TRADITIONAL CANADIAN

POLITICAL CULTURE

ADRIFT IN THE ERA OF THE CHARTER

BY

GLENN D. JOYAL

A Thesis
Submitted to the Faculty of Graduate Studies
in Partial Fulfillment of the Requirements
for the Degree of

Master of Arts

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Theology 0469

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Anthropology
- Archaeology 0324
- Cultural 0326
- Physical 0327

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- General 0310
- Accounting 0272
- Banking 0770
- Management 0454
- Marketing 0338

Canadian Studies 0385
Economics
- General 0501
- Agricultural 0503
- Commerce-Business 0505
- Finance 0508
- History 0509
- Labor 0510
- Theory 0511

Folklore 0358
Geography 0366
Gerontology 0351
History
- General 0578
- Ancient 0579
- Medieval 0581
- Modern 0582
- Black 0328
- African 0331
- Asia, Australia and Oceania 0332
- Canadian 0334
- European 0335
- Latin American 0336
- Middle Eastern 0333
- United States 0337

History of Science 0585
Law 0398
Political Science
- General 0615
- International Law and Relations 0616
- Public Administration 0617

Recreation 0814
Social Work 0452
Sociology
- General 0626
- Criminology and Penology ... 0627
- Demography 0938
- Ethnic and Racial Studies 0631
- Individual and Family Studies 0628
- Industrial and Labor Relations 0629
- Public and Social Welfare 0630
- Social Structure and Development 0700
- Theory and Methods 0344

Transportation 0709
Urban and Regional Planning 0999
Women's Studies 0453

THE SCIENCES AND ENGINEERING

BIOLOGICAL SCIENCES
Agriculture
- General 0473
- Agronomy 0285
- Animal Culture and Nutrition 0475
- Animal Pathology 0476
- Food Science and Technology 0359
- Forestry and Wildlife 0478
- Plant Culture 0479
- Plant Pathology 0480
- Plant Physiology 0817
- Range Management 0777
- Wood Technology 0746

Biology
- General 0306
- Anatomy 0287
- Biostatistics 0308
- Botany 0309
- Cell 0379
- Ecology 0329
- Entomology 0353
- Genetics 0369
- Limnology 0793
- Microbiology 0410
- Molecular 0307
- Neuroscience 0317
- Oceanography 0416
- Physiology 0433
- Radiation 0821
- Veterinary Science 0778
- Zoology 0472

Biophysics
- General 0786
- Medical 0760

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Biogeochemistry 0425
Geochemistry 0996
Geodesy 0370
Geology 0372
Geophysics 0373
Hydrology 0388
Mineralogy 0411
Paleobotany 0345
Paleoecology 0426
Paleontology 0418
Paleozoology 0985
Palynology 0427
Physical Geography 0368
Physical Oceanography 0415

HEALTH AND ENVIRONMENTAL SCIENCES
Environmental Sciences 0768
Health Sciences
- General 0566
- Audiology 0300
- Chemotherapy 0992
- Dentistry 0567
- Education 0350
- Hospital Management 0769
- Human Development 0758
- Immunology 0982
- Medicine and Surgery 0564
- Mental Health 0347
- Nursing 0569
- Nutrition 0570
- Obstetrics and Gynecology .. 0380
- Occupational Health and Therapy 0354
- Ophthalmology 0381
- Pathology 0571
- Pharmacology 0419
- Pharmacy 0572
- Physical Therapy 0382
- Public Health 0573
- Radiology 0574
- Recreation 0575
- Speech Pathology 0460
- Toxicology 0383

Home Economics 0386

PHYSICAL SCIENCES
Pure Sciences
Chemistry
- General 0485
- Agricultural 0749
- Analytical 0486
- Biochemistry 0487
- Inorganic 0488
- Nuclear 0738
- Organic 0490
- Pharmaceutical 0491
- Physical 0494
- Polymer 0495
- Radiation 0754

Mathematics 0405
Physics
- General 0605
- Acoustics 0986
- Astronomy and Astrophysics 0606
- Atmospheric Science 0608
- Atomic 0748
- Electronics and Electricity 0607
- Elementary Particles and High Energy 0798
- Fluid and Plasma 0759
- Molecular 0609
- Nuclear 0610
- Optics 0752
- Radiation 0756
- Solid State 0611

Statistics 0463

Applied Sciences
Applied Mechanics 0346
Computer Science 0984
Engineering
- General 0537
- Aerospace 0538
- Agricultural 0539
- Automotive 0540
- Biomedical 0541
- Chemical 0542
- Civil 0543
- Electronics and Electrical 0544
- Heat and Thermodynamics ... 0348
- Hydraulic 0545
- Industrial 0546
- Marine 0547
- Materials Science 0794
- Mechanical 0548
- Metallurgy 0743
- Mining 0551
- Nuclear 0552
- Packaging 0549
- Petroleum 0765
- Sanitary and Municipal 0554
- System Science 0790

Geotechnology 0428
Operations Research 0796
Plastics Technology 0795
Textile Technology 0994

PSYCHOLOGY
General 0621
Behavioral 0384
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Collèges communautaires 0275
Commerce 0688
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Enseignement professionnel 0747
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Enseignement secondaire 0533
Enseignement spécial 0529
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Finances 0277
Formation des enseignants 0530
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- Anciennes 0294
- Comparée 0295
- Médiévale 0297
- Moderne 0298
- Africaine 0316
- Américaine 0591
- Anglaise 0593
- Asiatique 0305
- Canadienne (Anglaise) 0352
- Canadienne (Française) 0355
- Germanique 0311
- Latino-américaine 0312
- Moyen-orientale 0315
- Romane 0313
- Slave et est-européenne 0314

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Religion
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- Clergé 0319
- Études bibliques 0321
- Histoire des religions 0320
- Philosophie de la religion 0322

Théologie 0469

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- Archéologie 0324
- Culturelle 0326
- Physique 0327

Droit 0398
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- Généralités 0501
- Commerce-Affaires 0505
- Économie agricole 0503
- Économie du travail 0510
- Finances 0508
- Histoire 0509
- Théorie 0511

Études américaines 0323
Études canadiennes 0385
Études féministes 0453
Folklore 0358
Géographie 0366
Gérontologie 0351
Gestion des affaires
- Généralités 0310
- Administration 0454
- Banques 0770
- Comptabilité 0272
- Marketing 0338

Histoire
- Histoire générale 0578
- Ancienne 0579
- Médiévale 0581
- Moderne 0582
- Histoire des noirs 0328
- Africaine 0331
- Canadienne 0334
- États-Unis 0337
- Européenne 0335
- Moyen-orientale 0333
- Latino-américaine 0336
- Asie, Australie et Océanie 0332

Histoire des sciences 0585
Loisirs 0814
Planification urbaine et régionale 0999
Science politique
- Généralités 0615
- Administration publique 0617
- Droit et relations internationales 0616

Sociologie
- Généralités 0626
- Aide et bien-être social 0630
- Criminologie et établissements pénitentiaires 0627
- Démographie 0938
- Études de l' individu et de la famille 0628
- Études des relations interethniques et des relations raciales 0631
- Structure et développement social 0700
- Théorie et méthodes. 0344
- Travail et relations industrielles 0629

Transports 0709
Travail social 0452

SCIENCES ET INGÉNIERIE

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- Agronomie. 0285
- Alimentation et technologie alimentaire 0359
- Culture 0479
- Élevage et alimentation 0475
- Exploitation des pâturages 0777
- Pathologie animale 0476
- Pathologie végétale 0480
- Physiologie végétale 0817
- Sylviculture et faune 0478
- Technologie du bois 0746

Biologie
- Généralités 0306
- Anatomie 0287
- Biologie (Statistiques) 0308
- Biologie moléculaire 0307
- Botanique 0309
- Cellule 0379
- Écologie 0329
- Entomologie 0353
- Génétique 0369
- Limnologie 0793
- Microbiologie 0410
- Neurologie 0317
- Océanographie 0416
- Physiologie 0433
- Radiation 0821
- Science vétérinaire 0778
- Zoologie 0472

Biophysique
- Généralités 0786
- Medicale 0760

SCIENCES DE LA TERRE
Biogéochimie 0425
Géochimie 0996
Géodésie 0370
Géographie physique 0368
Géologie 0372
Géophysique 0373
Hydrologie 0388
Minéralogie 0411
Océanographie physique 0415
Paléobotanique 0345
Paléoécologie 0426
Paléontologie 0418
Paléozoologie 0985
Palynologie 0427

SCIENCES DE LA SANTÉ ET DE L'ENVIRONNEMENT
Économie domestique 0386
Sciences de l'environnement 0768
Sciences de la santé
- Généralités 0566
- Administration des hôpitaux 0769
- Alimentation et nutrition 0570
- Audiologie 0300
- Chimiothérapie 0992
- Dentisterie 0567
- Développement humain 0758
- Enseignement 0350
- Immunologie 0982
- Loisirs 0575
- Médecine du travail et thérapie 0354
- Médecine et chirurgie 0564
- Obstétrique et gynécologie 0380
- Ophtalmologie 0381
- Orthophonie 0460
- Pathologie 0571
- Pharmacie 0572
- Pharmacologie 0419
- Physiothérapie 0382
- Radiologie 0574
- Santé mentale 0347
- Santé publique 0573
- Soins infirmiers 0569
- Toxicologie 0383

SCIENCES PHYSIQUES
Sciences Pures
Chimie
- Généralités 0485
- Biochimie 487
- Chimie agricole 0749
- Chimie analytique 0486
- Chimie minérale 0488
- Chimie nucléaire 0738
- Chimie organique 0490
- Chimie pharmaceutique 0491
- Physique 0494
- PolymÈres 0495
- Radiation 0754

Mathématiques 0405
Physique
- Généralités 0605
- Acoustique 0986
- Astronomie et astrophysique 0606
- Électronique et électricité 0607
- Fluides et plasma 0759
- Météorologie 0608
- Optique 0752
- Particules (Physique nucléaire) 0798
- Physique atomique 0748
- Physique de l'état solide 0611
- Physique moléculaire 0609
- Physique nucléaire 0610
- Radiation 0756

Statistiques 0463

Sciences Appliqués Et Technologie
Informatique 0984
Ingénierie
- Généralités 0537
- Agricole 0539
- Automobile 0540
- Biomédicale 0541
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- Conditionnement (Emballage) 0549
- Génie aérospatial 0538
- Génie chimique 0542
- Génie civil 0543
- Génie électronique et électrique 0544
- Génie industriel 0546
- Génie mécanique 0548
- Génie nucléaire 0552
- Ingénierie des systèmes 0790
- Mécanique navale 0547
- Métallurgie 0743
- Science des matériaux 0794
- Technique du pétrole 0765
- Technique minière 0551
- Techniques sanitaires et municipales 0554
- Technologie hydraulique 0545

Mécanique appliquée 0346
Géotechnologie 0428
Matières plastiques (Technologie) 0795
Recherche opérationnelle 0796
Textiles et tissus (Technologie) 0794

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Généralités 0621
Personnalité 0625
Psychobiologie 0349
Psychologie clinique 0622
Psychologie du comportement 0384
Psychologie du développement 0620
Psychologie expérimentale 0623
Psychologie industrielle 0624
Psychologie physiologique 0989
Psychologie sociale 0451
Psychométrie 0632

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ADRIFT IN THE ERA OF THE CHARTER

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GLENN D. JOYAL

A Thesis submitted to the Faculty of Graduate Studies of the University of Manitoba in partial fulfillment of the requirements of the degree of

MASTER OF ARTS

TO MY WIFE, VALERIA

PREFACE

This thesis is a product of my interest in both law and politics. It is my hope that this dual interest has been tempered by De Tocqueville's always useful reminder that: "There is no country in the world in which everything can be provided for by the laws, or in which political institutions can prove a substitute for common sense and public morality."

As fitful and uncertain as the relationship between law and politics has always been, it is as this thesis discusses, increasingly difficult in Canada to see where one ends and the other begins. It is significant that there is currently less and less public concern respecting the inter-mixing of these previously separated fields. This thesis is an attempt to offer a moderate warning with respect to the new Charter orthodoxy that seems to be developing: an orthodoxy that willingly accepts and accommodates a heretofore unseen blurring of legal and political lines.

This thesis was completed while I was employed with the Federal Department of Justice. To state the obvious, none of the positions expressed herein represent in any official way, the positions of Canada's Justice Department. In my role as a Federal prosecutor, my responsibilities are principally in the area of criminal litigation. Given my position, it may seem paradoxical that the main focus of concern in this thesis is not the manner in which the courts have dealt with entrenched legal rights (Section 7 to 14) and the new exclusionary possibilities (pursuant to Section 24(2), but rather the more broad and general patterns of judicial public policy-making in areas that have traditionally been political. The reason for this is two-fold. First, while evidentiary changes connected to the legal rights have occurred, rendering more complicated the policing and prosecutorial function, I see these new legal rights as simply expressing in a more expansive way many of the already existing common law due process and evidentiary protections. Moreover, however misguided and disturbing I may consider particular and isolated decisions made in the name of some of those legal rights and the exclusionary Section 24(2), the developing case law seems to leave sufficient room for fine tuning and correction. Quite simply, the legal rights and the connected case law do not represent a potential institutional shift of

emphasis the sort of which is more fully discussed in this thesis. Second, it is my view that while there may superficially appear to be reason to sound the "law and order" alarm (based upon some frustrating acquittals resulting from excluded evidence), the exclusionary regime of Section 24(2) which is intertwined with the legal rights, provides for the courts at least the potential to consider the "community interest" in the context of considering the admission of evidence that could "bring the administration of justice into disrepute". In short, the corpus of Charter law that will develop from judicial interpretation of the legal rights and the application of Section 24(2) in the realm of the criminal law, does not in any significant way represent an unbalancing interaction between the legislative and judicial branch, nor does it by extension represent a significant change to the traditional Canadian political culture. Those purely legal rights are accordingly not the central focus of this thesis.

During the preparation of this thesis, I have had an opportunity to once again see how fortunate I am. In that regard, I would like to thank my wife, Valeria, whose love and support has been demonstrated in too many ways to recount. While I'm troubled by the fact that her infinite and tangible expressions of love and support may be difficult to reciprocate, I find comfort in knowing that she is aware of the depth of my love and gratitude.

I would also like to acknowledged my parents, my father Valentine and my deceased mother Agnes Joyal. Their sacrifices and love were plentiful and constant. While we must endure my mother's premature passing, I continue to find her support in the special friendship I share with my father. My father is quite simply, the kindest and most giving man I have ever known.

I wish also to thank Professor Kathy Brock, who as my thesis advisor provided the measured combination of impatience and encouragement that finally brought this project to its conclusion.

Along with Professor Brock, I am also indebted to my friend and colleague Gerald Chartier, whose own not insignificant obsession and preoccupation with judicial policy-

making, stimulated much discussion and debate. Those discussions and his comments have provided helpful insights that have further buttressed the ideas expressed in this thesis.

TABLE OF CONTENTS

CHAPTER 1

INTRODUCTION

CHAPTER 1

INTRODUCTION

This thesis will examine how, since the formal entrenchment in 1982 of the Canadian Charter of Rights and Freedoms,[1] a new and sometimes imbalancing interaction between the legislative and judicial branches, has exposed the traditional Canadian political culture to a potential fundamental change. This apparent shift of institutional emphasis reflects the still uncertain relationship between two fundamental elements of our system: Parliamentary supremacy and judicial review. The thesis will seek to discuss ways in which that interaction or relationship can be reshaped or redirected so as to restore some vibrancy and energy to the legislative branch. The thesis will explain why such a potent legislative branch has been and will be required to preserve the ideological mix that is so characteristic of our legislation and so representative of our political culture.

The political players who gave their approval to the Charter in 1982, did not understand the newly "entrenched" constitutional instrument to be a substitute for the important and primary responsibility of the elected representatives to provide good government for the Canadian people.[2] The desired role for the legislative branch was confirmed a few years after the formal entrenchment when speaking as Minister of Justice, Kim Campbell stated perhaps hopefully:

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[1] Canadian Charter of Rights and Freedoms PART I of the Constitution Act 1982, being Schedule B of the Canada Act 1982 (UK) 1982, CH, ss. 1-34, hereinafter the Charter.

[2] B.L. Strayer, "Life Under the Canadian Charter: Adjusting the Balance Between Legislatures and Courts," Public Law (1988): 347.

> While the Charter has created a new role for Canadian courts and has had a profound impact on the way government must operate, it has not meant a fundamental change in our democratic system. Parliament continues to have a role in our system of government, as an arbiter amongst competing interests, as the guardian of the public purse, as the protector of the community's social and economic interests, as its guarantor of our national security and survival.[3]

The nature of the 1982 political compromise, and the acknowledged common understandings about the constraints that were to govern the judiciary, provide a perspective that enables one to see how unanticipated some of the subsequent interaction between the two branches has been.[4] In that spirit, it will be suggested that a new judicial/legislative equilibrium is possible and necessary at a time when the newly activist judiciary and the newly entrenched constitutional instrument promise to remain as important elements of the Canadian polity.

The traditional Canadian political culture is explained in this thesis as having been fashioned and shaped largely by attitudes which are consistent with and sympathetic to the core of the liberal ideal, attitudes which convey respect for the

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[3] Kim Campbell, A Speech on the Occasion of the 10th Anniversary of the Charter, April 14, 1992, Ottawa, Ontario.

[4] Supra 2. Strayer believes that the negotiations leading to the accord and the committee discussions during the approval process, illuminate a painstaking process of compromise whereby there was an attempt to appease those provinces that worried about the loss of legislative supremacy and some of the natural law based policy-making of the U.S. Supreme court under the American Bill of Rights. The background debates and the committee hearings of the day provide an information base that shows that while the terminology in the Charter was still expected to require some particularizing by the courts, only a limited number of rights were intended to be protected. In addition to highlighting the potential restraints represented by Sections 1 and 33, Strayer maintains that: "there was no presumption created that every wrong must find a Charter remedy" and furthermore, it was believed that "...this consensus was premised upon positivism." Supra 2, 352.

individual and liberty.[5] It will be shown that the significant, idiosyncratic and enduring quality of this political culture was the general degree to which it remained ideologically open. In a more specific way, it will be shown how this instinctively esteemed liberal element was tempered with noteworthy strains of European toryism and socialism.[6] Put in slightly more comparative terms, it was an openness to new ideological influences which at once enabled Canadians to value their freedoms as highly as the Americans and at the same time to point to important distinctions. The distinctions were based on among other things, the nature of Canadian legislation, and the public discourse. Both elements reflected the collectivist and communitarian aspects of Canada's incoming European ideologies.[7]

The Canadian political culture has always been uniquely constituted and ideologically accommodating. It was this political culture and the less dominant but always present tory, social-democratic and collectivist-communitarian aspects which

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[5] William Christian and Colin Campbell, Political Parties and Ideologies in Canada 3d ed., (Toronto: McGraw-Hill Ryerson Ltd.), 6.

[6] Ibid., 287.

[7] The writer's depiction of traditional Canadian Political Culture in this thesis is largely focused and premised upon the historical ideological mix of English Canada. It is accepted that the early feudal fragment that was New France gave rise to a communitarian - collectivist social emphasis that was (up until the early 1960's) even more dominant than those similar strains studied in English Canada's development. For reasons of space, the writer does not specifically address the particular details and development of French Canada's liberal - non-liberal value mix. Although (in Quebec) there still remains the understandable appreciation and emphasis respecting collective or group rights in matters relating to language and culture, that mix has changed considerably since the Quiet Revolution. The increasingly industrial, urban and secular orientation of Quebec society has seen, over the past three decades, an infusion of a liberal strain. This infusion saw not only a changing of Quebec's traditional political and religious elites, it also culminated in the passing of the province's own Charter. While Quebec's preference for a more collectivist or group rights approach in matters of language and culture has and will continue to impact upon some of the issues discussed in this thesis, a more nuanced description and interpretation of the changing and stable aspects of the separate value mix need be the subject of a separate and full study.

proved so well served by the Canadian processes of conciliation, compromise and consensus. These processes were inherently part of the usually moderate, ideological party positioning, which takes place in a liberal democracy where an elected parliament is supreme and accountable.

