1. The first step in the process of identifying a problem is to recognize that a problem exists. This involves gathering information about the situation and identifying the specific issue that needs to be addressed.

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IN DEFENCE OF CHARTER REVIEW

by

Joseph E. Bradley, B.A.Hon., B.Ed.

**A Thesis submitted to the Faculty of
Graduate Studies and Research in partial fulfilment
of the requirements for the degree of**

Master of Arts

in Canadian Studies

Carleton University

Ottawa, Ontario

July 1, 1992

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ABSTRACT

"*Charter* Review" has recently been severely criticized as damaging to Canadian society. Critics say it is damaging for three main reasons. First, *Charter* review contradicts our political/legal traditions. Second, it involves a political rather than legal decision-making process. Third, it is inherently undemocratic. This thesis will show that these criticisms are unsound, and that *Charter* review is beneficial to Canadian society.

Charter review is not, however, contrary to our traditions. Judicial review of subordinate legislation has long been known to common law and judicial review of sovereign legislation has existed in Canada for over one hundred years. Parliamentary sovereignty is not only a modern tradition, but one whose force or authority is questionable. *Charter* review is highly Canadian as it respects the value our society has placed on both individual and collective interests. Additionally, it does not involve the judiciary in a political decision-making process. Interpreting 'rights creating' sections is purposive in nature. Judges do not make policy decisions in *Charter* cases but instead interpret moral and legal principles. They remain at best, policy advisors. Finally, *Charter* review is not undemocratic but makes a useful contribution to the preservation of democracy in Canada.

Charter review therefore is not open to the objections raised by critics. On the contrary, it is beneficial to our society in providing new methods of cultural analysis. It aids in the identification of positive conceptions of Canada's elusive cultural identity. *Charter* review has the potential to promote national cohesion in troubling constitutional times.

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INTRODUCTION

"I desire to know what kind of government that is, and how much better it is than the state of nature, where one man commanding a multitude has the liberty to be the judge in his own case, and may do to all his subjects whatever he pleases, without the least liberty to any one to question or control those who exercise his pleasure."

With the adoption of the *Canadian Charter of Rights and Freedoms* in 1982, new substantive or rights-based limitations have been placed on the power of government.² These new limitations have resulted in a new form of judicial review, that being *Charter* review. Before 1982, the judiciary could only strike down legislation as unconstitutional based on the division of powers outlined in sections 91 and 92 of the *Constitution Act 1867*.³ Determining the scope of jurisdictional limits on government power did not, however, provide the judiciary with direct training for reviewing legislation in light of our new entrenched *Charter*.⁴

Between 1983 and 1989, one hundred and twenty-one cases reached the Supreme Court of Canada (hereafter the Court) regarding *Charter* issues.⁵ Of those, thirty-eight upheld rights and freedoms, and struck down legislation as unconstitutional. Cases such as *Oakes*, *Morgentaler*, *Singh* and *Big M Drug Mart*, have become household names.⁶ Because of these and other decisions, the institution of *Charter* review has truly had a significant impact on our system of government. Is it any wonder that the adoption of the *Charter* was viewed by some as, "... the most significant event affecting Canada's system of government since creation of the Canadian federation."?

The *Charter* was seen as a welcome addition to our constitutional tradition by many legal, political, and academic scholars in 1982.⁸ It was a sign that Canada had risen to join most other western democracies that have similar entrenched bills and charters of rights. Touted as the "peoples' package," the *Charter* is thought to be an effective vehicle for transferring power to Canadians. They can now appeal to the courts if they feel their rights have been infringed upon or denied. Parliament and the provincial legislatures and assemblies are no longer 'judges in their own case'. The people now have an effective avenue to ensure that the exercise of government does not adversely affect their rights and freedoms.

In spite of this outpouring of optimism, the institution of *Charter* review has been harshly criticized on several fronts.⁹ Critics point out three main problems or criticisms that lead to the conclusion that *Charter* review damages our system of government, and our society as a whole. First, it is argued that *Charter* review goes against Canadian tradition. The Court's new power to strike down laws in the name of rights and freedoms is said to be contradictory to our long standing tradition of parliamentary sovereignty.¹⁰ This overemphasizes the importance of individual interests and is therefore 'un-Canadian' because Canadian society has traditionally more highly valued collective or community values.¹¹

The second problem cited by critics is that *Charter* review is inescapably political in nature.¹² According to professor Russell, "The principal impact of a Charter on the process of government can be neatly summarized as a tendency to judicialize politics and politicize the judiciary."¹³ *Charter* review is accordingly said to be a highly subjective or value-laden 'policy-making' process.

Finally, critics claim that *Charter* review is also highly undemocratic if policy or lawmaking power has been transferred to an unelected and unrepresentative judiciary. The will of the people has been replaced by that of Platonic 'philosopher kings' and the ability of the average citizen to participate in political debate has been undermined. According to Alan Hutchinson, "To hand over political issues . . . to judges is a mistake. . . If Canada is to become a 'free and democratic society,' the Charter and its judicial enforcement are not the answer. Democracy is about popular, not privileged power."¹⁴

This thesis examines these three criticisms and shows how they are unsound and fail to support the conclusion that *Charter* review is a harmful addition to Canada's constitutional heritage. Part 1 looks at the claim that *Charter* review is untraditional, and demonstrates how it respects, rather than contradicts, longstanding legal and cultural traditions in Canada. Part 2 outlines the problem of *Charter* review being political in nature, and shows how this criticism is unsound based on an analysis of the decision-making process in *Charter* cases. Part 3 addresses the claim that *Charter* review is undemocratic, and points out that this criticism is misguided as it is based on misconceptions of democracy and *Charter* review.

Having disposed of the criticisms, Part 4 outlines how *Charter* review aids in developing coherent conceptions of Canada's illusive cultural identity. *Charter* review is a useful means of identifying meaningful cultural norms or patterns. These patterns, or fundamental substantive values, provide a basis from which to build unity in this culturally and constitutionally fragmented society. In this way, this thesis supports the original optimism of the *Charter* as a positive and beneficial nation building tool.

PART 1. JUDGING, CANADIAN TRADITION AND THE CHARTER

It is necessary to outline briefly the role of the judge as a decision-maker in our society before moving on to address the main criticisms. This furnishes a common ground of understanding of the function of both the judge and the legislator in government, and of the nature of judicial review.

An idealistic or 'naive' conception of adjudication and judicial review will first be developed as a basic framework from which to explore two competing philosophical conceptions of the judicial decision-making process, **formalism** and **functionalism**. A better understanding of the main criticisms of *Charter* review and the responses to those criticisms will be gained through identifying the underlying assumptions and premises of both philosophical theories.

A. Judicial Decision-Making in Canada

1) Adjudication

The judiciary in Canada has traditionally been perceived as a body that resolves disputes involving some aspect of the law. The responsibility of judges is to find legal solutions to problems, and to instruct the coercive power apparatus of the state, (police, penal institutions) to back up or carry out their decisions. This is known as **adjudication**. It distinguishes the judiciary from other branches of government, and other methods of dispute resolution:

'Adjudication is a function which must be performed in virtually all countries. Only in an extremely small and socially homogeneous society could the rules or customs governing acceptable social behaviour be so clear and so spontaneously observed that the need for mechanisms to settle disputes about their meaning and proper application may never arise.'¹⁵

Being adjudicators of legal disputes, judges are thought of as **impartial and independent**. As impartial, they are presumed to be uninfluenced by personal bias and discretion and as independent, not influenced by the wishes or desires of government, politicians, or private interest groups.

Traditional theory points out that the moral legitimacy of adjudication rests on different grounds than that of the legislature. In a representative democracy, the executive and legislative branches of government derive their moral authority from their responsibility to the electorate. Ministers and representatives are elected to carry out the will of the people and, failing to do so, are liable to lose their jobs at the next election. Judges, being not elected but appointed, must find their moral legitimacy elsewhere.

The moral legitimacy of adjudication, it is believed, stems from holding judges accountable to a standard of rationality that requires them to provide explicitly **legal** reasons to justify their decisions. Judges must do more than raise a hand when deciding the outcome of a case. They must support their positions with reasoning grounded in the legal rules and customs of society and not, like politicians, in party doctrine:

'It is not that the decisions of other branches of government necessarily are lacking in rationality, but that the judicial decision is apt to find its strongest basis of public support in its capacity to persuade those whose rights or interests it affects that it is the correct decision -indeed, the legally required decision. In this sense the

reasons which judges give for their decisions. . . are, in our society, the prime basis of the judicial decision's moral authority."¹⁶

Finally, adjudication (in countries with common law systems) has three distinct but related characteristics. First, it operates in a context where proceedings are adversarial in nature and plaintiffs (or the state) and defendants battle in the court room until one emerges triumphant. Second, judges do not negotiate decisions between these combatants but impose solutions that favour one side almost entirely, while placing costs, duties, or sanctions on the other party or adversary. Third, as one party wins and the other loses, adjudication results in a 'zero sum' game whereas in the legislative arena, an attempt is made to try to accommodate as many interests as possible.

2) The Nature of Judicial Review

Judicial review is a special form of adjudication concerned specifically with government action. Under judicial review, the judiciary is said to resolve disputes over whether a particular government body, level or official has the legitimate power to act or make law in certain areas and ways. According to professor Hogg:

"All that is involved in judicial review is the determination by a court of whether a particular law is the kind of law which may be enacted by the Parliament or Legislature which enacted it. If it is, it is valid; if it is not, it is invalid."¹⁷

The judiciary, under judicial review, decides whether a law made by government is valid by testing it against two types of standards. The first standard

is the vast system of **precedent** developed over the years in the common or judge-made system of law inherited from Britain. Although statutory law is the most authoritative form of law, precedents developed over the years - in particular those in relation to 'natural justice' - remain influential in the review process.¹⁸

The second main standard is the set of rules found in a **constitution**. Rules outlined in constitutions place two types of limitations on government power, those being **jurisdictional** and **rights-based**. Jurisdictional limits restrict a particular level of government from making laws that encroach on another level of government's legislative responsibilities. Right-based limits restrict **all** levels of government from infringing or impeding on an individual's or group's rights and freedoms.

Common law principles and jurisdictional and rights-based limits profoundly affect what type(s) of judicial review will be found in a particular society. Each has enjoyed a long history in our legal system and provides an initial line of defense against the criticism that *Charter* review is untraditional.

2) Formalism vs. Functionalism

The above outline of adjudication and judicial review is naive in the sense that it provides only a general overview of those institutions. There are, however, two competing philosophical conceptions that deal with more specific and controversial aspects of both, those being **formalism** and **functionalism**.

Formalism is similar to the concept of adjudication developed so far. It portrays the judiciary as impartial legal actors who rationally apply an internal

system of legal logic to arrive at their decisions.¹⁹ The bulk of the relevant legal rules and principles has already been settled and the judge has little if any discretion to change these rules. Judges do not create new legal rules or laws in the decision-making process according to formalism.

Formalism is connected with the **literal** rule of statutory interpretation. Under this approach, judges methodically rely on the most plain and ordinary meaning of the statute possible and not on personal, innovative interpretations.²⁰ Formalism is also similar to the mechanical, automatic, or 'slot machine' theory of *stare decisis*. According to mechanical jurisprudence, there is a '... set of timeless rules [or precedents] stocked in some conceptual warehouse awaiting discovery by judges. . .'.²¹ Both the literal rule and mechanical jurisprudence recognizes the inherent logical, rational, and impartial nature of adjudication and judicial review.

Functionalism, on the other hand, concedes that judges are resolvers of disputes in society, but not that they are impartial or independent. It is not as dogmatic as formalism in that adjudication is not portrayed as a purely rational or deductive process. Functionalism argues that an individual judge's beliefs or **ideologies** necessarily influence their decision-making process.

This conception of adjudication roughly coincides with the **mischief** rule or approach to statutory interpretation. Judges, when applying the mischief rule, attempt to identify the problem or mischief the statute aimed to correct, and then examine how Parliament went about rectifying the problem. They examine the object or **wisdom** of the statute and judge the pros and cons of the particular law in question from the point of public policy.

Functionalism also goes hand in hand with the strict and loose view of precedent outlined by Karl Llewellyn. The strict view allows judges to distinguish between cases to show that the reasons laid down in one case do not apply to the case at hand. For Llewellyn, the strict view ". . . is in practice the dogma applied to unwelcome precedents."²² The loose view of precedent, on the other hand, is relied on to show how reasons given in one decision do apply to the case at hand, or are used '. . . for capitalizing welcome precedents.'²³ Both the strict and loose views of precedent recognize the functional and not rational or mechanical manner in which precedents are applied to new cases.

Formalism and functionalism comprise the main theoretical approaches to understanding the role of the judge as a decision-maker in society. They embody two competing perceptions of adjudication and judicial review whose underlying assumptions heavily influence the main criticisms and defense of *Charter* review. The criticisms, in particular the claim that *Charter* review is political in nature, adopt a more functional approach to adjudication while this thesis' responses are more formalistic in nature.

B. Charter Review and Parliamentary Sovereignty

The idea that *Charter* review goes against longstanding Canadian legal and political tradition is based on the assumption that it conflicts with the principle of parliamentary sovereignty. This principle, inherited from Great Britain, says that Parliament can make or unmake any law it chooses. It was once remarked that

"Parliament can do anything but make a man or woman" to which it was replied that "they could also do this as well."²⁴ Under the *Charter*, however, the judiciary can now strike down laws that infringe on rights and freedoms. This new power is said to severely limit true parliamentary sovereignty.

Several points can be raised in response to this criticism. First, judicial review of subordinate legislation is and has been a very old and important common law tradition. Second, Parliament's sovereignty since confederation has been limited because of division of powers or **federalist** review. Finally, parliamentary sovereignty is a relatively new and modern tradition.

1) Common Law and Parliamentary Sovereignty

According to Blackstone, there were certain principles developed in common law that limit the power of Parliament to make law. In his, *Commentaries on the Laws of England*, he says that acts of Parliament that are impossible to comply with, have absurd consequences, and are "manifestly contradictory to common reason," are for all intent and purposes null and void.²⁵ Judges, in the name of reason and justice, have the legitimate power to review, and strike down if necessary, inequitable legislation.

Blackstone points out another important reason why judicial review of subordinate legislation is an integral part of our legal tradition. He draws strength from **Natural Law** theory and argues that aspects of this theory, applied to certain laws, may result in those particular laws being struck down as invalid. He says there

are certain universally valid moral axioms that cannot be overridden by laws made by human beings.²⁶ Many modern day charters and bills of rights of various nations contain moral axioms that transcend in importance ordinary laws. According to Blackstone, natural law theory justifies limiting parliamentary sovereignty:

"This law of nature, being co-eval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this; and much of them that are valid derive all their force, and all their authority, mediately or immediately, from this original."²⁷

Blackstone's commentaries show that judicial review of legislation is a long-standing common law tradition. Both justice and natural law principles support the judiciary in striking down subordinate legislation and therefore significantly limit the scope of parliamentary sovereignty. The first response then to the criticism that *Charter* review is untraditional is that judicial review of a substantive nature that limits parliamentary sovereignty is a very old common law tradition.

2) Jurisdictional Limits and Federalist Review

The second response to the criticism that *Charter* review is untraditional is that absolute parliamentary sovereignty in Canada is essentially a 'myth' due to the existence of federalist review. Judges have, since 1867, struck down both federal and provincial legislation as unconstitutional based on the division of powers outlined in sections 91 and 92 of the *Constitution Act 1867*. Sections 91 and 92 place jurisdictional limits on each level of government's power to encroach on

the other's area of legislative responsibility. Judicial protection of those limits entails that neither level of government has ever been, nor is now, truly sovereign.

Because Canada is a federal state, legislative power has to be clearly divided between the federal and provincial levels of government. This is different from unitary states such as Great Britain where one central legislative body has the power to make all types of law. The enumerated heads of power found under sections 91 and 92 outline different areas of legislative responsibility such as the Criminal law, Taxation, the Management of Hospitals, and the Military. They place limits on the ability of each level of government to encroach on a specific area assigned to the other level of government.

The framers of these sections did not, however, define conclusively the scope of each individual power, nor could they have accounted for new areas that would arise over time, for example, that of aeronautics.²⁸ The enumerated powers were left vague so that the constitution could grow as a 'living tree' and adapt to changes in the scientific, political, and social climates of the times.²⁹

Federalist review has developed over the years as the methodology used to nurture and flourish that living tree. There have been a number of cases dealing with most if not all the enumerated heads of power outlined in sections 91 and 92.³⁰ Questions over which level of government had the proper authority to make laws dealing with such things as prohibition, the regulation of the insurance industry, wage and price controls, and offshore mineral rights, have all been decided under federalist review. Preserving federalism sometimes entails relying on the judiciary to ensure that neither the federal nor provincial levels of government encroach on either's constitutionally guaranteed powers:

'If in a nation paramount central [federal] power completely overlapped regional [provincial] power, then that nation would not be federal. . . It is only where overlapping of power is incomplete, or the scope of central control is limited, that we have a federal system. In that case there are two levels of government which are "within a sphere" coordinate and independent."³¹

Great Britain's **Judicial Committee of the Privy Council** was Canada's first high court of appeal. It heard federalist disputes because Canada was a colony that remained under formal British rule until 1949.³² The *Supreme Court Act* 1875 established the Court as the highest court of appeal in Canada, yet it could not abolish appeals to the Privy Council. The new Court remained subordinate to the Committee until 1949 but did deliver many important and influential decisions prior to that point.³³

The one hundred and twenty year history of federalist review in Canada shows that parliament has never truly been sovereign. Although it could be argued that both Parliament and the provincial legislatures remain sovereign in their respective legislative areas, their degree of sovereignty has, and remains, jurisdictionally limited. Parliamentary sovereignty then, in an absolute sense, is a myth in Canada.

3) **Parliamentary Sovereignty: Tradition or Invention?**

While federalist review is an old and well established component of our legal system, judicial review of legislation in light of constitutional rights-based limits is a brand new tradition. In spite of its youth, *Charter* review is more traditional than

parliamentary sovereignty in a legal or authoritative sense. The manner in which parliamentary sovereignty was established as a tradition is, to say the least, questionable. In the article entitled, *Sovereignty*, R.F.V. Heuston points out that parliamentary sovereignty was invented by a group of 'Oxford men' in the 19th century.³⁴ According to Heuston, legal scholars such as A.V. Dicey, Sir William Anson and James Bryce, (building on Thomas Hobbes's writings in the 17th century) were responsible for perpetuating the belief that parliament was truly sovereign:

'It is generally agreed that Parliament is a sovereign body which can repeal or amend by way of a simple majority in both houses even the most time-honoured principles of the constitution. This principle is, however, established more by a series of *obiter dicta* by eminent persons, whether sitting on the bench or in the professorial study, than by any judicial decision of binding authority. Indeed, if we confine ourselves to the law reports, it has never been decided either that Parliament is a sovereign body or that one of its acts cannot be challenged. Further, the moral validity of the principle has been doubted - often by the same persons who expounded it.'³⁵

We see from Heuston's observations that parliamentary sovereignty is more the product of scholarly invention than of any official act or judicial decision. While it may be true that it has become a convention of sorts that parliament is sovereign, it is a tradition whose origins are not as firm or authoritative as those establishing *Charter* review. The latter procedure is clearly explained in section 24 of the *Charter* and therefore draws its legitimacy not from academic conjecture, but from constitutionally enshrined rules and principles.

As our society is a representative democracy, it is argued that because *Charter* review undermines parliamentary sovereignty, democracy or democratic rule

in Canada has been adversely affected. The claim that *Charter* review is undemocratic is addressed in greater detail in a later section. Both lines of criticism - that *Charter* review is untraditional and undemocratic - are based on the same assumption that it undermines parliamentary sovereignty. As parliamentary sovereignty in an absolute sense is an invented myth, *Charter* review does on the face of seem no more undemocratic than federalist review.

C. Individualism, Communitarianism and the *Charter*

Charter review is accused of being untraditional not only because it is said to undermine parliamentary sovereignty, but also because it is felt to be inherently 'un-Canadian.' This, it is argued, is the result of the overemphasis it places on protecting individual rights and freedoms in our society. Canada, by reputation, is not an individualist, rights-oriented nation like the United States but a collective or community minded culture. This community spirit stems from a mixture of 'Tory' and socialist ideologies in our socio/political, historical and legal traditions. According to professor Monahan:

'... Canadian politics has always placed particular emphasis on the value of community, in contrast to the overriding individualism of the American experience... It seems to have been commonly assumed that the Charter represents a radical break with this communitarian political tradition; according to this scenario, the Charter has administered a potent dose of liberal individualism to the Canadian body politic.'³⁶

The criticism that *Charter* review is un-Canadian is, however, misguided for three main reasons. First, Canadian society has always placed great value on the

preservation of individual rights and freedoms. Constitutional protection is a natural extension of this value. Second, when examined closely, the rights and freedoms outlined in the *Charter* represent a strong balance between community and individual interests. This highlights the importance our society has always placed on both types of values. Third, a point that is developed further in Part 4, is that *Charter* review provides an excellent method of cultural analysis that will help strengthen Canada's unique cultural identity.

1) Individualism as a Canadian Tradition

Before the adoption of the *Charter*, the expression of respect for individual rights and freedoms in Canada took two main forms. The first was seen in general common law principles adopted by the judiciary as Canada inherited ". . . a Constitution similar in Principle to that of the United Kingdom." The second was in the rights and freedoms outlined in the *Canadian Bill of Rights* and subsequent provincial bills and charters.

Rights-based principles such as freedom of the press, the rule of law, *habeas corpus*, and *mens rea* are an integral part of Great Britain's 'unwritten' constitution. They have been well represented in the history of Canadian law.⁷⁷ The adoption of these common law principles by the judiciary is said to have formed an 'implied' bill of rights in Canada.

Arguably the most famous example in Canada of the Court relying on common law principles to limit the power of government was in the case of

Roncarelli v. Duplessis, [1959] S.C.R. 121. The Court, in this case, ruled that premier Duplessis of Quebec violated the rule of law and acted arbitrarily when he revoked the liquor license of Roncarelli. Duplessis revoked the license only because Roncarelli was sympathetic to the Jehovah Witness movement.

