “have the effect of completely removing the conduct complained of from the reach of the Act” (p.175-76). McIntyre J. clearly sees these Codes as the mechanism, inefficient though it is, by which to address private sector discrimination and its effects. Section 15 of the Charter is to be available for use when incidents of discrimination are alleged by people who can show that they are the victims of systemic discrimination because the world of private ordering has made them so. Only where a governmental law (or decision — this is unclear) perpetuates this. The mere fact of systemic discrimination is not, a priori, the basis for a s.15 action: the state must have exacerbated, it or caused it. It is important to note that all members of the Court, including members of the the so-called progressive wing, expressed their total agreement with McIntyre J.’s reasoning.

In sum, the Supreme Court of Canada has understood that it must forego an interpretation of equality which is formalistic in

---

McIntyre J. spends a good deal of time denouncing these decisions. As usual, I expect Charter supporters to point to the judicial social conscience exhibited in these passages. Yet, legislation largely had overcome the Bliss and Lavell problems well before Andrews was decided. That is, while the language of tolerance and understanding is welcome, the court was not being too radical, too daring, when it used it.

153 Supra note 43, 172.
nature only. Nonetheless, it retains its strong adherence to the public/private distinction which it has espoused in other areas of interpretation of the Charter, such as in the s.2 cases discussed earlier in this paper. It is likely that, for quite a long time yet, the private ordering system will be left alone, even though it is the, or at least the most, significant cause of inequality in our society. This tells us a lot about the nature of the Charter of Rights and Freedoms as interpreted by the courts. In concrete terms, it is difficult to see how much progress is offered by the Andrews holding. There will be some, but probably not that many, cases where legislation or regulations, by purporting to apply equally to people who are unequally situated, will be found to violate s.15. But, note that, even if such legislation is found to be discriminatory, this does not necessarily mean that benefits will enure to the victors in such a case. After all, the disadvantaged group may get a court to hold that there was a violation of section 15(1) but find that the court believes that the discrimination is a justifiable limitation in a free and democratic society. It is important to note that, in Andrews itself, McIntyre J. came to the opposite view to that of his colleagues on just this point, even though they agreed with his principled reasoning. Secondly, to win a case, that is to have a piece of legislation or regulation held to be discriminatory under s. 15(1), does not mean that the government or the executive will take the appropriate action to make sure that the disadvantaged get the benefit that they were seeking. Further, it is to be remembered that much law which is overtly discriminatory is so because it seeks to confer a benefit on poorly placed people. What Andrews does offer, is that, in the future, statutes which do confer such a benefit, such as legislation providing specifically for single mothers, pregnant women, or adoptive parents, will no longer be the subject of successful challenges by single fathers, male parents or natural parents who are jealous of adoptive ones. That is, it is likely that Andrews' most progressive impact will be that it might enure from attack those legislative schemes which benefit minority groups and which, in pre-Charter days, were never challengeable.\footnote{One interesting possibility is that it might be argued that when systemic discrimination caused by private actors is not overcome by reliance on Human Rights Codes, that it is those governmental laws which are a cause of it. Something like this argument surfaced in Re Blainey and Ontario Hockey Association (1986), 26 D.L.R. (4th) 728 (Ont. C.A.). It is typical of the form of argument forced on people by the Charter that this is a plausible line of reasoning: progressive legislation is to be characterized as reactionary. In any event, the reason Human Rights Codes might have this effect, as noted by McIntyre J., in Andrews, is that they provide far too many defences. Those defences likely will appeal to courts, given the Supreme Court of Canada's expressed view in Andrews that "merit" is always a permissible ground of discrimination. "Merit" is based on economic rationality, as are most of the defences and exemptions in the Human Rights Codes. This will make it easy to use s.1 to save discriminatory practices should this line of argument be advanced.}
IV. Summation

Much effort has been invested in portraying, and having the courts treat, the Charter of Rights and Freedoms as an ideal instrument by which to guarantee an increased respect for the rights and sovereignty of individuals against the actions of a potentially oppressive state. In this paper I have not been able to prove that the Charter and judicial review cannot lead to the achievement of these goals. It is a plausible line of argument and, occasionally, there is a decision or judicial language which bolsters it. But, overall, the judicial record does not support the argument. To the contrary. This is so because, in order to make the argument, its proponents have had to rely on some shaky assumptions about the need for the entrenchment of the Charter of Rights and Freedoms and the nature of judicial decision-making. In particular, the politics surrounding the entrenchment process have not been given the weight it ought to be. Nor has the role of the judiciary in the development of a capitalist economy which requires the protection of private property and private contract-making, been taken into account. Its historic support for private market power has made the judiciary a key player in contributing to the maintenance of a society of haves and have-nots, a society in which the have-nots are fragmented into competing groups.

By contrast, a no-frills' approach places heavy emphasis on these aspects of the constitutionalization of liberal rights and freedoms. Such an approach, while it cannot predict with certainty how the Charter will be interpreted in the future, does provide a framework within which the results yielded so far can be said to have been not unexpected. To explain them there is no need to resort to some of the sophisticated, abstract rationalizations which some of the Charter proponents use. Nor is there a need to mount an argument which acknowledges that things have gone awry thus far but that, eventually, when courts come to terms with what the Charter is really all about, we will get a perfection of the rights and freedoms which Charter proponents believe the enshrinement of that document was meant to achieve. This seems somewhat romantic. Further, to those who use a no-frills approach, the large scale displacement of contentious issues, which arise out of the massive inequality in Canadian society and out of the class-related fragmentation of Canadians, from the more directly (if deficient) participatory democratic institutions to another branch of the state whose particular role it has been to help create and maintain inequality and fragmentation, is not likely to lead to the alleviation of these problems. Yet such amelioration is required to develop a society which truly respects rights and freedoms and democracy. To shift much of that important task to a judiciary armed with the Charter of Rights and Freedoms is a step in precisely the wrong direction.