A presupposition of this thesis is that two of the most important symbols or cornerstones of Canadian political culture have been, first, a distinctive Canadian public discourse, and second, an ideologically eclectic public policy emanating from federal and provincial legislation. Both such cornerstones have traditionally reflected an attitudinal tone, which in large part shaped what Canadians thought and felt about politics. It is the position of this thesis that those attitudes were largely liberal yet often tempered by Canada's tory and social democratic rudiments. The public discourse and the legislation reflected attitudes of a Canadian society which possessed a liberal tendency to acknowledge and protect individuality and the individual. At the same time, the discourse and legislation were flavoured with aspects which demonstrated a continuing commitment to the organic, collectivist tenets of the other ideologies. It was from the latter traits that one could trace what could be said was the Canadian sense of duty, commitment, community and even identity.[8]

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[8] In his 1982 treatment of what he called the "Radical Tories", Charles Taylor described one of his subjects (W.L. Morton) using traits with which many Canadians have traditionally and happily identified: "a conservative-radical mix which is based on a sense of community and order, a feeling for the land, a respect for human diversity and human rights, a concern for social justice, and a non-ideological approach to the problems of political and economic organization." Charles Taylor, Radical Tories (Toronto: Anasi, 1982), 213.

Much of this thesis is inspired by the thoughtful attention given to Canadian political culture as expressed through the Tory nationalism of the late George Grant. While most of Grant's writing came before the Charter and while his most influential work implied a battle already lost ("the impossiblity of conservatism in our era"), his insights and concerns about a threatened culture take on a new relevance in the era of the Charter. In the context of the Canadian nationalism of the 1960's, Grant observed:

In terms of the public discourse, it will be suggested that since 1982 the public or political discourse is now increasingly dominated by the language of "rights", which in turn emphasizes a growing and narrow focus on the individual. Such a shift in the nature of our public discourse is significant in light of the role David J. Bell suggests language can play:

> The most important way in which political culture is transmitted is through language. To understand how political actors think, an observer must first learn their language. Assumptions about politics and the meanings of institutions and practices are always present in language, however hidden as language serves to express and transmit, encode, and preserve culture... Those who are untrained in examining language seem unaware that their words contain and preserve culture, shaping their outlook and even colouring their sentiments.[9]

> The founders of the United States took their thought from the eighteenth-century Enlightenment. Their rallying cry was "freedom." There was no place in their cry for the organic conservatism that pre-dated the age of progress. Indeed, the United States is the only society on earth that has no traditions from before the age of progress. Their "right-wing" and "left-wing" are just different species of liberalism. "Freedom" was the slogan of both Goldwater and President Johnson.

Grant further asked:

> If Lockian liberalism is the conservatism of the English-speaking peoples, what was there in British conservatism that was not present in the bourgeois thought of Hamilton and Madison? If there was nothing, then the acts of the Loyalists are deprived of all moral significance. Many of the American Tories were Anglicans and knew well that in opposing the revolution they were opposing Locke. They appealed to the older political philsophy of Richard Hooker. They were not, as the liberal Canadian historians have often described them, a mixture of selfish and unfortunate men who chose the wrong side. If there was nothing valuable in the founders of English-speaking Canada, what makes it valuable for Canadians to continue as a nation today?

see: George Grant, Lament for a Nation: the Defeat of Canadian Nationalism, (Toronto: McClelland and Stewart, 1965), 65-67.

[9] David Bell, The Roots of Disunity: A Study of Canadian Political Culture (Don Mills: Oxford University Press, 1992), 2.

The second important cornerstone of Canadian political culture is the public policy which had most typically emanated from legislation proposed by the federal and provincial governments. In that regard, the Canadian experience had always seen the legislative forum, even where one party was dominant, as providing a certain ideological openness and willingness to compromise. This openness and flexibility usually produced legislation that reflected the main identifiable ideological strains. This thesis suggests that there is now a new and ever-expanding set of constitutionally and judicially formulated criteria that the legislative branch must anticipate and meet. The sometimes technical and legalistic nature of such criteria does not always mesh or reconcile with the compromises that need regularly be made in the legislative forum where an effort is made to accommodate the differing ideological positions.[10] Moreover, it is becoming increasingly difficult for the legislative branch in Canada to anticipate the expansion of these criteria and the connected analytic or interpretive approach adopted by the courts. Even if one accepts that since 1982 some legislation was understandably struck down because of conflict with Charter protections, one need still acknowledge that the more numerous, less precise and still expanding criteria by

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[10] It is suggested in this thesis, that these parliamentary processes which produced ideological compromise, are now seen by the Canadian citizenry as less legitimate when juxtaposed to perceived Charter rights. It is suggested that the sometimes subtle political accommodation and creative compromising that had taken place in Canada on many of the hard issues, is now being replaced by the polarizing potential of unambiguous principle. David Frum has suggested that Canadians had "always preferred to fudge hard issues, not only because of the infamous blandness of the national character, but also because the country's stability was too fragile. A clear answer to questions like conscription, prohibition of alcohol or the rights of linguistic minorities could well have torn Canada apart." D. Frum, "Who's Running this Country Anyway?" Saturday Night Magazine (October 1988): 66. See also: Janet Hiebert's discussion respecting the position of those who believe that governments no longer possess the constitutional legitimacy to pursue policies in conflict with protected rights. J. Hiebert, "Should Rights Be Paramount?", paper for the Department of Political Science, Queen's University, p. 4.

which the legislation is now judged greatly increases the power of the courts to diminish the potency of legislative supremacy.

Given the expanding nature of the criteria and the manner in which that criteria is expanded by the courts, the legislative branch faces the sometimes impossible task of trying to produce the balanced legislation required to resolve controversies which frequently involve the basic question of whether an individual's personal choice or his/her civic responsibility to others ought to be given legislative priority.[11] Such uncertainty and the resulting institutional overlapping, seem at the very least to be inconsistent with the nature of the political compromise of 1982 which validated and entrenched the Charter only after specific qualification, the inclusion of which seemed to expressly reassert legislative supremacy (s.1, s.33) in the area of policy-making. Such a shift, however slight and incremental in the balance away from legislative supremacy towards judicial review, would seem to threaten what Christian and Campbell lauded as the ideologically adaptive and accommodating legislative and political process. In their view it was a political process fit into a political context which contained realities and diversities that required Canadian politicians to be, on the whole, the sort Burke characterized as philosophers in action. These politicians working within the parliamentary system were not disposed to ambitiously and extensively outline their assumptions about the nature of man and his connection to the physical and social world. The pragmatic nature of the traditional Canadian legislative and political process, informed as it was by ideas and values that were both liberal and

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[11] Ian Greene, The Charter of Rights (Toronto: J. Lorimer and Company, 1989), 2.

non-liberal, made it difficult to compare the identifiable ideologies in Canada with their often more strongly and starkly articulated namesakes in Europe and the United States.

If this shifting of the balance toward judicial review and the institutional overlapping continues to take place, the traditionally pragmatic and hybrid liberal, non-liberal value mix in Canada will change. The result may be policies and attitudes which view the notion of liberty in a way that is more consistent with the explicit American ideological statements and doctrines; statements and doctrines whose origins lie in the country's different historical traditions and needs. The moderating legislative process admired by Christian and Campbell may become less and less effective:

> ... (In Canada) What we have observed instead is a slow and steady adaptation of the ideologies in response to a variety of circumstances: economic, electoral, social, diplomatic, military and others. But in all cases there has been an inescapable element of continuity, provided in the case of liberalism, conservatism and socialism by the institutional structures of major and electorally successful political parties. However radical the leaders of these parties might have wished, on occasion, to depart from the settled traditions of their predecessors, they have found themselves restrained by the need to retain the support of their colleagues, to encourage the enthusiasm of their party activists, and to seek the broad support of a populous that has never been united in the belief that major, radical changes were needed.[12]

The post-1982 relationship between the judicial and legislative branches underscores how the judiciary is playing a more active and central role in a phenomenon which is largely international. In addition to the domestic and pragmatic realities, the Charter's enactment in 1982 was in part said to be "a response to an

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[12] Supra 5, 4.

emerging international criterion of statehood linked to more expansive notions of citizenship".[13] This impetus for the Charter was seen as linked to international forces which were connected to the developing international norms of statehood, that as Cairn's stated, "put Parliamentary supremacy on the defensive, and increasingly postulated a correlation between statehood and Charters or Bills of Rights."[14] With the legitimating support of an international phenomenon, the more activist judiciary has caused anything but concern for a newly empowered and rights-conscious citizenry. In fact, the expanded role of the judiciary seems welcome by most, even if the extent and nature of the new power is not completely understood.[15]

The post Charter years have seen the judiciary expand its role in ways so as to cause what the writer characterizes as a new interaction with the legislative branch. This newly expanded role in areas which had for the most part been left to the legislatures, manifests itself in three principal ways.[16] First, the judiciary now deals in number and breadth, with vastly new issues and subjects. Subjects which were often

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[13] Alan C. Cairns, "The Charter: an Academic (Political Science) Perspective," paper presented at the Conference on the impact of the Charter on public policy powers (York University: November 15-16, 1991): 1.

[14] Ibid.

[15] Monahan suggests that the discussions and understanding of the Supreme Court of Canada remain largely "adhoc, episodic and impressionistic." Patrick Monahan, Politics and the Constitution: the Charter, Federalism and the Supreme Court of Canada (Toronto: Carswell-Methunen, 1987), 4.

[16] Generally this expanded judicial power and role, however it is expressed, has the effect of giving the judiciary a part in the significant determination respecting the permissible scope of state power. As Monahan observes: "A constitutional decision has the potential to amend or even rewrite the ground rules for the public policy process in Canada. This is particularly the case since the enactment of the Charter in 1982, with the court now pronouncing on issues as diverse and important as abortion, Sunday closing, and the right to strike. The Court's rulings on these politically sensitive issues could force legislators and the public to rethink fundamentally their approaches to these questions." Ibid., 5.

the exclusive domain of the legislative branch are now addressed by the courts. Section 52 and the expanded interpretations of what is "justiciable", have all but assured that broadened capacity. Second, the judiciary now has expanded policy-making power arising from their chosen interpretative approaches to the Charter. In that regard, the Supreme Court of Canada has all but eliminated the presumption of constitutionality in Charter cases, it relies on the doctrine of the living tree and it has chosen to interpret Section 7 of the Charter substantively as opposed to procedurally. Third, the judiciary has permitted previously unrecognized parties to certain types of litigation to use the Charter to gain access to the courts. Thus, these groups now have "standing" and access to a new potentially active policy-making forum. It is the theme of this thesis that if in these areas the new judicial power is not acted upon with the moderation befitting the 1982 compromise, then the potential will exist for the erosion of what has been described as one of the legislative functions, the function of reflecting and preserving the uniquely constituted Canadian political culture.[17]

Despite the unifying and empowering potential of the Charter, without a proper judicial/legislative equilibrium, the danger exists that the chief impact of the Charter

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[17] The writer agrees with Patrick Monahan that it would be a fundamental error to assume that simply because the Charter is framed in the rhetoric of individualism, it is necessarily the embodiment of liberal individualism. In fact the political compromise of 1982 reflects the Canadian liberal and non-liberal value-mix by simultaneously emphasizing liberal and communitarian values. In this way, the 1982 compromise reflects one of the fundamental differences between the Canadian and American traditions. That is, "Canadian politics has always placed particular emphasis on the value of the community, in contrast to the overriding individualism of the American experience." Ibid., 13.

This writer's concern with the Charter rests largely with the Supreme Court's approach to the interpretation and application of the Charter. By using a non-interpretivist approach, the judiciary has abandoned the premises and understanding of the 1982 compromise and it now in its review of legislation, defines and resolves issues in a way that is less able (than the legislative branch) to reflect the liberal and non-liberal value-mix so typical of traditional Canadian political culture.

may be, as Peter Russell has pointed out, that it will "judicialize politics and politicize the judiciary".[18] Law and politics may truly become indistinguishable.[19] Russell's connected concern was that social and political questions may become transformed into questions which are so abstract and legally technical that the majority of the citizenry will feel unable to participate in the public debate. This could obviously have consequences for the Canadian political culture and its conduits. The technical and abstract nature of a public discourse dominated by "rights" formulations which flow primarily from judicial analysis will make the legislative branch and the attendant participation in the political process less inviting and important. In the context of such specific and abstract claims, the traditionally compromising and conciliatory nature of party politics may prove to be a distant second choice for individuals who are impatient with the trade-offs of politics.

In general, the entrenching of the Charter is causing a shift in societal orientation. Arguably, Canadian citizens now reflect a perceptively more individualistic and litigious outlook in their apparent belief that the courts are best placed to vigilantly safeguard their rights.[20] It is noteworthy that the appellation "rights" in this context is

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[18] R. Sigurdson, "Left and Right Wing Charter Phobia in Canada: A Critique of the Critics," paper delivered at the annual meetings of the Canadian Political Science Association, (University of Prince Edward Island, May 31, 1992): 1.

[19] Ibid., 15.

[20] Janet Hiebert suggests that "Canadian Political Culture has in the not so distant past been characterized by the deference accorded political institutions and by the people affected by them. For many, this trust is changing rapidly, encouraged in no small part by the Charter which invites scrutiny of legislative decisions in terms of how they might impact on individual rights. The Charter and the language of rights it has encouraged, has contributed to a growing distrust of discretionary decision making where government decisions have the effect of conflicting with a perceived right." Hiebert goes on to suggest that this distrust

sometimes extended to and/or confused with policy preferences, or as Donald Smiley stated, "claims on the state".[21] In this milieu, the Canadian citizenry seems to have become less amenable, both legally and philosophically, to the legislative compromises sometimes required to ensure the protection of collective and societal rights and interests. It is suggested that this tendency towards a new litigious and legal rights-dominated absolutism, is in part a consequence of the new and sometimes uncomfortable way the judiciary and legislative branches interact in the era of Section 52 Charter supremacy.

The subject of the Canadian Charter of Rights and Freedoms has been examined both generally and specifically in the legal and political literature. Much has been written generally about the advantages and disadvantages of an entrenched set of constitutional rights as compared to a system where legislative supremacy and the common law are dominant. The most focused discussion about entrenching or not entrenching took place in the literature that came before 1982. Ten years with the Charter has now given rise to more specific work dealing with the perceived impact, both legally and politically of the Charter. While most writers acknowledge that there has been a clear impact and even a change, few if any writers have specifically focused

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of governments and preference for courts stems from one of the assumptions that underlies "the rights are always paramount view of the Charter; namely, that judicial decisions are preferable to legislative ones because they are more objective." See: J. Hiebert, Supra 10, 2-4; See also Jeffrey Simpson, "Rights Talk: The Discourse of the 1990's", paper delivered to the conference, "The Charter: Ten Years After", May 15, 1992; see also: Jeffrey Simpson's columns in the Globe and Mail, (May 19, 20, 21, 22: 1992), A14.

[21] Supra 9, 4; In the American context it was observed that in recent years, individuals, "claim rights for themselves and leave responsiblities to governments".see also: Amitai Etzioni, The Spirit of the Community: Rights Responsibilities, and the Communitarian Agenda (New York: Crown Publishers, 1993), 4.

upon how the communitarian-collectivist flavour of our political culture may have been or will be transformed. Writers like Peter Russell and Alan Cairns have written extensively on the dramatic impact the Charter has had on political consciousness in Canada. In this way, both Russell's and Cairn's work have gone beyond the immediate analysis of specific rights disputes. Both have written about how the Charter has empowered the citizenry in a way so as to modify not only the public discourse but also the citizenry's expectations respecting legitimate political participation. Cairns has been particularly prolific in his work relating to the Charter and federalism and the impact of the Charter on constitutional politics. Russell, in addition to his continuing analysis of the judiciary, has also specifically enumerated patterns and trends of Supreme Court Charter decisions and decision making. Yet even these two writers who have so dominated many of the general themes in the literature, have spoken only indirectly about the Charter's effects on the Canadian political culture. Others like Monahan, Manfredi, Hawkins and Gold have examined particular roles of the two branches and their historic and current interaction. Still, the matter of political culture in such an examination is usually mentioned only in passing. There are others as well, many of whom have written more critically of the Charter for one reason or another. Some oppose the general notion of an entrenched Charter. Others criticize the judicial manner of interpreting the Charter (as either too timid or too bold).[22] Still others are outraged

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[22] See: David M. Beatty, Talking Heads and the Supremes: The Canadian Production of Constitutional Review, (Toronto: Carswell, 1990); see also: M. Mandell, The Charter of Rights and the Legalization of Politics, (Toronto: Wall and Thompson, 1989); Beatty and Mandell criticize the current judicial timidity in comparison with what some saw as the early activist and broad approach to interpreting Charter rights (with a view to regulating important issues of social justice). This writer takes the view that having chosen to depart from the premises and common understandings of the 1982 compromise by using an essentially non-

by specific judicial decisions. Again, none of these critics address directly, if at all, the issue of a changing Canadian political culture. Even the most fervent (and perhaps ideological) critics of the Charter have been more limited in their focus. Morton and Knopff bemoan the usurpation of the judiciary in the realm of policy-making and the potentially relativistic and libertarian basis for much of this judicial policy-making by the "court party".[23] Yet the importance of the legislative branch in the protecting and preserving of the ideologically eclectic Canadian political culture, usually goes unexamined. This thesis seeks to fill the above mentioned gap by discussing what is lost when the legislative branch is obliged to share some of its policy-making function with a more activist judiciary. This thesis will examine what is lost or changed in the Canadian political culture when a more classically-liberal, American style of rights-formulation becomes a regular basis for policy discussion and judicial interpretation. This thesis will examine the long term impact on the public discourse and legislation, if the legislative branch is not able to play its traditional role in maintaining through legislation, a balanced respect for not only the dominant liberal strain in Canadian political culture, but also those important historic touches of European conservatism and socialism.

The following five chapters will develop the theme discussed in this

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interpretivist approach, any subsequent or recent deference by the courts is largely rhetorical. The Supreme Court's early decisions still provide it the interpretative and legal tools to shape public policy.

[23] Supra 18, 14, the "court party" is a term used by Morton and Knopff to designate what they see is a loose collection of feminists, civil libertarians, environmentalists, and racial and ethnic minorities who seek to use the Charter "to advance their own narrow (special) interests over and against the wishes of the majority and its duly elected servants."

introduction. Chapter 2 will provide more background to the general characterization or definition of Canadian political culture supported by the writer. In explaining how and why Canadian political culture can be so characterized, discussion will turn to how Parliament and the legislative branch generally, has worked to play a nurturing and creative role respecting the public discourse and legislation. It is this which in part both shaped and reflected Canadian intellectual history.

Chapter 3 will examine the pre and post 1982 interaction or relationship involving the traditional and legislative branches. The principle of constitutional supremacy as outlined in Section 52 of the Charter, will be seen to have shifted the balance somewhat away from the legislative supremacy in policy-making that was still envisioned by the 1982 compromise. The chapter will address the extent to which the courts can now act in ways that the earlier relationship with the legislative branch (pre-1982) did not permit them to act and in some cases, ways in which the players behind the compromise of 1982, did not expect them to act.

Chapter 4 will discuss empirically through selected case examples and the accompanying judicial decisions, analyses and reasoning, the expanded areas of activity involving the judiciary since 1982. The cases and analysis will show how the courts have expanded the breadth and variety of the subjects they examine, their policy-making role, and their interpretation of standing and access. The discussion will reveal the real and potential effects on the public discourse, legislation and what had been a political culture tempered by collectivist and communitarian values.

Chapter 5 will briefly summarize the conclusions to be drawn from Chapter 4's

discussion of the cases. Discussion will then turn to the suggested balance that can and must be struck between the legislative and judicial branches. Examination will turn to what each branch need do to obtain this equilibrium. It will be argued that even a greater moderation will be required of the judiciary in the manner in which it uses its potential new power, if it seeks to be true to the essence of the 1982 compromise. Conversely, there will be an examination of what remedial steps the legislative branch need take to re-assert its function.