Although common law principles such as the rule of law were effective in controlling these obvious abuses of government power, an implied bill of rights did not provide the Court with a strong enough mandate to strike down less obvious encroachment on individual rights and freedoms. Canada needed a more formal declaration of the importance of rights and freedoms in our society and in 1961, Parliament enacted the *Canadian Bill of Rights*.

This bill contains such clauses as: the right to life, liberty, and security of person and the enjoyment of property, freedom from cruel and unusual punishment, and, the right to be presumed innocent until proven guilty. The *Bill of Rights* is similar to the *Charter* in that it formally recognizes important rights and freedoms, but is dissimilar in two important ways.

First, the bill was intended to be only an interpretation act. It was meant to provide guidance, and not specific power, to the courts when reviewing legislation. Second, because it was not entrenched, the rights and freedoms outlined were not constitutionally protected and therefore could be overridden or ignored altogether.

Although the rights and freedoms outlined in the *Bill of Rights* were not formally entrenched, the bill was nonetheless influential on the future development of rights and freedoms in Canada. After its adoption, a number of provinces moved to develop their own charters, bills, and codes of human rights. These were

intended to deal with encroachments on human rights by both government and private citizens. Parliament later enacted the *Canadian Human Rights Code* 1977, to deal with discrimination in the workplaces and services of the federal government such as housing, unemployment, etc.

The protection and promotion of liberal values before the adoption of the *Charter* are well documented. Common law principles and statutory law have both been used to ensure that basic individual rights and freedoms are respected in Canada. The criticism then that the promotion of individualism is an un-Canadian value or tradition is clearly misguided.

2) The *Charter*: A Balance of Canadian Values

Adoption of the *Charter* in 1982 can be viewed as a natural extension of respect for human rights in Canada. The time had finally come (according to prime minister Pierre Trudeau anyway) to formally entrench in a constitutional document the more important rights and freedoms that had been respected in law since confederation. The *Charter* became an important means by which people could ensure the protection of their basic interests from government encroachment.

Rights and freedoms outlined in the *Charter*, however, are not exclusively aimed at protecting individual interests. While the first fifteen represent traditional individual values, there are thirteen other rights and freedoms that refer to collective or community interests. Specific groups such as French-speaking Canadians and aboriginal peoples have been guaranteed certain collective rights and

freedoms. On the face of it then, it could be argued that the *Charter* strives to achieve a balance between both individual and community interests.

Section 1 of the *Charter* states that the rights and freedoms outlined in it are guaranteed ". . . subject only to such reasonable limits prescribed by law in a free and democratic society." This section points out that individual rights and freedoms are not absolute and that under certain conditions, may be overridden by important government objectives.

Section 2 deals with fundamental freedoms like that of conscience, religion, belief and opinion, the press, and association and assembly. Sections 3-5 are concerned with democratic rights and establish who has the right to vote, how long Parliament should sit, and in what time frame. Section 6 deals with mobility rights and the ability of Canadians to live in the various parts of the country. These three sections are traditional individual rights and freedoms normally associated with the preservation of one's place in a democratic society.

Sections 7-14 deal specifically with legal rights and include: the right to life, liberty, and security of person, the right against unreasonable search and seizure, arbitrary detention, cruel and unusual punishment, self incrimination, and the right to a fair and impartial hearing. These types of rights are the most traditional of all liberal rights and apply specifically to the administration of the criminal law in Canada. Section 15 is concerned with the right to be treated equally in regard to race, colour, religion, and so on.

From this point on, the rights and freedoms outlined in the *Charter* begin to take more collective or community oriented directions. Sections 16-22 outline

specific rights in relation to both official languages and describe what those languages are, who has to respect them, and what services or information must be available in both English and French. Section 23 deals with minority language educational rights and outlines what, where and why both languages should be made available for educating Canadians. Sections 25-29 also protect collective interests such as aboriginal rights, multicultural rights, equality among the sexes, and, separate and denominational schools.

It is clear then that these thirteen sections of the *Charter* do not express traditional individualistic liberal values. They promote the interests of the collectivity or community in fundamental ways.

Section 24 and sections 31-34 are ancillary rights and refer specifically to the application of the *Charter*. Section 24 for example is concerned with the enforcement of the *Charter* and that certain types of evidence should be excluded if it would bring our system of justice into disrepute. Section 31 states that the *Charter* does not extend legislative powers to any body. Sections 32 and 33 outline general rights such as the application of the *Charter* to the territories, and the notwithstanding override clause respectively. The final section, 34, deals with the citation of the *Charter* and establishes its official name.

Although these ancillary clauses do not appear to promote community interests directly, section 33 does imply that the voice or will of the collectivity is at times more important than the interests of individuals. Governments, under section 33, can make laws that infringe upon certain *Charter* rights if they feel such laws would be in the best interests of the country as a whole.

Charter review then cannot be un-Canadian because judges are forced to examine legislation in light of both individual and collective interests. They will have to explain clearly how both types of interests are to be respected, in particular in cases involving section 1. *Charter* review is also not contrary to the invented myth of parliamentary sovereignty as judicial review (and adjudication in general) is a long standing Canadian tradition. The criticism that *Charter* review is untraditional because it undermines parliamentary sovereignty and because it is un-Canadian is therefore unsound.

PART 2**THE POLITICS OF CHARTER REVIEW**

Prior to the dawn of the '*Charter* era', traditional legal theory and criticism of judicial review concentrated primarily on the merit of individual decisions.²⁸ The integrity of the judge and the perception of the judiciary as a legal institution was never seriously questioned by most critics. Since 1982 though, *Charter* review has been accused of being inherently political in nature. This observation has become the central topic of debate in Canadian jurisprudence.

The criticism is based on two main premises or assumptions. First, the process of defining or giving meaning to the rights and freedoms outlined in the *Charter* is said to be value-laden or subjective in nature due to the vagueness of its clauses. Second, judges are accused of becoming deputy legislators or policy-makers under *Charter* review. Professor Monahan sums up the two points when he states:

"The very process of defining the content of the rights protected by the Charter seems inherently political. Many of these rights . . . contain little or no substantive criteria: they resemble blank slates on which the judiciary can scrawl the imagery of their choice. But there is a second problem. Having given content to these open-ended rights, the judiciary must "balance" these rights against the considerations of the general welfare under section 1. This process of "interest balancing" seems just another way of asking fundamental legislative [or policy-making] questions: "is it worth what it costs"."

In spite of Monahan's stinging observations, *Charter* review remains essentially legal in nature. While it is true that *Charter* decisions have a significant impact on the political process in Canada, the decision-making process is not itself subjective and judges do not become policy-makers.

A. The Subjectivity of *Charter* Review

In response to the claim that *Charter* review is subjective, *Charter* clauses may be vague, but vagueness in moral and legal terminology is desirable. Defining the meaning of rights and freedoms is no more subjective than defining the meaning of other terms and phrases. The process of giving meaning to rights and freedoms is not in the end subjective but highly purposive in nature.

1) Defining Constitutional Terms

'Questions about the history of a right or freedom, or the political and philosophical values it supposedly embodies, are political and value-laden: they are not matters of legal right and legal wrong . . . If judges must choose between different and often conflicting formulations of the purpose of a right or freedom, the problem of judicial subjectivity is reproduced rather than avoided.'⁴⁰

While it may be true that terms such as 'fundamental justice,' 'reasonable limits in a free and democratic society,' and, 'equality before and under the law,' are more vague than ordinary words and phrases, they are not so vague as to allow totally unconstrained, subjective or political interpretation.

One reason for this is that a certain degree of vagueness and uncertainty is a necessary attribute of most if not all phrases or words. Moral and legal terms are no exception and their exact meaning will also be uncertain to some extent. All words do, however, have a core meaning with a 'penumbra of uncertainty.'⁴¹ While there is no final or absolute authoritative definition of terms such as freedom, liberty, or justice, their meanings can be gleaned by the context in which they are

used, and the reasons given by the judiciary for such usage. Accordingly, Dworkin states that:

'Indeed the very practice of calling these clauses 'vague' . . . can now be seen to involve a mistake. The clauses are vague only if we take them to be botched or incomplete or schematic attempts to lay down particular conceptions. If we take them as appeals to moral concepts they could not be made more precise by being more detailed.'⁴²

The meanings of terms outlined in legislative clauses are intentionally left vague by their designers. This is so that the clauses will be flexible in the sense that they can be adapted to unforeseen future applications. There is, in other words, an attempt to create a balance between certainty in the language, and the breadth and clarity of application, in all legislation. An excellent example of overemphasis on certainty restricting breadth and clarity is in the area of tax law. When legislators attempt to define all of the subtleties and nuances of tax laws to prevent loop holes, the laws become more confusing to the public.

The *Charter's* framers always intended it to be part of a constitutional document that could adapt and grow with changing times. Terms outlined in the *Charter* strive to create a balance; they are not so vague as to lack a core of certainty, but are vague enough to provide room for the constitution to grow and adapt to new situations:

'Accordingly, criticisms of the *Charter* on the score of vagueness and uncertainty are . . . largely misconceived. The *Charter*, like the Constitution Act 1982 of which it forms a part, and like that acts predecessor of 1867, is meant to be a "living tree".'⁴³

The legislative history of rights and freedoms (events occurring during the drafting and enactment of statutes), provides guidance to the judiciary in defining the meaning of *Charter* clauses.⁴⁴ The main sources of legislative history are: Royal commissions, the Law Reform Commission, and parliamentary committee reports, earlier drafts of an Act, testimony of expert witnesses, and, speeches in the legislature. All provide background information for helping to define rights and freedoms, greatly reducing the degree of judicial subjectivity.

The meaning and scope of most of the rights and freedoms outlined in the *Charter* have been discussed in previous cases involving the *Bill of Rights* and the various bills and charters of rights of the provinces. Reference to their meaning and scope can also be found in a plethora of supplementary academic writings in law school journals, newspaper articles and books.

The judiciary can also draw from over two hundred years of American judicial decisions and jurisprudence.⁴⁵ The Court has been reluctant to embrace fully American definitions, as stated by La Forest when he said that American jurisprudence on such matters should be used ' . . . as a tool, not as a master.'⁴⁶ Nonetheless, the Court has relied on American jurisprudence to help define the various rights and freedoms outlined in the *Charter*.

"The court has referred to foreign jurisprudence in many *Charter* cases. The use of such jurisprudence as an aid in interpreting the *Charter* should be applauded and encouraged. The experience of other free and democratic societies can be invaluable."⁴⁷

Finally, the frequency with which a right or freedom is dealt with in various *Charter* cases will also have a significant impact on narrowing its definition,

therefore reducing judicial subjectivity. Its meaning will become clearer over time just as precedents develop over the years from application. Hogg sums up this point by saying that, 'Moreover, as a body of case law develops on the meaning of a particular right, the core of the definition tends to become settled.'⁴⁴

2) *Charter* Review as Purposive

'This Court has already, in some measure, set out the basic approach to be taken in interpreting the Charter. In *Hunter et al. v. Southam Inc.* . . . this court expressed the view that the proper approach to the definition of the rights and freedoms guaranteed by the Charter was a purposive one. The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in light of the interests it was meant to protect . . . In my view, this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter.'⁴⁵

The purposive approach to defining rights and freedoms attempts to narrow or confine the definition of a right or freedom to the particular interests it was meant to protect. This approach places restrictions on how a right or freedom is to be defined and therefore judges are not free to ignore those restrictions and provide only personal beliefs or opinions.

There are many significant *Charter* decisions that support the view that the judiciary takes a purposive approach to interpreting the meaning of the rights and freedoms outlined in the *Charter*. In *Morgentaler*, the Court refused to allow section 7 to be interpreted generously or beyond the scope or purpose of the right

it protects, in relation to the decision at hand.³⁰ They refused to engage in a discussion of whether a foetus was a person and therefore entitled to the guarantee of the right to life outlined in that section. This would have gone beyond the purpose or meaning of section 7 in relation to this case.

In the **Labour Trilogy** cases, section 2(d) 'Freedom of Association' was also interpreted in a purposive manner.³¹ Its meaning excluded a right to strike - a purpose felt to be clearly beyond the scope of section 2(d) in relation to these cases.³² Decisions involving section 15 (equality) such as **Andrews** were also decided purposively.³³ **Andrews** dealt with the issue of whether a British Columbia statute that required prospective lawyers to be Canadian citizens was discriminatory. The Court decided that the statute was discriminatory, and the scope of equality was defined in an purposive manner:

'It is clear that the purpose of sec. 15 is to ensure equality in the formulation and application of the law. The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect, and consideration.'³⁴

Justice McIntyre's interpretation of section 15 clearly highlights the purposive approach to interpreting rights and freedoms. This is because it is based on the principle of **equal concern and respect** raised and argued for several times by professor Ronald Dworkin.³⁵

Equal concern and respect lie at the heart of Dworkin's theory of **Law as Integrity**. It is the moral norm or principle by which judges ultimately base the legitimacy or 'rightness' of their decisions.³⁶ More will be said later regarding Dworkin's theory of Law as Integrity. It is necessary only to recognize the

significance of the Court's recognition of it in the decision-making process. This clearly shows that judges are not imposing their personal beliefs and opinions, or scrawling any amount they choose on blank constitutional cheques. They are defining the purpose of section 15 in line with one of the soundest jurisprudential theories ever established.

Professors Hogg and Alexander applaud the purposive approach taken by the Court when reviewing *Charter* cases. They provide evidence to support the view that the Court has adopted it, more than a general or subjective approach, to interpreting the rights and freedoms outlined in the *Charter*.⁷

The criticism then that *Charter* review is political because defining the meaning rights and freedoms is a subjective process is false. The terms outlined in the *Charter* were intentionally left vague as vagueness in moral and legal terminology is the rule and not the exception. Defining the meaning of such terms is not subjective but purposive in nature as judges will rely on personal experience, along with a plethora of authoritative sources.

B. Judges as Policy-Makers

The claim that *Charter* review is political because judges become policy-makers under it is unfounded for four main reasons. First, although issues involved in *Charter* cases are political, it does not follow that the decisions themselves must also be political. Second, *Charter* review does not perpetuate liberal ideology solely. When it does, it is not harmful or damaging. Third, *Charter* review is more a matter

of interpreting moral and legal principles than making public policy. Finally, an analysis of section 1 of the *Charter* will show that judges are at best 'policy advisors' and not policy-makers under *Charter* review.

1) The Political Nature of Issues Involved

Most critics claim that because issues involved in *Charter* decisions are highly political, i.e. abortion, mandatory retirement, Sunday closing etc., the decisions themselves must also be political. Resolutions to disagreements involving these types of issues have traditionally been the responsibility of Parliament and the provincial legislatures. Professor Morton points out why such issues will result in political or policy-making decisions under *Charter* review:

'...law making areas once the sole prerogative of provincial governments are now being threatened with uniform national standards laid down by the Supreme Court in the course of Charter decisions. Nor is it simply the case of judges seeking to influence public policy. Some political executives have used the reference procedure to avoid dealing with "political hot potatoes" such as abortion and minority language educational issues, and have abdicated policy responsibility to the courts. In sum, the "judicialization of politics" predicted by Russell in 1982 is well under way.'³⁸

Although issues involved in *Charter* cases may be of a highly political nature, it does not follow that judicial decisions in relation to them must also be political. Abortion, mandatory retirement, and cruise-missile testing, for example, have philosophical, moral-ethical, and legal dimensions. Philosophically, abortion can be approached by defining and outlining main concepts such as: who a person is, what

a right to life entails, and whether freedom entails no restrictions. Morally, questions such as, 'Is abortion acceptable in some circumstances and not in others?' and, 'Does the mother have a greater or more forceful right to freedom of choice than an unborn foetus has the right to life?' must also be addressed. What the law has to say about abortion is also important. Looking at how courts in Canada and other countries have dealt with the issue and what values previous laws embodied shows that examining abortion in a legal sense is also highly relevant.

The point here is that *Charter* issues are multidimensional or **polycentric** in the sense that they can be examined from many different angles.⁹ While it is true that abortion may have political dimensions, it does not follow that the judiciary will examine it only from a political aspect. Ironically, two of the *Charter's* main critics, professors Glasbeek and Mandel, state that *Charter* review has resulted not in the politicization of the judiciary, but in the **legalization** of politics:

'Naturally, a legalization of political discourse involves a concomitant increment in the peculiar legalese spoken by lawyers . . . We are concerned that political debate will henceforth have to take this form and be that much more removed from ordinary language.'¹⁰

2) Liberalism and Minority Rights

The policy-making function of *Charter* review is said to promote the undesirable ideology of **liberalism**. Judicial review of the liberal rights and freedoms outlined in the *Charter*, it is argued, only perpetuates the policies of this confused, outdated and damaging ideology.

Liberalism is accused of being incoherent because it relies on unsound epistemology. In this so called age of postmodernism, classic liberal works are constantly being 'deconstructed' by postmodernist theorists.⁴² Ronald Dworkin's theories, for example, have been extensively deconstructed on the grounds that the principles, grand axioms or 'metanarratives' he attempts to establish cannot be shown to be true because all knowledge in the end is relative.⁴³ Dworkin's claim that governments should treat individuals with equal concern and respect for example is a liberal policy that is false because no matter how hard he tries, he could never show it to be the right or best principle for governments to follow in all situations. Accordingly:

'[Liberal] Legal doctrine is [seen as] riddled with indeterminacy and adjudication is essentially a process of choice. By attempting to mask this fact with increasingly sophisticated theories, jurists serve an important political function . . . Judges and scholars enable society to convince people that its present organization is not only rational and just, but necessary and inevitable. The construction of elaborate schemes and entitlement from available materials help justify the status quo and direct formidable barriers to social change.'⁴³

Liberalism is not only seen as incoherent, but dangerous as well. It is dangerous because it promotes a negative, not positive form of freedom.⁴⁴ Negative freedom entails not having arbitrary restrictions placed on one's ability to enjoy life, while positive freedom involves actively trying to control or chose one's destiny in life. As 'The Charter is, at root, a liberal document . . . it arms individuals with a negative set of formal rights to repel attempts at government interference . . . ' yet does nothing to promote the positive interests of the disadvantaged.⁴⁵

This form of criticism is in line with the **political correctness** movement. Political correctness advocates hiring quotas, employment equity programs, and censorship of racist and sexist language in literature to promote the interests of certain minorities.⁴⁶ The main point here in relation to *Charter* review is that the rights of groups such as women, aboriginals, French-speaking Canadians and the economically disadvantaged do not get promoted under judicial review of a *Charter* firmly rooted in the politically incorrect ideology of liberalism. According to two prominent *Charter* critics:

'It is therefore a fairly safe bet that the new Charter will make little difference to the average Canadian. The lot of the majority is not going to be changed, for the Charter is not concerned with their bread and butter rights. In the great liberal tradition, economic rights do not generally qualify for inclusion in a political charter lest they contaminate the purity of its doctrine with everyday problems.'⁴⁷

and,

'The "double-edged" character of the Charter's equality provisions means that women, like organized labour and aboriginal peoples, find themselves fighting **against** the Charter just to hold on to what they have begun to achieve through more conventional political means. And even where the Charter's guarantees of formal equality are not positively dangerous, they are incapable . . . of changing the balance of power between men and women. Furthermore, the individualism of the Charter has been shown to have its own special application to women, providing a solution to the problems of some at the expense of the rest.'⁴⁸

An example of an actual *Charter* decision that is said to support this general view is that of **Dolphin Delivery**.⁹ The case involved questions over the scope of the rights of organized labour under section 2(b) of the *Charter*. The facts of the case are that Dolphin Delivery, a courier company, continued through another company, Supercourier, to make deliveries for a third company, Purolator, while Purolator was engaged in a labour dispute with its employees. The employee's union of Purolator gave notice that they were going to picket Dolphin Delivery and Dolphin subsequently obtained an injunction preventing picketing from the union on the grounds that it was illegal. Its illegality was not based on the violation of a statute, but that the picketing violated the common law tort of breach of contract between Dolphin and its employees.

The union appealed to the British Columbia court of appeal and then to the Court on the grounds that the tort amounted to a denial of freedom of expression outlined in section 2 (b) of the *Charter*. The Court, however, held that the legality of granting the injunction was beyond the reach of the *Charter* because common law precedents in private law disputes do not involve government action. Hutchinson and Petter point out that the Courts's decision only highlights their reliance of the confused policies of liberal ideology:

'The court in Dolphin found itself between a rock and a hard place. The rock was the incoherence of the public/private dichotomy in a post-realist age, the hard place the overtly political character of Charter adjudication in the absence of the public/private cushion. Given this uncomfortable state of affairs, the courts only choice was to produce a judgement as contradictory and incoherent as liberalism itself.'¹⁰

This general line of criticism, however, is unsound for two main reasons. First, the claim that *Charter* review is so firmly rooted in liberalism that certain interests will not be protected or promoted is false. Second, it may be more incoherent and harmful for the Court to embrace openly the ideology of socialism so coveted by most critics.

a) The *Charter*, Liberalism and Minority Issues

As was mentioned earlier, the *Charter* is a reflection of the importance Canadian society has placed on both individual and collective rights and freedoms. While the first fifteen rights outlined enshrine traditional liberal values, sections 16-23, 25, 27 and 29 reflect a more socialist belief or ideology.⁷¹ Professor Monahan, for example, argues that "The inclusion of these references to community reinforces the idea that the Charter is not simply a reflection of liberalist individual values."⁷²

Although the *Charter* contains both individual and collective values, detractors still argue that certain collective interests will not be promoted under *Charter* review. This criticism is misguided, however. The interests of women, aboriginal people, and French-speaking Canadians for example have been protected and enhanced under the *Charter*.

The interests and rights of women have been promoted in many important ways. Section 28 of the *Charter* for example states that all rights outlined in the *Charter* are guaranteed equally to both men and women. The bold words, 'Notwithstanding anything in this Charter . . . ' at the beginning of the section also

suggests that even a section 1 analysis may not be applicable. Any government body or official that wanted to limit the scope of section 28 would have to provide a very convincing argument. Also, section 15 not only prohibits discrimination based on sex, but permits governments to adopt affirmative action programs to alleviate inequalities of the past that may have resulted from gender discrimination. Both section 28 and section 15 are rights outside the realm of a section 33 override underscoring the point that the *Charter* openly and very convincingly protects the interests of women.