The thesis will close with some observations premised upon the view that in this era when both, internationally and domestically, entrenched protections have become a much valued safeguard for the guaranteeing of liberal-democratic freedoms, a judicial-legislative equilibrium can be found to ensure the ideal invoked by former Justice Minister Kim Campbell:

> The Charter is a unique and compelling document that not only expresses what we are but also what we aspire to be. The first ten years in the life of the Charter have I think, left little doubt that its vision cannot be fully realized unless each institution recognizes and pursues its essential function in bringing that vision to life.[24]

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[24] Supra 3.

CHAPTER 2

TRADITIONAL CANADIAN

POLITICAL CULTURE

Chapter 2

A. POLITICAL CULTURE: IS IT WORTHY OF CONCERN?

The term political culture can be a vague and malleable concept, one applied in many fields of academic examination. Broadly speaking, political culture can be defined as the attitudes and beliefs that people hold about the political system.[25] Political culture will often encompass the more ill-defined and implicit orientations of the political actors in a polity. Most writers in the field of political culture acknowledge that, like the notion of culture, political culture provides a perspective for examining a society's approach to matters political. Normally, political culture includes a common stock of knowledge about appropriate and inappropriate behaviour.[26] Political culture thus deals with a certain set of beliefs and values relating to politics. It deals with the predominant and the less dominant attitudes of the citizenry to both the political system and the general and specific political issues which arise.

The utility of the concept of "political culture" lies with the potential insight it can provide into the general attitudinal and value orientations of a polity, which in turn can be used for purposes of description and comparison. For example, cross-national comparisons can be done with other political systems and cultures.[27] In that way, the

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[25] Ronald Landes, The Canadian Polity: A Comparative Introduction (Toronto: Prentice Hall, 1987), 217.

[26] David Bell, "Political Culture in Canada," in , Canadian Politics in the 1990's 3d, ed. M.S. Whittington and G. Williams (Scarborough: Nelson, 1990), 137.

[27] Michael Whittington, "Political Culture: The Attitudinal Matrix of Polities," Approaches to Canadian Politics ed. J. Redekop, (Scarborough: Prentice Hall, 1978), 140.

notion of political culture can be used to analyze Canadian politics and the Canadian polity in comparison with the political cultures of international community.[28] Political culture thus enables one to perceive how Canada is different from other systems and in which ways the Canadian political characteristics are unique, special and perhaps worth preserving. At the same time, an examination of political culture will also permit the observer to trace the origins of any changes which one may suspect are occurring in the attitudes of citizens belonging to a particular polity. To the extent that those attitudes may be changing, the study of political culture will often permit one to see those changes reflected in institutional relationships.

Political culture can also be seen as the conglomeration of ideas and attitudes which set the parameters in which the debate over policy justification takes place.[29] It shapes the perception of politically relevant problems and further affects what people perceive are the appropriate areas of governmental and institutional action.[30] In this way political culture can both define and constrain a governments' approach to formulating a legislative solution for a politically relevant problem. Accordingly, this formal legislative solution, usually legislation, can be seen as both a product and conduit of the political culture. For, while the legislation will reflect a polity's values and beliefs, it will also in the process, depending on the manner in which solutions are formulated and defined, include, highlight, emphasize and reinforce a society's

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[28] Ibid.

[29] Supra 26, 138.

[30] Ibid.

priorization of these values, attitudes and beliefs. For instance, depending on the political culture, the legislation may reflect a varying emphasis and priority with respect to the predominance of liberal, conservative and social democratic values. The particular emphasis or mix can result in the commensurate positioning of legislative priorities that will emphasize a liberal individualism or a conservative and/or social democratic communitarian-collectivism.

The priorities and mix of these values can also be seen in the language used by the citizenry of a polity. Like legislation, a public discourse, can constitute a further manifestation of the values and attitudes that make up political culture.[31] The public discourse as a transmitter of ideas and attitudes, plays a part in re-enforcing the prevailing values that in turn perpetuate and maintain the political culture. In modern western societies, the discourse and language is not exclusively a matter of words. While words are indeed one type of symbol, public discourse will necessarily include the messages of modern media and the images of television.[32] A change in the tone of the public discourse or political communication, and a change in the control of that

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[31] David Bell suggests that political culture greatly influences public discourse. This writer would suggest that the converse holds equally true. This is especially so if one uses Bell's language-speech metaphor. Bell says that "In effect the political culture serves as the language-political discourse constitutes speech." Bell goes on to quote from Jane Jenson who developed the notion of "the universe of political discourse". Jenson writes: "What is the universe of political discourse? At its simplest it comprises beliefs about the ways politics should be conducted, the boundaries of political discussion and the kinds of conflicts resolvable through political processes...The universe of political discourse functions at any single point in time by setting boundaries to political action and by limiting the range of actors that are accorded the status of legitimate participants, the range of issues considered to be included in the realm of meaningful political debate, the policy alternative feasible for implementation, and the alliance strategies available for achieving them...within a given universe of political discourse, only certain kinds of collective identities can be forged; for more to be done, the universe itself must be challenged and changed", Supra 26, 138.

[32] Supra 9, 2.

language by different players and agencies of the political system, can reveal a great deal about the distribution and nature of political influence in that political system.[33]

When discussing political culture, whether the focus is on the societal orientation generally or the more specific areas of public discourse and legislation, what is important is what the citizens feel, think and do politically. This in turn can usually be tied to a culture's rich traditions and roots in a distant past.[34] There is little meaning to a political culture if it is considered outside the material circumstances of its birth and its development in the social arrangements that keep it alive.

B. CANADIAN POLITICAL CULTURE: HOW IS IT TO BE DESCRIBED?

The values, beliefs, and attitudes that have manifested themselves in the Canadian public discourse and legislation and which contribute to the phenomenon that is characterized as Canadian political culture, have been the subject of much examination. While most acknowledge the more obvious and fundamental political values held dear by Canadians (like popular sovereignty and the rule of law), the particular "value-mix" which constitutes Canada's political culture is often the subject of debate. Michael S. Whittington described this debate as often being a conflict between general liberal and non-liberal values.[35] Irrespective of the particular value-mix or degrees of liberal or non-liberal values present in Canadian political culture, it

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[33] Supra 25, 43.

[34] Supra 9, 4-9.

[35] Supra 27.

is agreed that this conflict is fundamentally about the distinctions which separate the differing traditions of the United States and the United Kingdom.[36] In its most extreme and sometimes undiluted description, liberalism in this discussion is seen as standing for a commitment to individualism, to individual as opposed to collective or group rights, the principles of privately owned property and to economic free enterprise and capitalism.[37] Socialism, by contrast is seen as standing for a commitment to collectivism, economic equality, social and economic planning and a general acquiescence to a larger role for government in the planning of the social and economic pre-occupations of the citizenry.[38] Ever-present as well in this discussion is the inclusion of the tory element which has in the Canadian context offered an emphasis on the ordering and organic aspects of the community, that accepted to some extent the notions of prescription, elitism, inequality, and hierarchy. The degree to which these liberal, collectivist and communitarian values are seen by an observer to mix and manifest themselves, to a large extent depends upon the manner in which Canadian intellectual and ideological history is interpreted and characterized. There have been theoretical approaches ranging from the concepts of "founding fragments" to "formative events". Somewhere in between these approaches lies what the writer believes is common ground. This position provides a more measured and likely explanation for what constitutes Canadian political culture and why it remains so ideologically eclectic.

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[36] Ibid., 143.

[37] Ibid.

[38] Ibid.

The theorist Louis Hartz put forth an analysis using an explanatory technique (the fragment theory) that helps explain the ideological background of new societies. His approach was to analyze new societies founded by Europeans. Societies like Canada and the United States were studied as fragments thrown off from Europe.[39] Others like Gad Horowitz shared with Hartz this belief that to understand the ideological development and intellectual history of new societies, it would be necessary to examine the point of departure from Europe.[40] In this regard, the founders of the new society are not seen as representatives of the mother country but rather as only a fragment of that country. Hartz argued that these new societies develop a political culture that reflects the values and beliefs of the groups that were dominant during that "founding period". Hartz believed that these "founders" are able to dominate the political culture of the new society by establishing institutions and myths that add to the values and beliefs a certain nationalistic flavour which makes membership in the nation contingent upon accepting the dominant ideology.[41] Using the "founding fragment" framework, Hartz and his Canadian surrogate Kenneth McRae would seem to emphasize the American liberal strain as dominant in English Canada. The non-liberal strains in the fragment were minimized as minor deviations from the American

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[39] L. Hartz, The Founding of New Societies, (New York: Harcourt Brace, 1964); see also: Supra 26, 147.

[40] G. Horowitz, "Notes on Conservatism, Liberalism and Socialism in Canada," Canadian Journal of Political Science, (June 1978), 383-99; see also: I. Stewart, "Putting Humpty Dumpty Together: The Study of Canadian Political Culture" Canadian Politics: An Introduction to the Discipline eds. in A.G. Gagnon and J. P. Bickerton, (Petersborough: Broadview Press, 1990),91-100; see also: Supra 26, 147-152.

[41] Supra 26, 147.

experience.

Hartz was therefore saying that the ideological character of the founding fragment, established the basic tint of the political culture. It could be said that the individuals who settled the United States were liberal capitalists or amenable to such a perspective and thus the political culture of that society has consistently reflected that liberal capitalist outlook.

Seymour Martin Lipset disagrees with Hartz's view that societies bear forever the cultural marks of their birth. For Lipset, cultural inheritance is less significant than the experiences that a society undergoes. Indeed, he suggests that one can identify certain "formative events" in the history of a country that help share or mould its values and consequently impose a lasting impression upon its institutional practices. When Lipset applies his formative events theory to Canada, he finds that he shares with Hartz an emphasis on the Loyalists. For Lipset the most important formative event in Canada was the "counter-revolution" and the subsequent migration north of the Loyalists, an event that he believes was as important for Canada as was the American Revolution in the United States.[42]

Both Hartz's "fragment theory" and Lipset's "formative events" theory focus upon the Loyalist experience as a major source of English Canada's political culture. As a result, much of their discussion turns on the issue of defining the tory ideological outlook of the Loyalists and the extent to which they present an organic conservative

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[42] S.M. Lipset, "Revolution and Counter-revolution: The United States and Canada," in O.M. Kruhlak, R Shult and S.I. Pobihushchy (eds.) The Canadian Political Process: A Reader (Toronto: Holt, Rinehart and Winston), 13-38; see also: S.M. Lipsett, Continental Divide: the Values and Institutions of the United States and Canada, (New York: Rautledge, Chapman and Hall, 1991), 10-13.

world view as an alternative to the view of the liberals and the revolutionaries in the newly independent United States.[43] For his part, Gad Horowitz observed the Canadian political culture to be predominantly liberal but with a significant tory touch. He also saw a strain of socialism which he said emerged from the dialectical interaction between liberalism and toryism. Horowitz believed that the ideological strains have to some extent all been manifested in the ideologies of Canada's major three political parties.

Horowitz like Hartz and Lipset perceived Canada as being a more elitist, prescriptive and collectivist country than the United States. Horowitz talks specifically of this "Tory Touch" which implies that Canada has adopted from European conservatism a system which permits or tolerates a certain amount of intervention by the state in many aspects of societal life. As a consequence, Horowitz went on to suggest that our executive dominated system has blended well within a certain "deferential hierarchy" with which Canadians had traditionally felt very much at ease.[44]

Adopting portions from both Hartz and Horowitz, William Christian and Colin Campbell provide an interpretation and characterization of Canadian political culture to which the writer largely subscribes. It is a view which accounts for many of the elements discussed by the other theorists, and at the same time addresses what seems

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[43] Supra 26, 147-148.

[44] Stewart, Supra 40, 97; See also: G.T. Stewart, The Origins of Canadian Politics: A Comparative Approach (Vancouver: University of British Columbia Press, 1986), 23.

to be a uniquely Canadian ideological openness. It is their argument that:

> ...Contemporary Canadian ideologies cannot be properly understood without considering their European origins. Two facts stand out. First, the Canadian ideological structure contains the same elements as the European, but the balance among liberalism, toryism and socialism is strongly in favour of liberalism in this country. Most of the immigration to Canada from Britain took place after liberal ideas had risen to considerable prominence there. However, the pattern of immigration in the 19th century helped to re-enforce the ideological structure that had early been established in Canada. On balance, those who were inclined more towards toryism found a more congenial atmosphere in Canada, although those more liberal preferred the United States. Nonetheless, most immigrants who came to Canada in the late 18th and 19th centuries accepted important elements of liberalism. Second, although Canada is the product of a European culture, the ideas brought back by the settlers were modified in the course of their encounter with their new conditions.[45]

As was mentioned in the introduction, there has been a continuity in the balancing and mixing of these liberal and non-liberal ideologies rendered possible by the institutional structures and the electorally successful political parties. Moreover, Christian and Campbell suggest that the important restraining ideologies of European conservatism and socialism, in part explain the sympathy for group interests in Canada. While Christian and Campbell agreed with Hartz that it was characteristic of fragment societies to be intolerant of other ideologies, Christian and Campbell could not accept that Canada was a fragment society. Rather they thought Canada exhibited the ideological diversity of European societies but with a more liberal cast. They believed

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[45] Supra 5, 281.

that with diversity can come tolerance. This tolerance and openness was required of a citizenry and government that realized that such diverse peoples needed to live with and listen to "the other voices in the ideological conversation".[46] In this regard the political process had political parties that were seen to provide an ongoing flexibility enabling them to adapt to and accept the modifications required of their ideologies. For example, Canadian liberalism in the wake of the 1919 convention, adapted itself to a new form of liberalism suggested in Britain by Hobhouse and Green; a move which ushered in the 20th century form of welfare liberalism. For its part, the Conservative party building upon certain loyalist influences, accepted the direction followed by the British conservative party and Benjamin Disraeli in the 19th century. That conservatism later faded to represent a brand of business liberalism that was later and further influenced by the new conservatism of Ronald Reagan and George Bush. The socialists for their part were required to remain receptive to influences which flowed from religious, Marxist, central European and British sources. That socialism in turn developed over time to emphasize certain populist and then social democratic strains. Christian and Campbell suggested that the ideological diversity and the apparent adaptability of the political parties, represented a continuing and central theme symbolic of much of Canadian history. The theme was "the assertion and survival of a distinctive Canadian identity in North America".[47]

This thesis follows the view held by Christian and Campbell that one of the

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[46] Ibid., 283.

[47] Ibid., 287.

important marks of distinction delimiting the Canadian identity in North America, is the manner in which the influence of the liberal individualism of American society was restrained and tempered in this ideologically open and eclectic mix. This occurred as a result of a particularly Canadian emphasis on an "over-arching social order". In this regard, Canada's political culture included a political discourse and legislation which sponsored:

> An order imposed and achieved through the collectivity, and an order based on an explicit recognition of the value of the whole, whether nation, region or community. In toryism, this concept of order took a more traditional and hierarchial form; in socialism, an egalitarian cast; in nationalism, it looked to a linguistic or ethnic basis. In all three cases, there existed a division of a society ordered by imperatives beyond the sum of the desires of its individual members.[48]

While this peculiarly Canadian appreciation for the communitarian and collectivist values can be accounted for in part by reference to both the tory and socialist forces of Canadian history, it is the Burkean conservative orientation (as initially found in Loyalist settlement) that is most instructive in explaining why, prior to 1982, an entrenched Charter had such trouble in taking hold. Again, it is the loyalist settlement which provides some clues and explanation. It was a settlement whose approach to rights protection flowed more naturally from Burke than Locke. As R.I. Cheffins noted:

> Canada has a much more distinctly European flavour than the United States. Its thinking goes much more to the great philosopher, Edmund Burke then to another great

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[48] Ibid., 287.

> philosopher, John Locke. Locke emphasized the individual, Burke emphasized the community.[49]

By examining and understanding the Canadian fragment of Burkean conservatism, one is better able to understand why there was such a delay even a reluctance, in the adoption of an entrenched Charter. Perhaps more importantly, such an examination offers an insight into why the 1982 compromise necessarily included safeguards and guarantees for the continued supremacy of the legislative branch as a chief policy-maker.

C. THE CANADIAN FRAGMENT OF BURKEAN CONSERVATISM

The loyalist settlement possessed characteristics and beliefs which did indeed reflect a tory inclination and a particular Burkean world view. It cannot however be proven, nor is it contended that there was strictly and only the presence of tory beliefs amongst the Loyalists or even that this tory streak survived undisturbed.[50] Nonetheless, whether one views the Loyalists as primarily a bourgeois fragment only tinged with toryism or a settlement rather more heavily informed by the "tory touch", the Burkean perspective that was present would seem to explain some of the attitudes

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[49] R.I. Cheffins and Johnson, P.A., The Revised Canadian Constitution: Politics and the Law, (Toronto: McGraw-Hill Ryerson, 1986), 151; Peter Russell suggests that this view to a large extent carried over to the "Fathers of Confederation" who Russell says "had they been asked to name a philosophical patron saint it would surely have been Edmunde Burke not John Locke" In the context of our most recent constitutional crisis, Russell goes on to suggest "Canadians now are basically Lockean, not Burkean, in their constitutional aspirations...Ironically, having become one of the world's oldest constitutional democracies largely on Burkean terms, Canadians must now find out whether they are capable of re-establishing their country on the basis of the Lockean social contract." P. Russell, Constitutional Odyssey: Can Canadians be a Sovereign People? (Toronto: University of Toronto Press, 1992), 10, 11.

[50] Stewart, Supra 40, 98.

reflected in the important political institutions and the resulting approach of these institutions to rights protection.[51]

In even a brief description of Burkean conservatism, it is necessary to understand that Edmund Burke wrote largely in response to the excesses of rationalism. The rationalists coming out of the enlightenment were a diverse group indeed, but generally and in common, they believed that the essential laws governing both human affairs and natural sciences were few, simple, clear and verifiable by reason or science. Their's was an absolute faith in reason and man's supreme ability to exercise it in obtaining truth in all areas of human knowledge. These rationalists linked this liberated reason to a method for creating rational principles which were seen as a means to material and scientific progress. Reason and speculation became the accepted guarantees by which a new perfected reality might be obtained. Not surprisingly, such optimism respecting the limitless potential of man and reason led to a rise in reformist and revolutionary political theory based upon abstract principles of science, reason and philosophy. This inevitably led to a situation where liberal rationalists utilized these abstract principles to criticize otherwise traditional social orders, whose roots and historical background were neither scientific nor rational.[52]

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[51] Reginald Whitaker, "Images of the State in Canada", in The Canadian State: Political Economy and Political Power, ed. Leo Panitch (Toronto: University of Toronto Press, 1977), 32-38.

[52] James L. Wiser, Political Philosophy: A History of the Search for Order, (Englewood Cliffs: Prentice-Hall, 1983) 273-287; Michael Curtis, ed., The Great Political Theories v. 2 (New York: Avon Books, 1981), 48-75; Appreciation is owed to I. Restall BA, LLB, BCL (Oxon), from whom an elaboration of the Burkean theme was drawn; see also: Edmunde Burke, "Reflections on the French Revolution and A Letter to a Noble Lord", The Harvard Classics. ed., Charles W. Eliot (Danbury: Grolier Enterprise Corporation, 1980), 141-420.

Edmund Burke wrote largely to refute this enlightenment rationalism. The basis of much of his perspective was theological. Burke believed that a higher moral order was to be the foundation and framework for society and its politics. The content of that moral order was revealed by the scriptures and man's nature (which was formed by God). Burke believed that the essential principles upon which man's nature was based were secreted throughout history. His was a more subtle conception of the application of metaphysical laws or principles to society. He realized that there was a necessity for mediating even the higher moral order with a concrete reality when making political judgments. Burke was clearly aware not only of the importance of moral necessity and principle in human existence, but also of the requirement for acknowledging a vast area of contingency and mutability in that experience. Burke recognized the value of unique and circumstantial adjustments to general natural laws. In contrast to the rationalist affirmation of universal principles, he emphasized the value of the circumstantial, historical and idiographic.

Burke had a definite vision of an ordered society. He believed that the leaders of a society should be the natural aristocracy. That is, those by birth and breeding who possessed sufficient wisdom and virtue, would act for the common good and according to their natural moral inclinations and reason. This aristocracy would be able to perceive the circumstantial means of realizing the moral order in society. Although the natural aristocracy was to employ its reason to direct society, Burke had a far different concept of the role of reason than that of the rationalists. For Burke, reason was not to be employed for wholesale societal renovation according to single principles. Rather,

reason was to be applied cautiously in view of various factors including the moral order, as revealed by history and tradition and with an appreciation of the complexity of the particular society. Burke had a great distrust in man's capacity to reason. He conceded that it was an imperfect but passable instrument for the interpretation of the moral order. However, unlike enlightenment rationalists, he believed reason was not to be used to create universal principles for a homogenous new moral order, but simply to interpret the divinely created one which could be perceived from man's natural moral inclinations, history and traditions.[53]

Consequently, Burke's view of civil liberties and entrenched rights seems to be consistent with his general perspective.[54] He was sceptical of man's ability to discern "rights" accurately through the faculty of reason. Further, he was of the view that rights are incapable of a generic definition because they do not exist independently of circumstances. What may be a right on one occasion and for one man may be unjust folly for another man at a different time. Burke's opposition to rationalist rights was further crystallized due to the consequences he saw for the community, the security of which in his view, had as much importance as the rights of any individual.

Burke, sought and valued constitutional arrangements which would harmonize with the social structure of a country. It was in that harmony that the "hidden wisdom" of the forefathers would be brought to full consciousness through the nation's social and

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[53] Russell, Supra 49, 10.

[54] "Burke believed in the real rights and obligations which grow out of the social conventions and understandings that hold society together." Supra 49, 10.

political institutions. Such harmony was the surest manner of protecting both community and individual rights. For Burke, the important rights and liberties would best be protected within the framework of a country's inheritance:

> We wished at the Revolution and do now wish, to derive all we possess as an inheritance from our forefathers. Upon that body and stock of inheritance we have taken care not to inoculate any scion alien to the nature of the original plant. All the reformations we have proceeded upon the principle of reverence to antiquity; and I hope nay I am persuaded, that will be carefully formed upon analogical precedent, authority, and example.[55]

Burke's preference was for a framework of rights and liberties bound to experience and tradition. He was skeptical of man's ability to fashion rights through the use of his unaided intellect, unbound by his nation's particular history.

Thus, one can perceive in the Burkean perspective certain elements that can be contrasted to liberal rationalism. There are five key elements in Burke's philosophy: 1) a respect for order and hierarchical structures in society; 2) a profound appreciation of the role of tradition, history and religion in society; 3) a sense of societal caution; 4) a concern for the health of the community over individual liberties (though it should be indicated that Burke was nevertheless a Whig commercialist); 5) an antipathy to universal rights with a corresponding respect for the circumstantial and idiographic.

Burkean perspective must be remembered when considering the Loyalists. They retained a belief in societal order and property. They were apprehensive of the implications of republican democracy. Many of these Loyalists wanted to retain their

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[55] Supra 52, 53. See Curtis quoting from Burke's "Reflections on the Revolution in France".

uniqueness and traditional lifestyle in a new land. Consequently, they were sceptical of and demonstrated caution about with respect to enlightenment rationalism and Lockean principles of individual equality. They feared doctrines which would leave their communities open to majoritarian aggression and other homogenizing influences. In fact, many of these Loyalists had a deep sense of history and they therefore had a faith in the historic institution of Parliament and its inherent right to supremacy. William Christian and Colin Campbell suggested that:

> Unlike the British immigrants to the United States in the 16th and the 17th centuries, those who settled in British North America were not a persecuted and dissenting liberal minority. They reflected more fully the powerful Tory or conservative strain in British political culture. Many were catholic Scotts and Irish, bearing a faith that was fundamentally hostile to liberal individualism.[56]

Such a Burkean tory perspective still seemed present in Canada until 1982, even if so in greater or lesser degrees. In fact, the Constitutional Act of 1867 itself asserted the values of "peace, order and good government" as opposed to the liberal guarantees of "life, liberty and pursuit of happiness". In a similar vein, that 1867 Constitution acknowledged and endorsed a constitutional monarchy, a propertied upper house, and a set of protections for minority religions.[57] It is the position of this thesis that, more recently, the compromise which was the Constitutional Act, 1982 embodied provisions which recognized the role of the legislative branch as the final arbiter in allocating

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[56] Supra 45, 282.

[57] Kathy Brock, "Polishing The Halls of Justice: A Political Analysis of Sections 24(2) and 8 of the Charter of Rights," National Journal of Constitutional Law 2, no. 3 (March, 1993), 279.

liberal and communitarian rights and values.[58] Such a view, even with its new constitutional constraints, harkened to a Burkean preference for legislative supremacy.

In summary, the Burkean perspective, which was present in the Loyalist settlement and which seemed to remain at play in many of Canada's constitutional and institutional arrangements, did not subscribe to the liberal view of rights protection which envisioned a society that was more atomistic than collective or organic. Similarly it was a perspective and political culture which did not accept the belief that a Charter of enumerated rights was required to give expression to a "distrust of government by removing areas from its sphere of action and influence". [59] Such a distrust of government in Canada (as will be shown), was quite simply never the norm.

D. THE TRADITIONAL CANADIAN POLITICAL CULTURE, ITS LEGISLATION AND PUBLIC DISCOURSE

Thus far, the chapter has briefly examined the general concept of political culture, and some of the historical explanations which account for Canada's unique and ideologically open political culture. It was a political culture which up to 1982, saw this ideological openness sufficiently well protected and preserved by an approach to rights protection which was decidedly non-rationalist and certainly less obsessed with "individual rights" than was the focus in the United States. One can conclude that the

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[58] Supra 15, 19.

[59] Supra 57, 18.

way in which the predominantly liberal values mixed with the historically rooted conservative and socialist values, resulted in Canada developing a distinctive appreciation for collective rights. While this political culture in no way caused Canadians to casually devalue individual liberty or common notions of democratic freedom, such a history and political culture did produce a reluctance to protect those rights in a more typically American manner; that is, through the liberal-rationalist approach of entrenching certain and specified rights. Instead, up to 1982 such a liberal regime with the corresponding increased role of the judiciary was not fully accepted, partly because of what the writer suggests was a Burkean conservative fragment which was reflected in our systemic and cultural approach to rights protection. Up to 1982 that fragment continued to ensure the preference for the maintenance and nurturing of these individual and collective rights under the auspices of a legislative branch that was supreme. The legislation that was produced and the language that was used in the political process, was such so as to perpetuate the important balancing of collective and individual rights. It kept alive and affirmed many of the cultural traits of the Canadian political culture that distinguished Canada from the U.S.[60]

The role of the state in Canada had always been more activist than that of the United States. The States' legitimacy to act in ways that may have impinged on or restricted certain freedoms, led to a comparatively more deferential posture on the part of the citizenry towards legislation than was the case in the United States. In that

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[60] Supra 15, 13. Repeating Monahan's description, it was legislation that acknowledged that state intervention can often serve as a means of enhancing individual freedom.

respect, Canadians developed over time a more palpable deference toward the legislative branch and, by extension, a greater respect for the legislative product. Guy Rocher suggests that there is "some ground to assert that law can be regarded as both a reflection of and an active agent in the structure and evolution of a society and its culture".[61]

He goes on to suggest that there is a fundamental difference between the sociological function of law in Canada and the United States:

> Throughout the history of the United States, the common law and the courts have been perceived and used as a check on the power of the state. American jurisprudence reflects a concern for liberating governmental corrosion of her individuals. In Canada, the courts have been closely identified with the State, and perceived as the arm of the State.[62]

Seymour Lipset also sees these differences as being linked to the differing historical emphasis placed in Canada on the rights and obligations of the community in comparison to that of the United States.[63] Traditionally, the Canadian government had used the legitimate power of the State in law and legislation, more than had the American. Whether this legal power was for the purposes of a noble public welfare objective or merely for the purposes of crime control, the legislative branch in Canada had traditionally been more willing and more able to use its law-making power and its supremacy over the judiciary, to shape a society that was unique from the one south of

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[61] Continental Divide, Supra 42, 92.

[62] Ibid., 93.

[63] Ibid., 93.

the border.[64] Until 1982, Canadians did not experience to the same degree of what Seymour Lipset acknowledged were the "rights dominated" legal challenges present in the United States, an inherent part of a system "in which egalitarism is strongly valued and diffuse elitism is lacking."[65]

In the Canadian experience, legislation can on the one hand be seen as a product of the political process. It is in that sense, the practical exercise of power by differing ideological parties, trying to produce or broker differing ideological positions by representative legislative debate and compromise. On the other hand, legislation in the Canadian context can also be seen to have been a tool of a legitimated and active state. In this sense, while the legislation was ideologically representative and reflective of the varying strains, it also had the uplifting effect of nurturing, bolstering and altering habits, dispositions and values on a broad scale.[66] Such legislation held out the prospect of realizing the expressive function of the law which involves the expression, instruction and reaffirmation of certain values and ideas.

The values that have been traditionally maintained, nurtured and preserved through Canadian legislation, were not only the predominate liberal values but also those collectivist and communitarian values that tempered liberal individualism. Such laws necessarily contemplated the technical and sometimes not so technical infringement of individual liberty in the pursuit of a commitment to a larger community.

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[64] Ibid., 94.

[65] Ibid., 94.

[66] See the discussion of "public philosophy" and the connected role of the state in G.F. Will, Statecraft as Soulcraft: What Government Does, (New York: Simon and Schuster, 1983), 19.

This legislation worked to perpetuate the indigenous Canadian concern for the community. It also had the effect of causing the citizens to perceive problems along political lines. That is, they saw problems that could be resolved through political compromise and consensus. Such a political conception of the issues, inevitably considered the element of "community", which in turn was anticipated to be part of any possible legislative solution. This community concern was typically presented in legislative solutions which offered a commensurate balancing of rights and responsibilities. Monahan provides an explanation that seems to approximate the Canadian experience:

> Within collectivism, individuals are constituted by a membership in an organic community. Society is primarily a community of hierarchialy organized classes or groups, rather than an association of antecedently free individuals. The good of the individual is not conceivable apart from some regard for the good of the whole. Thus, restraints on individuals are natural rather than contractual, pulling from the very duties and rights which are implicit in membership in a larger community.[67]

While the legislation of this traditional Canadian political culture ensured the formal legal expression of the less dominant tory and socialist strains, the language, rhetoric and discourse of the Canadian citizenry remained similarly imbued with this same value-mix. Patrick Macklem was addressing this point when he observed:

> It is common place to see Canadian social and political life as being informed by competing ideologies. Toryism, liberalism, and socialism are familiar names in the history of Canadian political thought. Each generates a descriptive and prescriptive picture of social and political

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[67] Supra 15, 92.

> life and each can be said to offer different ways of reconciling individuality and community. These pictures of reconciliation are painted by language and their complex relation gives meaning to our social and political institutions as well as our daily interaction with others. Through the rhetoric of each, we make sense of our surroundings and enter into a universe of common discourse.[68]

The language and rhetoric of the traditional Canadian political culture had reconciled individuality and community with a discourse that reflected the deference towards a state which acknowledged through its legislation the need to occasionally place a greater emphasis on collective rather than individual rights. The tone of the discourse was consequently more restrained and respectful, in keeping perhaps with the language and posture used to deal with a legitimate government whose laws when necessary, asserted the right of the community to restrain individual rights and freedoms in the name of the common good. Although there was equal rhetorical attention paid to the individual and his freedoms, that discourse was nonetheless not dominated by an individual "rights talk".[69]

In the post-1982 period, the perspective is that "rights must be paramount". This view seems to be an underlying assumption in the citizens' discourse and in their views

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[68] P. Macklem "Constitutional Ideologies," Ottawa Law Review 20, no.1 (1988): 122.

[69] Hiebert, Supra 10, 2-4; see also: M. Gold, "The Rhetoric of Rights: The Supreme Court and The Charter," Osgoode Hall Law Journal 25 no. 2 (1987): 398, "The Court clearly has based its jurisprudence on the proposition that the interpretation that best promotes rights is the one to be preferred. Informing this jurisprudence is a highly individualistic, almost classical liberal vision of the Charter and Canadian society." This vision has most recently been personified in the roles played by Newfoundland Premier, Clyde Wells and Manitoba Liberal Party Leader, Sharon Carstairs, in their respective opposition to constitutional proposals entrenching chosen collective rights."

of Canadian politics and constitutional litigation.[70] There is an accompanying sense of empowerment on the part of many citizens who, while perhaps not consciously complaining about an activist and ideologically open government, nonetheless now by virtue of their rights-driven legal challenges, invite and validate the courts to deal with matters previously left to the politically-rooted legislative branch. As will be seen at the conclusion of this chapter and in chapters 3 and 4, this new activist judiciary is using an interpretive approach which provides it increasing power to define political issues in a narrowly legalistic way. This thereby changes the parameters of the public debate and in the process, the judiciary reshapes the ways citizens perceive political problems. The technical and abstract nature of these rights and the manner in which the challenges and ultimately the "rights" are formulated, flow primarily from judicial analyses which make the legislative branch and the attendant participation in the political process, less inviting and important. As was mentioned at the beginning of this chapter, this in turn can affect what the citizens of a political culture perceive are the appropriate areas of governmental and institutional action.

E. WHAT IS POTENTIALLY LOST OR CHANGED IN THE TRADITIONAL CANADIAN POLITICAL CULTURE WITH THE POST-1982 JUDICIAL-LEGISLATIVE RELATIONSHIP?

Leaving aside the question that will be addressed in Chapter 3 (whether the

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[70] Supra 3, "To some degree, I think these fears have been realized, and that some of the same trends seem to be manifesting themselves in this country. We, too, have become an increasingly litigious and confrontational society and I fear that some of our citizens have begun to look to courts - rather than to Parliament and legislatures - as agents of political and social change."

political compromise of 1982 contemplated, anticipated and even allowed for the number of rights-driven challenges to legislation and the accompanying expansion by the judiciary of their judicial sphere of influence), the changes that are currently being occasioned by this new judicial-legislative institutional interaction do indeed pose a threat to the traditional Canadian political culture. In a Canadian Parliamentary system with a less potent legislative branch, the ideological openness and the tempering communitarian-collectivist influences may come to be increasingly less visible and less prominent in the legislative and political outcomes. Instead, these outcomes will be more regularly produced by a sharing of the policy-shaping power between the legislative and judicial branches regulated by members of the citizenry who will have adopted a rights-driven public discourse and vision.

It can be argued that much of the ideological openness and diversity in Canada was fostered via the political conduit that is the Parliamentary system. It was a forum, notwithstanding its imperfections, which permitted the less dominant ideological strains to remain influential in the formulation of public policy. The national political parties participated in this system and they remained adaptive to and representative of their foundation ideologies and their particular connections to the Canadian past.

> ...in all cases there has been an inescapable element of continuity, provided in the case of liberalism, conservatism and socialism by the institutional structures of major and electorally successful political parties. However radical the leaders of these parties might have wished, on occasion, to depart from the settled traditions of their predecessors, they have found themselves restrained by the need to retain the support of their colleagues, to encourage the enthusiasm of their party activist, and to seek the

> broad support of a populous that has never been united in the belief that major, radical changes were needed.[71]

The organized and channelled expression of different but representative political views within the context of party and legislative debate encouraged the process of compromise that often carried over to and resulted in the Canadian legislation earlier described. The nature of the political and legislative solutions allowed for a more subtle inclusion and expression of both the liberal and non-liberal values. In this era of the Charter, there are concerns that the self-perpetuating language of "rights" and the increased judicial power to review legislation and make policy will discourage such subtlety and instead "encourage confrontations of black and white, subordinating the shades of grey in between."[72] The shades of gray or voices that may be less considered or lost in such confrontations, are those communitarian-collectivist elements which had been best protected and considered by elected legislatures.

As the principal policy-making institution, the legislative branch had offered a forum in which its elected participants utilized key political instruments and tools with a view to broadening and retaining support. At the same time, they were faithfully acting pursuant to settled national and cultural traditions. The tools and instruments which facilitated this legislative function, were in many respects the stock and trade of the political process. These were the tools of negotiation, persuasion, bargaining and compromise; tools that are now seldom accessible to litigants disputing Charter rights.

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[71] Supra 5, 4.

[72] F.L. Morton and R. Knopff, Charter Politics (Scarborough: Nelson, 1992), 221.

These tools are similarly unavailable to a judge, whose difficult process of justifying his legal decision by reference to reason, will often demonstrate in that stark result, that legal adjudication is not always appropriate for problems that are better resolved by accommodation. These legislative results and brokered solutions are usually premised upon the types of compromises that are excluded from the more black and white process of rights litigation. [73]

Peter Russell has stated that increased judicial review and judicial policy-making could lead to litigation the sort of which will exacerbate the tendency to rely on strictly legal or legally reasoned solutions to social and political problems. In addition to institutional unbalance, this type of judicial policy-making if not moderate, can lead to a predominant legal absolutism where "the issues are narrow, simplified and framed as

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[73] The inadequacy of the foundation upon which judicial determinations are made respecting complex political and social problems, relates to the necessarily subjective and individualistic manner with which trial counsel and the trial judge at first instance, adduce or allow some evidence over other evidence. Factual and legal findings may be made based upon evidence which is as much the product of trial strategy as a substantive search for broad based information. Conversely the more general and wide ranging historical sociological and/or political information that is increasingly being accepted by the appellate courts, may be similarly unreliable. Either way the judiciary cannot be said to be provided the type of information experience, characteristic of the legislative committee. See M.L. Pilkington "Equipping Courts To Handle Constitutional Issues: The Adequacy of The Adversary System And Its Techniques Of Proof," paper presented to the special lectures of the Law Society of Upper Canada (Ottawa, Ontario: September 1991). Respecting the Brandeis Brief, Pilkington says, "Judges cannot be expected to evaluate, or have the expertise to evaluate, without assistance, the validity of research methods used or inferences drawn there from on a broad range of social policy issues. When they are presented with voluminous "Brandeis briefs" consisting of government reports, studies undertaken by various advocacy groups, and articles in academic and professional journals, when such briefs are separately filed by various parties who provide little assessment of each other's material, the court is essentially provided with material from which it can pick and choose to support a particular position, but which does not necessarily assist the court to choose between competing positions. A Brandeis Brief may be sufficient if the issue to be determined is whether there is a rational basis for a legislative choice, but if the choice itself and its impact must be assessed, such brief may be of limited assistance." Pilkington goes on to quote Justice Estey in R v Mercure [1988] 1 S.C.R. 234 at 321: "The courts, and particularly those at the second level of appeal, are neither qualified nor authorized to conduct a trial of historical issues. Texts and essays on local history do not always agree. Some will be factual, some speculative and even designedly controversial. There is rarely unanimity. Migratory history and demographic material concerning these frontier times are in my view, even if properly admissible at this stage, seldom precise. Without the admission of this material through the conventional processes of justice, the reliability of such material is not demonstrated."

polar opposites, so that in a classic zero-sum fashion, what one side wins the other side loses."[74]

If the judiciary, (by virtue of an increased policy-making power, drawn from the Charter's supremacy and the judiciary's own interpretative technique), more regularly defines the parameters of public debate, there may indeed be an understandable flight from what will then, the less potent and influential processes of politics. Such a flight from the consensus engendering political process may be an acknowledgement of the power that Patrick Monahan now sees as resting with the Supreme Court. Despite what Monahan sees as attempts by the Supreme Court of Canada to maintain the legitimacy of its reviewing function by trying to divorce a legal analysis from the political, he nonetheless concludes:

> The Supreme Court is inevitably called upon to make some assessment of the wisdom of legislation in order to resolve the constitutional disputes which come before it. The values embodied in the constitutional text are simply too general and indeterminate to dictate uniquely correct answers in the constitutional cases which reach our highest court. Thus, the act of interpreting constitutional values inevitably requires the court to redefine and to create the very values which are the subject of the interpretation. [75]

With such apparent power respecting the interpretation of some of these values, is it surprising that such power-sharing has left the legislative branch less potent and influential? Is it surprising that the function it performed in preserving the political culture is now less clear and certain? Is it surprising that Russell's initial prediction

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[74] Supra 72, 222.

[75] Supra 15, 8.

respecting the flight from politics is perhaps coming to pass?