Along with the provisions in the *Charter*, it is possible that the appointment of more women judges to Court will increase sensitivity to gender bias and discrimination in our legal system. This is not to imply that female judges will be overtly partial to women's needs and therefore compromise their own independence, impartiality, and integrity. It is only to suggest that with more women judges on the bench, the essence of true equality outlined in the *Charter* may be more easily attainable. This will happen by improving the balance of perspectives on important social issues in the Court's decisions. In the words of former justice Bertha Wilson:

'If women lawyers and women judges through their differing perspectives on life can bring a new humanity to bear on the decision-making process, perhaps they will make a difference. Perhaps they will succeed in infusing the law with an understanding of what it means to be fully human.'

There have been at least three major decisions to date that have had a direct impact on advancing women's interests. The first was *Morgentaler* that struck down Canada's abortion law, section 251 of the *Criminal Code*. According to Mandel, ' . . . the repeal of the abortion law is perhaps the only unqualified good result to

come from the Supreme Court of Canada yet . . . Morgentaler has removed a law whose only concrete effect was to make life more difficult for women in the already excruciating difficulty of an unwanted pregnancy.⁷⁴

A second victory of sorts for women's interests regarding the abortion issue came in the *Borowski* decision.⁷⁵ The Court unanimously accepted the arguments put forth by L.E.A.F. (Women's Legal Education and Action Fund) that Borowski's claim to have the rights of the foetus defined in relation to section 7 of the *Charter* was moot since the law Borowski was challenging - section 251 of the *Criminal Code* - had already been struck down.

The third victory came as the decision in *Butler*.⁷⁶ In this case, the issue of obscenity was addressed by the Court in relation to section 163 of the *Criminal Code*. Again L.E.A.F. intervened and argued for women's interests. The Court was persuaded by their arguments; although the definition of obscenity in the *Code* violated one's right to freedom of expression under section 2(b) of the *Charter*, this infringement could be justified under a section 1 analysis. The Court upheld the appeal and ordered that Butler be retried on all charges.

In regard to the issues of abortion and obscenity it can be concluded that the Court has not overlooked the interests of women and imposed some ideologically slanted or biased opinion that was discriminatory or damaging. *Charter* review has resulted in the direct promotion and enhancement of women's interests.

Canada's aboriginal peoples have also benefited by the adoption of the *Charter*. Section 25 recognizes aboriginal rights dating from the *Royal Proclamation of October 7, 1763*, and states that the rights and freedoms outlined in the *Charter*

will not 'abrogate or derogate' from them. Aboriginal rights, under this clause, receive a special form of protection. The equality of treatment implied in section 15, for example, will not affect the 'distinctness' of these rights and freedoms.⁷⁷ Further, section 25 is beyond the scope of a section 33 override emphasizing the importance the *Charter* places on native rights.

Section 25 is an interpretive clause and is intended to provide guidance to the judiciary on how to interpret the *Charter* in relation to native concerns. The scope or purpose of this right is limited. It does not establish any new aboriginal rights and freedoms, but instructs the courts to interpret the *Charter* so as not to erode further the rights or freedoms of aboriginal people.

Arguments brought before the Court in relation to this clause have, however, sought to have it interpreted in a more generous manner. The attempt has been made to persuade the Court to adopt the view that the *Royal Proclamation* in essence amounts to a guarantee of native sovereignty.

The Court has refused to interpret the clause in this way. This has resulted in accusations that *Charter* review does not respect aboriginal or native concerns.⁷⁸

Section 35 of the *Constitution Act* 1982, though, deals specifically with the scope of aboriginal rights and freedoms in Canada. It recognizes existing aboriginal and treaty rights, who is entitled to the benefit of them, and that future constitutional conferences should be held to discuss aboriginal rights.

Defining the scope of aboriginal rights and freedoms has clearly been left in the hands of our country's leading politicians and native leaders. It was not considered the responsibility of the judge under section 25 by the judiciary or the

drafters of the constitution. It has been unproductive constitutional conferences that have resulted in any disrespect for native interests, and not the *Charter* or *Charter* review. As Greene concludes, 'The failure of the Canadian political system to give priority to the resolution of native rights issues represents a major gap in the human rights apparatus in Canada.'⁹

Although section 35 is not formally a part of the *Charter*, it is still considered entrenched in that it would take the complicated amendment formula to make any changes to it.¹⁰ Section 35 is also immune to a section 1 review, or a section 33 override, because it is outside the *Charter*. This gives it that much more special protection. According to McNeil:

'Canada's aboriginal peoples have always enjoyed special status and unique rights under Canadian law as a result of their original occupation and use of the land that now makes up this country. Prior to the enactment of the Constitution Act, 1982, however, the constitutional protection afforded those rights was at best limited.'¹¹

Finally, the interests of French-speaking Canadians, particularly those in Quebec, have been enhanced by the addition of the *Charter*. While it is true that Quebec did not sign the constitutional package in 1982, and in that sense was left out of the process of constitutional reform, it was not because the people of Quebec or their federal representatives did not support the package. The Parti Quebecois and its leader, Rene Levesque, were committed to a policy of separation (which was earlier defeated in a referendum by the people of Quebec) and therefore could not have agreed to sign a package intended to strengthen confederation.

Although the *Meech Lake Accord* was not ratified, it was the political process, and not the *Charter*, which showed disrespect for Quebec's interests. In the current

government's proposed constitutional package, Quebec receives 'distinct society' status in the areas of civil law, language, and culture in the *Charter*. Whether Quebec should receive some form of distinct society status is a hotly debated topic and one beyond the scope of this paper.⁸² Interpreting such a clause might be the Court's greatest challenge to date, and reliance on a purposive approach needed.

How then does the *Charter*, as it currently stands, respect the interests of Quebec? First, sections 16-23, as noted above, recognize the minority language rights of French-speaking Canadians. Professor Greene states that, 'Language rights . . . unlike most of the other civil liberties the Charter was designed to protect, are not rights in the traditional liberal sense. Rather, they represent a compromise designed to enable two linguistic communities to coexist in one federal country.'⁸³

Sections 16-23, along with section 27 (multiculturalism), currently recognize and respect Canada's francophone culture. Judicial review of them holds out the possibility of promoting the interests of French-speaking Canadians in particular, and the country as a whole. According to professor Magnet:

'The reform offered by the language provisions is ultra-particular. It is a reform inspired by a vision of linguistic and racial equality. If the courts are faithful to the spirit of duality radiated by the language guarantees, French Canadians will experience relatively greater mobility and security throughout Canada. The vast expanse of Canada will beckon them with French-language government jobs, services, schools, and culture. They will be buffered by fundamental law against the armies of assimilation. A new consciousness of belonging might take root in the francophone mind, and the thesis of political separation may lose credibility . . . Linguistic duality may have been constitutionally entrenched with a master stroke of timing to bind together the failing Canadian experiment.'⁸⁴

In regard to *Charter* review, the Court's decision in *Protestant School Board* may on the face of it seem to have harmed the interests of French-speaking Canadians.⁶⁵ The Court struck down Quebec's infamous *Bill 101* because it infringed on section 23, or the "Canada Clause." Although said to be anti-Quebec by Quebec nationalists or separatists, this decision was not viewed as a serious threat to the survival of the French language in Quebec. Actually, it enhances a feeling of self worth for Anglophones who choose to move to Quebec.⁶⁶

Charter review, in this instance anyway, did not directly harm the interests of French-speaking Canadians. The addition of English-language school privileges in Quebec because of this decision may benefit Quebec by fostering and developing a greater degree of tolerance, concern and respect among its citizens.

b) Is the Promotion of Liberal Rights Harmful?

From the above arguments, it should be evident that *Charter* review does not harm the interests of certain groups of people in Canada. The collective interests of women, Canada's native people and French-speaking Canadians, for example, were shown to be enhanced by the addition of the *Charter*. It still, however, remains to be seen whether *Charter* review is directly harmful because of its so called emphasis on promoting the policies of liberal individualism.

This line of criticism, advanced by critics whose political position is usually left of centre, is unfounded for two main reasons. First, the protection and promotion of individual rights in Canada, as mentioned above, have been important

traditions of our legal system. Judicial review of legislation based on inherited common law principles, coupled with the various bills and charters of rights of adopted by both levels of government, suggests that the promotion of individual rights and freedoms in Canada has not been considered harmful.

Second, the world as a whole does not view liberal rights as harmful. The United States have a *Bill of Rights*, France has a bill, and there is a *Universal Declaration of Human Rights*. The crumbling of the ideology of Marxist/socialism and the cry for more liberal values such as a free market economy, elections, and parliamentary democracy in former communist countries suggests that the promotion of liberal rights be considered beneficial.

In countries where human rights abuses are flagrant, the addition of liberal rights may have a positive effect on improving conditions for the people. If, for example, the people in the Ukraine had the power to speak out against Stalin's policy of collectivization that caused the starvation of millions of people, then possibly international opinion and pressure could have reduced that tragedy. Fitzgerald sums up this point when he says that, "To those who say, "what use to empty bellies is freedom of speech, the right to liberty and so on?" The answer surely must be: "quite a lot".⁴⁷

The claim that liberalism is incoherent and therefore harmful is also misguided. This criticism, advanced most forcefully by members of the **Critical Legal Studies** movement, is based on an unsound assessment of liberal theory. These critics do not have a clear understanding of what is entailed by liberalism yet try to undermine it to draw attention to their own political or ideological agendas:

'Arguments . . . about the incoherence of liberalism, have so far been spectacular and even embarrassing failures. They begin and end in a defective account of what liberalism is, an account supported by no plausible reading of the philosophers they count as liberal . . . They may want to show law in its worst rather than its best light, to show avenues closed that are in fact open, to move toward a new mystification in service of undisclosed political goals.'⁹⁸

If it could still be argued that liberal values are incoherent and dangerous, the adoption of the so called 'bread and butter' rights these critics argue for would be more problematic. Who would pay for the cost of ensuring that everyone had some equal standard of living?⁹⁹ While it is agreed that everyone should have a reasonable standard of living, who is to shoulder the burden for ensuring it?

The Court's refusal to interpret section 2(d) to include the right to strike showed its desire to limit purposively the scope of that right. It also shows judicial restraint in reading into legislation rights, duties, or obligations that have not been explicitly outlined. According to Mr. Justice Le Dain in the *Alberta Labour Reference*, 'It is surprising that in an area in which this Court has affirmed a principle of judicial restraint in the review of administrative action we should be considering the substitution of our judgement for that of the legislature.'¹⁰⁰

Criticism that *Charter* review is political and harmful because judges enforce liberal policies is clearly misguided. Minority interests are well represented and respected in the process, and the Court has refused to endorse openly any ideology that is not in line with the principles that underlie the *Charter*.

3. Charter Review: Focus on Policy or Principle?

The claim that judges become policy-makers under *Charter* review raises the issue of whether the process is essentially a matter of policy or principle. *Charter* review, critics argue, is not a logical or rational process based on principle. It is a 'balancing' act in which judges' personal ideologies and beliefs influence heavily what policy choice they will make in trying to balance and accommodate various interests. In this way, *Charter* review is portrayed as being functional and not formal in nature.

The distinction between the role of the judge and legislator in society is blurred here or erased completely. Judges, it is argued, balance interests in essentially the same way legislators do and therefore make policy choices as well. It follows that if there is no distinction between the policy-making function of the Court and that of the legislature, then *Charter* review must be an inherently political process. This, critics state, is most evident when the Court reviews legislation in light of section 1 of the *Charter*.⁹¹ Professor Greene, for example, states that the Court was necessarily drawn into making policy under a section 1 analysis in *Singh*.⁹²

In this case, the Court had to decide two things. First, whether the rights of refugee claimants who had been denied an oral hearing were being infringed upon in relation to principles of fundamental justice outlined in section 7 of the *Charter*. The Court decided that denying an oral hearing violated the principles of natural justice to receiving a fair and just hearing. It then had to decide whether such an infringement could be justified under section 1 as a "reasonable limit" on that right.

Professor Greene argues that while the first question may be essentially a legal one, the second is based on policy and not principle. It is a policy question because it would take a great deal of social and scientific research to determine whether oral hearings are the most efficient and cost effective way of dealing with refugee claims. The Court, in other words, did not decide what is fair or just to the individual (a matter of principle) but what was in the best interests of society as a whole (a matter of policy). Greene concludes that although the Court 'stumbled' into making the right decision - that the denial of an oral hearing was not a reasonable limit under section 1 - their political decision-making process left something to be desired.

More will be said in the next section regarding judicial review of section 1. It is arguably the most important and controversial section of the *Charter* from the point of view of the impact it will have on scope and importance of rights and freedoms in Canada. For now an attempt will be made to clarify the distinction between principle and policy. Through this it should become evident that in spite of the above criticisms, judges are not policy-makers under *Charter* review but remain essentially interpreters of moral and legal principle.

The question of whether judicial decisions are based on principle or policy has been the central focus of the work of Ronald Dworkin. Dworkin's main contribution to jurisprudence has been to show how the judicial decision-making process is ideally a 'matter of principle' and not policy.²⁹ As a matter of principle, the judiciary decides issues by interpreting moral and legal principles that are found in the political morality of a particular society. Judges choose principles that put

the law in its 'best light' in the particular case at hand. Since decisions are based on the interpretation of principle rather than on an exercise in policy-making, the role of the judiciary, according to Dworkin, remains essentially legal and not political in nature. According to Dworkin:

'I call a 'policy' that kind of standard that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community . . . I call a 'principle' a standard to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice, fairness, or some other dimension of morality.'⁴⁴

Policies are concerned with the collective goals of the community as a whole, and are in that sense, **utilitarian** in nature. They are also forward looking because their aim is to try to establish general plans or schemes to realize some future goal or desire. For example, free trade with the U.S. is considered a policy because its justification is based primarily on the fact that a more open market will benefit most Canadians. This, it is argued, will improve the future economic well being of the country as a whole and not specifically advance the interests of individual citizens. Decisions that are based on reasons that reflect policy considerations take the future interests of society as a whole to be the most important factor.

Decisions based on principle concentrate on what is just or fair to individuals or groups such as corporations, women or natives. They are backward looking and focus on past legal history in relation to present interests. According to Dworkin, decisions based on principle establish or reaffirm **legal rights**.

An example of a principle is that 'no person shall profit from their crime.' In the case of a grandson murdering his grandfather to collect the inheritance, for

example, this principle was relied on to bar the grandson from collecting the inheritance even though he was entitled to it in the will.⁶⁶ This decision is based on principle and not policy because its focus is on the right of the individual and not on whether society as a whole would benefit by forbidding people from collecting an inheritance after committing a criminal act in order to obtain it.

Traditionally, deciding what is just and fair has been the main forte of the judge, whereas deciding what is in the best interests of the community or country as a whole, the job of our elected officials. Adjudication then, according to Dworkin, is more a matter of principle than policy:

'For the idea that adjudication is a matter of principle - that someone is entitled to win a lawsuit if the law is on his side, even if society overall loses thereby, and even if the law on which he relies was justified in the first instance on grounds of policy - presupposes that some distinct importance, at least, is attached to moral harm; and if that is so then it is morally inconsistent to leave the procedures that protect against this moral harm to a utilitarian calculation that denies that presupposition'⁶⁷

Dworkin's distinction between principle and policy has not been universally accepted as self-evident and has been an endless source of heated controversy among members of the jurisprudential community.⁶⁸ The main resistance to the principle/policy distinction has been voiced by many American and British theorists. In Canada, professors Alan Hutchinson, Michael Mandel and members of the Critical Legal Studies movement have been the most vocal opponents of Dworkin's distinction.⁶⁹ The main claim made by these critics is that '... issues do not come prepackaged and brightly labelled as "principle" or "policy." Any issue can be looked at from the point of view of either of these categories.'⁷⁰ More specifically,

critics argue that no clear line can be drawn between matters of policy and principle, that it is not clear that judicial decisions are based on principle, and, even if they are, it does not follow that they ought to be in the future.

In response to the first criticism, Dworkin says that while it may be true that drawing a clear distinction between matters of policy and principle has not been a staple of jurisprudence, it is not a novel argument and has been advanced by other authors.¹⁰⁰ The distinction becomes most evident, according to Dworkin, when the question of rights comes into play. Judges or lay people need not have read Kant, Bentham or Rawls to hold a particular view about rights to see how matters of principle are directly connected with rights and freedoms. They need only recognize that when discussing whether an individual or group right exists - be it a moral or legal, concrete or abstract right - a particular type of question must be asked.

Asking whether a right exists, according to Dworkin, differs significantly from asking what is in the best interests of the community as a whole. The main differences between the two types of questions are that when the interests of the country as a whole are at stake, the future well being of more than one person is considered. When a right or freedom is involved, the questions concentrate on what is fair or just to particular individuals or groups at present, based on past practices and situations of a similar nature. The distinction therefore between matters of principle and policy cannot be so easily collapsed. Questions about rights, according to Dworkin, concentrate on matters of principle, whereas policy questions focus on utilitarian calculations of the common good:

The question an individual should confront when deciding what duties he owes to others . . . is a different question, and must receive a different answer, from the

question of what a legislature should, in the name of utility, require all such individuals to do . . . ¹⁰¹

It may still be argued that judges have asked what would be in the interests of the community as a whole when they refer to what **consequences** their decisions will have on the community. For example, when deciding a case on whether a person could use their land to build a factory that would cause pollution, a judge may entertain evidence about how that pollution will affect the community or country as a whole.

Dworkin counters this argument by saying that while it may be true that judges have quite often appealed to the consequences of actions in their decisions, it does not follow that the decisions were based on policy considerations.¹⁰² It would only be so if the judges did not ask or frame the question in terms of what individual rights a person did or did not have.

If, for example, the judge was concerned only with how a person's use of their land would affect the general well being of society, with no consideration as to the right of an individual to enjoy free use of their property, then the decision would be one based on policy and not principle. Once the question of individual rights comes into play, it does not matter whether consequences are used to argue for or against a decision. What matters is that the judge or judges base their final decision on whether a concrete right does or does not exist:

The difference between an argument of principle and an argument of policy, then, is a difference between two kinds of questions that a political institution might put to itself, not a difference in the kinds of facts that can figure in an answer. If an argument is intended to answer the question whether or not some party has a right to a political act or decision, then the argument is

an argument of principle, even though the argument is thoroughly consequentialist in its detail.¹⁰³

Dworkin at this point proceeds to develop a highly complex argument to show how actual decisions have been based on principle and not policy to counter his main critics. Unfortunately, space does not allow a detailed examination of this argument. It does present a very strong case for maintaining the distinction between the two types of questions and the claim that the courts decide cases based on principle rather than policy. Instead, a brief outline of Dworkin's general theory on adjudication will be offered to show why judges ought to or should base their decisions on principle rather than policy.

Dworkin's theory of adjudication as a matter of principle is complex and has evolved (and continues to evolve,) over the last twenty or so years. It started out as a critique of H.L.A. Hart's version of positivism in **The Model of Rules**, moving into to a more positive exposition known as the **Rights Thesis**. The main point of the **Rights Thesis** was to show that it was possible for judges to reach right answers in cases of first impression, or **Hard Cases**.¹⁰⁴ A further elaboration came as a defense of **naturalism** in which Dworkin revealed his affinity towards Natural Law Theory.¹⁰⁵ In his most recent book, **Law's Empire** he advances a new form of his theory of adjudication known as, **Law as Integrity**. According to Dworkin:

'Law as integrity asks judges to assume, so far as this is possible, that the law is structured by a coherent set of principles about justice and fairness and procedural due process, and asks them to enforce these in fresh cases that come before them, so that each person's situation is fair and just according to the same standards. That style of adjudication respects the ambition integrity assumes, the ambition to be a community of principle.'¹⁰⁶

Recall that according to Dworkin, principled decisions involve a discussion of rights contained in the political morality of a particular society, whereas policy decisions involve discussions of utilitarian calculations of the general interest of the community as a whole. Integrity is offered by Dworkin as a distinct political virtue beside that of justice and fairness that ensures that if followed by judges, their decisions will be coherent and consistent and based on principle and not policy.

Law as Integrity is intended to describe how judges interpret the law so that they first find the legal and moral principles that are relevant to, or 'fit' the case at hand, and second, decide which put the law in its best light.

The principle of equal concern and respect comes into play in the second stage of interpretation and provides a basis from which to aid judges in deciding between two or more principles that seem to bear equal weight. The one that can be shown, either directly or tacitly, to further the principle of equal concern and respect in this situation will be the soundest or most purposive interpretation that can be offered for that particular case.

Dworkin believes that law as integrity not only fits as an accurate explanation of adjudication, but also substantively justifies what judges ought to do when confronted with new cases, in particular, hard cases. Law as integrity outlines how judges decide issues based on consecrated principles rather than policy. It is intended to draw a distinction between how a legislature goes about making a policy, and how a judge decides a case. The decisions of judges, according to Dworkin, are rights-oriented and therefore based on principle, while decisions of the legislature are goal oriented therefore based on policy:

'A legislature does not need reasons of principle to justify the rules it enacts . . . even though these rules will create rights and duties for the future that will then be enforced by coercive threat. A legislature may justify its decision to create new rights for the future by showing how these will contribute, as matter of sound policy, to the overall good of the community as a whole . . . Law as integrity assumes, however, that judges are in a very different position from legislators . . . Judges must make their common-law decisions on grounds of principle, not policy: they must deploy arguments why the parties actually had the "novel" legal rights and duties they enforce at the time the parties acted or at some other pertinent time in the past.'¹⁰⁷

Judges should rely on Law as Integrity because it helps legitimize the judicial decision-making process due to its emphasis on consistency, coherency and respect for justice and fairness. Former justice Bertha Wilson, in **Retail Holiday Business Act**, openly embraced Dworkin's theories and according to Chapman, is one judge ' . . . to refer to a theory of legal reasoning which purports to provide a formal guideline for judicial decision making.'¹⁰⁸

Dworkin's theories have been discussed at length here because he provides a sound theory regarding the nature of adjudication and judicial review. His views also provide a formidable line of defence against the criticism that *Charter* review is political in nature if *Charter* review is more a matter of interpreting moral and principle than making public policy.