Russell predicted this shift from politics, one that would also come from a deepening disillusionment with the procedures of "representative government by discussion", as a means of resolving fundamental questions of political justice.[76] It is this flight from politics and the seemingly less used tools of compromise and negotiation, that causes Christopher Manfredi to worry that this new reliance on the private processes of litigation, is threatening to both exacerbate social conflict and enervate the public discussion of important political questions.[77]

Manfredi highlights in his argument the concern of communitarians, who see the current interpretation and application of the Charter as embodying "an antiquated and morally bankrupt political theory of individualism that ignores the reality that society comprises a thick web of interdependent relations." It would seem that the trend on the part of the judiciary "to fail to find any coherent political theory in the Charter at all" or the tendency to "argue that whatever theory it does contain provides inadequate answers to contemporary social problems", simply justifies and perpetuates an active departure from the clearly explained and accessible premises and common understandings of the 1982 compromise.[78]

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[76] P. Russell, "The Effect of a Charter on The Policy-Making Role of Canadian Courts," Canadian Public Administration 25, no. 1 (1982): 15, 32.

[77] C. Manfredi, Judicial Power and the Charter (Toronto: McClelland and Stewart, 1993), 11.

[78] Ibid., 10. Manfredi describes those who passionately support constitutional review of legislation by the courts. They see such review as providing a means for attaining social and specific policy change for those who have traditionally not had much influence. Dale Gibson argues that "the shifting winds of social, political and technological change" can create an important need and demand for legal and political reform. In Gibson's view, the task of finding coherence in the Charter and "the demanding task of putting legal meat on the Charter's bones, is the sole responsibility of judicial law makers." Gibson's view is the "results

In this environment, the most apparent concern for group or collective interests, comes in the form of self-interested pressure group, who are mobilized by shared goals relating not to the "thick web of interdependent relations", but rather by what Smiley called "claims on the state." Mallory has also observed:

> ...the Charter is opening up the political system to new political strategies by interest groups, particularly through the strengthened role of advocacy public interest groups, which are in many cases assisted by public finding. The political climate has already experienced a change in both rhetoric and vocabulary. Before 1945, the vocabulary of rights was still largely in terms of the essentially negative individual rights. Today it is more common to talk of groups -----native peoples, the handicapped, linguistic groups et al....[79]

It has been argued that a more prudent and restrained approach on the part of the judiciary could have left the matter of policy to the legislators and permitted, under a federal system, a variety of laws "representing different kinds of social consensus in

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orientated view of the judicial social engineering school". It is a view which sees the Charter requiring socially meaningful development. As Manfredi quotes Gibson, it is a view that sees legislators as having "only a limited capacity to meet this demand because of time constraints, the absence of adequate incentives, and a lack of legal expertise."

[79] J. Mallory "The Courts As Arbiters of Social Values" in Federalism and Political Community: Essays in Honour of Donald Smiley, eds. D. Shugarman and R. Whitaker (Peterborough: Broadview Press, 1989), 291. See also: A.C. Cairns, Disruptions: Constitutional Struggles From the Charter to Meech Lake, ed. D.E.Williams (Toronto: McClelland and Stewart, 1991), 20. This mobilization and atomization of collectivities and groups (around their own specific causes as opposed to any mobilization around the more general understanding of "community") is evidenced in the contemporary debate respecting "inclusion" and "exclusion". Under the Charter, Cairns notes: "a positive self-consciousness developed among various formerly marginalized groups, epitomized by the phrase 'coming out' that gays and lesbians employed as they left their closets, and this self-consciousness insisted on respect for their 'difference.' 'Coming out,' or perhaps more appropriately 'becoming visible,' can also be applied to women, aboriginals, the disabled, racial minorities, and others. Formerly peripheral, isolated, and ignored groups came out of the background and replaced their former deference and quiescence with a demanding, sometimes shrill behaviour suggestive of the insecurities that accompanied the transition from passivity to a more public posture."

different jurisdictions" to arise.[80] Unfortunately for the future of traditional Canadian political culture, the function of the law appears to have been misapprehended in the Charter era. Instead of seeing the function of the law as preserving and protecting, it is seen as a tool to achieve policy goals.[81] The function of politicians and legislators to by "trial and error, evolve new policies which might involve new values", has been correspondingly eroded. [82] As a result, the Canadian polity risks having its national discourse, and its political parameters, defined by the judiciary.[83]

If the social and political questions troubling Canadian society are thus to be defined within parameters set by the courts, and if the liberal and non-liberal ideological mix is less pronounced because of a perceived shift in power (causing a flight from the political process), is it unreasonable to ask what conduits remain for the pursuit of the traditional Canadian commitment to the notion of a larger community? The continuing development of Charter law and this necessarily abstract judicial reasoning has and will give rise to additional legal formulations, definitions and tests the sort of which now routinely characterize Charter litigation. The acceptance of these formulations in the public discourse, could perpetuate the shift from the political sphere to the legal sphere. The impact may become apparent in the long term attitudes and responses of both the

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[80] Mallory, Ibid., 302.

[81] Ibid., 302.

[82] Ibid., 302.

[83] Supra 26, 138. See also: M. Gold Supra 69, 399, "Through the constant affirmation of the virtues and values of individual rights, the Court not only adds to the persuasive force of its opinions, it also encourages us to see ourselves as rights-holders, thereby transforming the language of political discourse in Canada."

citizenry and the law makers.

To the contemporary citizenry, the non-liberal values that were part of Canadian traditional political culture may find little room to flourish. This is especially so to a citizenry that now may realize and fulfil its interests not with reference to the consensus-inspired solutions normally required for complex social or political questions, but rather in relation to "rights" formulations which are more legal, technical and abstract. Russell rightly suggested that something would be lost if the bulk of the citizenry felt incompetent to participate in such a public debate so dominated by sterile narrow legal abstractions.[84]

For the law makers and legislators, there is a danger that a new timidity may set in. Whether in the practical area of brokering legislative solutions or in the area of legislating with the more bold and uplifting purpose of nurturing and preserving societal habits and dispositions, the tendency may be for the legislators to step aside from the earlier described legislative functions. The legislative functions of trying to broker reasonable solutions or the attempts to preserve, nurture and cultivate habits and values on a broad scale, may seem a dash too ambitious and bold for legislators who could become increasingly comfortable deferring to the parameters set by the courts. The danger posed by a more active judiciary and a more timid legislative branch brought a strong response from Douglas A. Schmeiser when he wrote:

> A legislator should be concerned primarily with the rightness of his legislation, not with its constitutionality,

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[84] P. Russell "The Political Purposes of the Canadian Charter of Rights and Freedoms," Canadian Bar Review, 61 (March 19, 1983): 52.

> and the people should have a similar concern. In a democracy, decisions should be made through a process of reasonable debate, co-operation and compromise. The general legal goal should be a system where individual conflict is minimized, and where resort to the courts is reduced. Under judicial review the parameter of legislative wisdom becomes its constitutionality, and the legislator is distracted from his proper goal.[85]

Schmeiser's concern for the community, highlights additional concerns respecting both legislators and the citizenry. The broad based community interests for example, normally expressed in legislation, may not always be compatible with the narrow and abstract formulations which outline what is constitutional. In such a blurred legal-political climate, the citizens may lose the habit of contemplating the public or community interest. The citizens like their legislators, may become obsessed with grounding their own interests and rationalizing their own behaviour on the basis of what is constitutional. In this regard, Schmeiser stated:

> Citizens may succumb to a similar pre-occupation with constitutionality, and choose an adversarial proceeding to enforce their views on others, regarding themselves as champions of liberty in the process. Again, they may assume that constitutionality is wisdom, and if their conduct is constitutional it is good, and if the conduct of others is unconstitutional, it is bad.[86]

Such a narrow vision and understanding of community interest caused by an obsession with constitutionality, will lead to a continuing confusion between "constitutionality" and the merits of a particular broad based public policy. In the

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[85] D.A. Schmeiser, "The Case Against Entrenchment of a Canadian Bill of Rights," Dalhousie Law Journal Volume 15 (1973), 18.

[86] Ibid.

context of such a confusion, the traditional role of the legislative branch of ensuring a representative and ideologically reflective public policy, seems increasingly more challenging. The uncertainty and confusion in the post-1982 judicial-legislative relationship would seem to guarantee what Cheffins and Johnson predicted:

> The Charter of Rights and Freedoms will bring an essentially counter-revolutionary, non-rationalist communitarian society into direct collision with individual-focused legal rights based upon Charter arguments.[87]

The future for what was the traditional Canadian political culture in such a polity, would seem to promise no certainties but drift and unanticipated change.

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[87] Cheffins and Johnson, Supra 49, 152.

CHAPTER 3

THE CHANGING INTERACTION BETWEEN THE JUDICIAL AND LEGISLATIVE BRANCHES IN THE CANADIAN POLITY

CHAPTER 3

The central interest of this thesis is the change which may ensue over the long-term to the traditional Canadian political culture where the interaction between the judicial and legislative branches involves a more equal sharing of policy-making power. While it has been suggested that the Canadian polity's ideological openness and its appreciation and representation of the less dominant tory and socialist strains were in part a consequence of the nurturing and sustaining role of the supreme legislative branch, it is certainly not suggested that the pre-1982 judicial-legislative relationship involved no judicial review.[88] Nor is it suggested that the entrenchment of the Charter envisioned a smaller role for the courts. Indeed there has always been in Canada, pre and post confederation, a reviewing role for the courts. In fact, there is no question but that the entrenchment of the Charter created understandable expectations for a comparatively more active judiciary than was the case when the courts were interpreting and applying the Canadian Bill of Rights. Notwithstanding the specific pre-Charter role played by the judiciary and the international trend which fuelled the rights expectations under the Charter, it is important to understand that the Constitution Act 1982 was truly a political compromise. It is the position of this thesis that, by any interpretation, the compromise brokered certain common understandings which amongst other things, were able to assuage the interests of those who worried about the potential loss of legislative supremacy. By its nature, the compromise of 1982 envisioned through its included

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[88] P. Russell, The Judiciary in Canada: The Third Branch of Government, (Toronto: McGraw-Hill Ryerson, 1987), 3.

balancing mechanisms and terminology, a more nuanced and subtle relationship for the institutions. The writer asserts that part of the threat to the Canadian political culture under the Charter comes from the extent to which the courts and in some cases the politicians have forgotten or ignored the nature and background of the 1982 compromise; the essence of which was to maintain the potency of legislative supremacy and avoid what was perceived to be "the worst problems or negative effects arising under the United States Bill of Rights".[89] To properly understand the extent to which the political realities and compromises of 1982 have been disregarded or forgotten (and the extent of the current shift and institutional emphasis), one need examine the pre-1982 relationship, the compromises of 1982 and the post-1982 development of Charter law based on the judiciary's approach to Charter interpretation and application.

I. THE PRE-1982 JUDICIAL-LEGISLATIVE RELATIONSHIP

While the Canadian judges have for sometime exercised influence by virtue of their decisions on the common law, their interpretation of statutes, and their arbitrating of the federal division of powers, the potential extent and breadth of judicial policy-making only now comes under close scrutiny.[90] The traditional conception of judicial review includes two basic types of review. The first type relates to full judicial review (interpretations of constitutionality) and the second encompasses a more limited judicial

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[89] Supra 2, 347, 351.

[90] Ibid.

review (decisions regarding the allocation of powers in a federal polity).[91] Under either type of judicial review, the judiciary can approach the question of interpretation and application of a constitution in a activist or restrained way.[92]

Judicial activism displays a willingness on the part of the judiciary to use their powers boldly and interpret the provisions of the constitution expansively. Under such an activist approach, a judiciary may if it feels it is required, interpret the law broadly to give it the broadest possible reading and to in effect adapt the law to changing circumstances, particularly if the legislative branch appears to have been reluctant to do so.[93] Following a perspective of judicial restraint, the courts take a more narrow view of their role and their respective powers of interpretation. Under this pattern of judicial review, the courts are more likely to approach the matters of constitutional interpretation and application more narrowly. In fact, under such a restrained approach, the judiciary will take a more modest view of its own powers and ensure interpretation less likely to make obvious policy. Judicial restraint sees judges attempting to interpret the literally intended or commonly understood meaning of the initial constitution. The judges under judicial restraint are decidedly unwilling to see their role as including the responsibility to adapt the law to changing circumstances.[94] Any changes or adjustments are seen by supporters of judicial restraint as requiring the authority of the

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[91] Supra 25, 193.

[92] Ibid.

[93] Ibid.

[94] Ibid.

executive or legislative branches. Into the framework of that debate, Cheffins once asserted that law is "that part of the overall process of political decision-making which has achieved a somewhat more technical, more obvious and more clearly defined set of ground rules than other aspects of politics". [95] Traditionally, judges by virtue of their experience and training were cognizant of the technical nature of the legal process and the limitations imposed upon them. The principle historical limitations placed upon the judiciary were: 1) judges were not to enter areas regarded the exclusive domain of the elected legislatures and, 2) judges were not to do any more than necessary in disposing of the cases before them. [96] These two restraints essentially reflected the doctrines of Parliamentary supremacy and stare decisis.[97] Canadians, as citizens who inhabited a portion of British territory, accepted early in their collective life the notion of Parliamentary supremacy as it came from England after the Glorious Revolution.[98] Canadians further accepted (unlike the Americans) that statutes enacted in the United Kingdom would be supreme everywhere in the British territories. As B.L. Strayer stated, "That supremacy was accepted in Canada without serious question down to 1982 when it was expressly abandoned by Westminster in the Canada Act of 1982."[99] Yet, that judicial-legislative interaction in the years before 1982, even

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[95] J. Noel Lyon and R. Atkey, ed., Canadian Constitutional Law in a Modern Perspective (Toronto: University of Toronto Press, 1970), 291.

[96] Ibid.

[97] Ibid.

[98] Supra 2, 347.

[99] Ibid., 348.

where parliament was supreme, saw the legislative branch as being subject to limitations which were both explicit and implicit. These limitations were imposed by the judiciary. [100] These limitations were to provide the source for much of the judicial review that would take place before 1982.

There was always a fundamental principle in the British system which acknowledged that Colonial governments and legislatures were bodies of limited power.[101] It was similarly accepted that these limitations could be enforced by the courts. These limitations included those in the Constitution Act of 1867, which as British law extended to Canada, had supremacy over the laws of the Parliament of Canada and the provincial legislatures.[102] This Act imposed restrictions and limitations to the extent that it delineated jurisdictional spheres of influence for the new federalism. As well, the Act provided some additional guarantees or group rights with respect to language and religion.[103] Those limitations were to be imposed by the judiciary. Though the courts did comparatively little to enforce the language guarantees, the Canadian courts had frequently and regularly (along with the Privy Council up to 1950) assessed and evaluated the validity of various provincial and

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[100] Ibid.

[101] Ibid., 349.

[102] Ibid.

[103] See: The Constitution Act of 1967; section 133 and later the Manitoba Act 1870, 33 Vict.; c3 (Canada) s. 23, this Canadian Act being confirmed by 34-35 Vict.; c28 (UK).

federal legislation in the context of the division of powers.[104] Strayer rightly points out that the courts in holding laws to be invalid even in the context of umpiring disputes of federalism, nonetheless de facto "thwarted the will of duly elected legislatures." In this sense legislative supremacy has never been an absolute principle of Canadian government."[105] It is worth pointing out that this kind of judicial review was not without the potential for some policy-making. The doctrine of the "living tree" (to be discussed in more detail later in this Chapter) was used in the context of disputes of Sections 91 and 92 of the Constitution Act of 1867. Yet even the most expansive interpretation and application of Sections 91 or 92 along the lines of the "living tree" doctrine, did not see the high courts in the Canadian context creating or reading in new rights.

Despite similarities, there is no question but that the judicial-legislative roles and relationship in Canada differed somewhat from the roles and the relationship in Britain. Canadian courts were clearly more accustomed to the striking down of some laws in some circumstances. Yet the pre-1982 judicial-legislative relationship in Canada shared important similarities with that same institutional relationship in Britain. Most importantly, the judicial traditions in both Canada and Britain were very much typical

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[104] Ibid.; see also: Supra 1, 14-15; P.W. Hogg, Constitutional Law in Canada, (Toronto: Carswell, 1977), 42-48; P. Monahan Politics and the Constitution: The Charter, Federalism and the Supreme Court, (Toronto: Carswell-Methunen, 1987), 149-159; E. McWhinney "Legal Theory and Philosophy in Canada: Civil Law and Common Law in Canada," Canadian Jurisprudence, 4-33.

[105] Ibid.

of the positivist tradition.[106] The Canadian courts pre-1982, even when relying on the living tree doctrine to umpire federal disputes, looked to and applied man-made sources of constitutional law. This tendency to a very large extent pre-determined the judiciary's approach to the Canadian Bill of Rights. The Canadian judiciary's approach made it quite clear to would-be litigants that the Bill of Rights would not be used as an instrument for challenging federal statutes.[107] In commenting upon this positivist judicial tradition in Canada, Strayer observes:

> Unlike the participants at the Philidelphia convention of 1787, our fathers of confederation did not indulge in the conceit that their words embodied, or were at least inspired by, the laws of god or the laws of nature. As a result, unlike their American counterparts, Canadian courts have not in the past been tempted to look for the true meaning of the constitution in natural law or in some similarly mystical source.[108]

It will be suggested later that a similar modest positivism was at the root of the

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[106] "Positivism" or "Positive Law" has been defined as "law actually and specifically enacted or adopted by proper authority for the government of an organized jural society. A law in the sense in which that term is employed in jurisprudence, is enforced by a sovereign political authority. It is thus distinguished not only from all rules which, like the principles of morality and the so-called law of, honour and fashion, are enforced by an indeterminate authority which is either, on the one hand, superhuman, or, on the other hand, politically subordinate." HOLL JUR. 37 in H.C. Campbell Black, Black's Law Dictionary, 4th ed, (St. Paul: West Publishing, 1968), 1324; see also: H.L.A. Hart The Concept of Law (Oxford: Clarendon Press, 1982),p. 181-182, "The first is question which may still be illuminatingly described as the issue between natural law and legal positivism, though each of these titles has came to be used for a range of different theses about law and morals. Here we shall take Legal Positivism to mean the single contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have done so..." For Hart the other classical theory against which Positivism is usually juxtaposed is Natural Law. Natural Law implies "that there are certain principles of human conduct, awaiting discovery by human reason, until which man-made law must conform if it is to be valid." Former U.S. Supreme Court nominee Robert Bork believes "Natural Law and fundamental rights not stated in the Constitution are not the business of judges." "The Advocates: Point and Counterpoint", Esquire Magazine, (October, 1990), 97-98.

[107] Supra 77, 33.

[108] Supra 2, 350.

foundation cemented by those involved in the 1982 political compromise that led to the Constitution Act 1982 and the Canadian Charter of Rights and Freedoms. With respect to the entrenched Charter, while there was undoubtedly the expectation that there would be some judicial development respecting some of the vague terminology, it was nonetheless "no invitation to the courts to look to natural law (by whatever label they might call it) to prescribe the rights which, to the judicial mind, should be protected".[109]

To conclude the pre-1982 discussion of the judicial-legislative relationship in Canada, it is important to remember that, while limitations previously existed on Parliamentary supremacy, they remained largely confined to division of power disputes. Furthermore, such review was usually rooted in an essentially positivist interpretation and application of the constitution. The shift from such a limited form of judicial review to a more fully activist and expansionist review carried out under the aegis of the Canadian Charter of Rights and Freedoms, represents a departure not only from the more positivist Canadian tradition, but a departure from the more modest vision that rests at the foundation of the 1982 compromise.

II. THE CONSTITUTION ACT 1982: A LEGAL AND POLITICAL COMPROMISE

The repatriation of the constitution and the ultimate entrenching of a Charter of Rights, had been for some time prior to 1982 a goal of the federal government. The

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[109] Ibid., 352.

most intense and concerted efforts occurred during two prolonged periods (1968-1971, 1978-1981) during which time a number of federal and provincial conferences took place on that subject. The goal of entrenching a Charter of Rights was seen as a key ingredient in the federal government's nation building strategy during the period of 1967-1982. The immediate goals in that regard were three fold. First, it was hoped that the entrenching of the Charter would create the conditions that would encourage a stronger national identity to counteract what the central government saw as excessively strong forces of provincialism; second, it was hoped that the entire process would lead to the patriation of the constitution and at the same time provide for an entirely Canadian amending procedure; third, it was hoped that language rights and new "mobility rights" would be created and extended so that the average Canadian would feel more free to move and reside anywhere in Canada. [110] By the very nature of these somewhat political goals, it would seem clear that some compromising and trading-off would have been seen as required in order to to win over what had for a long time been, the strong provincial government opposition.

During the period from 1968-1981, most provincial governments to greater or lesser degrees, opposed the adoption of the sort of Charter that the federal government wanted as the centre piece of any patriation package. [111] Some of their opposition to a large extent was based on hesitation which arose from an intense loyalty to what was perceived as Canada's British Parliamentary traditions. The Charter was seen by these

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[110] Supra 11, 38.

[111] Ibid., 37.

opponents as an instrument which was irreconcilable with the concept of legislative supremacy.[112] Apart from the conceptual difficulties, these opponents were also mindful of some of the developments that occurred during the development of American constitutional law wherein an entrenched Bill of Rights had created an extremely potent judiciary.[113] These premiers and provincial officials were extremely concerned by what they had recently seen in the United States in terms of the manner of judicial interpretation and innovation which often served to circumvent the power of the elected representatives. In addition to the conceptual purists, and those who feared the sort of judicial innovation personified by the judges of the American Supreme Court, there were still others who felt that duly elected legislatures were better positioned than appointed judges when it came to the matter of protecting individual and community rights.[114]

With the momentum of a successful Quebec referendum campaign, the newly returned Prime Minister, Pierre Elliott Trudeau, began in 1980/81 another new constitutional initiative. This one was seen as responsive to his earlier promise for a renewed federalism, which he proposed to the Province of Quebec during the 1980

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[112] Supra 2, 351;see also: M. Gold, Supra 69, 379. Respecting those who held strong to their concerns in the face of public indifference Gold said: "A number of provincial premiers, notably Premier Lyon of the Manitoba and Blakeney of Saskatchewan, expressed their opposition to the idea of an entrenched Charter, but they proved unable to influence the debate significantly. By ridiculing them as politicians representing narrow and parochial interests, who were prepared to trade individual rights for fish, Prime Minister Trudeau and his colleagues succeeded in delegitimating their principled arguments against the Charter. As a result, the public bought the idea of entrenchment without worrying very much about the question of the enhanced powers of the court."

[113] Ibid.

[114] Ibid.

referendum campaign. Even beyond the promises made during the referendum campaign, there were other imperatives. Canada like most Western industrial democracies, had since the second world war experienced remarkable growth in government. This growth had occurred at both the federal and provincial levels, transforming and creating governmental institutions, departments, agencies and the service side of the civil service. The expansion had brought with it a much discussed and underlying justification. It was thought that such widened scope would necessarily cause effective and efficient social progress and comfort for all citizens in an increasingly modern and complex society. While much of this comfort (and even progress) has been secured, there had been nonetheless, a corresponding cost both politically and socially. By the early 1970's the disagreeable flip-side of huge government became increasingly apparent to Canadian citizens who were now wondering if government, with its various and seemingly endless number of departments and agencies, was not now more prone to stymie and obstruct rather than provide the citizenry and the community with the fulfilment of their respective wants and needs. While Canadians still exhibited an appreciation for community interests, big government and the accompanying detachment of an increasingly smaller political elite, were now causing the citizenry to feel more vulnerable than "looked after" or "protected". Citizens began to more regularly voice their frustrations at the perceived inertia, unfairness and non-responsiveness of an excessively large bureaucracy. In a general sense, for the average citizen governmental and administrative decisions and policy were now seen as more threatening not only because the decisions were

sometimes inherently unpopular, but also because these decisions were seen as too impossibly far removed from the possibility of appeal and change.[115] It was during this period that the international trend encouraging the entrenchment of Charters and Bills of Rights, found fertile ground in Canada.

It was into this context that the government of Canada attempted in the early 1980's to propose a package which would successfully lead to the patriation of Canada's constitution and simultaneously lead to a new amending formula and a new entrenched Charter of Rights. It was a context and background in which the traditional liberal and non-liberal value mix continued to exist, but against which there was also on the one hand, provincial governments opposed to the adoption of an entrenched Charter, and on the other hand a citizenry increasingly frustrated with the remote and distant government apparatus.

Despite the rancorous political argument and the eventual high court constitutional challenges, the Prime Minister in November of 1981 was able to converge

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[115]While the government apparatus or the "state" still remained important to Canadians, its size and non-responsiveness now seemed to cry out for checks on a Parliamentary system that seemed unable to check itself. See also: A.C. Cairns, "The Charter: An Academic (Political Science) Perspective," a paper prepared for the Round Table Conference on the Impact of the Charter on the Public Policy Process, November 15-16, 1991 York University. J.M. Bumsted, The Peoples of Canada A Post-Confederation History (Don Mills: Oxford University Press, 1993), 310-311. Bumsted describes the burgeoning size of the provincial and federal bureaucracies in the post war period. See also: R. Bothwell, et al., Canada Since 1945: Power, Politics and Provincialism, (Toronto: University of Toronto Press, 1984), 458, "The rise of living standards was accompanied by increased organization, larger corporations, larger cities and their attendant problems, and larger government. Most Canadians had more comfort and security than ever before, but they were dependent for these things on distant and impersonal institutions both private and public. The wish for new and expensive services created certain tensions and unhappiness which may or may not be regarded as inevitable. People distrusted bureaucracy, feared large corporations, and resented the power of larger labour unions and other special interest groups. By 1980 some parts of Canadian public life were visibly malfunctioning, such as the schools, the post office, and the Canadian system of labour relations. At times during the late 1970's, one might have thought that the national mood might best be summed up as a long and ear-splitting whine."; See also: Supra 72, 197-233.

his philosophic and national objectives with the interests of enough First Ministers. The compromise was a negotiated text which ultimately gained the acceptance of the government and Parliament of Canada, and the governments of nine provinces.[116] The November 4, 1981 agreement amounted to a compromise which saw both the federal government and the provincial governments give and take. Prime Minister Trudeau preferred the previously proposed but rejected Victoria Charter amending formula. Trudeau ultimately agreed to a modified version of that formula. In return, the eight provinces agreed to a constitutional Charter of Rights, but on the condition that it contained a clause which would permit both the federal and provincial governments to enact statutes that could override the entrenched Charter. For his part, Prime Minister Trudeau agreed to the override clause on the condition that when it was specifically used it would necessarily expire after 5 years and the clause would require re-application. Moreover, the clause was not to apply to the democratic rights, mobility rights, language rights and minority language education rights.[117]

The compromises that were struck in order to obtain the entrenched Charter confirm that there was an attempt to obtain a consensus which would assuage all concerned parties. In 1981, B.L. Strayer was the Assistant Deputy Minister of Justice in the Public Law Section of the Federal government. He indicated:

> For those of us who were representing the Government of Canada in these negotiations, acting as advocates for the Charter, we sought structure and terminology which would

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[116] Hogg, Supra 104, 43.

[117] Supra 2, 351.

> make the Charter effective while making it as acceptable as possible for the legislative supremacists. To the later end, we tried through choice of language to avoid what we perceived to be the worst problems and negative effects arising under the United States Bill of Rights.[118]

Participants such as Strayer, in looking back at the events of 1981, acknowledge that the public debate over the Charter provides an important information base for both the interpretation of the Charter and the understanding of its nature. [119] When one examines the nature of the negotiations and the trade-offs, it should be clear that the patriation package constitutes a tough political compromise. It was a tough political compromise which nonetheless succeeded in mirroring much of the liberal and non-liberal value mix that had made up Canadian political culture. Strayer takes pains to stress that "this consensus was premised on positivism, and the language of the Charter so painfully arrived at by elective representatives, was to define the rights being guaranteed by it".[120] Far from inviting courts to interpret these specifically enumerated rights on the basis of an inspired natural law interpretation, the drafters or framers wanted the courts to be mindful of which rights were specifically prescribed and which were excluded.[121] While the framers of the Charter were realistic enough to realize that the Charter did contain many open ended provisions with vague terminology (which would eventually have to be particularized by the courts), the public

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[118] Ibid., 351.

[119] Ibid.; Part of that important information base includes the Special Joint Committee of the Senate and House of Commons on the Constitution (1980-81).

[120] Supra 2, 352.

[121] Ibid.

debate of the day and the specific and limited number of purposely included rights, were thought to provide sufficient guide posts for a future judicial moderation. There were in summary, only a limited number of individual and group rights chosen to be protected, and there was certainly no presumption that every social or political ill would find an appropriate remedy in the Charter.[122]

The traditional Canadian concern for communitarian interests was expressed in Sections 1 and 33, which sought to find an acceptable balance between individual rights and majoritarian democracy.[123] As a participant, Strayer offers the following significant observation:

> Thus, an important measure of legislative freedom to qualify individual rights is preserved, although the onus is on those relying on such qualifications, to justify them before the court if necessary...courts were not given a roving mandate - a kind of "search and destroy" - to ensure that all our laws are suitable for a free and democratic country.[124]

Section 1 (the general limitation clause), reads as follows:

> 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 and as can be demonstrably justified in a free and democratic society.

The inclusion of Section 1 recognized that the rights outlined in the Charter were not absolute. The limitation clause envisioned limits that could be placed on the Charter rights, as long as the legislative bodies (federal or provincial) accepted

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[122] Ibid.

[123] Ibid., see also: P. Monahan Supra 2, 13.

[124] Supra 2, 352.

responsibility for prescribing such limits. Moreover, those limits have to be limits that could be considered "reasonable and demonstrably justified in a free and democratic society.[125]

Section 33 (the notwithstanding clause), reads as follows:

> Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

While it was understood that Section 33 would be used rarely and with caution, its inclusion was not generally seen as an encouragement for the court to give the most expansive scope possible to Charter guarantees and the narrowest possible scope to the power of limitation (such as under Section 1). That is, the judiciary was not given carte blanche to make policy via the Charter guarantees knowing that legislatures would be forced to invoke Section 33 on a more regular basis if they intended to defend the collective interest.[126]

The essential elements of the 1982 political compromise permitted a common understanding on the part of the political players which in turn led to a formal agreement and the adoption of the Constitution Act 1982. The essence of that compromise and those common understandings can be summarized as follows:

1) Concessions were made to both the communitarian and liberal elements as they found expression in both the individual rights guarantees and those provisions guaranteeing group rights.

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[125] Ibid.

[126] Ibid.

2) There was an underlying premise of positivism based on a consensus as to the necessarily limited number of specifically enumerated individual and group rights; the Charter was not seen to offer remedies for all societal problems and accordingly natural law was not to be seen as the interpretative guiding inspiration.

3) The inclusion of Section 1 expressly recognized that individual rights will sometimes yield to collective rights.

4) The inclusion of Section 33 was not understood as permitting the courts the freedom to give the most expansiveness scope to Charter rights knowing that the legislatures could always invoke Section 33 in defence of collective interests.

5) The negotiated definition of the individual rights to be protected and the inclusion of some qualified legislative powers such as under Section 1 and 33, were meant to preserve important elements of legislative supremacy.

These elements of the 1982 compromise, while signifying a certain caution with respect to individual rights, nonetheless created a Charter which was understood to be ushering in a new and meaningful instrument by which individual freedoms could be protected. At the same time, the elements of the compromise re-asserted and preserved the traditional role played by the Canadian state in looking after the community interest. The essence of the Charter was not inconsistent with the Canadian tradition of allowing for both state regulation and individual freedom.[127] The delicate balance supporting this agreement was to call for vigilance on the part of both the judicial and the legislative branches. The two branches would have to ensure that each branch did not upset the equilibrium through action that was unjustifiable, intrusive or expansive, vis-a-vis the designated and somewhat newly defined institutional roles.

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[127] P. Monahan, Supra 15, 13.

Much of the rest of this thesis will be spent discussing how the delicate balance risks being upset by the judicial-legislative interaction that has developed since 1982. Much of the shift in that interaction has seen the judiciary act in a way that has not been completely faithful to the underlying elements and common understandings of the 1982 package. The expansive interpretive approach adopted by the judiciary and its resulting potential to make policy, have given the judiciary an unanticipated potency in its relationship with the legislative branch. It is a potency which exaggerates the powers provided via the 1982 agreement and it risks altering the sort of judicial-legislative relationship that was anticipated; a relationship which would have been more consistent with our legal traditions and our political culture.

III. THE POST-1982 JUDICIAL-LEGISLATIVE RELATIONSHIP

The post Charter years have seen the judiciary expand its role in ways that are not consistent with the commonly understood essence of the 1982 compromise agreement. The manner in which this role was expanded, in turn causes a new interaction between the judicial and legislative branches. It is this interaction which this thesis argues reduces some of the potency of the legislative branch and which risks changing the political culture. This newly expanded role, in areas which had for the most part been left to the legislatures, manifests itself in three principle ways. First, the judiciary now deals in number and breadth with vastly new issues and subjects. These were subjects which were often left to the exclusive domain of the legislative branch.

This expanded breadth relates directly to the broad scope of "justiciability". [128] Second, the judiciary now has a new policy-making power arising from their chosen interpretative approaches to Charter sections. In that regard, the Supreme Court of Canada has all but eliminated the presumption of constitutionality in Charter cases. It now relies on the doctrine of the living tree and it has chosen to interpret Section 7 of the Charter substantively as opposed to procedurally. Third, the judiciary has permitted previously unrecognized parties to certain types of litigation to use the Charter to gain access to the courts. Thus, these groups now have "standing and access to a new potentially active policy-making forum". In these areas, the judiciary is not acting with the moderation befitting the 1982 compromise and consequently the potential exists for the erosion of what has been described as one of the legislative functions, the function of reflecting and preserving the uniquely constituted Canadian political culture. For the remainder of this chapter, the theoretical foundations of this expanded judicial power will be discussed. The discussion will specifically deal with the three specific ways in which the judiciary has expanded its policy-making power.

A) JUSTICIABILITY: THE EXPANDING BREADTH OF ISSUES AND SUBJECTS DEALT WITH BY THE COURTS

Section 52 of the Constitution Act 1982 provides:

> The Constitution of Canada is the Supreme Law of Canada, and any law that is inconsistent with the

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[128] A matter is "justiciable" if it is a subject which can properly be examined by a court of justice. See: H.C. Black, Supra 106, 1004.

> provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

In the context of the qualified provisions reasserting and preserving the legislative policy-making power, Section 52 nonetheless provides the underpinning for judicial review based on the notion that the Constitution is supreme. While the courts could have properly understood this to be a mandate for the expected judicial review ensuring the limited number of enumerated rights, Section 52 along with Section 24(1) has more generously provided the courts with a basis to seemingly expand both the breadth of its examination and its sphere of influence. Section 24(1) reads:

> Anyone whose rights or freedoms, as guaranteed by this Charter have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedies as the court considers appropriate and just in the circumstances.

Notwithstanding the supremacy of the Constitution and Sections 52 and 24(1) respectively, one of the traditional means for restricting constitutional judicial review has always been the requirement of justiciability.[129] Given the spirit of the 1982 compromise, it would not be unreasonable to suggest that this doctrine of justiciability was expected to have been applied by the judiciary in a more modest way than has been the case since 1982. In this regard, it is useful to note that the American practice had been to determine that "political questions", those questions that are assigned by the Constitution to the political judgement of the elective branches of government, were not

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[129] Supra 2, 364.

justiciable.[130] B.L. Strayer suggests that, in form at least, the Supreme Court of Canada previously rejected the "political questions" doctrine.[131] The highest courts now seem to be willing to review the propriety of what would otherwise have been considered to be political matters and political decisions.[132] The Court has rejected the notion that certain acts of the executive (for example in the field of foreign and defence policy), are beyond the purview of judicial review. Chief Justice Dickson indicated that cabinet decisions "are therefore reviewable in the courts and subject to judicial scrutiny for compatibility with the Constitution." [133]

B. THE EXPANSIVE INTERPRETATIVE APPROACHES AND A NEW JUDICIAL POLICY-MAKING POWER: THE ELIMINATION OF THE PRESUMPTION OF CONSTITUTIONALITY; THE DOCTRINE OF THE LIVING TREE; SECTION 7 AND "FUNDAMENTAL FAIRNESS"

An important constraint that had previously been observed by the Canadian courts was the presumption of constitutionality.[134] This presumption required the person attacking the validity of the law to demonstrate that the law was indeed constitutionally invalid. The presumption may still indeed govern division of power issues, but in Charter cases the Supreme Court has determined that that presumption

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[130] Ibid.

[131] Ibid., See also: Operation Dismantle Inc. v. The Queen [1988] 1 S.C.R. 441.

[132] Ibid.

[133] Ibid., 3065.

[134] Ibid.

ought not to apply.[135] It has been suggested the rationale for this position is similar to the rationale justifying the generally expansive approach taken by the judges. That is, it cannot be assumed that the legislature intended to obey the Charter because the Charter is necessarily in a state of constant evolution and change and no law maker can possibly be expected to have known in advance of judicial interpretation, the meaning of the Charter. This denial of the presumption of constitutionality is a clear demonstration of the court's unwillingness to defer to the legislatures with respect to what may be a specifically intended piece of legislation.[136]

The living tree doctrine or approach, which emphasizes a progressive and liberal interpretation of Charter provisions while allotting a secondary importance to the notion of original intent, has come to be associated with most current Charter jurisprudence. Under the doctrine, it is an article of faith that judges must keep the law from becoming frozen in time. It is an approach to Charter interpretation initially used by Justice Estey, who specifically invoked the metaphor first made famous by Lord Sankey. Justice Estey states, "that a narrow and technical interpretation, if not modulated by a sense of the unknowns of the future, can stunt the growth of the law and the community it serves."[137] The growth mentioned by Justice Estey was presumably to be attained through a large and generous interpretation of Charter provisions.

The living tree approach to constitutional interpretation was initially used in the

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[135] Ibid.; see also: A.G. Manitoba v. Metropolitan Stores (M.T.S.) Ltd. [1987] 1 S.C.R. 110.

[136] Ibid.

[137] Law Society of Upper Canada v. Skapinka [1984] 1 S.C.R. 357 at 366.

more specific law of federalism. That domain required resolution of questions respecting the distribution of powers involving central and provincial governments.[138] In that regard, the approach was properly praised as a method of avoiding a rigid constitutional measurement that would preclude new and important governmental policy initiatives as a result of a narrow ruling on the even narrower issue of division of powers. As Morton and Knopff suggest:

> The original purpose of the living tree doctrine in the BNA Act jurisprudence was to expand enumerated legislative powers. In plain terms, it encouraged judges to accommodate the new policy initiatives of Canadian political leaders through a "flexible" interpretation of the BNA Act, especially the enumerated grants of power in sections 91 and 92 of the Act. The practical effect of the living tree doctrine was thus to enhance majoritarian or democratic influence in Canadian government.[139]

Having acknowledged the peculiarly important need for a modernizing approach in interpreting the constitutional law of federalism, serious questions must be asked as to why the doctrine was so easily accepted and applied in the context of Charter jurisprudence?

As seen in the earlier explanation, when judges were liberally and largely interpreting a constitutional text (relating to the division of powers) they were doing so to support the policies and initiatives proposed by various governments of the day.[140] Conversely, applied in cases of Charter interpretation, which are concerned primarily

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[138] F. L. Morton and R. Knopff "Permanence and Change in A Written Constitution: The "Living Tree" Doctrine And the Charter of Rights," Supreme Court Law Review 1, no. 2: 553 at 537.

[139] Ibid., 538.

[140] Ibid.

with civil rights, courts do not support but rather usurp the legislative function. The legislative power is reduced as the courts use their progressive and generous analysis to correct what they see as legislative error. In so doing, the delicate and balanced compromises emanating from a legislature are often struck down.