4) Section 1 - A Matter of Principle and Not Policy

'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.'¹⁰⁹

Section 1 is arguably the most important section of the *Charter*. The American *Bill of Rights* articulates that the rights and freedoms outlined in it are absolute, and the American judiciary has been left with the task of reading into that *Bill*, limits on rights.¹¹⁰ The purpose of section 1, however, is to formally grant our judiciary the power and duty to enforce reasonable limits on rights and freedoms. The onus of stating what those limits are, and showing that they are justifiable or reasonable is on the party (usually the government) wishing to impose such limits.

As mentioned above, judicial review of section 1 is said to demonstrate clearly the inherent political nature of *Charter* review. Again critics point out that vague terms such as 'reasonable limits', 'prescribed by law', and 'demonstrably justified in a free and democratic society' invite subjective or political interpretations. More importantly though, critics argue that inherent in a section 1 review is an 'interest balancing' process that is legislative and not judicial by nature. The Court necessarily becomes a policy-maker when balancing interests, making review of section 1 highly political:

"This process of balancing and mediation is normally considered to be part of the development of policy and the responsibility of the legislature. The explicit invitation in section 1, for the judiciary to evaluate the considerations that have gone into the formulation of a specific legislative approach, seems to rule out even Professor Dworkin's principle-policy dichotomy or at least blur an already nebulous distinction beyond the point of usefulness."¹¹¹

It would appear from the above statement that when section 1 was added to the *Charter*, it was inevitable that *Charter* review would be political in nature. It will, however, be shown that judicial review of cases involving it, in particular the

most famous section 1 case, *The Queen v. Oakes*, [1986] 1 S.C.R. 103, are based on principle and not policy and that Dworkin's distinction therefore holds here as well.

Oakes involved questions over the constitutionality of a reverse onus clause contained in the *Narcotic Control Act* R.S.C. 1970. The facts and decision of the case will be discussed in greater detail below and for now it is necessary only to outline the procedures developed by the Court for interpreting section 1.

Chief justice Dickson (as he then was) delivered the majority opinion in *Oakes*, and constructed a two-part test that section 1 claims must pass before an infringement on a right or freedom is upheld. The first part states that the objective of the government policy that infringes on or limits a right or freedom must be sufficiently important to justify government encroachment on that right. Second, the policy must be reasonable and proportional to the government objective in that: it must be rationally connected to the objective and not arbitrary or capricious, it must impair the right as little as possible to achieve the objective, and, the effects of the policy cannot be out of proportion with what is sought by the government objective.

The Court appears to have gone to great lengths to devise a test that would give some degree of substance and meaning to section 1. Although the test does not outline in specific detail the meaning of such words as "sufficiently important," "rationally connected," or, "as little as possible," (a point that will be discussed below) the test is nonetheless highly structured and does place a stringent standard on the party wishing to limit a *Charter* right. It also prescribes a method by which all *Charter* rights are to be interpreted, that method being the purposive approach discussed earlier. According to Hogg:

'The court's decision in *Oakes* to prescribe a single standard of justification for all rights, to make that standard a high one, and to cast the burden of satisfying it on the government entails a corresponding caution in defining the guaranteed rights. Each right should be so interpreted as not to reach behaviour that is outside the purpose of the right - behaviour that is not worthy of constitutional protection.'¹¹²

The Court's recognition of the need to render the interpretation of all rights purposive by establishing stringent guidelines for a section 1 analysis raises an initial doubt regarding the subjectivity of a section 1 review. It may still be argued though that some words contained in the *Oakes* test - and terms such as "little as is reasonably possible" and "reasonable alternative" that the Court added in *Edwards Books* to fill out certain parts of the test - only make the test that much more subjective in nature.¹¹³ Indeed even Alexander concludes that "... it seems that in assessing both 'importance' and 'reasonableness' a court is necessarily concerned with the wisdom of legislation, and in the end must make a policy decision".¹¹⁴

Alexander goes on to suggest a solution to this problem. He argues that the Court may entertain certain types of evidence to determine the meaning of such terms in particular cases. He points out several instances where they have relied on extrinsic evidence to help define reasonableness, and concludes that:

'In the future, in assessing the reasonableness of a law that limits a right or freedom in the light of the purpose of the law and the means used to accomplish it, the court may want to refer to evidence such as 'a study prepared specifically for the case and filed as a social science brief (or Brandeis brief), or expert evidence from economists or other social scientists who are able to testify as to the necessity for and the likely efficacy of the impugned law and of alternatives to the impugned law.'¹¹⁵

In this way, defining even the most problematic terms will not be subjective because expert witnesses and testimony in individual cases will be common place. Defining section 1 terms will not be the sole responsibility of judges and will involve the opinions of experts such as the Law Reform Commission Reports that were relied on by the Court in the *Edwards Books* decision.

In relation to the point that the Court balances interests under section 1, several observations can be made. If the Court does balance interests, is their interest balancing process the same as that of the legislature? When governments balance interests, they include in their calculations the effect the decision or policy will have on promoting their party's image. In *Charter* cases, however, the Court has no direct interest in the case in the sense of securing future popularity or votes. One key set of interests is therefore missing between the two types of interest balancing processes.

A government policy is not an all or nothing proposition in which one person wins and the other losses as in the adversarial arena of *Charter* litigation. Policies are usually the result of a compromise between a number of competing interests. Under *Charter* review, on the other hand, the Court almost exclusively decides in favour of one party over the other and does not try to devise some workable compromise between competing interests. In this way, the interest balancing process of the legislature is different from that of the Court. The legislature's scale must weigh a more numerous and divergent range of interests than the Court's.

Although former chief justice Dickson admitted in *Oakes* that the proportionality part of the section 1 test would seemingly require the court to

"balance the interests of society with those of individuals and groups," it does not follow that it is the same type of process that the legislature uses when making public policy. While it may be true that legislators try to give proportional weight to the various interests involved when they devise a policy, a *Charter* decision does not achieve the same result. *Charter* review produces concrete results that provide solutions and remedies to individuals, whereas legislative policies are abstract and provide no clear solutions to problems in specific situations:

"The primary function of the judge is to decide the case before him, to *"trancher le litige"* - cut through the issue. He deals with a concrete issue and has the benefit of seeing the practical implications and repercussions of a rule of law on individual members of society. The legislature, on the other hand, is dealing with issues at a certain level of abstraction, and cannot exhaustively provide for every mutation possible."¹¹⁶

The claim that the Court balances interests under *Charter* review is therefore not entirely persuasive. Labelling the process interest balancing does not support the conclusion that judicial review of section 1 is political.

One final point to be addressed is whether the Court has been making policy in relation to section 1 decisions. In cases decided before *Oakes* involving section 1, some critics have accused the Court of avoiding living up to its true policy-making role. They argue that the Court developed a number of clever threshold tests that allowed it to sidestep a section 1 analysis in several instances thereby unjustifiably postponing its foray into politics.¹¹⁷

In the cases of *Skapinker* and *Operation Dismantle* for example, the Court ruled that a clear violation of a right must occur before a section 1 analysis can take place. This did not occur in either case, and therefore the Court did not address

the matter in light of section 1.¹¹⁸ In *Protestant School Board* discussed above, the Court ruled that an outright denial of a right, (sec.23) in a legislative act, (Quebec's infamous *Bill 101*) could not be considered a reasonable limit in any circumstances and therefore could not be saved under section 1.

A third test was devised in *Big M Drug Mart*. It stated that if a government's submissions are *ultra vires* or beyond their proper powers as outlined by sections 91 or 92 of the *Constitution Act 1867*, the submissions could never be considered a reasonable limit on a *Charter* right. Finally, in *Therens*, the Court decided that if a person's right to counsel was arbitrarily limited by police, that action was not 'prescribed by law' and therefore not open to a section 1 analysis.¹¹⁹

These pre-*Oakes* decisions avoid having to deal with the specific question of how section 1 would apply to various *Charter* rights and issues. As Chapman argues, 'This failure to address section 1 may point to a more general reluctance to recognize the political and moral elements inherent in decision making under the *Charter* . . .'¹²⁰ It would appear that the Court postponed its political destiny by devising clever tests to sidestep a section 1 analysis.

Were the reasons given by the Court arbitrary or capricious? It does seem that if a *Charter* right is not violated, it would make little sense to test whether it could have nonetheless been saved under section 1. Does an outright denial of a right pose a reasonable limit on that right? This seems more a case for a section 33 override or actual amendment to the *Charter* than a limit under section 1. If a level of government has made a law that it was not empowered to make, does common sense dictate that the law is still a reasonable limit on a *Charter* right?

Finally, if an action or law is not prescribed by law (or in essence **legal**), yet can still be upheld as a limit on a *Charter* right, then where does one draw the line regarding what potential actions can or cannot override a *Charter* right?

It does seem that the Court's reasons for avoiding a section 1 discussion are based on a solid and reasonable footing. Attempting to interpret such an important clause without an actual case that was clearly applicable, and without prior experience with *Charter* litigation, would have no doubt produced a more subjective and arbitrary test than the one the critics say is in place now. In the words of justice Estey in *Skapinker*:

'May it only be said here, in the cause of being helpful to those who come forward in similar proceedings, that the record on the s.1 issue was indeed minimal, and without more, would have made it difficult for a court to determine the issue as to whether a reasonable limit on a prescribed right had been demonstrably justified. Such are the problems of the pioneer and such is the clarity of hindsight.'¹²¹

Turning now to the actual case that laid down the law so to speak, on section 1, was it decided as a matter of policy or principle? As mentioned above, the Court in *Oakes* was asked to decide the constitutionality of a reverse onus clause contained in the federal statute, the *Narcotic Control Act*. The clause stipulated that a person in possession of narcotics had the onus of proving that he or she did not intend to traffic or sell that substance. The policy underlying the clause was to curtail the sale of illegal drugs, a very serious social problem in Canada.

David Edwin Oakes was arrested in Ontario in 1981 and had in his possession eight one gram vials of hashish oil. He was charged with trafficking and at his trial had to prove that he did not intend to sell the drugs. He contended that

they were for his private use and that the reverse onus clause violated section 11(d) of the *Charter*. This states that 'Any person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.'

Oakes won his appeal in the Ontario Court of Appeal in 1983, yet the crown subsequently appealed to the Court on the grounds that although the clause clearly violated Oakes' rights under 11(d), such a clause was a reasonable limit on that right under section 1.

In this case an actual right was infringed upon (11d), and the Narcotics Control Act did not directly state that the right should be denied. Also, such a law was in the federal government's power to make and, reverse onus clauses have been respected as something that can legitimately be prescribed by law.

The reasons for avoiding a section 1 analysis in previous cases do not hold here and the Court rightfully decided it was time to address the issue. Chief justice Dickson, writing for a unanimous seven-judge panel, declared that the government's policy of curbing the illicit drug trade was important enough to pass part one, or the important objective part of the test. Dickson, however, failed the policy on the second part of the test, in particular, in regard to the rational connection between the policy and the means used to achieve that goal. According to Dickson:

'In my view, [the reverse onus clause] does not survive the rational connection test . . . [P]ossession of a small or negligible quantity of narcotics does not support the inference of trafficking. In other words, it would be irrational to infer that a person had an intent to traffic on the basis of his or her possession of a very small quantity of narcotics . . . In light of the seriousness of the offence in question, which carries with it the possibility of imprisonment for life, I am further

convinced that the first component of the proportionality test has not been satisfied by the Crown. Having concluded that [the reverse onus clause does not satisfy this first component of proportionality], it is unnecessary to consider the other two components.'¹²²

It must be added that although *Oakes* was in possession of more than a negligible quantity, the Court was considering how the law would apply to anyone arrested under the clause. This is the dictum of the rule of law that says that laws must be applied equally to everyone.

The policy being challenged in *Oakes* seems to be the benefit to society of curtailing the illicit drug trade by deterring potential "dealers" with a reverse onus clause. If we recall Dworkin's distinction, the difference between matters of principle and policy comes down to two different types of questions the judiciary asks itself. If the Court were deciding the issue as a matter of policy, it would have to ask itself the question, 'Does this policy achieve its stated goal efficiently or effectively, or in other words, is its worth to society as a whole comparable to its costs?' On the other hand, if the Court were to decide the issue based on principle it would have to ask, 'How does this policy affect individual rights or interests?'

Looking at the reasons given by the Court, what type of decision was reached? It would appear that while the Court recognized the importance of such a policy to society as a whole, its decision was based on whether it was fair to an individual to impose such a heavy burden as life imprisonment for possession of a negligible quantity of drugs. The Court decided that the individual's right to be presumed innocent until proven guilty was paramount in this case and therefore the decision seems on the face of it to be based more on principle than on policy.

What if, however, the issue is examined from the perspective of the policy or policies the Court may have established in this case. First, did it establish that it would be in society's best interests to permit use of the reverse onus clause to override an individual's rights if they had a substantial quantity of drugs in their possession? Or, that it would be in society's best interests not to have a reverse onus clause in relation to drug trafficking at all? That it would be in society's best interest not to arrest, prosecute, and imprison people with small amounts of drugs for either possession or for trafficking? That it would be in society's best interest to legalize possession of any amount of drugs? Or finally, that it is in society's best interest that the policy of curbing the illicit drug trade is not as important as the policy to protect an individual's rights and freedoms in instances where unreasonable burdens and restrictions are imposed on them in certain circumstances?

One could go on and on trying to identify how this decision was based on a policy that benefited society as a whole in some way. The best explanation, however, is that it was unfair to Oakes to make him prove that he did not have the intention to sell those drugs. The question comes down to the rights and freedoms of individuals, and not the interests of society as a whole in this case. This decision does seem sound in a Dworkinian sense. Not only were all the relevant principles and policy choices examined in a coherent and concise fashion, (by applying the test) but the one chosen did seem put the law in its best light by advancing equal concern and respect for Oakes' rights.

As an aside, one may grapple over what is a 'negligible' quantity of drugs. Without that definition from the legislature, however, it is unfair to an individual,

and irrational for the state - with all its power, lawyers, jail, police and so on - to make a person prove they did not intend to sell the drugs in their possession if that amount could be considered for private usage. It would be like arresting a person coming out of the beer store with a six-pack of beer and charging them with the intention of selling it illegally. While it may be true that they were going to sell it, simple possession does not logically lead to such an action. If they came out with a truck load or two of beer, common sense may dictate that it was more beer than needed for personal use. But again who knows, and who should have the onus of proving accusations involving such potentially harsh repercussions?

Even a cursory examination of a section 1 decision then does not support the theory that judges become policy-makers when deciding cases under it. What, however, happened in cases after *Oakes*, in particular one in which a law was upheld as a reasonable limit on a right?

In *Edwards Books*, the Court held that Ontario's *Retail Holiday Business Act* - which called for a common pause day in that retail stores in Ontario be closed Sunday - was a reasonable limit on section 2(a) of the *Charter* (freedom of religion). The Court accepted the argument that part of the Act violated the right to freedom of religion as it imposed an essentially Christian belief on people. The Court then went on to state that the limit on the right was an important objective and that the legislation impaired section 2(a) within a manner that was reasonable. Dickson, again writing for the majority, concluded that the Ontario Sabbatarian exemption '... represents a satisfactory effort on the part of the legislature ...' to try to impair the right as little as reasonably possible.¹²³

It has been suggested that the Court's interpretation of sec 2(a) in this case was more generous than purposive, and that the section 1 analysis more 'relaxed' than in *Oakes*. This has led to speculation that the Court was making some form of public policy in this case.¹²⁴ Again, it can be asked which type of question the Court asked itself in order to resolve the issue. It began by looking at the right in question, section 2(a), making a pronouncement on it, then focusing in on whether that right could be limited by the policy objective in question. The Court began with examining the right in question first, a principled approach, and then used a consequentialist examination - the policy of a common pause day - to help qualify the definition or limits of application of that right.

Did the Court, however, tacitly create a new policy that common pause days were important enough to override one's right to freedom of religion? Did they, in other words, decide that it is in Ontario society's best interest to have a common pause day?

This may be too simplistic an answer and again an examination could be undertaken of all the possible policies that were created by the decision. The most reasonable answer though is that the Court simply affirmed that a particular policy, in a particular situation, was a reasonable limit on, and furthered the definition of, a right and did not establish a brand new policy. Indeed, the Court went to great pains to say that it was not its place to decide all instances in which Sunday closing may be an appropriate policy and that, ' . . . the nature of the choices and the compromises that must be made in relation to Sunday shopping is essentially legislative in nature.'¹²⁵

Only if one is willing to conclude that upholding a policy after careful analysis in relation to a right amounts to making a policy, can the decision in **Edwards Books** be seen as an example of judicial policy-making. This is a rather shaky conclusion and an ardent critic of the Court's policy-making function under section 1, after reviewing **Edwards Books** and several other cases, is only able to conclude that:

"The judgements of both Dickson C.J.C. and La Forest J. in **Edwards Books** evidence a clear retreat from the formalism and strictness of the **Oakes** test. On the other hand, however, they do not represent a sudden acceptance by the Court of its political role in deciding *Charter* questions. By retreating into a position of deference to legislative decision they have only avoided the mandate clearly given to them by the Constitution. Similarly, the transfer of the balancing process back into the definition of a right, explicit denials of a policy-making function, and the use of threshold tests all aid the Supreme Court judiciary in affirming the "legal" nature of their reasoning and therefore denying the spectre of "politics".¹²⁶

It should be evident by now that no matter how strongly critics of *Charter* review want the Court to accept its new policy-making function under the *Charter*, their arguments are neither logically convincing nor empirically supported. Review of the so called politicization section of the *Charter*, that being section 1, does not result in the Court becoming a policy-maker.

Even if the critics could still somehow convince the public that the Court has become Canada's newest political party, does the public want, as does Chapman, the Court to embrace openly the role of policy-maker? The question of whether we want judges to be policy-makers is answered by the critics themselves.¹²⁷ The judicial system's adherence to precedent, principles, and other methods of approach

is not flexible enough to encompass fully the diversity of policy issues as stated by La Forest in **Edwards Books**. The resources of judges (while expanded in *Charter* cases) are limited whereas those of the politicians - public hearings, research institutions, and policy advisors - are more appropriate for policy making.

Information in *Charter* cases is provided predominantly by the litigants only. The Crown argues for a restrictive interpretation of a right whereas private citizens, groups or corporations, argue for a wide interpretation. This provides a limited, not to mention biased, background for a judge to attempt to formulate a policy. *Charter* cases are win or lose propositions, which is not how we traditionally perceive the manner in which interests are balanced in a legislative policy.

Judges therefore make bad policy-makers and should stick to their accepted role as adjudicators of principle. This does not mean that the judiciary does not play an important role in the general development of public policy, and do not have a limited political function. The issues that come before it in *Charter* cases are of a political nature, (among other things) and the principles it relies on to decide cases come from the political morality of our society. What then could the role of the judiciary, in particular that of the Court, be in the overall governing of Canadian society?

5) The Court as a 'Policy-Advisor'

In **Edwards Books**, the Court upheld Ontario's Sunday closing law in relation to section 2 (a) of the *Charter*. In that way it helped to define further the nature

of the right to freedom of religion. It is through such definitions of a right that the government and legislatures find out whether past and future policies are in line with the *Charter*. In this way, the Court becomes an important **advisor** to government in relation to the rights and freedoms outlined in the *Charter*.

The Court, under *Charter* review, becomes a policy-advisor for several reasons. First, government policies that are referred to the Court for judgement on their constitutionality provide an excellent example of how the legislature relies on the judiciary to help shape the content of their policies. The reference procedure allows Parliament and the provincial legislatures to have their policies examined by the Court outside the context of an actual case. A policy is referred to the Court and after examining it, the Court advises the legislature on its constitutionality.

The power granted to the Court under the *Charter* does not allow it to make law in same way as politicians. It can only 'edit' or censor laws and not write or make them.¹²⁸ Laws are struck down or upheld but not created in the same way Parliament passes a law. Section 24(1) guarantees that anyone who has had their rights or freedoms interfered with can seek remedy from the courts. Section 52 states that any law that is inconsistent with the constitution is of no force or effect, but does not authorize the judiciary to replace the law with a better one or anything like it.

There is nothing in the traditions of our legal system that suggests that the Court will try to exercise its new power in a politically activist or policy-making manner. Judicial **restraint** and not activism is the more firmly rooted tradition as evidenced by the Court's deference to legislative policy-making in **Edwards Books**.

This underscores the point that the Court will advise, rather than rival government, on important constitutional issues. There is nothing in the *Charter* or the decisions that have been rendered under it to suggest that the Court will abandon this tradition of restraint and adopt an activist role:

'We believe that restraint is a principle too deeply embedded in the thought processes of Canadian lawyers and judges to be abruptly displaced through the adoption of the Charter. Conversely, activism is neither an approach to judging or a style of judging that does not sit well with Canadian judges.'¹²⁹

There is of necessity an element of law development in interpreting rights and freedoms. This must be distinguished from the actual process of law making adopted by our elected representatives. Precedents and new principles are developed over the years that will influence the decisions of both the judiciary and the legislature and in that sense are legally binding. They do, however, differ in content and style from legislative rules and regulations.

The manner in which principles are developed and the problems they are aimed at addressing therefore are significantly different from legislative procedures. The judiciary does make law in a limited sense yet this limited sense seems more advisory than that of actual legislative policy-making:

'I would answer the question by saying that the judiciary are both interpreters and, in the limited sense I have indicated, makers of law. The role of the judiciary is not political nor executive nor administrative. It is adjudicative, but there is of necessity an element of law development in the work.'¹³⁰

Finally, if one accepts Dworkin's Law as Integrity, then judicial policy-advising may be desirable. Because Law as Integrity demands consistency and

coherence in judicial decisions, this virtue may be transferred over to the legislature because of the Court being advisors. The current negative image of politics could thus be improved if our elected officials exercised more integrity both in and out of the legislature. In that way, the image of politics being based on corruption, favouritism, and slavery to towing the 'party line', may be improved.