Why was the doctrine of the living tree so quickly adopted by the Canadian courts? It is submitted that it could not have been adopted for the reason for which it was seen as justified in the cases involving issues of division of power. That is, even if one accepts the doctrine's rationale, since the Charter's enactment in 1982 no such remarkable or obvious changes have occurred that require the courts to scrutinize legislation through such a liberal or progressive analysis. As Morton and Knopff pointed out: "No one can seriously argue that Canadian society has so changed since 1982 that the 'original meaning' of the Charter needs to be updated by the judges."[141]

Given the fact that the original meaning and understanding of the Charter provisions were and are still readily available and discernable, it is suggested that the reason the doctrine was so readily adopted, related to the lingering disappointment over the 1960 Canadian Bill of Rights. It was a profound disappointment relating to the timid manner in which the admittedly unentrenched 1960 legislation was interpreted and applied. The disappointment was repeatedly expressed in various law journals. In the post-1982 period, the interpretive approach to the new Charter was to be determined by the pervasive academic and intellectual view that a "frozen concepts" approach

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[141] Ibid.

would inhibit eventual Charter development.[142]

So the Supreme Court did indeed accept the more progressive doctrine.[143] Yet even in the early years of applying that doctrine warnings were sounded by judges like Justice McIntyre, "the Charter should not be regarded as an empty vessel to be filled with whatever meaning we might wish from time to time."[144] There were others both before and after Justice McIntyre who expressed similar concerns, by warning that it was not the court's responsibility to discover "implied rights".[145] Nonetheless, such warnings were often ignored when it came to Section 7 and other provisions. Indeed the Charter interpretation generally, has all too often given credence to the somewhat extreme proposition: "that the judicial creation of new rights or new limits on what government can do, is more properly seen as a self-anointed progressive minority forcing "reform" on an unwilling majority."[146]

The adoption of the living tree approach permitted the Supreme Court to commence their search for new rights; a search which would assist in the finding of "substantive" rights to Section 7. Predictably, Section 7 now threatens to become the empty vessel Justice McIntyre feared.

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[142] Ibid., 534.

[143] Supra 138.

[144] Reference re: Public Service Employee Relations Act Alta. [1987] 1 S.C.R. 313 at 394.

[145] Ibid.

[146] R. Hawkins "Interpretivism and Section 7 and 15 of the Canadian Charter of Rights and Freedoms," Ottawa Law Review (1990), 275-316; see also: Robert L. Bork, The Tempting of America: The Political Seduction of the Law (New York: Free Press, 1990), 130.

Section 7 of the Charter reads:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

With the combined assistance of some disappointing sophistry and the metaphorical interpretive instrument that is the living tree, the Supreme Court of Canada has approached Section 7 interpretation, in a way that is seriously at odds with the interpretivist or original meaning approach to constitutional interpretation. Having ignored the original meaning or even the common understandings, the Court found substantive rights as opposed to procedural rights in the phrase fundamental justice. In so doing, encouragement was provided to those individuals and groups who continue to treat "fundamental justice' as an empty vessel.

The interpretivist or original meaning approach is mostly associated with the former United States Supreme Court nominee, Robert Bork, whose nomination was ultimately rejected by the American Senate. Bork suggested that the interpretivist theory of constitutional interpretation is neither conservative nor liberal, but rather is neutral as it is founded solely upon what is thought to be the common understanding (or meaning) of the Constitution, held by members of the "informed" public at the time it was adopted.[147] The importance for Bork resided in the fact that it provided a method of interpretation which would accommodate the need to protect important individual liberties and the citizen's freedom to govern as part of a majority.[148] With

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[147] Hawkins, Ibid., 277.

[148] Bork, Supra 146, 78.

adequate reliance on the original dictionary definitions of the words contained in the text, the meaning of the words as commonly understood, as well as on secondary materials (such as the political debate in Parliament, Parliamentary committee hearings, public discussion at the time, journal and newspaper articles, etc.), it would be possible to obtain the original meaning of the words and the way in which they were understood at adoption.[149] Also where possible, attention should be paid to precedents from the time of ratification, since presumably judges of the time were aware of the original meaning of the words. For Robert Bork, it is critical to avoid the temptation to create rights by ignoring to original meaning, despite the noble results sought:

> It is no answer to say that we like the results, no matter how divorced from the intentions of the lawgivers, for that is to say that we prefer an authoritarian regime with which we agree to a democracy with which we do not.[150]

To avoid the court assuming a legislative posture, the court must apply the law as those who made the law understood it would be applied.[151]

Despite warnings about an empty vessel and the lip service paid to the purposive approach, the Supreme Court of Canada took an incongruously creative approach to Charter interpretation. The dichotomy between their words and practice is best observed in Chief Justice Dickson's judgement in R. v. Big M Drug Mart Ltd.:

> The interpretation should be, as the judgement in Southam emphasizes, a generous rather than a legislative one, aimed at fulfilling the purpose of the guarantee and securing for

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[149] Ibid.

[150] Ibid., 279.

[151] Ibid.

> individuals the full benefit of Charter protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the Charter was not enacted in a vacuum.[152]

The discrepancy between the Supreme Court's fidelity to Parliamentary purpose (usually approximating the clauses' original meaning) and its desire to modernize and thaw freezing concepts, was never more apparent or consequential than in its early decisions involving Section 7. Those decisions, despite the intentions of the parliamentarians and the original understanding of the text, proceeded to transform a clause dealing with process or procedure into a clause mandating substance. Since the section was so open-ended and vague, the "discovered" substantive mandate now provides adventurous arguments, which writers like Morton and Knopff suggest are often ideological, libertarian and relativistic in nature.[153]

The disturbing potential for such a section with such substantive flexibility, brings to mind Robert Bork's comments respecting a similarly vague and open-minded section found by the U.S. Supreme Court to mandate substance, "The clause now means anything that can attract 5 votes on the Court." [154]

In reference re Section 94(2) of the Motor Vehicle Act (B.C.) the Supreme Court of Canada after determining that "fundamental justice" included a substantive element, implicity indicated that even where not specifically enumerated elsewhere in the Charter, a court can use Section 7 to mandate a new substantive right which may be

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[152] R v BIG M DRUG MART LTD [1985] 1 S.C.R. 295 at p. 344.

[153] Supra 138, 541.

[154] Bork, Supra 146, 283.

used to strike down a perceived bad law. In so doing, it is suggested that the Court invaded the democratic and Parliamentary sphere. Writing the judgement of the court, Mr. Justice Lamer was of the view that the phrase "principles of fundamental justice" was not limited to protection against procedural injustice. It was held that the phrase does not describe a protected right itself but rather qualifies the protected right not to be deprived of "life, liberty and security of the person". The meaning of "the principles of fundamental justice" was to be determined according to Justice Lamer, having regard to the purpose of this section and its context in the Charter. Thus Sections 8 and 14 of the Charter address specific deprivations of the "right" to life, liberty and security of the person in breach of the principles of fundamental justice, and as such violations of Section 7. They are designed to protect in a specific manner, and setting, the right to life, liberty and security of the person set forth in Section 7.[155] The Court indicated that while many of the principles of fundamental justice are procedural in nature, they are not limited solely to procedural guarantees. Whether any given principle may be said to be a principle of fundamental justice within the meaning of Section 7 would rest upon an analysis of the nature, sources, rationale and essential role of that principle within the judicial process and in our legal system as it evolves.

In a subsequent affirmation of the breadth to be given to Section 7, Mr. Justice Lamer, ostensibly applying a purposive approach, attempted to deal with all issues - jurisdictional, remedial and substantive - from the perspective of ensuring that the

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[155] The Canadian Charter of Rights and Annotated Volume 2 (Sections 7 to 10) (Toronto: Carswell), 7 70030.

Courts consider and appreciate the fundamental values and special interests which the Charter was intended to protect and then provide the means of guaranteeing those protections. In regard to the narrow Section 11(d) issue before the Court in Mills v. R., Mr. Justice Lamer explained that:

> In my view, the fundamental purpose of s. 11(b) is to secure, within a specific framework, the more extensive right to liberty and security of the person of which no one may be deprived except in accordance with the principles of fundamental justice. The purpose of s. 11(b) can, in other words, be ascertained by reference to s. 7 of the Charter. Section 11(b) is designed to protect, in a specific manner and setting, the rights set forth in s. 7, though, of course, the scope of s. 7 extends beyond those manifestations of the rights to liberty and security of the person which are found in s. 11. Hence, the focus for the analysis and proper understanding of s. 11(b) must be the individual, his or her interests and the limitations or infringement of those interests.[156]

Following along with the expansive and substantive interpretation of the mentioned cases, the Supreme Court held in R. v. Morgentaler that certain sections in the Criminal Code were in violation of a woman's rights not to be deprived of security of the person except in accordance with the principles of fundamental justice.[157] Writing for the majority Chief Justice Dickson held:

> I conclude that the procedures created in s. 251 of the Criminal Code for obtaining a therapeutic abortion do not comport with the principles of fundamental justice. It is not necessary to determine whether s. 7 also contains a substantive content leading to the conclusion that in some

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[156] Mills v The Queen [1986] 1 S.C.R. 863.

[157] R v MORGENTALER [1988] 1 S.C.R. 30.

> circumstances at last, the deprivation of a pregnant woman's right to security of the person can never comport with fundamental justice. Simply put, assuming Parliament can act, it must do so properly.[158]

While concurring with the majority, Madam Justice Wilson expanded the grounds. She expanded Mr. Justice Lamer's doctrines of substantive fundamental fairness in saying:

> While Lamer J. draws mainly upon Sections 8 and 14 of the Charter to give substantive content to the principles of fundamental justice, he does not preclude, but seems rather to encourage, the idea that recourse may be had to other rights guaranteed by the Charter for the same purpose.[159]

Using the above rationale, Justice Wilson concludes by suggesting that the legislation preventing women from seeking an abortion violates freedom of conscience and by extension cannot accord with the principles of fundamental justice as found in Section 7.[160]

The approach taken by Madam Justice Wilson is open to obvious criticism. By using the logic that she employed, she avoided the necessity of relying specifically on subsection 2(a) of the Charter (freedom of conscious) to substantively attack the legislation. Her use of Section 7 seems to add nothing to the logic of her rationale and by taking that approach she seems simply to have expanded tremendously the

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[158] Ibid., 73.

[159] Ibid., 175.

[160] Hawkins, Supra 146, 292.

substantive content of "fundamental justice".[161] Critics like Richard Hawkins characterize this as pure judicial legislation.[162] The approach taken to justify the conclusion she reached, seems to clearly run counter to the original understanding of the text of the Charter. That is, the common understanding shared by most of the participants and which can be gleaned from examining the public debate during the ratification period circa 1981. During that period, there was ample discussion respecting the impact of the Charter on the power of government to legislate in such areas as capital punishment and abortion. In fact those were topics expressly raised and debated in the Parliamentary joint committee set up to examine the Charter.[163] The members of the committee who heard concerns about the legislative supremacy in these areas, worried themselves about these two issues (capital punishment and abortion) being determined pre-emptively by the judiciary as was the case in the United States.[164] As Richard Hawkins reported:

> Prior to the Charter's ratification, and in an effort to reassure all sides, the federal government formally adopted the following position: "the government agrees that such matters as abortion and capital punishment should be left to be dealt with from time to time by the democratically

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[161] Ibid., 292-293.

[162] Ibid.

[163] Ibid. See also: the comments of B.L. Strayer, then Assistant Deputy Minister, Public Law, Department of Justice, speaking before the Special Joint Committee of the Senate and House of Commons on January 27, 1981, "However, it ('fundamental justice') does not cover the concept of what is called substantive due process, which would impose substantive requirements as to the policy of the law in question" Canada, 32 Parl. sess 1, Special Joint Committee on the Constitution of Canada, Proceedings No. 46 at 32 (1980-81) cited also in P. Monahan, Supra 15, 76.

[164] Supra 146, 292-293.

> elected representatives in Parliament as evolving social and moral issues." The Minister underscored this position in his testimony before the joint committee: "if you write down the words, due process of law here [Section 7] the advice that I am receiving is that the court could go behind our decision and say that their [Parliament's] decision on abortion was not the right one...and that it is a danger, according to the legal advice that I am receiving, that it will very much limit the scope of legislation by the parliament who did not want that; and that is why we do not want the words "due process of law". [165]

Hawkins concludes that because of the transcendent nature of the capital punishment and abortion issues at the time the Charter was being ratified, it is unlikely that the Charter would have continued to enjoy broad based popular support if both the proponents and opponents of those issues, understood that the courts could predetermine the substantive outcome of the respective debates.[166]

So "fundamental justice" can be seen to have come a long way since it was initially commented upon by the Assistant Deputy Minister of Justice, B.L. Strayer, when he specifically indicated that "fundamental justice does not go beyond the procedural requirements of fairness."[167] As can be seen, instead of simply providing procedural safeguards in situations where the right to the administrative concept of natural justice was not available, the court has now determined that Section 7 has the potential to open the door to the mandating of new rights for the purpose of striking down what could be perceived as bad law.

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[165] Ibid.

[166] Ibid.

[167] Supra 146, 287.

While it may be true that recent challenges involving specific Section 7 claims have not always been successful, the broad breadth previously given this section will continue to inspire adventurous arguments.[168] In concluding the discussion of Section 7, the following questions need be asked: Why did Parliament bother to enumerate any specific rights at all if new rights were to be discovered in such an effortless manner? Moreover, if Section 1 is seen by some as the consistent corrective the courts can use to temper the affects of the more frivolous Section 7 violations they may find, why did Parliament entrench any right other than Section 1?

C. THE EXPANSION OF STANDING AND ACCESS TO THE COURTS

It is suggested that in the era of the Charter, the courts (particularly the Supreme Court of Canada) have significantly relaxed the rules which permit the participation of non-government interveners in Charter legislation. At a time when the issues being litigated are increasingly political, organized groups are now given a means by which they can more easily circumvent the political process in pursuit of what is often a self-interested policy agenda. As F.L. Morton and Rainer Knopff suggest:

> ...Canadian interest groups are quickly learning to play the new game of Charter politics, and can be counted on to challenge -either directly or as intervenors - any new

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[168] F.L. Morton, P.H. Russell and M.J. Whithey "The Supreme Court's First 100 Charter of Rights Decisions: A Quantative Analysis" p. 12. While the authors describe specific section 7 arguments to be comparatively, amongst those with the lowest success rate, their quantitative findings ought not to minimize the effect of those cases that were won using a non-interpretivist approach. The significance of those cases rests with the manner in which similar challenges will be mounted in the future which could further perpetuate a judicial "discovery" or "creation" of not specifically mentioned legal rights.

policy initiative that is not to their liking.[169]

To the extent that these self-serving interventions amount not to the desire for protection from the unjustified intrusion or expansion of state activity, but rather a desire to expand state activity "by extracting additional goods and services", this expanded scope for intervention or "standing" results in a false symmetry respecting Parliament's and the courts' right to make policy.[170] The notion of empowering some interested and potentially affected party who may seek redress and protection from state encroachment (orthodox liberal constitutionalism), has now given way to a system, where a legally sophisticated citizenry or interest group, can use the courts to sometimes gain that which had been accessible only through legislative committee.[171] The traditional doctrine of standing which had limited unjustified participation in litigation by individuals who were not directly affected by a law but wished a second chance at the issue (having already lost the political and legislative battle), has now been dramatically loosened. As a result the courts have demonstrated their willingness to confront Parliament with decisions that sometimes supersede the enacted will of the elected representatives.

Traditionally, "status", "standing", or "locus standi", required an alleged injury to a recognizable and justifiable legal interest which could be adjudicated by the courts.

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[169] F.L. Morton and R. Knopff "The Supreme Court as the Vanguard of the Intelligentsia: The Charter Movement as Post Materialist Politics" Paper prepared for conference on "Two Hundred Years of Canadian Constitutionalism" (Ottawa, November 1-2, 1991), 4-5.

[170] Ibid., 5.

[171] Ibid., 10.

Moreover it was required that the party seeking to intervene be the injured party.[172] The movement away from those old rules has been occurring throughout the 1980's. The case of R. v. Big M Drug Mart represents just one of many of those cases. In the face of an argument that Big M Limited. (a corporation without a soul and assured of eternal life by the Alberta Business Corporations Act) could not make application using the freedom of religion provision to strike down the Lord's Day Act, the Supreme Court of Canada skillfully deflected what would have been a limitation on standing. Dickson C.J.C. held:

> Section 24(1) sets out a remedy for individuals (whether real persons or artificial ones such as corporations) whose rights under the Charter have been infringed. It is not, however, the only recourse in the face of constitutional legislation. Where, as here, the challenge is based on the unconstitutionality of the legislation, recourse to s. 24 is unnecessary and the particular effect on the challenging party is irrelevant.[173]

The Court went on to use Section 52 of the Constitution Act 1982 and ultimately held that the Lord's Day Act was inconsistent with the Constitution "and therefore of no force and effect". With respect to standing specifically, Dickson C.I.C. indicated that, "It is the nature of the law, not the status of the accused, that is in issue."[174]

The court has now involved itself in revising the procedural law that had earlier been used to appropriately avoid dealing with cases which did not involve a person

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[172] W.I.C. Binnie Q.C. "Standing In Charter Cases" paper delivered at Canadian Bar Association Annual Meeting (Toronto: October, 1986).

[173] R v. BIG M DRUG MART [1985] 1 S.C.R. 295 at p. 314.

[174] Ibid., 314.

directly among the injured. In Borowski v. Minister of Justice et al, the Supreme Court of Canada virtually broke free form the old established rules of standing. The court permitted Borowski to directly challenge the abortion law although he was not directly affected by it. In that case, Borowski sought a declaration that pursuant to the equality rights section, Section 15, the fetus is entitled to full protection of the Charter. Along with such an evolution in standing came a corresponding evolution in procedure.[175] For example, The Attorney General of Canada v. Law Society of British Columbia enlarged the scope of the declaratory action and as earlier discussed in Operation Dismantle v. The Queen[176], the Supreme Court of Canada broadened the notion of "justiciable controversy". As these cases indicate, the Supreme Court gave themselves and litigious citizens and groups, the procedural tools to get involved in interesting or important matters of government.[177] In the same vein but more recently, Singh v. M.E.I. [178] further expanded standing, this time ignoring citizenship in favour of geography. By ruling that "everyone" also means all individuals physically present in Canada and thereby subject to our laws, the Supreme Court further increased its own power over heretofore legislative responsibility (immigration) and reduced further the required connection between the litigant and the legitimacy of the "public inquiry" in question.

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[175] Borowski v. Minister of Justice et al [1989] 1 S.C.R. 342.

[176] The Attorney General of Canada v. The Law Society of British Columbia [1982] 2 S.C.R. 307 Operation Dismantle v THE QUEEN.

[177] Supra 85.

[178] Singh v. M.E.I. [1985] 1 S.C.R. 177.

The situation has evolved to where the courts can on occasion, seek to act like the legislative equal of Parliament. Having relaxed the rules respecting standing, the courts have almost created their own form of constitutional reference.[179] Such reference was once the exclusive power of the provincial and federal governments. With the assistance of citizen activists and plaintiffs, the court can now pose to itself questions the government may have already answered or perhaps preferred not to ask. W. Ian C. Binnie, Q.C. suggests:

> As the Canadian Courts began to see themselves increasingly as active shapers of society, it became a handicap to have to wait for the vagaries of the court docket to produce the questions to which the judges wish to supply answers. Now, under the new rules governing status, the court can, by the exercise of its discretion, pick and choose the public policy issues it feels are ripe for judicial determination. A ready supply of plaintiffs is encouraged by a low threshold test of qualification. There will be few serious activists who fail to meet the test laid down in Borowski v. The Minister of Finance et al (1981) 2 S.C.R. 575. In effect the only people who do not qualify as potential plaintiffs are those who demonstrably lack a "serious interest" in the matter in dispute (and therefore, presumably, would not have bothered to mount a Charter attack in the first place) or actions launched in relation to issues that the court feels can be tested in a more "reasonable and effective" manner by other litigants."[180]

In summary, whether it be with respect to "justiciability", an expansive and substantive interpretation of Section 7, or through a newly expanded definition of "standing", the non-interpretivist's view of constitutional interpretation expands the

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[179] Supra 171.

[180] Supra 172, 7.

judicial policy-making potential. This position assumes that social problems can be resolved through constitutional adjudication and that the courts are at least as well placed as the legislatures, to determine "democratic" values derived from "changing societal needs".[181] The judiciary seems unconcerned that such an approach may not reflect the compromise of 1982, which sought to preserve a policy-making role for the legislative branch to maintain the liberal-communitarian balance found in traditional Canadian political culture.