To conclude on this point, and bridge the gap between this and the next section, I quote at length a point made by professor Samuel Freeman that may shed some light on what is meant by advancing the claim that the Court has become a policy advisor and not policy-maker under *Charter* review:

'In interpreting the constitution in light of its application to specific laws, the Court gives content to the otherwise abstract provisions of the constitution, and furnishes a common source for the terms of public debate. This can have the effect of sobering and improving the quality of public and legislative discussion and argument by securing commonly understood meanings for abstract and often vague constitutional principles and concepts. Moreover, the existence of a body of constitutional law can serve as a reminder to legislators of their constitutional responsibilities and their duty to direct laws towards constitutionally legitimate ends. These considerations show that, as a means for both rectifying unconstitutional legislation and cultivating citizens' commitment to just constitutional forms, judicial review, if correctly exercised can be an important stabilizing force in those democracies where it is called for.'¹³¹

PART 3. THE UNDEMOCRATIC NATURE OF CHARTER REVIEW

'Constitutional entrenchment of a Charter of Rights and Freedoms limits the power of both provincial and federal government in favour of the rights of individual citizens. It gives people the power to appeal to the courts if they feel their rights have been infringed or denied. The Charter does not transfer any powers or authority from the provincial governments to the federal government - rather it transfers power to all Canadians.'¹³²

Although the addition of the *Charter* was seen as a beneficial addition to democratic rule in Canada, *Charter* review has been harshly criticized as highly undemocratic. This belief follows from the criticism that *Charter* review is political in nature. If judges have become Canada's chief policy-makers, then power has not been transferred to the people but to an unelected judiciary, in particular, the Court.

The argument thus far has shown that the Court has not become society's chief policy-maker. It does not follow, therefore, that *Charter* review is undemocratic. While the Court's role may have been heightened to that of policy-advisor, Parliament and the provincial legislatures and assemblies remain Canada's primary policy-making bodies.

Nonetheless, *Charter* review is still argued to be undemocratic. First, it is said to be 'counter-majoritarian' as the opinions of the nine individuals that make up the Court can now take precedence over the voices of majority governments. Further, judges are not elected nor accountable in the same way as the legislature and cannot be replaced, like politicians, by an election. Finally, *Charter* review is said to constrain the ' . . . equal right of citizens to take part in and influence the government decision-making process that significantly affect their lives.'¹³³

Before addressing the main criticisms, a brief discussion of the concept of democracy and its place in the Canadian state is in order. Democracy has come to assume several different meanings over the years and it is important to gain a better understanding of its more subtle characteristics. This will provide a basis from which to explore democracy in Canada, and how *Charter* review may be a prerequisite of having a more democratic Canadian state.

A. The Nature of Canadian Democracy

1. What is Democracy?

In modern times, democracy has become the 'acid' test by which the legitimacy of government is measured. The crumbling of the Berlin wall and the Soviet Union, the student demonstrations (and deaths) in China, the slow dismantlement of apartheid in South Africa and the cries for sovereignty from both Quebec and Canada's aboriginal people are testimonies to the importance that democracy plays in justifying any form of government. Other political virtues such as liberty and justice seem to have taken a back seat to democracy in political importance. They have been viewed as by-products of democracy.

What then is democracy? Literally it means 'rule by the people' (from the Greek *demos*, "people," and *kratos*, "rule").¹³⁴ Ancient Athens was the home of the purest expression of rule by the people where each citizen (excluding slaves and women) personally participated in government by voting in face to face situations.

Over the past two thousand years, the concept of democracy has evolved and changed in appearance.¹³⁵ There are four main forms all of which have in common as a 'core of certainty', rule by the people. They are:

- 1) **Direct democracy** - each citizen participates directly and majority rules.
- 2) **Representative democracy** - citizens participate through responsible representatives.
- 3) **Constitutional and/or liberal democracy** - usually a representative government that acts under a higher form of law contained in a constitution.
- 4) **Economic or social democracy** - strives to minimize social and economic inequalities that result from the unequal distribution of wealth.

These four conceptions of democracy differ from each other primarily by the manner in which citizens participate in government, and the restrictions or guidelines placed on the outcome of that participation. There is a shift from people voting directly and in person on political issues, to having a representative do this for them on their behalf, to having a representative, constitution, and a dominant ideology, (be it liberal or socialist). There is also a shift from having individual opinions overruled only by the majority of peers, to having them determined and then represented by an assembly or parliament, to having opinions further censored in accordance with a written document and a dominant political ideology. Clearly then democracy does have many faces and each implies a different system or form of achieving rule by the people.

One may argue that direct democracy comes closest to what democracy truly is and all the others are just imitations. Representative democracy, for example, does not guarantee the expression of many personal views in a public forum. "Parliament is not a congress of ambassadors from different and hostile interests . . . Parliament is a deliberative assembly of one nation, with one interest that of the whole . . . You choose a member indeed, but when you have chosen him he is not a member of Bristol, but he is a member of Parliament."¹²⁶

Constitutional democracy, enforced by unelected, so called ideologically biased judges, also cannot guarantee that every voice will be heard when fundamental social issues are decided. Finally, economic democracy still entails some form of representation, (The Soviet party for example) and is no better at representing the true will of the people than a liberal democracy. Does it follow then that direct democracy is the only real or pure form of democracy?

There are two main problems standing in the way of achieving direct democracy. First, highly populated and widely diverse modern societies necessarily require some form of representation.¹²⁷ Although two-way television may some day allow each citizen to participate actively in government from the comfort of their living room, there is at present a practical and logistic need to have representatives speak for us. Second, even if direct democracy were possible, it would not be unlimited in the sense that the majority would rule each time it decided something. Our society respects basic human and legal rights be they entrenched or not, which cannot be trampled on by the whim or 'tyranny' of the majority.

Direct democracy then is not only empirically impossible to achieve in modern society, but theoretically problematic as well. Criticizing the state for not having a direct democratic system would be unfair for as noted above, it is an impossible standard to live up to. The other three forms of democracy, while not as pure, are necessary evils of sorts. The one, however, which comes closest to achieving rule by the people seems to be the more desirable system of government. With this in mind, one can now move on to examine Canadian democracy to see how *Charter* review promotes direct democracy.

2) Democracy in Canada

Canada's system of government is a representative constitutional democracy with three distinct branches of government, the executive, the legislature, and the judiciary. All three operate at both federal and provincial levels. Before 1982, the executive and legislative branches retained almost exclusive authority to decide what was in the best interests of the people, limited only by the jurisdictional limits outlined in section 91 and 92 of the *Constitution Act 1867*.

Important and fundamental decisions concerning rights and freedoms were left in the hands of representatives. Only occasionally would the judiciary intervene to ensure that elected officials had not blatantly violated basic common law principles of justice and fairness. Direct public participation was therefore limited and the avenues open to the average citizen to ensure that their basic interests were protected, minimal.

In the book, *Masks of Proteus: Canadian Reflections of the State*, Philip Resnick is highly critical and argues that democracy has not fared well in Canada. He examines Canadian political history by tracking Proteus (or the state) through many of its multiple guises, paying particular attention to the Canadian state's ineptness under the mask of social democracy. He devotes considerable time to criticizing Canada's liberal democratic system of government and how it has impeded progress towards a more democratic state. His main conclusion is that "Canada has had an overdose of Burkean-type legitimacy, stemming from our political leaders' unwillingness to risk turning over some power to people in whose name they rule."¹²⁸

While Resnick does not see the addition of the *Charter* as enhancing democracy, he seems more concerned that representatives retain too much power or influence. He argues that participation in the governmental decision-making process in Canada has been severely restricted, and that the voice of the economically disadvantaged, for example, has not been well represented. Resnick goes on to say that it is the promotion of 'equality of condition' that is an important prerequisite of achieving a democratic system of government:

'My argument is that democratic theory of the state . . . recognizes the equality of legal rights or citizenship, disdaining special privileges for some, whether based on heredity, wealth and social or political position . . . [and] recognizes . . . the need for citizens to be able to participate in some ongoing manner in political affairs . . . [and] it sees equality of condition [economic?] as the prerequisite for the practice of democratic citizenship.'¹²⁹

Resnick's conception of democracy seems to come closest to that of economic or social democracy. His emphasis on respect for legal rights implies that he may

also endorse some form of a written constitution as well, although this is not entirely clear. His theory on how to democratize the Canadian state leaves room for representative government. It is kept in check by a 'network of basic councils' comprising the 'whole population' with the tool of a referendum at their side.¹⁴⁰

Resnick seems to embrace at least two of the conceptions of democracy outlined earlier, and he criticizes the Canadian state as lacking in its 'maximization' of democracy. Canada's current parliamentary system is cited as a major roadblock. Although he does not wholeheartedly embrace abandoning our current system, he does suggest that "A unitary form of state with participatory democracy at the base . . . has a good deal more to commend it than an officially federal state with only limited citizen participation."¹⁴¹

As mentioned above, Resnick does not see the addition of the *Charter* as an improvement on our already undemocratic system of representation. He feels that "In the Charter of Rights . . . there is a notably narrow definition of democratic rights . . . No echoes of participatory democracy or face-to-face community here, but a soberly instrumental substitution of parliamentary for popular sovereignty."¹⁴²

Resnick implies that the addition of the *Charter* has enhanced the parliamentary system, not undermined it. This supports the observation made earlier that policy-making power has not been transferred to the judiciary under the *Charter*. Final authority remains, as always, with elected representatives.

B. Democracy and *Charter* Review

1) Is *Charter* Review Counter-Majoritarian?

'The root difficulty is that judicial review is a counter-majoritarian force . . . [This] is the reason the charge can be made that judicial review is undemocratic . . . Although democracy does not mean constant reconsideration of decisions once made, it does mean that a representative majority has the power to accomplish a reversal.'¹⁴³

As a counter-majoritarian force, *Charter* review is said to undermine the power of the representative majority, or more specifically, Parliament. Although there is a difference between Parliament as a whole and the particular party that hold a representative majority in the House, laws enacted by Parliament are usually initiated, drafted, presented, defended, and then passed by the party in power. *Charter* review then is claimed to be undemocratic because it is a counter-majoritarian force that subverts parliamentary sovereignty.

The tradition of parliamentary sovereignty, however, is not supported in theory and practice. It was shown in Part 1 to be essentially a myth. There have always been limits on the degree to which both the federal and provincial legislatures could enact any law they chose, particularly jurisdictional limits. If Parliament has never truly been sovereign, then the claim that *Charter* review is counter-majoritarian loses its force. There is, however, a more specific reason this criticism is unsound.

Professor Freeman, in, *Constitutional Democracy and Judicial Review*, argues that this criticism points out only one aspect of democracy. He says that democracy

has two basic sets of principles, those being **procedural** and **substantive**. Procedural principles guarantee that each person has the right to participate in the act of government equally. Substantive principles guarantee certain rights and freedoms such as equal rights of self determination, freedom of association, and the pursuit of individual interests and needs. In outlining the difference between the two, Freeman says:

‘The focus here is not upon individuals’ unconstrained preferences and their equal consideration in (maximizing) the aggregate satisfaction of interests, [procedural] but upon the capacity and interest of each person to decide rationally and freely pursue his interests, and participate on equal terms in political institutions that promote each person’s good.’¹⁴⁴

Both principles form an integral part of any general conception of democracy. The criticism that *Charter* review is counter-majoritarian, though, equates representation with procedural participation and assumes that this is the only true form of democracy. If we include substantive principles, then it is not clear that judicial protection of them is undemocratic.

The mere possibility that representative or procedural participation may be limited because of the judiciary striking down a law on substantive grounds does not mean that *Charter* review is necessarily undemocratic. The judiciary is the branch of government entrusted with the protection of rights and freedoms. If that protection involves ruling against the will of representatives, then *Charter* review cannot be undemocratic. Substantive principles, according to Freeman, are as important as procedural principles and therefore protection of them by the judiciary highly democratic.

2) To Be or Not to Be Elected

The second main criticism of the undemocratic nature of *Charter* review is that the members of the Court are not elected. It does on the face of it seem undemocratic that unelected judges now have the power to override the views of our elected officials and strike down laws made by Parliament. The American constitutional scholar, John Ely, sums up this point when he states:

"The central problem of judicial review is: a body that is not elected or otherwise politically responsible in any significant way is telling the people's elected representatives that they cannot govern as they'd like."¹⁴⁵

Accepting for the moment that procedural democracy is the only true form of democracy, and that citizens should have the right to elect all important public officials including judges, the criticism that judicial review is undemocratic still does not follow. It does not follow, according to Freeman, because it is not how decision-makers attain their position, but how the decisions of those people affect the rights of citizens to participate in the decision-making processes of government. "Judges could be elected to office for a set term . . . and reservations about judicial review would still remain."¹⁴⁶ Would it, for example, be more desirable to elect a prime minister who consistently imposed undesirable policies on the public, or, appoint an impartial judiciary that is not a slave to any particular party line and goes to great pains to ensure that individual interests and values are promoted in the decision-making process?

Add to this the fact that the theory of public choice in economics, (applied to the voting habits of the public) points out how unreliable voting is for ensuring

that fundamental social issues become the main focus of the election. Public choice theory states that it is the image of the politicians and how well they speak and look in front of a camera that determines who will be elected, and not the substance of the platform on which politicians stand:

'Increasingly, public choice scholars have started to model governments in monopoly rather than competitive terms. Electoral competition has come more and more to be viewed as competition between prospective monopolists, all of whom are bidding for an exclusive franchise, with profit maximizing assumed to characterize the behaviour of the successful bidder. Governments are viewed as exploiters of the citizenry, rather than the means through which the citizenry secures for itself goods and services that can best be provided jointly or collectively. Both the modern analysis and the observed empirical record suggests that governments have, indeed, got out of hand.'¹⁴⁷

The claim that *Charter* review is undemocratic because judges are not elected is unsound. Elections could not and would not guarantee that judges would be more accountable to the electorate. According to public choice theory, they cannot guarantee that the will of the majority will be represented even by our elected officials.

3) *Charter* Review as Promoting Public Participation in Government

The above criticisms are the most obvious and frequent attacks levelled against the so called undemocratic nature of *Charter* review. There is, however, one other line of criticism that is more forceful, and underscores the point made by critics that *Charter* review is harmful or damaging to our system of government.

When the Court defines the meaning or scope of a right or freedom, so the criticism goes, that definition becomes the standard by which other courts, government, and the average citizen come to view the meaning of that right or freedom. This procedure strongly undermines public participation and control over the definition of fundamental values in our society. This restriction on direct public participation is called the 'judicial factor' by Mandel:

'Once we admit the controversial nature of constitutional rights and the great differences in "interpretation" that can result from differing ideological points of view among judges, and between judges and the rest of us, the idea that judicial review is democratic, in the usual sense of enhancing popular power, evaporates into thin air.'¹⁴⁸

Charter review then is said to limit the ability of individuals to participate equally in important governmental decisions. The principle of equal participation is considered a constitutional requirement of democracy in the sense that 'Each citizen is to have an equal right to take part in constitutional processes that establish laws and basic social institutions.'¹⁴⁹

Critics argue that the judicial factor limits the ability of citizens to participate equally because the people have already determined, through their representatives, what the substance of certain laws in relation to rights and freedoms should be. When the Court overrules or strikes down a law it is in essence shutting out and ignoring the opinions of the people on important social and political issues.

This line of criticism differs from the counter-majoritarian thesis in that it is not simply procedural participation that is being undermined here. While it may be true that participation in government can be limited in the name of rights and

freedoms, it is not clear that the judiciary should have the sole responsibility for defining the content and meaning of rights and freedoms. In other words, if there are to be limits on government power then the people, and not the judiciary, should define the meaning of those limits.

If, however, this argument assumes that it is only through the workings of majority legislative procedures that a citizen's equal right to participate is insured, then the argument is seriously flawed. According to Freeman, this assumes that representatives can always be trusted to define the scope of rights and freedoms in such a manner that each citizen would agree with. As was noted, however, representatives do not always have in mind the views of the people. More often than not, their own image and popularity play a key role in how they make important decisions.

Therefore, moral limits must be placed on the degree to which an elected representative body can exercise its power. The government itself cannot guarantee that it will limit its own power. Individuals cannot be guaranteed that their equal right to participate in the promotion of certain fundamental values will be respected by a majority government. Other means are needed to ensure their voice is heard.¹⁵⁰

It was noted in Part 1 that Canada has established limits on the provincial and federal government's power to encroach on each other's areas of legislative sovereignty. There were several instances in which both levels of government tried to encroach on the other's area of legislative sovereignty. This in turn highlights the point that government cannot be expected to respect fully limits on its power. The institution of federalist review has become the trusted means by which the average

citizen can ensure that the principle and essence of federalism are protected. There are, however, limits other than the proper division of legislative powers that the majority might not take the initiative to protect. Elections, for example, are important and we would think it highly undemocratic if our elected officials one day decided to suddenly banish the vote.

Also, we feel it would be unjust to exclude members of racial minorities or sexes from positions of social and political power simply because they were part of such a group. Certain civil rights such as owning property, or legal rights such as a fair trial, are deemed important. If a majority government were to override them we would feel that democracy somehow was not being served.

According to Freeman, judicial review becomes the means whereby the content of rights and freedoms comes to be defined; citizens rationally and freely choose this method over others.¹⁵¹ Once it has been decided that certain limits must be placed on the legislative process, judicial review is one means that the citizenry can rely on to not only enforce those limits, but define their substance and meaning as well. This does not limit the sovereignty of the people to participate in defining the content of important rights and freedoms. Just as citizens choose to have elected officials make ordinary laws that influence their day to day lives, they too can choose to have a judiciary protect and enforce their equal rights of democratic sovereignty. According to Freeman:

'So conceived, judicial review is a kind of rational and shared precommitment among free and sovereign citizens at the level of constitutional choice. By the exercise of their rights of equal participation they agree to a safeguard that prevents them, in the future exercise of their equal political rights, from later changing their minds and deviating from their agreement and

commitment to a just constitution . . . By granting to a non-legislative body that is not electorally accountable the power to review democratically enacted legislation, citizens provide themselves with a means for protecting their sovereignty and independence from the unreasonable exercise of their political rights in the legislative process . . . Judicial review then is one way to protect their status as equal citizens.'¹⁵²

It was noted above that the process of defining the meaning of rights and freedoms is not subjective but highly purposive in nature. It is therefore not simply a blind faith or trust that citizens place in the judiciary, but a rational choice based on the Court's past performance. The public remains confident that the judiciary is for the most part impartial and independent. It can and does represent the public's interests justly and fairly.

4) *Charter Review as a Prerequisite of Democracy*

Not only is judicial review the product of a rational and informed choice made by the public to ensure its rights and freedoms are properly defined and upheld, but it may also turn out to be a prerequisite of democracy in societies such as Canada. Judicial review may become a prerequisite of democracy because there must be a final and authoritative interpretation of the constitution that can coordinate and resolve disputes between various levels and branches of government. There must also be an authoritative body that can ensure that the demands being placed on citizens in the form of duties and obligations are consistent to ' . . . insure that the constitutional forms are being respected and adhered to by the ordinary powers of government.'¹⁵³

Professor Freeman does, however, say that it is not necessarily true that this final authority is placed in the hands of judicial review. This is in contrast with other popular arguments raised such as in the famous American case of **Marbury v. Madison**.¹⁵⁴ Here, the American Supreme Court decided that it was its constitutional duty to be the protector of rights and freedoms. Freeman also argues though that there is nothing intrinsic in the power of the legislature to perform this role either. Although the legislature is the delegated authority to make ordinary law, it does not follow that it is also the delegated authority to see over the constitution:

"The people are sovereign in a democracy, as is evidenced by their retaining authority to amend the constitution. They delegate a fiduciary power to legislative agents to make ordinary laws for the public good. In so doing, they do not alienate constituent power or any part of their sovereignty."¹⁵⁵

How then can *Charter* review be justified as a legitimate means of insuring that the rights and freedoms set out in our constitution are properly protected? Freeman advances three main points that in turn can be applied in the context of *Charter* review.¹⁵⁶ First, he argues that judicial review should be viewed as a "special majority" of sorts in the same way that a special type of majority is needed to amend our constitution.

Part 5, or more specifically, section 38 of the *Constitution Act 1982* outlines the procedures for amending the constitution. It states that there must be support in two-thirds of the provincial legislative assemblies that represent at least fifty percent of the population of the country as a whole, and by the Senate and federal House of Commons, to amend the constitution or a judicial decision in relation to

it. All judicial decisions under the *Charter* can be amended or overturned by exercising the amendment procedure. Power therefore has not been transferred to the judiciary in any ultimate sense and our elected officials in the end retain fir authority over the constitution.

In relation to this point, the section 33 override clause (which states that both the federal and provincial governments can legislate notwithstanding section 2 or sections 7-15 of the *Charter*), also ensures that the people retain the final authority over the *Charter*. The use of this section by the legislature at the beginning of any piece of legislation means that the Court cannot review that legislation in relation to the *Charter* even if it clearly violates a right in section 2 or 7-15.

Both the amendment procedure and the section 33 override clause, however, are tools of last resort and governments have been very reluctant to use either one. Any government that did use them might risk political 'suicide'. The voting public would not view changes made to judicial decisions concerning their rights and freedoms kindly. This suggests that the decisions of the Court - the special majority entrusted with the job of interpreting the *Charter* - are felt to enhance public participation in the governmental decision-making process. The opinions of individuals or groups who convinced the Court that their rights and freedoms were being infringed upon become constitutionally supported and protected.

The second reason offered by Freeman in support of judicial review as a prerequisite of democracy is that it promotes self-respect among the citizenry. Self respect, in this context, is achieved when people participate in public life on equal terms. Their participation and satisfaction of basic needs are recognized as

important and meaningful. Self respect is cited by Freeman as a very important virtue or component for having a just and democratic society. Because the protection of rights and freedoms promotes self respect, *Charter* review is therefore beneficial to democracy.

Finally, Freeman says that because judicial decisions are publicly justified due to the issuing of reasoned opinions, democracy is advanced or promoted. For example, when the Court strikes down a law it provides constitutional reasons why the law was not upheld, furthering public awareness of the moral foundations on which the constitution was built. When it upholds a law under the constitution, it shows how that law is not too coercive but in line with democratic principles.

In Canada, this is most evident when a section 1 analysis occurs. Here the public is truly exposed to values and virtues outlined in our constitution. In *Oakes* for example, the virtues of our approach to curbing the drug trade and an individual's right to be presumed innocent were presented for all the country to see. In the end, a moral lesson of sorts was learned on the degree of concern and respect we have in Canada for individual rights and freedoms.

Edwards Books demonstrated that a particular government policy was important enough to override a *Charter* right. This affirmed the importance of the legislature in representing the interests of the public in certain circumstances. While it may be true that the Court retains the final word on whether a piece of legislation can be saved under section 1, government policies will and have been upheld, and there are instances where the will of the majority is deemed more important than that of the individual.

As an educative tool, *Charter* review may be invaluable. It helps to cultivate an individual's appreciation and support for just democratic institutions and ways of life. This is accomplished through the publication of decisions and the heightened degree of citizen participation in the process. An increase in standing in who may raise a *Charter* claim and the allowance of intervenors in *Charter* cases also opens the door for greater public participation in, and appreciation of, the decision-making process.¹⁵⁷

Charter review may not necessarily be the only means of protecting the fundamental virtues or ideals that underlie any sound conception of democracy. It is, however, no worse, and possibly better than entrusting our politicians with the job of policing limits on their own power. Judicial review, like majoritarian government, is an acceptable and legitimate part of an overall conception of democracy. It may actually be a prerequisite of democracy in certain societies where appreciation and protection of rights and freedoms are not fully developed or promoted:

'Judicial review is, I have said, most appropriate under conditions where the public's sense of justice is divided or underdeveloped, or where legislative representatives are unresponsive to the interests of everyone. Under these circumstances, when legislative procedure departs from the requirements of a just democratic constitution, they are unlikely to be capable of self correction. As an institutional means of cultivating the public's sense of justice, review cannot only be a way of increasing the likelihood that legislative departures from justice will not be repeated, but also that they will not be publicly tolerated.'¹⁵⁸

The criticism then that *Charter* review is undemocratic is unsound. *Charter* review is not counter-majoritarian because the power of government has always

been limited in significant ways. Electing judges would not guarantee that they would better represent the view of the public as elections are a highly suspect procedure. Individual participation in defining the scope and meaning of rights and freedoms has not been limited to the point where our system of government has been harmed or damaged. It was shown that *Charter* review is a rational means by which citizens can guarantee that their voices are heard in the governing process.

Charter review is highly beneficial for it may be a prerequisite to achieving a more democratic state in our overly 'Burkean' or representative system of government. It is also beneficial because as was introduced in this section (and will be outlined in more detail in Part 4), it is an educative tool for enhancing public awareness regarding the fundamental moral or substantive values our society is founded on.

PART 4. CHARTER REVIEW AND CANADIAN CULTURE

'Without vision the people perish.'¹⁵⁹

In this Canada's one hundred and twenty-fifth year as a nation, national 'disunity' is threatening to tear the country apart. Public fora and committees set up to examine Canadian unity have found that Canadians have serious doubts regarding the future of the country. Quebec's renewed desire to separate, the native peoples' 'Summer of Discontent', and the general population's loss of faith and trust in our representative system of government are just some of the warning signs.

If ever there were a time where the collective spirit of this country needed rejuvenation, it is now. We need a vision or informing spirit that can generate a sense of cultural nationalism, or at least a sense of pride in being Canadian. Canada, it is argued, has always lacked a common or collective sense of identity. The relative youth of the nation, the fact that Canada is the product of counterrevolution instead of revolution and the multicultural make-up of the nation have made it difficult to find a distinct Canadian identity.¹⁶⁰

Traditional Canadian cultural theory, while successful in mapping out general cultural values, has had limited success in formulating them into an overall coherent and consistent conception. By saying that Canadians are **multicultural**, or **tolerant**, or **conservative**, for example, Canadian culture is portrayed as a hodgepodge of vague cultural norms. Substantive values such as justice, fairness and democracy have not been fully dealt with in traditional cultural theory.

If traditional Canadian cultural theory cannot provide satisfactory models, then untraditional approaches must be looked to for answers. *Charter* review provides such an untraditional model. It is considered untraditional because there is little mention of the *Charter* as a means of cultural production in Canadian cultural theory. This may be because of its relative infancy, yet it appears that this area of the law is overshadowed by that of government policy-making whenever the law is considered a factor in cultural analysis.

This part will outline how *Charter* review provides an alternative framework in which cultural issues can be examined so that a new, positive and coherent vision of Canadian culture can be formulated. It will begin by providing an outline of what culture and cultural analysis is. Next, certain traditional patterns found in Canadian cultural thought will be examined and shown to provide an inadequate general conception of Canadian culture. Finally, it will be argued that *Charter* review can provide a sound basis from which to develop a more coherent conception of Canada's elusive cultural identity.

A. The Nature of Culture and Cultural Analysis

1) Culture and Cultural Patterns

There are three general categories in the definition of culture. There is, first, the 'ideal', in which culture is a state or process of human perfection, in terms of certain absolute or universal values . . . Then, second, there is the 'documentary', in which culture is the body of intellectual and imaginative work, in which, in a detailed way, human thought and experience are variously recorded . . . Finally, third, there is the 'social' definition of culture, in which culture is a description of a

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particular way of life, which expresses certain meanings and values not only in art and learning but also in institutions and ordinary behaviour.'¹⁰¹

A definition of culture, according to Raymond Williams, has three distinct dimensions and would be inadequate if it failed to properly recognize each. An idealist conception for example that dealt exclusively in abstractions of perfect human behaviour would fail to properly account for 'animal nature', or the basic drive to satisfy material needs. An approach based solely on the documentary dimension could not account for the interrelationship between cultural records and the different aspects of society that influenced the production of those records. A conception of culture that relied exclusively on the social dimension would treat documented cultural records as a mere by-product or ' . . . passive reflection of the real interests of society.'¹⁰²

These three categories form the foundation of an overall conception of culture. It is here where specific values or **patterns** of cultural significance can be found. Cultural patterns represent 'reasonably permanent valuations' that portray an aspect of a distinct way of life of a particular society:

"The 'pattern of culture' is a selection and configuration of interests and activities, and a particular valuation of them, producing a distinct organization, a 'way of life'."¹⁰³

Patterns, like ideals, are abstractions and according to Williams have a fundamental defect. They tend to be lacking the living, participatory element. Williams calls this record of experiences the **structure of feeling**. He argues that the structure of feeling becomes frozen in a painting, a poem or a style of architecture of a particular period. What is represented in art forms is not learned but felt

deeply by the individuals of the particular period and society that the art work came from.

Patterns of culture and the structure of feeling then play an important role in depicting aspects of a society's culture. A particular type of methodology is adopted by cultural theorists when trying to identify cultural patterns. This choice is influenced by the institutional and academic rules that govern different areas of social discourse. The logical or rational deduction of ideals, the criticism of art and literature and the nature of social relationships, (i.e. a Marxist conception) all have different internal rules and guidelines. Williams calls the different methods of approach the particular **selective tradition** of the author or theorist.

2) The Selective Tradition in Cultural Analysis

The selective tradition in cultural analysis first isolates works of cultural significance that are perceived to represent the values of a particular period. In this sense a general human culture is first created.¹⁶⁶ Second, as time passes, the selective tradition singles out specific cultural works that represent the values of a particular period, until such time when only one cultural record may remain to reflect that period. According to Williams, this selective process alters drastically or changes the essence of the original value.

In this way, the selective tradition adopts one or two patterns to represent the culture of a particular period. As it is an abstraction, it also distorts the living or feeling aspect of that culture. For example, people who grew up in the fifties may

come to view present and future representations of cultural patterns of that period as 'misrepresentations' of what it was really like to be alive at that time. They may see the pattern as lacking in not only representing the significant cultural works or patterns of that period, but also in representing the structure of feeling of that period as well.

The selective tradition process, although unable to capture all the patterns of culture and their exact structures of feeling, is nonetheless rooted in the general development of society and grounded in the process of historical change. It forces cultural analysts to confront the past and therefore insures that old traditions, customs, habits, and beliefs are not easily discarded in contemporary theory.

Williams points out though that traditional cultural analysis has been primarily concerned with ' . . . the selection and reselection of ancestors . . . ' or dominant cultural patterns. It has neglected not only other patterns and feelings, but also how all cultural patterns interact with past and present patterns to reveal real values.¹⁶⁵

Cultural analysis, according to Williams, is ' . . . the attempt to discover the nature of the organization which is the complex of these relationships.'¹⁶⁶ In this sense, cultural patterns have value not only as isolated parts of different selective traditions, but working or influential factors that aid in the development of an overall culture. This aspect of cultural analysis, Williams argues, is often missing in cultural theory. Only when we adopt it will ' . . . the real cultural process . . . emerge.'¹⁶⁷ He refers to this as the *interpretive dimension* of cultural analysis.

3) The Interpretive Dimension of Cultural Analysis

'We tend to underestimate the extent to which the cultural tradition is not only a selection but also an interpretation. We see most past work through our own experience, without even making the effort to see it in something like its original terms. What analysis can do is not so much to reverse this, returning a work to its period, as to make the interpretation conscious, by showing historical alternatives; to relate the interpretation to the contemporary values on which it rests; and, by exploring the real patterns of the work, confront us with the real nature of the choices we are making.'¹⁶⁸

Interpretation for Williams plays an important role in understanding why certain past cultural norms or patterns are chosen to represent a society's culture. It also plays a key role in describing how established cultural patterns interact with contemporary values to produce a more coherent conception of a society's culture.

The interpretive process then seems to have two distinct stages. The first involves the identification of patterns of a cultural nature. This stage is similar to the selective tradition and for this purpose can be assimilated with it. The main concern with both is the documentation and selection of patterns that represent certain cultural norms or traditions found in a particular society.

This first level of interpretation is also similar to that described by Northrop Frye in, *Culture as Interpenetration*.¹⁶⁹ Frye argues that culture as interpenetration involves adopting an individual, local, or nonconformist view of culture that provides a ' . . . vision that becomes the focus of the community.'¹⁷⁰ According to Frye, interpenetration occurs when artists have shaken off the shackles of predetermined forms and conventions. They begin to express basic values or patterns that emanate

from their own community or region, rather than mimicking established forms. Interpenetration is the identification of distinct cultural patterns and therefore is similar to Williams' selective tradition.

The second level of interpretation is different from the first in that it ' . . . confront[s] us with the real nature of the choices [or the result of cultural analysis] we are making.'¹⁷ It moves beyond the mere documentation of cultural patterns, to the nature of the organization and interaction of past and present patterns found in the different subcategories of culture.

Cultural interpretation moves from a simple documentary approach, to a social analysis, through to the development of general theories or ideals that describe a particular society's culture in a coherent way. These points should be kept in mind when comparing *Charter* review with cultural analysis as both processes are by nature very similar.

B. Canadian Cultural Analysis

1) Patterns of Canadian Culture

As mentioned at the outset, there have been a number of significant roadblocks standing in the way of developing a clear notion of Canadian cultural identity. Canadian cultural theorists have nonetheless been successful in identifying certain aspects of our culture that have a distinct Canadian flavour. These patterns generally fit into one of the three main dimensions of culture outlined by Williams.

First, cultural theory in Canada has identified three main cultural ideals. The first is the two nations or two solitudes ideal that describe the French-Canadian/English-Canadian dichotomy in Canadian society.¹⁷² The second is the multicultural ideal and has been influential in Canadian cultural theory ever since the British, French, American, Scottish, Irish, Ukrainian, Chinese, and Native people, (to mention only a few) united to form our cultural mosaic.¹⁷³ Multiculturalism has also become an official policy of modern governments and the ideal is enshrined in section 27 of the *Charter*.¹⁷⁴

The third ideal is that of tolerance. This ideal is an outgrowth or result of multiculturalism in that in multicultural societies, the need to create a tolerant community atmosphere becomes essential for that community's survival.¹⁷⁵ Also, the vast wilderness of Canada required that European settlers be more tolerant of both themselves and of the native people to ensure stability in the fur trade, not to mention their own basic survival.¹⁷⁶ Finally, our respect and advocacy for environmental issues are also offshoots of this pattern of tolerance found in the Canadian identity.

Second, in the documentary category, numerous paintings and volumes of literature have concentrated on revealing certain patterns. The first is that of the landscape. The Group of Seven for example concentrated primarily on painting Canada's vast wilderness. Canadian poets and writers have also spilled a great deal of ink in depicting the realities of surviving in our harsh climate and landscape.¹⁷⁷

The second dominant pattern in documentary analysis is that of 'regionalism'.¹⁷⁸ The West Coast, the Prairies, Central Canada, Quebec, the

Maritimes, and the North, are all subjects of literature and painting that express the unique regional diversity of Canada.

The native contribution is also well documented. The artwork and literature of Canada's native people and their influence on non-native artists have been strongly represented in cultural thought. Only recently, however, as the world teeters on the brink of environmental destruction, are we becoming truly affected by the influence of our native heritage.

The final category, or social dimension, is also highly visible in Canadian cultural theory. One pattern found here is the conservative or Tory touch on our political system mentioned earlier.¹⁷⁹ Canadians are said to be very conservative, have a great respect for the law and government, and are concerned more with collective goals, than individual interests or rights.

Economic patterns such as Canada's early staple economy, its dependency on other countries, and its 'branch plant' mentality have all been well recorded.¹⁸⁰ In relation to this point, the pattern of Canada's enslavement by technology and how it has limited the development of a distinct cultural identity has been thoroughly discussed or 'lamented' as well.¹⁸¹

The above list, while outlining some of the more popular themes or patterns found in Canadian cultural analysis, is not exhaustive of all the patterns that exist in Canadian culture. Nor do the patterns identified necessarily belong in only the category in which they have been placed. These patterns do, however, seem to fit best into the general categories identified as they incorporate the main characteristics of each dimension.

2) Analysis of Canadian Cultural Analysis

From the above list, no one pattern succeeds in capturing a comprehensive notion of Canadian culture identity. They are vague and at times contradictory and the majority of patterns do not deal directly with the substantive values of Canadian society. The two nations ideal, for example, is vague. It portrays Canadian culture as either being one culture made up of two distinct components, two separate cultures entirely with no real common Canadian element, or a hybrid or conglomeration of both cultures.¹² This ideal is at odds with the multicultural pattern. It is an affront to, among others, people of Irish, Scottish, Chinese, Ukrainian, and Aboriginal descent to imply that they are members of either an English or French culture.

The two nations ideal also conflicts with the pattern of toleration. When we consider that the French were conquered people, it appears that early English Canadians were not overly tolerant of a two nations concept. The so called 'marriage' between the two cultures at confederation has been portrayed as a 'shotgun' wedding in which Quebec was politically and economically forced to comply with the wishes of English Canada. The Quiet Revolution, the F.L.Q. crises, the failure to include Quebec in the patriation of the constitution in 1982, and the rejection of Meech Lake, show a country intolerant of the two nations ideal.

The two nations ideal also provides an inadequate general conception of Canadian culture. It does not adequately portray the enormous impact of the interaction between early French explorers and native people, and the subsequent

development of the 'Metis' culture.¹⁸³ Also, it does not reflect the current population distribution between all the different cultures and again suggests that there are only two dominant cultures in Canada. It does not explain how the interrelationship between the English and French cultures produced the distinct Quebecois culture.

Finally, stating that Canada is made up of two distinct cultures also says little about the substantive nature of Canadian culture. The real nature of justice for example is not adequately portrayed in the two nations concept. Before 1867, French-speaking Canadians were not treated equally in the sense that they never controlled their own destiny, either during the French regime, or from the period of the Conquest down to 1867.¹⁸⁴ Even at confederation, they remained governed by a British statute and had to rely on a British court of appeal to ensure that they were not subsumed by the centralist intentions of the early English-speaking prime ministers.¹⁸⁵ Finally, Quebec's renewed desire for separation also goes against the notion that Quebec perceives itself as equal to the English in Canada.

It appears that the two nations concept, while describing one general aspect of Canadian culture, does not provide an overall coherent conception of Canadian identity. There is, however, a pattern of Canadian culture that is more coherent in nature and has dealt extensively with the substantive value of justice in Canada.

The technological dependence pattern is the dominant theme in the works of George Grant and Harold Innis and addresses the loss of some past or mythical sense of justice. Grant, while lamenting the loss of a sense of Canadian nationalism, described North America's drive towards the mastery of technique as resulting in a loss of 'mythic consciousness' or memory of what a just society is really based on:

'For it is Grant's contention that technological society rests on a series of **exclusions** (religious morality, mythic consciousness, natural law, the tragic imagination); and a series of **actualizations** (pragmatic morality, historical consciousness, positive law, and instrumental reasoning) . . . This is the essential theme: having adopted modern consciousness we are condemned 'to freedom in a universe indifferent to our purposes'; and having denied 'mythic consciousness,' we have also abandoned Plato's vision of 'time as a moving image of eternity.' Grant laments the loss of the Greek imagination . . . as the informing impulse of western society.'¹⁸⁶

Western society has lost a sense of true justice according to Grant as a result of our dependence on technology. Harold Innis, although not quite as pessimistic as Grant, also argues that Canadians have lost a sense of justice in their culture, or as he calls it, a sense of the importance of time. Our drive towards technology and our conquering of space have been the primary directives or impulses, and the subsequent downfall of our modern society:

'It is our fate as Canadians to be formed by a history of technological dependency . . . and to be pulled from ahead by a modern 'civilization' which finds 'its own method of suicide' in the radical division of time and space.'¹⁸⁷

In Innis' seminal work, *A Plea for Time*, he argues that we must recapture a lost spirit or a sense of time that predated the onslaught of technology and the conquering of the space bias.¹⁸⁸ In this way, we can restore a sense of purpose or justice in a society driven by the 'will to will' or the mastery of technology. Both Grant and Innis portray Canada as a society that cannot be just in any sense that includes the logic of technology. Technology, they argue, is based on a method of instrumental reasoning that has no sense of purpose or common unity, but only an impending future of doom or nihilism.¹⁸⁹

The pattern of technology then confronts the nature of the substantive value of justice in Canadian society. Both Grant and Innis are highly critical of the loss of some past Greek or religious sense of justice and state that any salvation of modern society is dependant on recapturing that sense. They do not, however, explain how key elements of past senses of justice have endured the onslaught of technology and are present in contemporary society.¹⁹⁰

Although modern society does not have perfect equality, the existence of universal declarations of rights, coupled with the existence of justice and equity as fundamental values in common law dating back to the *Magna Carta*, cannot be brushed a way so easily. Despite its imperfections, justice does exist as one of the primary virtues underlying moral actions. Lamenting the loss of some romantic idea therefore does not explain the endurance of it over time.

The vision that both Innis and Grant portray as the salvation of Canadian society is one of past societies, just as the two nations ideal depicts some vague and romantic conception of Canadian society. Although both Grant and Innis' method of analysis is interpretive in nature, it lacks the coherence and consistency needed to provide a general conception of Canadian culture. We are left with an incomplete portrayal of Canadian cultural identity and still in need of both a vision and a methodology that can provide a concrete and relevant conception.

C. *Charter* Review and Cultural Analysis

1) The Cultural Nature of the *Charter*

'According to the Trudeau government's strategy for nation building, the *Charter*'s primary purpose was to promote national unity. It was hoped that the *Charter* would encourage national debates about important issues and that these debates would cut across regional and ethnic cleavages. It was also hoped that the *Charter* would cultivate national rather than regional loyalties through providing a common base of language and mobility rights.'¹⁹¹

The *Charter* provides such a vision of cultural unity. It can be seen as an expression of Canadian culture as it deals directly with, or has the potential to encompass, all three aspects of culture as identified by Williams. It recognizes, for example, the cultural ideals of two nations, multiculturalism, and communitarianism.

The two nations concept is reflected in sections 16-23 where French and English language, educational, and religious rights receive protection. The second ideal of multiculturalism is clearly outlined in section 27 and states, 'This *Charter* shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.' The communitarian ideal is not explicitly set out in the *Charter* yet sections 16-33 in particular, and the *Charter* in general, have been argued to be founded on this ideal. Cheffins and Johnson point out that the ideal of communitarianism in the *Charter* is a common theme in the works of two constitutional scholars, W. Christian and C. Campbell:

'These scholars see in Canada a leaning towards values which emphasize tradition, order and historical continuity. This thrust has a much more communitarian and collectivist element in it, in that it tends to stress group interest rather than individual interest.'¹⁹²

As a form of documented culture, the *Charter* does not clearly recognize the theme of landscape found so often in Canadian artwork and poetry. This does not, however, mean that the *Charter* could not be amended to include the right to own landscape or property, or to add an environmental clause. Considering the recent interest in environmental bills of rights, an environmental clause seems an appropriate addition to the *Charter* due to Canada's particular fascination and admiration of the landscape.

The pattern of regionalism is well represented in section 6 (mobility rights) and section 30 (reference to Yukon and Northwest territories). Finally, the pattern of native influences is also well documented in section 25, and 35 of the *Constitution Act 1982* as mentioned above.

Dimensions of the social category in Canadian culture can also be found in the *Charter*. The pattern of conservatism, for example, is well represented as it is an offshoot of the communitarian ideal stated above. Again it is professor Monahan who argues that it is a combination of both Toryism and of socialism that has lead to Canadians placing a higher value on collective rather than individual interests in the *Charter*.¹⁹³

Although the economic and technological dependency patterns are not dealt with explicitly in the *Charter*, aspects of them can be detected. For example, the nature of the type of economic system Canada is founded on can be gleaned by what the *Charter* hasn't got. It does not contain economic rights and as mentioned in Part 2, has been the object of a great deal of criticism because of this omission.¹⁹⁴ As was noted, the *Charter* is said to be a reflection of classical liberal doctrine, and

therefore supportive of free or laissez-faire capitalism as it does not guarantee all Canadians true 'bread and butter' rights.

Although the technological dependency pattern is also not expressly outlined in the *Charter*, the virtue of justice is, however, expressed in several ways. Reference to it can be found explicitly in section 7 which discusses the right to life, liberty, and security of person in relation to principles of fundamental justice. A sense of justice is also captured in the preamble to the *Charter*. This states, 'Whereas as Canada is founded upon principles that recognize the supremacy of God and the rule of law.'

The reference to God is an interesting addition in our modern, secularized, and multicultural society. The exact reasons for including it are vague and as Cheffins and Johnson point out, it might have been included simply to keep the preamble as short as possible.¹⁹⁵ They also mention that both the references to God and to the rule of law could provide an interpretive aid. As the supremacy of God suggests a moral code, and the rule of law equality before and under the law, it is submitted that both statements imply that the *Charter* is to be founded on the principles of justice. Justice is '... the principle virtue, the source of all others . . . ' and therefore both the supremacy of God and the rule of law - being sources of morality themselves - share this common characteristic.¹⁹⁶

Finally, the notion of justice is also represented in the equality of treatment outlined in section 15, and section 28 which states that '... the rights and freedoms referred to in it are guaranteed equally to male and female persons.' Both sections outline how the virtue of justice is well represented in our law.

The *Charter* brings together the cultural patterns identified in the previous section. It presents in a coherent and consistent manner the main cultural norms this country is founded on. It outlines most of these patterns in such a way that the judiciary can breathe substantive life into them based on sound interpretations of Canada's past socio/political and legal history.

2) Principles, Interpretation and Cultural Analysis

In Part 2, it was argued that *Charter* review is essentially a matter of principle where judges base their decisions on established legal principles and not policy. According to Dworkin, principles are embedded or found in the political morality of a society. Political morality is a vague concept and one that Dworkin never clearly defines. Nonetheless, it is the source of legal principles in the same manner that cultural documents, paintings and literature provide the source of cultural patterns. Principles are similar to cultural patterns in that they describe unique aspects of a system of analysis, and have endured over time to remain important in contemporary discussions.

Dworkin argues that the particular methodology judges use when deciding both regular cases and hard cases - Law as Integrity - is interpretative in nature. Its main purpose is to clarify how judges determine from principles what concrete legal rights people have. Judges, according to Dworkin, cannot and do not exercise the type of discretion positivists (or for that matter *Charter* critics) maintain they use. They are constrained and guided by a method of adjudication that is more

representative of the political structure as a whole. He outlines how his method of judicial interpretation satisfies this condition when he states:

"[J]udges should decide hard cases by interpreting the political structure of the community in the following, perhaps special way: by trying to find the best justification they can find, in the principles of political morality, for the structure as a whole, from the most profound constitutional rules and arrangements to the details of, for example, the private law of tort or contract."¹⁹⁷

Interpreting the law is similar to cultural analysis because each enterprise strives to continue the project handed to them in a coherent and consistent manner. Judges and cultural theorists must evaluate competing principles or cultural patterns and decide from them the ones that will advance or represent that endeavour in its best light. At the heart of both judicial and cultural interpretation is a two-stage process in which competing principles or interpretations must pass threshold tests of fit and substance.

This first stage of fit involves weeding out irrelevant principles or patterns. It is primarily concerned with identifying or describing existing and relevant legal principles and is similar to the selective tradition in cultural analysis where cultural patterns are also identified or selected. The second stage of interpretation is the more important of the two and deals specifically with how judges decide which is the best or right interpretation.

This stage is governed by the important virtue of integrity. This ideal ensures that the relevant legal principles (or cultural patterns) are interpreted in such a manner that the substantive ideals a society is founded on are represented in a coherent and consistent manner. Integrity, like justice, fairness, fraternity, and equal

concern and respect, are substantive values and the degree and manner in which any society protects and promotes them says a lot about the nature of that society.

One example of how *Charter* review promotes substantive cultural values was in the case of **Big M Drug Mart**. Although the Court did not rely specifically on section 27, it did state that the *Lords Day Act*, which required a common pause, did go against our multicultural heritage. The promotion of one religious view in law does not portray an air of tolerance of other religious viewpoints. This was one of the underlying reasons why the law was struck down under section 2(a) of the *Charter*.

A more telling example of how *Charter* review plays a key role in identifying and promoting substantive cultural values was in, **Ref re Electoral Boundaries Commission Act, ss 14 20 (Sask) (1991) 81 D.L.R. (4th) 16 (S.C.C.)**. This reference involved questions over the constitutionality of the Saskatchewan government's electoral redistribution plan that would change the electoral boundaries in that province. The *Charter* issue at stake was how this plan would affect the rights of citizens to vote under section 3. The Court's decision went a long way in defining an individual's substantive democratic rights in relation to voting parity.

This decision is culturally significant because the Court took into consideration unique factors about Canadian society in its decision. Doug Williams, senior research officer in public law with the federal justice department, in an article entitled, **Canada's Constitutional Mosaic: Boundaries in Dispute**, highlights this point when he says:

"Specifically, in upholding the Saskatchewan government's electoral boundary scheme, the [Court] . . . reaffirmed its intention to interpret the rights . . . in the *Charter* in historical

and philosophical contexts unique to this country. More significantly, it did so with regard to the issue that perhaps better than any other takes us to the very heart of the distinctiveness of Canada's political traditions. For in concluding that an individual's "parity of voting power, though of prime importance, is not the only factor to be taken into account in ensuring effective representation," the Hon. Justice McLachlin gave strong voice to the range of considerations distinguishing the difficulties of representing Canadians from, say, their neighbours to the south . . . Factors like geography, community history, community interests and minority representation the judgement goes on to argue, "may need to be taken into account to ensure that our legislative assemblies effectively represent the **diversity of our social mosaic**".¹⁹⁸

Williams' observations sum up most of the points this thesis has attempted to establish. First, in relation to the cultural significance of the decision, it can be seen quite clearly that the Court was concerned with Canada's unique geographical, historical and political characteristics. It recognized that Canada is significantly different from the U.S. in regard to voting parity in that it relies on the principle of fair representation - a substantive value different from the "numerical tests of voter equality" that Williams cites as the ruling principle or pattern in the U.S. Reference to our social mosaic by the Court also points out the weight it is willing to place on aspects of our cultural identity when interpreting the *Charter*.

Second, the principle of fair representation that governed this decision is, as the Court noted, firmly embedded in the political morality of our society. The Court did not make a new policy but interpreted with integrity what the right decision should be, based on past substantive cultural principles or patterns. It did not base its decision on utilitarian calculations of what it thought ought to be the best policy regarding voter parity, but on whether the law respected the interests of individual voters fairly.

This decision is also illustrative of how the Court acts as a policy advisor, furthering and not hindering the promotion of democracy. It affirmed the importance of the protection of an individual's interests in participating in the election of our representatives. The Court, in this case, upheld limits on the ability of the legislature to override the interests of minorities such as those that may have been outside certain electoral boundaries. According to Williams "... the [Court] went on to confirm that ours, indeed, is a representative democracy, the contours of which fall very much within the traditional jurisdiction of provincial legislatures and Parliament to reconfigure provided the deviations from voter parity are justified."⁹⁹

3) The Cultural Promise of *Charter* Review

The *Charter* outlines some of the most important values or substantive cultural patterns that have existed in Canada since confederation. *Charter* review, it has been argued, is firmly based on a principled interpretive methodology. It succeeds in bringing cultural values to light and providing a basis from which to build a sense of national unity or identity in Canada.

Charter review therefore has the potential of providing an excellent model for correcting the main deficiencies in traditional Canadian cultural theory cited above. It provides an example of how identified patterns of Canadian culture can be compared and contrasted with one another, and with contemporary values. From that, one pattern, or a combination of patterns could be found that better represent Canadian culture. As *Charter* review deals with fundamental or substantive

Canadian values, they could be added to the overall conception when revealed. In this way, the *Charter* may someday realize its stated goal of providing a basis for national unity once it is embraced as a valid, albeit untraditional, means of cultural analysis and production.

Charter review then provides an untraditional model for cultural analysis in Canada. It deals with areas missing in traditional Canadian cultural theory while providing a basis from which a coherent conception of Canada's elusive cultural identity can be developed. Though it may be impossible to find a perfect conception of Canadian cultural identity, we must nonetheless strive to find better methodologies of cultural analysis. The development of a sense of national identity, vision or informing spirit based on sound, substantive Canadian values that can unite this country in these troubled times depends on it.

CONCLUSION

'On balance, though, one can be proud of a court that has risen to the formidable challenge the Charter poses with dignity and humility, with intelligence and self-restraint, and often with a measure of grace and eloquence which few of us realized it possessed.'²⁰⁰

In addition to the virtues outlined above, one can also be proud of the integrity the Court has demonstrated under *Charter* review. It has been consistent and coherent in its approach to *Charter* review and has raised awareness in this country regarding the importance of rights and freedoms in our society. The Court may not have delivered perfect decisions in each case thus far yet it has, as Alexander suggests, done a good job and needs to be applauded for it rather than harshly criticized.

The claim that *Charter* review is untraditional, for example, was shown to stem from misconceptions about the history of substantive or rights-based review of subordinate legislation in our common law system. This line of criticism also wrongly assumed that the adoption of the *Charter* would result in converting Canada into a "Franco-American . . . rights conscious citizenry [with] an activist judiciary," and that this would go against ". . . the Canadian tradition of parliamentary democracy and rule by the people".²⁰¹

Charter review was shown not to be untraditional because it does not undermine the principle of parliamentary sovereignty, and is an older tradition in our law. Absolute parliamentary sovereignty is in essence a myth. *Charter* review is highly Canadian in that the *Charter* itself enshrines both individualism and communitarianism, two fundamental Canadian traditions.

The political nature of *Charter* review is based primarily on a false perception of what the Court does when deciding *Charter* cases. This false perception perpetuates a negative public image of *Charter* review. According to Morton, "... in politics, perceptions and not facts usually carry the day, and the Supreme Court has a public image problem."³⁰²

The reason the image is negative stems from *Charter* review being associated with a private or external conception of politics.³⁰³ This is the less noble and more conniving, self-serving, and irrational aspect of politics that has come to give it a dirty name.³⁰⁴ This perspective is held by people outside the study and execution of government, or the average 'Joe on the street.'

The 'game of politicking' is seen as played by power hungry people with nepotism, patronage, and pork barrelling the pieces they use to manipulate themselves around the board, collecting \$200.00 each time they return a 'favour.' The instruction cards tell them to be evasive and illusive when pressed on important issues so as not to tarnish their image. The winner of the game is the person who manages to survive the power struggle or conflict between themselves and the other players, and enforces their personal views and aspirations on the people affected by that particular struggle. The concern with power and the acquisition of it by conciliation, favouritism, lying, and deceit through a system of 'party politics' is the essence of the private or external perspective of the political.

The internal or public perspective, on the other hand, is held by politicians and political scientists and concentrates on policy formulation by the state as the apex of political activity. Although most critics did point out that the policy-making

function of the Court under *Charter* review makes that institution political, it is submitted that they labelled *Charter* review political to paint the negative image under the external perspective.

All the critics oscillated between internal and external perspectives in their criticisms yet nowhere did any of them outline what they meant by using the term politics. Politics however, like democracy, is an essentially contested or ambiguous concept and in need of clear elaboration before one can easily pin it as a banner or label on something.

The critics cited rely on the private, negative perception of politics encompassed by the external perspective to draw attention to their otherwise unsubstantiated arguments. Indeed, in order to be academically popular they try to undermine public faith and trust in the judiciary by using the public's dissatisfaction with the performance of our elected officials as of late. One commentator in particular, that being professor Allan Hutchinson, enjoys labelling *Charter* review political at every chance he can get in the newspapers.²⁰⁵ Any one familiar with Hutchinson's work knows his political leanings are to the left and that unless *Charter* review could promote the interests of trade unions in particular, it is a harmful and negative addition to our constitutional heritage. As professor Hunt notes however, '... the type of position Hutchinson expresses comes dangerously close to a one dimensional negative politics of law, or perhaps more accurately, the absence of a politics of law.'²⁰⁶

Implying that the Court is subject to the same type of conniving, self-serving favouritism as politicians concentrates more on a negative image of *Charter* review

than the substance of particular decisions. No matter how much the critics may wish that the Court would accept its new political role, the actual decisions of the Court in *Oakes* and *Edwards Books* for example do not support the claim that the Court is a policy-making body. Bora Laskin recognized the shortcoming of this line of criticism long before *Charter* review became a reality when he stated:

"We certainly must expect and, indeed, even welcome scholarly criticism of our decisions. Such criticism is in the tradition of our law, but it is voiced or expressed without charging the Court with bias. It is the decision that is always open to question and to criticism but not the integrity of the judge."²⁷

Finally, *Charter* review was shown to possibly be a prerequisite of, and not antithetical to, democracy in Canada. Ours is not a perfectly tolerant society and our elected officials do not automatically respect rights and freedoms when establishing as law public policy. Respect for individual rights and freedoms is as important, and as Freeman argued possibly more important, to the achievement of a democratic state than mere rule by a bare majority.

It is through our freedom to pursue individual goals and aspirations without having the state unjustly interfere that is the true essence of democracy. Our representative system is the most effective means we have developed so far to promote that freedom but as Locke observed over two hundred years ago, society would be no better than a Hobbesian state of nature if our representatives were complete masters in their own house.

The criticism that *Charter* review is undemocratic (and that it is untraditional), as Williams notes, commits the "constitutional and philosophical fallacy of misplaced polarities."²⁸ It tries, in other words, to establish that *Charter*

review is antithetical to traditional concepts of Canadian society and as such the debate becomes polarized in that critics only view *Charter* review as opposite to Canadian tradition, rather than being a reflection or enhancement of it. According to Williams:

'As such, this "populist" critique of the *Charter* obscures fundamental historical and political realities about the nature of rights, it unwittingly underestimates the strength and depth of the Canadian political tradition itself, and finally, this type of critique frequently burdens discussion of constitutional change with unnecessary and misleading simplifications.'²⁰

In addition to defending *Charter* review against these unsubstantiated lines of criticism, it was also shown that it is an effective means of promoting and enhancing Canada's cultural identity. It provides an excellent, albeit untraditional, means and model of cultural analysis that holds out the promise of promoting national unity and cohesion. *Charter* review reveals the substantive values this country is founded on and shows the true respect we have for both individual and collective interests.

The institution of *Charter* review then is not a harmful or damaging addition to our constitutional, political and social heritage. It is one of the most important and fundamental ways by which members of our society can come to understand and gain true equal concern and respect for one another.

FOOTNOTES

1. John Locke, The Second Treatise on Government, edited by Thomas P. Peardon. New York: Macmillan Publishing Company, 1952, 1985, pp.9-10.

2. *Schedule B, Canada Act* 1982, (U.K.), c.11.

3. Formerly, *British North America Act*, 1867, 30-31 Vict., c.3, (U.K.) renamed *Constitution Act* 1867, when section 1 of the original Act was revised and came into force on April 17, 1982.

4. The adoption of the *Bill of Rights* in 1962, (Stats. Can. 1960, c.44, Part 1,) resulted in the courts gaining some experience in reviewing legislation in light of rights and freedoms, yet their power to strike down laws in the name of rights and freedoms outlined in this bill, and under provincial charters and bills, remained limited. More will be said on the limitations of the *Bill of Rights* in part 1. See, Peter W. Hogg, Constitutional Law of Canada. Toronto: Carswell, 2nd ed., 1983, chapters 28 and 29 for an excellent overview of the Bill of Rights era along with Walter S. Tarnopolsky, The Canadian Bill of Rights. Toronto: McClelland and Stewart, 2nd rev. ed., 1975. Also, see Patrick Fitzgerald and King McShane, Looking at Law - Canada's Legal System. Ottawa: Bybooks, 2nd ed., pp.98-99 for a discussion of the limited nature and scope of the Bill of Rights. And, see Ronald I Cheffins and Patricia A. Johnson, The Revised Canadian Constitution: Politics as Law (Toronto: McGraw Hill-Ryerson, 1986) p. 134., and Greene *supra* note 35., pp.23-29 for an overview of the ineffectiveness of the *Bill of Rights*.

5. See, Andrew D. Heard, "The Charter in the Supreme Court of Canada," (1991) 25 Canadian Journal of Political Science pp. 289-308 for an in depth statistical analysis of Charter decisions decided by the Court between 1983-1989. Heard discusses in great detail the differences of opinion between the various judges on the Court, including a statistical analysis and critique of concurring and dissenting opinions. As this thesis does not address the role of concurring and dissenting opinions in the decision-making process, Heard's article should be consulted for a good elaboration of these issues. That fact that judges offer different and at times conflicting reasons for upholding or striking down a particular law in *Charter* cases does have a limited bearing on the nature of the main criticisms and defense of *Charter* review presented in this thesis. These issues are not discussed directly but are addressed to a certain degree when the issue of judicial subjectivity, and Dworkin's theory of Law as Integrity, are outlined in Part 2. The main conclusion is that while individual judges may offer different reasons or opinions for deciding a particular case in a particular way, the fact that there is difference of opinion does not mean that reasons chosen by the majority are arbitrary or capricious. As will be discussed in more detail in Part 2, decisions are ultimately based on the best and most reasonable or rational interpretation of all the relevant moral and legal principles offered by both the litigants, and the judges sitting on the bench.

6. **R. v. Oakes**, [1986] 1 S.C.R. 103; **R. v. Morgentaler**, [1988] 1 S.C.R. 30; **Singh et al. v. Minister of Employment and Immigration**, [1985] 1 S.C.R. 177; **R. v. Big M Drug Mart Ltd. et al.**, [1985] 1 S.C.R. 295. This thesis will concentrate primarily on decisions delivered by the Court under *Charter* review. Although the decisions of the lower courts are important and influential, and subject to the same lines of criticism, it is the final decisions of the Court that become the ultimate source of judicial authority and precedent. And it is the Court, more often than not, that receives the brunt or majority of criticism.

7. **Toronto Globe and Mail**, April 18, 1983 at 7, col. 1.

8. See, Patrick Fitzgerald, "Canadian Rights and Freedoms -First Class or Charter?" (1983) 13 Manitoba Law Journal no. 3, p.277, for a list of '...four sets of special reports or digests, fifty learned articles or comments, four special journal issues and no fewer than seven texts or treatises' all devoted to adoption of the *Charter*.'

9. See, R.A. Macdonald, "Postscript and Prelude - The Jurisprudence of the Charter: Eight Theses" 4 Supreme Court Law Review (1982) pp.321-350 for an excellent overview of the main criticisms of the Charter and Charter review, along with Ian Greene, The Charter of Rights and Freedoms (Toronto: Lorimer, 1989) pp.61-69.

10. *Ibid.*, Macdonald, p.332.

11. See, Patrick Monahan, Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada, (Toronto: Carswell, 1968) pp.91-94 for a good outline of the origins of the communitarian/tolerant ideal.

12. This line of criticism is advanced by a number of Charter "sceptics" and "pessimists" and will be outlined in more detail in Part 2. See, A.Wayne Mackay, "Judges and Equality - For Whom Does the Charter Toll," Dalhousie Law Journal, 10(2), (1986) p.40, for an outline and index of the various Charter sceptics and pessimists.

13. Peter Russell, "The Political Purposes of the Canadian Charter of Rights and Freedoms," 61 Canadian Bar Review (1983) p.51.

14. Alan Hutchinson, Dwelling on the Threshold: Critical Essays on Modern Legal Thought, (Toronto: Carswell Company Ltd., 1988), p. 226-227.

15. Peter Russell, The Judiciary in Canada: The Third Branch of Government (Toronto: McGraw-Hill and Ryerson, 1987) p.17.

16. *Ibid.*, p. 26.

17. Hogg, *Supra* note 4, p.77.

18. Principles of natural justice affect quasi-judicial bodies formed by the executive or administrative branch of government. They require that individuals who are

affected by the decisions of such administrative boards be given ample notice of decisions, and that the decision-making process is fair and that the individual has the right to retain counsel and respond to the board's decisions. See, **Re Nicholson and Haldimand-Norfolk Regional Board of Commissioners of Police** (1979), 88 D.L.R. (3d) 671 (S.C.C.) for a good example of how the principles of natural justice affect the review of administrative actions. The term judicial review is also used to describe the process used by a provincial Supreme court jury to decide whether a prisoner is eligible for parole. Despite these variations, the term is almost exclusively used to describe the process involved in deciding whether laws made by the various levels and branches of government infringe or trench on rules and principles outlined in constitutional documents.

19. *Supra* note 12, pp.70 - 88, for an excellent overview of formalism and functionalism. Formalism is usually adopted by positivists and certain strands of Natural Law theory.

20. Fitzgerald and Mcshane, *supra* note 4, p.85, for a good discussion of the literal and mischief rules of statutory interpretation.

21. Ronald Dworkin *Taking Rights Seriously* (Cambridge, Mass: Harvard U.P., 1977) p.15.

22. Karl Llewellyn, *The Bramble Bush*, (1960) p.67.

23. *Ibid.*, p.68. Variations of functionalism are most often advanced by members of the schools of Legal Realism, Sociology of Law, and Critical Legal Studies.

24. See, Fitzgerald and Mcshane *supra* note 4, p.28, for an outline of this belief.

25. *Blackstone's Commentaries*, 1765-1769, Vol. 1, p.91. There is a distinction that must be drawn between judicial review of subordinate legislation, i.e. municipal by-laws and acts of government ministers and officials, and sovereign legislation as in acts of Parliament and the provincial legislatures and assemblies. Judicial review of the former, as illustrated in the case of *Roncarelli v. Duplessis* discussed below, was and is well established in both Canada and England, yet review of the latter different in Canada than in Great Britain. Because both the *Constitution Act 1867* and *Schedule B, Canada Act 1982*, (U.K.), c.11., are British statutes, parliamentary sovereignty in Canada does not exist as laws made by our government must be in line with British constitutional documents. Parliament in England may be sovereign yet Canada's parliaments were never truly sovereign as they remain subordinate to Great Britain. Judicial review then that ensures that both the provincial and federal governments in Canada respect the dictates of these British statutes, in particular the *B.N.A. Act*, is not in opposition to parliamentary sovereignty but in fact helps preserve the ultimate sovereignty of the Acts of the British Parliament.

26. Moral axioms can be religious like the Ten Commandments, or can be rationally deduced like the principle of equal concern and respect. The latter axiom will be

discussed in more detail in Part 2. See also, Lord Lloyd of Hampstead, Lloyd's Introduction to Jurisprudence (Toronto: Carswell, 1985), p.92, for a good overview of the Natural Law position and its earliest origins.

27. Supra note 25, p.41.

28. See, Alain Cairns, "The Judicial Committee and its Critics" (1971) 4 Can.J.Pol.Sci., for a good outline of the intentions of the framers of the *Constitution Act 1867*.

29. This is Lord Sankey's dictum on how the provisions of the *Constitution Act 1867* ought to be interpreted as expressed in *Henrietta Muir Edwards v. Attorney-General for Canada* [1930]. A.C. 124, at p.136.

30. See, Peter Russell Leading Constitutional Decisions (Ottawa: Carleton U.P., 1987) for a general overview of the more important federalist review cases.

31. Hogg, supra note 4, p. 32.

32. The Privy Council's authority stems from the 'Royal Prerogative,' and *The Judicial Committee Act 1833*. These points on the origin of judicial review in Canada are taken primarily from Barry L. Strayer, The Canadian Constitution and the Courts: The function and Scope of Judicial Review (Toronto: Butterworths, 1983) chap 1.

33. See Russell supra note 31, for an outline of some of these cases. The emergence of the Court as a sovereign body so to speak resulted from the enactment of the *Statute of Westminster 1931*, and the decision in *Attorney General of Ontario v. Attorney General of Canada (Reference re Abolition of Privy Council Appeals)* (1947) A.C. 128.)

34. Found in, A.G. Guest, Oxford Essays in Jurisprudence, (Oxford: Oxford U.P., 1961) chapter 8.

35. Ibid., p.202.

36. Supra note 11, pp.12-13.

37. See Greene, supra, note 9, pp.1-36, for a good outline of the respect for rights and freedoms in both legislation and judicial decisions prior to the adoption of the *Charter*.

38. There are, however, some notable exceptions to this generalization. The schools of Legal Realism and Critical Legal Studies have always maintained that adjudication in general is more political than legal in nature. The main reasons will be outlined in Part 2. See Lloyd supra note 21, chap. 8 for a good outline of both positions. See also Alan Hutchinson, "Of Kings and Dirty Rascals: The Struggle for

Democracy," 9 Queens Law Journal (1984) pp.273-292, for a good outline of the Critical Legal Studies position.

Federalist review has also been criticised as being political in nature as both the Privy Council and the Court were said to have been 'biased' towards the interests of the provinces and federal government respectively. This position, however, has fallen out of favour. See Cairns *supra*, note 23, for a good outline of the criticism and response.

39. *Supra* note, 11. p.53.

40. See, Joel C. Bakan, "Constitutional Arguments: Interpretation and Legitimacy in Canadian Constitutional Thought" (1989) 26 Osgoode Hall L.J. pp.155-157.

41. H.L.A. Hart, The Concept of Law, (Oxford: Oxford U.P., 1961) p.120.

42. *Supra* note 19, p.136.

43. *Supra* note 7, p.280.

44. See, E.R. Alexander, "The Supreme Court of Canada and the Canadian Charter of Rights and Freedoms," (1990) 40 University of Toronto Law Journal, pp.19-22.

45. *Ibid.*, pp.22-27.

46. *Rahey v. The Queen* [1987] 39 D.L.R. (4th) 517.

47. *Supra* note, 44, p.27.

48. Peter Hogg, "Interpreting the Charter of Rights: Generosity and Justification," (1990) Vol. 8 No.4 Osgoode Hall Law Journal, p.820.

49. *Big M*, *supra*, note 6, pp.359-360.

50. *Morgentaler*, *supra*, note 6, p.397.

51. *Reference Re Public Service Employees Relations Act (Alta.)*, [1987] 1 S.C.R. 313 (*Alberta Reference*); *PSAC v. Canada*, [1987] 1 S.C.R. 424 (*Six and Five*); *RWDSU v. Saskatchewan*, [1987] 1 S.C.R. 460 (*Dairyworkers*).

52. *Supra* note 48, p.830.

53. *Andrews v. Law Society of B.C.*, [1989] 1 S.C.R. 143

54. *Greene*, *Supra* note 9, p.167.

55. See Ronald Dworkin, "Natural Law Revisited" (1982) U.Florida L.R. p.185, *A Matter of Principle* (Cambridge, Mass.: Harvard U. Press, 1985) chap. 5, p.143-144,

and chap. 8 p.203, Taking Rights Seriously chap. 7 pp.198-199, and, Chap. 6, "Justice and Rights", for examples of where Dworkin discusses the principle.

56. The view that Dworkin's principle is axiomatic or categorical in a Kantian sense is developed in J.E. Bradley, "Law Wars Part 1: The Hidden Force Behind Ronald Dworkin's Law's Empire", Carleton University, 1988, and is supported by the views of Pamela A. Chapman in, "The Politics of Judging: Section 1 of the Charter of Rights and Freedoms" (1986) 24 (4) Osgoode Hall L.J. p. 872. Dworkin himself states in Taking Rights Seriously, p.xv:

'Chapter 12 suggests, moreover, that the right to concern and respect is fundamental among rights in a different way, because it shows how the idea of a collective goal may itself be derived from that fundamental right. If so, then concern and respect is a right so fundamental that is not captured by the general characterization of rights as trumps over collective goals, except as a limiting case, because it is the source of both the general authority of collective goals and of the special limitations on their authority that justify more particular rights.'

57. Hogg, supra note 48, p.820, and Alexander supra note 44, p.5.

58. F.L. Morton, "The Political Impact of the Canadian Charter of Rights and Freedoms," (1987) Canadian Journal of Political Science, XX:1, p.51.

59. See, Macdonald supra, note 9, p.337, for a good discussion of the polycentric nature of *Charter* issues.

60. Michael Mandel and Harry J. Glasbeek, "The Legalisation of Politics in Advanced Capitalism: The Canadian Charter of Rights and Freedoms," in R.E. Martin, Critical Perspectives On the Constitution: Socialist Studies 2 (1984) p.103.

61. For an excellent overview of modernity and postmodern theory see Richard J. Bernstein, Habermas and Modernity, (Cambridge, Mass.: M.I.T. Press, 1985), in particular the introduction, pp.1-35; Jean-Francois Lyotard, The Postmodern Condition: A Report on Knowledge, (Minneapolis: University of Minnesota Press, 1984), p.xxiv.; and, Jurgen Habermas, "Modernity v. Post Modernity," 22 New German Critique 15 (1981).

62. David Couzens Hoy, "Dworkin's Constructive Optimism v. Deconstructive Legal Nihilism," (1987) 6 Law and Philosophy, pp.321-356.

63. Hutchinson, supra note 38, p.280.

64. See Toronto Globe and Mail, Monday, December 30, 1991, "Why it Isn't Wrong to be Correct," for an outline of the 'political correctness' movement and of Isaiah Berlin's article, "Two Concepts of Liberty" where positive and negative freedom are discussed.

65. See, Allan C. Hutchinson, and Andrew Petter, "Private Rights/Public Wrongs: The Liberal Lie of the Charter", (1988), 38 University of Toronto Law Journal, p. 283., for a good outline of this general position.

66. Supra note 64. See also, Macleans, May 27, 1991, p.15, and pp.40-50, "The Silencers," and Time magazine, February 3, 1992, pp.44-49, "The Fraying of America," for elaboration and insightful criticism of the political correctness movement in North America.

67. Robert Samek, "Untrenching Fundamental Rights," McGill Law Journal 27 (1982) pp.756-757.

68. Michael Mandel, The Charter of Rights and the Legalization of Politics in Canada, (Toronto: Thompson Educational Publishing Inc., 1989) p.272.

69. Retail, Wholesale and Department Store Union, Local 580 et al. v. Dolphin Delivery Ltd., [1986] 2 S.C.R., 573.

70. Supra note 58, pp.290-291.

71. Supra note 11, pp.111-115.

72. Ibid., p.114.

73. Bertha Wilson, "Will Women Judges Really Make a Difference?", (1990) 28 Osgoode Hall Law Journal, No. 3, p.522.

74. Supra note 68, p.287.

75. Borowski v. A.G. Can., [1989] 1 S.C.R.

76. R. v. Butler, [1992] S.C.J. no. 15, File no. 22191.

The decision in the recent Rape Shield Law case - Seaboyer v. Her Majesty the Queen and A.G. Canada et. al., [1991] 2 S.C.R. 577 - may, however, be argued to be a major setback to women's interests. This case was concerned with s.276 of the Criminal Code which made the past sexual practices of people inadmissible as evidence at trial in a sexual assault case. The law was designed so as more women who had been sexually assaulted would come forward to testify against their accused assailants without the fear that their sexual past would be dredged up in a courtroom. The Court, however, struck down the law as it violated the right of the accused to a fair trial as it disallowed evidence that may have an important bearing on the defence of the accused.

The majority decision was delivered by justice McLachlin, and outlined that a person's sexual history would not automatically be allowed to be brought up at trial. It was up to the presiding judge, in the privacy of his or her chambers, to hear testimony as to whether that evidence should be admissible. The fact that the decision was delivered by a women and not a man, and that it put restrictions on

when a women's (or for that matter a man's) sexual history may be admitted as evidence, shows that the Court was not totally insensitive to the interests of women. The right to a fair trial is an important and fundamental right whether it affects women or men and unless we want to make the somewhat shaky conclusion that the person delivering the decision, and the restrictions outlined, were influenced by chauvinist men on the Court, then it does not follow that even this decision was based on a liberal ideology that does not respect the interests of women in our society. In the words of justice McLachlin:

'I conclude that the operation of s.276 of the *Criminal Code* permits the infringement of the rights enshrined in ss. 7 and 11 (d) of the *Charter*. In achieving its purpose - the abolition of the outmoded, sexist-based use of sexual conduct evidence - it overshoots the mark and renders inadmissible evidence which may be essential to the presentation of legitimate defences and hence to a fair trial.'

77. See, Cheffins and Johnson, *supra* note 4, p.140, for an outline of the view that section 15 will not abrogate or derogate from aboriginal rights and freedoms.

78. Greene, *supra* note 9, pp.58-59.

79. *Ibid.*, p.59.

80. See, Kent McNeil, "The Constitutional Rights of the Aboriginal Peoples of Canada", (1982) 4 *Supreme Court Law Review*, pp.255-266, for a good outline of the status of aboriginal rights prior to and including the adoption of the *Charter*.

81. *Ibid.*, p.255.

82. See, *Macleans*, October 7, 1991, pp.26-27 for an outline of the main constitutional proposals of the Mulroney government. See also, *The London Free Press*, Monday, March 2, 1992, p.1, "The Search for Unity", for an interesting outline of public opinion on the new constitutional proposals, and arguments both for and against special status for Quebec in a new constitutional deal.

83. Greene, *supra* note 9, p.186.

84. Joseph Eliot Magnet, "The Charter's Official Languages Provisions: The Implications of Entrenched Bilingualism," (1982) 4 *Supreme Court Law Review*, pp.191-192.

85. *A.G. Que. v. Association of Quebec Protestant School Boards et al.*, [1984] 2 S.C.R., 66. See also, Greene, *supra* note 9, chap. 7, for a good discussion of language rights and *Charter* review.

86. *Ibid.*, p.212.

87. *Supra* note 7, p.284.

88. Ronald Dworkin, Law's Empire (Cambridge, Mass.: Harvard U.P., 1986), pp.274-275.
89. Supra note 7, p.283.
90. Greene, supra note 9, pp.88-89.
91. Ibid., pp.64-65. I am relying here on professor Greene's outline but there are a number of other *Charter* critics who adopt this position such as professors Monahan, Russell, Morton, Hutchinson and Petter. A detailed examination of section 1 will be offered in a later section.
92. Ibid., p. 65. *Singh et al. v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 17.
93. See, supra note 19, pp.22-28, for Dworkin's first outline of this distinction.
94. Supra note 19. p.22.
95. See Dworkin's discussion of the case, *Riggs v. Palmer*, 115 N.Y. 506, 22 N.E. 188 (1989), in Taking Rights Seriously p.23, that involved this issue.
96. A Matter of Principle, supra note 55, p.94.
97. See, Marshall Cohen, Ronald Dworkin and Contemporary Jurisprudence (New Jersey,: Rowman & Allenheld, 1983) for an outline of some of the main criticisms of Dworkin's theories. See also, Ken Greenwalt, "Policy, rights and Judicial Decision", 11 Gal.Rev. 991,992 (1977), and Dworkin's response in Taking Rights Seriously at p.294. And, for a good overview of all the lines of criticism regarding the principle/policy distinction see Lloyd, supra note 21, pp.1121-1126.
98. Supra note 14.
99. Supra note 68, p.55.
100. Supra note 19, p.299.
101. Ibid., p.317.
102. See, ibid., pp.294-325, for Dworkin's outline of this response to his critics.
103. Ibid., p.297.
104. Ibid., chapters 1, 2, and 3.
105. "Natural Law Revisited," supra note 55.

106. Supra note 88, p.243.
107. Ibid., pp.233-244.
108. **R. v. Edwards Books and Art Ltd.** [1986] 2 S.C.R. 713. See Chapman, supra note 56, p.892.
109. Supra note 2, section 1.
110. The decision of justice Marshall in the famous case of **Marbury v. Madison**, 5 U.S. (1 Cranch) 137 (1803), introduced the duty of the American Supreme Court to enforce limits on the rights and freedoms set out in their *Bill of Rights*.
111. Chapman, supra note 56, p.874.
112. Supra note 48, p.819.
113. Chapman, supra note 56, p.889.
114. Supra note 44, p.35.
115. Ibid., p.37.
116. Mr. Justice Brian Dickson, "The Judiciary - Law Interpreters or Law-Makers?," (1982) 12 Manitoba Law Journal no.1, p.5.
117. See Chapman, supra note 56, pp.875-882, for an overview of the following argument.
118. **Operation Dismantle Inc, et al. v. The Queen t al.**, [1985] 1 S.C.R. 441. **Law Society of Upper Canada v. Skapinker**, [1984] 1 S.C.R. 357.
119. **Regina v. Therens et al.**, [1985] 1 S.C.R. 613.
120. Chapman, supra note 56, p.881.
121. **Skapinker**, supra note 118, p.182.
122. Greene, supra note 9, p.151.
123. **Edwards Books**, supra note 108, p.65.
124. Supra note 48, p.825.
125. Chapman, supra note 56, p.891.
126. Ibid., p.892.

127. See Greene, supra note 9, pp.59-69, for a good outline of the undesirability of the Court as a policy-maker.

128. The point that the Court's role is more of editors than actual writers of law was raised in private discussion with professor Patrick Fitzgerald of Carleton University, Department of Law.

129. Berend Hovius and Robert Martin, "The Canadian Charter of Rights and Freedoms in the Supreme Court of Canada," (1983) 61 The Canadian Bar Review, p.374.

130. Supra note 116, p.8.

131. Samuel Freeman, "Constitutional Democracy and the Legitimacy of Judicial Review," (1990-91) 9 Law and Philosophy, pp.366-7.

132. Supra note 68, p.35.

133. Supra note 130, p.333.

134. I am relying here on the outline of democracy found both in the Encyclopedia of Philosophy, Vol. 2., (MacMillan Comp.: New York, 1967), pp.339-341, and the Encyclopedia Britannica, p.5.

135. See, Philip Resnick, The Masks of Proteus: Canadian Reflections on the State, (McGill-Queen's U.P.: Montreal/Kingston., 1990) for an insightful discussion of the various forms or faces of government that have influenced the evolution of the Canadian state.

136. This is an excerpt from the famous, "Speech to the Electors of Bristol," in The Philosophy of Edmund Burke, Ann Arbor: University of Michigan Press, 1960, pp.147-8.

137. Supra note 133. Both excerpts on democracy cite this and the argument concerning limitations on the will of the majority as reasons for the unlikelihood of having a direct democracy.

138. Supra note 134, p.105.

139. Ibid., p.31.

140. Ibid., pp.104 and 259, for insight into the above arguments.

141. Ibid., p.242.

142. Ibid., p.94.

143. Supra note 130, p.332.

144. Ibid., p.331.

145. John Ely, Democracy and Distrust. (Cambridge: Harvard University Press, 1980), pp.4-5.

146. Supra note 130, p.333.

147. James M. Buchanan, "Politics Without Romance: A Sketch of Positive Public Choice Theory and Its Normative Implications," in The Theory of Public Choice II (Michigan: University of Michigan Press, 1982), p.19.

148. Supra note 68, p.38.

149. Supra 130, p.334.

150. Ibid., p.337.

151. Ibid., p.353.

152. Ibid., pp.353-354.

153. Ibid., p.359.

154. Ibid., p.358.

155. Ibid., p.360.

156. Ibid., pp.364-366.

157. See Morton, supra note 58, pp.39-43, for an excellent discussion of how the adoption of the *Charter* has resulted in the "... creation of a new forum for interest group activity." Morton argues that a number of interest groups, in particular feminists, have begun to have their voices heard through *Charter* litigation in a way that did not take place prior to the *Charter*. Third party intervenors such as the National Citizens Coalition, Canadian Abortion Rights Action League, Women's Legal and Education Action Fund, to name only a few, have had their degree of public participation in the governing process raised tremendously as a result of the increase in standing and allowance of the third party intervenors in *Charter* cases. Also, the federal government's "Court Challenges Program" adopted in 1985, according to Morton, "...will allow - perhaps encourage - Charter litigation by groups and individuals who could not otherwise afford such an undertaking." All this makes for greater participation in the overall governing process.

158. Ibid., p.366.

159. See, Harold Innis, The Bias Of Communication (1951/77), "A Plea for Time," p.91., for reference to this Holy Writ.

160. See Seymour Lipset, "Revolution and Counterrevolution: The United States and Canada," in Eli Mandel and David Taras, A Passion for Identity, (Scarborough: Nelson, 1988), pp.68-82.

161. Raymond Williams, "The Analysis of Culture" in The Long Revolution, (Chatto and Windus, 1961) Chapter 2., p.43. I have chosen to use Raymond Williams, a British theorist, for my analysis of culture because he is a recognized expert on the theoretical aspects of culture.

162. Ibid., p.45.

163. Ibid., p.48.

164. Ibid., p.50.

165. Ibid., p.52.

166. Ibid., p.45.

167. Ibid., p.52.

168. Ibid., p.52.

169. Northrope Frye, Divisions on a Ground, (Toronto: Anansi, 1982), pp.15-25.

170. Ibid., p.24.

171. Williams, supra note 160, p.52.

172. See generally, Mandel and Taras, supra note 159, in particular chap. 3, and section two of chap. 2. Also see George Woodcock, Canada and the Canadians, (Toronto: Macmillan, 1970), and Resnick, supra note 134.

173. Ibid. All references mentioned discuss this multicultural aspect, in particular, Mandel and Taras, p.82, and Woodcock, p.61.

174. Supra note 2, section 27.

175. See Monahan, supra note 11, pp.91-94, for a good outline of the origins of the communitarian/tolerant ideal.

176. Mandel and Taras, supra note 159, pp.21-65.

177. See Margaret Atwood, Survival (Toronto: Anansi, 1972) in general for an outline of this pattern.

178. See George Melnyk, Radical Regionalism, (Edmonton: NeWest, 1981) and Mandel and Taras supra note 159, pp.217-387, for an outline of regionalism.

179. See Monahan, supra note 11, p.93, for outline of Tory touch.

180. Mandel and Taras, supra note 159, pp.21-37 and pp.97-114.

181. See, Arthur Kroker, Technology and the Canadian Mind, (1984) pp.20-51, and pp.87-125, for an excellent outline of this pattern and of George Grant and Harold Innis' theories in general.

182. See Woodcock, supra note 171, p.223.

183. Ibid., p.225.

184. Resnick, supra note 134, p.214.

185. See Cairns, supra note 30, for a good outline of the intentions of the framers of the *Constitution Act 1867*.

186. Kroker, supra note 180, p.41.

187. Ibid., p.92.

188. Innis, supra note 158.

189. Kroker, supra note 174. Kroker gives a good outline of the nihilism inherent in the technological dependency pattern and compares the theories of Grant with that of Nietzsche to draw out this line of reasoning.

190. Ibid., p.49, for a good outline of this criticism.

191. Greene, supra note 9, p.210.

192. Cheffins and Johnson, supra note 4, p.151.

193. Monahan, supra note 11, p.93.

194. See Samek, supra note 60, pp.755-787, for a very good outline of this general position.

195. Cheffins and Johnson, supra note 4, p.136.

196. For a good outline of what justice is see Chaim Perelman, Justice, Law And Argument (Holland: D. Reidel Pub., 1980) p.1.
197. Dworkin, supra note 88, pp.165-188.
198. Doug Williams, "Canada's Constitutional Mosaic: Boundaries in Dispute," Department of Justice Canada, p.20.
199. Ibid., p.21.
200. Supra note 44, p.40.
201. Supra note 195, p.11.
202. F.L. Morton, Law, Politics and the Judicial System in Canada (Calgary: University of Calgary Press, 1984), pp.225.
203. I have in mind the distinction between internal and external perspectives outlined by professor Alan Hunt in, "The Critique of Law: What is Critical about Critical Legal Theory?" Journal of Law and Society, 14 (1987) pp.10-13.
204. The scope of this paper did not permit a detailed examination of what politics is yet in another essay, "The Politics of Charter Review," (1990) Carleton University Department of Law, I did peruse in detail the meaning of the concept in relation to Charter review. My sources were Alan R. Ball, Modern Politics and Government, (Great Britain: The Macmillan Press Ltd., 1964); Jean Blondel, Thinking Politically, (London: Willwood House Ltd., 1976), p.16 for an outline of 'micro' and 'macro' politics that coincides with the external and internal perspectives respectively; Carl Schmidt, The Concept of the Political (New Jersey: Rutgers University Press, 1976) p.27, for a discussion of the friend/enemy relationship and where conflict is offered as a necessary precondition of political activity; and, Frank J. Sorauf, Perspectives on Political Science, (Columbus, Ohio: Merrill Books Ltd., 1966).
205. See the section entitled, "Charter Cuttings" in Hutchinson supra note 14, pp.223-246, for a series of newspaper articles he wrote criticizing the political nature of Charter review.
206. Alan Hunt, "Living Dangerously on the Deconstructive Edge," (1988) 26 4 Osgoode Hall Law Journal p.892.
207. Bora Laskin, "Judicial Integrity and the Supreme Court of Canada" (1978) Canadian Institute for the Administration of Justice and the Canadian News Publishers Association Ottawa.
208. Supra note 198, p.13.
209. Ibid., p.13.

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