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[181] Supra 107, 62.

CHAPTER 4

NON-INTERPRETIVIST, SUBSTANTIVE JUDICIAL REVIEW AND ITS POTENTIAL TO SHAPE PUBLIC POLICY: SELECTED CASE STUDIES

CHAPTER 4

The theoretical choices and interpretive approaches adopted by the Canadian Courts since the entrenchment of the Charter in 1982 have significantly reshaped the judicial-legislative relationship. These choices and approaches were discussed in the previous chapter. This was done with reference to the core premises and common understandings of the political and bureaucratic participants who helped fashion the compromise in 1982, which in its essentials, attempted to include and preserve safeguards that would in the Canadian tradition, continue to reconcile individual and community interests.

This chapter will more specifically deal with selected cases which are representative of the development of the earlier discussed trends towards increased judicial policy-making and the more complicated judicial-legislative interaction. By virtue of the legal results and the judicial reasons offered in support, these cases constitute empirical evidence for the proposition that the Courts have chosen to apply and interpret the Charter in a way that could potentially undermine the aspects of the Charter and the 1982 compromise designed to preserve the supremacy of the legislative function: a function which the writer submits played a key role in preserving and maintaining the traditional Canadian political culture.

The cases selected are included because they most starkly signify the judicial trends discussed in this thesis. These cases have been selected in part because they represent one or more of the three ways in which the judiciary is expanding its role and

thus shaping a new interaction with the legislative branch.[182] The examination of these selected cases will necessarily involve some mention and analysis of the Court's reasons for judgment. These are the reasons which form part of the written record explaining the judicial formulation of the issue and the judges' sometimes varying approaches in reaching a conclusion. It is in the reasons for judgment in these cases that one finds the judicial analysis which can provide insight into how the judge got from point A to point B. Significantly, even where a litigant's constitutional cause of action was unsuccessful, an examination of the Court's reasons will often reveal a judicial analysis that could constitute the basis for a future and perhaps successful challenge to a piece of legislation. For, in addition to being the judicial decisions' prime basis for moral authority, the judges' reasons provide insight into the judges' premises and assumptions.[183] Those assumptions and premises may form the basis for justifying future challenges even if the future cases are founded on different facts. It is for this reason that the judges' analyses, even if writing a dissenting or slightly more subtle concurring opinion, often amount to a judicial invitation for a new or renewed challenge.[184] With the constantly developing and expansive corpus of

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[182] These are the expanded breadth of what is justiciable; the substantive and expansive approach to rights interpretaion and rights creation; and the expansion of standing and access; See Chapter 3 for a discussion of the theoretical background to the interpretive approaches and doctrinal choices respecting Charter interpretation since 1982.

[183] See: Chapter 3 of this thesis and the section entitled, "The Legal and Political Compromise of 1982".

[184] Chapter 3, Supra 1, 26-27; see also: P. McCormack and I. Greene, Judges and Judging (Toronto: J. Lorimer and Company, 1990), 29. "The decision of the court's majority on the law can be divided into two parts: that which was required for the determination of the case before the court (the ratio); and the "words in passing (or obiter dicta) statements about the law that are not essential to the court's decision. The ratio for a decision is a more authorative statement of law than obiter dicta, because the law is considered to be

Charter law, these invitations often hold the prospect of having a significant effect on public policy.[185] It is from a predictive and anticipatory posture, then, that a reader of the reasons for judgement (both majority and minority, concurring and dissenting) can attempt to observe trends and patterns in order to foretell not only future legal results but also the parameters and definitions for future public debate. It is an argument in this thesis that these expanding and developing legal formulations, definitions, and tests may allow the individual-focused legal rights culture to smother the counter-revolutionary, non-rationalist and communitarian aspects of Canadian society.

1) OPERATION DISMANTLE INC. v. THE QUEEN [1985] 1 S.C.R. 441

The Supreme Court of Canada in Operation Dismantle, was asked to address whether cabinet decisions are subject to the Charter notwithstanding that there may be no statutes involved. Furthermore, the Court was faced with deciding whether such issues as the federal government's defence policy, were in fact legal questions which could be considered "justiciable".

The case arose as a result of the coming together of a group of organizations

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established by the decisions about concrete cases and not simply by statements of judge's opinions. A lower court will feel relatively free to disregard a statement if it was made in obiter. It is up to the judges themselves in future cases to distinguish between ratio and obiter, because the two aspects are not always clear from the text of the opinions."

[185] Chapter 2, Supra 48, 98. Morton and Knopff stress that the courts can "have a direct impact on public policy whenever they invalidate an existing policy, legitimate one by upholding it, or impose a new one. The extent to which this occurs, of course, depends on how judges approach the task of legal interpretation." Morton and Knopff go on to suggest that: "the political impact of the Charter thus depends on whether judges undertake their interpretive task in an activist or restrained frame of mind, and on the theories of constitutional interpretation they employ."

who were mobilized during 1983, by their mutual opposition to the testing of the U.S. Cruise missile in Canada. These organizations joined forces to mount a constitutional challenge to stop the tests.[186] The groups worried that once the tests were to begin, the potential threat of a nuclear war would have increased. They believed that the legal corollary of this increased likelihood of nuclear war was that all Canadians were deprived of their security of the person and that such deprivation was contrary to the guarantees of life and security of the person in Section 7 of the Charter. Counsel for the Government of Canada argued that the federal and provincial cabinets derive their authority essentially from two sources: legislative and the prerogative power. While prerogative power may be limited or abolished through legislation, Parliament did not in this case choose to do so and accordingly cabinet was acting pursuant to their prerogative powers when making such a decision respecting Cruise testing. It was the position of the government that the Charter should not apply to the prerogative powers of the cabinet.

The majority decision written by Chief Justice Dickson, determined that there was no basis for the Operation Dismantle Statement of Claim because the arguments raised by the coalition of opposition groups, were based on mere speculation. It would seem that the decision with respect to the question being asked of the Court, was decided based on what the Supreme Court of Canada determined was a paucity of verifiable and convincing information respecting the claims of Operation Dismantle and the effects of the Cruise testing.

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[186] Chapter 1, Supra 11, 136.

The essence of the government's position was that such matters as defence policy were matters of a more or less political nature and as such were not justiciable. Operation Dismantle was an early Charter decision and accordingly the government urged the Supreme Court to determine the question of justiciability on the basis of the test used by the U.S. Supreme Court when dealing with the U.S. Bill of Rights. The U.S. Supreme Court attempted to draw a clear line between cases which dealt with "legal" issues and those that dealt with "political" issues. The Supreme Court of the United States determined that the "political" issues so characterized were not justiciable, whereas those cases that gave rise to legal issues would be justiciable. The distinction was based upon the rather obvious and important assumption that one branch of government ought not to encroach on the responsibilities and jurisdiction of another branch.[187]

The Supreme Court of Canada, in deciding Operation Dismantle, rejected the "political questions" doctrine. In so doing, the Court appears to have demonstrated early, its willingness to review decisions and matters which could be considered political in nature. In writing a concurring opinion to Chief Justice Dickson's majority opinion, Madam Justice Wilson made an effort to find a number of exceptions to the political questions doctrine, which she suggested was a doctrine derived from the notion of separation of powers. In fact, her concurring reasons provide the basis for the Court's rejection of the doctrine. Wilson, suggesting that the Courts not be too quick to give up their power to review judicially important matters of state, appears to have

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[187] Ibid., 137.

been choosing between two different interpretations of the application of the political questions doctrine. The two interpretations were represented by American Justices Felix Frankfurter and William Brennan respectively.[188] Wilson rejected Frankfurter's preference for judicial self-restraint in matters where Frankfurter thought the legislative and executive branches ought to be given wider discretion in the making of policies in areas outside the realm of judicial training, experience and expertise.[189] By accepting the wider Brennan approach for interpretation, Wilson opted for an approach which was more non-interpretivist in nature.

The decision in Operation Dismantle has particular significance when considered with the Section 7 substantive review cases. In so dismissing the political questions doctrine and in so interpreting Section 7 (as discussed in Chapter 3 and below), the Supreme Court of Canada chose to accept and ultimately extend the non-interpretivist's position now so often adopted by the U.S. Supreme Court.[190] It is an approach that the U.S. Supreme Court has used in most of the celebrated decisions which have dominated the American political scene in the modern era of judicial review.[191] Its adoption in Canada provides a fundamental foundation by which the Canadian Courts can shape a strong and creative role for itself in the defining of unenumerated rights and values which they may wish to find in the Charter's more vague provisions.

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188 Ibid.

189 Ibid.

190 Chapter 2, Supra 53, 56.

191 Ibid.

Operation Dismantle along with B.C. Motor Vehicle Reference and Vaillancourt v. The Queen, (discussed below), give rise to an important concern surrounding this non-interpretivist approach to unenumerated rights and values. The type of expansive interpretation (of a larger breadth of subject matter) used by the Courts in these cases potentially allows them to "discover the fundamental values of the polity by deeming these rights to have been protected in the sometimes vague terminology used in the Charter's provisions."[192] With Operation Dismantle having been decided as it was, it is clear that such expansive interpretations can take place in almost all areas of societal concern. Manfredi highlights the problem with such an interpretive approach applied to such a wide breadth of subject:

> In the hands of modern judges, each of the available alternatives - natural law, reason, tradition, consensus and neutral principles - can easily collapse into some version of judicial policy preference. What makes this problematic is that personal policy preferences is not sufficient to legitimate the decisions of such electorally unaccountable institutions as Courts.[193]

The adoption of the rationale used in Operation Dismantle and later used in other cases, demonstrates the ease with which the judiciary may determine and define the basic tenets and values which lie beneath our polity, notwithstanding the fact that the judiciary may be less well placed than the elected legislative branch in terms of determining what those values and tenets are. By expanding the breadth of the subjects and issues which the Courts may review, the Court in Operation Dismantle explicitly

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[192] Ibid.

[193] Ibid.

attempted to expand the legitimacy of judicial review and in so doing, further enhanced the potency of judicial policy-making. In opening up the Courts to new subjects and issues, the Supreme Court in Operation Dismantle took a significant step in presenting itself as an alternative forum for the resolution of problems respecting differing political values and points of view.

2) **REFERENCE RE: SECTION 94(2) OF THE MOTOR VEHICLE ACT (B.C.)** [1985] 2 S.C.R. 1123

The Supreme Court of Canada was asked to determine whether Section 7, in asserting that everyone has the right to life, liberty and security of a person unless deprived thereof pursuant to the principles of fundamental justice, allowed for the type of punishment contained in a piece of legislation emanating from the British Columbia legislature. More precisely, the question was whether or not the phrase "fundamental justice" included mens rea (the mental element of intent in criminal cases).

In 1982 British Columbia legislature created an absolute liability offence for those found to be driving without a valid driver's licence. On first conviction the mandatory minimum fine for the offence was $300.00 with a mandatory minimum jail sentence of 7 days. For any subsequent convictions, the minimum jail sentence would become 14 days. In addition to the severe nature of the penalty, the offence was made out upon the Crown showing that a person was driving without a valid licence irrespective of whether he intended to do so or knew of his status. Such liability is called "absolute liability". An absolute liability offence is an offence where irrespective

of the mental element, guilt is established immediately upon proof of the guilty act. The legislation arose as a result of difficulties the Province of British Columbia had been experiencing with respect to serious Motor Vehicle accidents which were alcohol related and which involved individuals who were driving while suspended, often after earlier imposed drinking and driving convictions.

In deciding whether or not mens rea was to be included in the phrase "fundamental justice", the Court was determined to look at the nature of the penalty as it related to the deprivation defined to have been protected against in Section 7. Mr. Justice Lamer concluded that the combination of a mandatory prison term (which can be seen to deprive a person of liberty) and the absolute nature of the offence, violated fundamental justice.

The Court was left to decide whether or not Section 7 ought to be given a substantive or procedural interpretation. A brief examination of that particular debate was outlined in Chapter 3. If the Court was going to give Section 7 a procedural interpretation, it would mean that the legislature could enact a law that would deprive people of their life, "liberty and security," on the condition that correct procedures of fundamental justice were adhered to (a hearing before an impartial and independent judge, adequate notice and the right to counsel, etc.).[194] If the Court were to give it a substantive interpretation, it would mean that even if the correct procedures were followed, there would be instances where the legislature simply could not (irrespective

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[194] Ibid., 57; see also: Chapter 1, Supra 11, 145.

of the legislation) deprive a person of his life, liberty or security.[195]

As was seen in the Chapter 3 discussion of this issue, the Court gave "fundamental justice" a substantive interpretation notwithstanding the intent of the framers of the Charter. The Courts seemed to disregard that the phrase "fundamental justice" was specifically chosen instead of "due process" in order to avoid the very substantive interpretation that the Supreme Court ultimately accorded Section 7. Reference Re: Section 94 (2) of the Motor Vehicle Act (British Columbia) was one of the first cases which confronted the Court with the question of whether or not (and if so how) the evidence and information which was part of the public record (during the approval process leading up to the entrenchment of the Charter) could be used by the Court. With respect to the issue relating to the substantive versus procedural interpretation to be given the phrase fundamental justice, the Court determined that it would accept the evidence from the legislative committee in its effort to choose the appropriate interpretative approach. However, having accepted the evidence which was part of the public record, the Court assigned the evidence minimal weight. That meant that notwithstanding the clear intention of the framers that Section 7 be interpreted procedurally rather than substantively, the Supreme Court opted for the later approach.[196]

The Supreme Court's preference (as demonstrated in Operation Dismantle) for a non-interpretivist approach to judicial review, was given its first meaningful

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[195] Ibid.

[196] Chapter 2, Supra 53, 57.

application in terms of substantive review, in B.C. Motor Vehicle Reference. By finding as he did, Justice Lamer found that the British Columbia legislation violated a substantive principle of fundamental justice and that Section 7 provides the Court the power to strike down provincial legislation on such substantive grounds. While there were some minor distinctions in the reasoning of the justices, everyone on the Court agreed with Lamer's view that the principles of fundamental justice permitted substantive judicial review.[197]

The Federal Department of Justice had specifically determined and then advised in the 1981-82 Committee process, that the "principles of fundamental justice" were to be purely procedural in nature. The Supreme Court of Canada's decision in B.C. Motor Vehicle Reference illustrates how by virtue of a chosen interpretive approach, the judges may now shape the principles they deem necessary to reach an intended result.[198] As Manfredi indicates:

> The Court's power to declare absolute liability offences contrary to substantive fundamental justice and violations of the Charter (where such offences are enforced by imprisonment or probation) had no source other than judicial will.[199]

One cannot conclude but that the Court in this decision knowingly if not defiantly moved to enlarge its policy-making capacity. By using Section 7 to mandate new substantive rights, the Court has provided itself the potential to define or "discover"

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[197] Ibid., 57.

[198] Ibid., 60.

[199] Ibid., 60.

all manner of new rights. Not only does this defy the specific intentions of the framers with respect to Section 7 and the phrase principles of fundamental justice, it also defies the positivist assumptions underlying the Charter. With such an openly substantive section as Section 7, the Supreme Court seems prepared to ignore the obvious fact that the framers chose to include some rights and exclude others.

Many argue convincingly that this decision, involving the impugned B.C. legislation, may represent a judgment by this Court that the particular type of punishment was too severe given the relatively trivial nature of the offence. Even if that is the case, it would still seem clear that the decision further represents an opportunity for Courts in the future to second guess legislators respecting the severity of penalties.[200] B.C. Motor Vehicle Act Reference provides to all judges the opportunity to review any penalty provided by a legislature, in order to see whether or not it accords with the principles of fundamental justice.[201] That quite simply is a substantive power.

The B.C. Motor Vehicle Reference case was no passing abberation. This is evident in the case of Vaillancourt v. The Queen[202], where building upon its decision in the B.C. Motor Vehicle Reference, the Supreme Court affirmed that it had used Section 7 as a basis for reviewing the substance of legislation. It further indicated that in the exercise of this power, the Courts have the duty to review the definition of any

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[200] Chapter 1, Supra 2, 364, 368.

[201] Ibid., 363.

[202] Vaillancourt v. The Queen [1987] 2 S.C.R. 636.

particular crime enacted by Parliament and ensure it accords to the principles of fundamental justice. In Vaillancourt, the Supreme Court held that Parliament cannot label a crime as "murder" unless the statute stipulates that as an element of the offence, the accused need have foreseen or ought to have foreseen the probability of death resulting.[203] This decision essentially vitiated the notion of "constructive murder"; a criminal law concept that dates far back into Legal history. "Constructive murder" had permitted a conviction for murder in cases where a death had ensued during the course of a robbery, and where the accused used a weapon or had a weapon on his person. Using the B.C. Motor Vehicle Act Reference for its basis, the Court in Vaillancourt suggested that Section 7 could be used to ensure that the names chosen by Parliament for offences do not unduly "stigmatise" the offender.[204] Yet, B.L. Strayer suggests:

> It seems clear from the decision that if Parliament had chosen to impose the same penalty for an offence called "manslaughter" for "robbery by weapon" or "trespass resulting in death through misadventure," it would have been free to do so.[205]

The decisions in both B.C. Motor Vehicle Reference and Vaillancourt represent approaches to the interpretation of Section 7 which have and may continue to substantially restrict legislative power and enhance the judiciary's own power. This is so both in the area of penal law and in the broader area of public law which is usually presented to address serious and complicated social problems. With a broad approach

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[203] Chapter 1, Supra 2, 363.

[204] Ibid., 364.

[205] Ibid.

taken to the question of justiciability and a seemingly endless number of rights to be found through Section 7, the judiciary can now be considered to be a formidable rival to the legislative branch in terms of its capacity to make public policy. This type of judicial potency has Christopher Manfredi asking:

> whether the adoption of an American-inspired non-interpretivist review will lead the Canadian Court to define these democratic values in a manner consistent with the philosophic assumptions of the U.S. constitutional jurisprudence, or whether non-interpretism will acquire a uniquely Canadian character?" [206]

3) **Morgentaler, Smoling & Scott v. The Queen [1988] 1 S.C.R. 30**

In 1985, Dr. Henry Morgentaler and two other doctors were convicted of procuring abortions contrary to Section 251 of the Criminal Code. The parties appealed to the Supreme Court of Canada on the grounds that Section 251 of the Canadian Criminal Code, violated the rights of pregnant women to liberty and security of the person contrary to the principles of fundamental justice found in Section 7 of the Charter.[207]

The section of the Criminal Code that was being challenged was a section which precluded abortions except in cases where they were performed by qualified medical practitioners and in hospitals that were approved for such abortions. Furthermore, the section required that the procedure had to be sanctioned by the majority of the members

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[206] Chapter 2, Supra 53, 57.

[207] Morgentaler, Smoling and Scott v. The Queen [1988] 1 S.C.R. 30.

of the hospital's abortion committee, based on the recommendation that the particular abortion was necessary to safe-guard a women's "life or health".[208] The approved hospitals were hospitals that were so designated by the Provincial Ministers of Health. It should be pointed out that the Provincial Ministers of Health were under no obligation to approve any hospitals. The persons sitting on the abortion committee necessarily included three doctors who were not to be performing abortions themselves.

In Morgentaler, the Supreme Court of Canada received evidence that as a result of the various restrictions outlined above, only 40% of the Canadian hospitals were eligible to provide abortions.[209] Only a proportion of those hospitals actually had abortion committees. The Court was told that in the end, women were able to obtain abortions in only about 20% of the Canadian hospitals.[210]

Seven judges heard the case and they produced four separate opinions, three writing for the majority and one in dissent. Chief Justice Dickson wrote the leading majority opinion, Mr. Justice Beetz wrote the second opinion, Madam Justice Wilson wrote the third majority opinion. The fourth opinion was Mr. Justice McIntyre writing in dissent.

Mr. Chief Justice Dickson began by indicating that a substantive review of the issue was not necessary, because the case could be decided on procedural grounds alone. Ruling that Section 251 did violate the security to the person, Dickson J. did

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208 Chpater 1, Supra 11, 153.

209 Supra 207; see also: Supra 11, 153.

210 Ibid.

not however exclude the possibility of a substantive review of this issue in the future. Mr. Justice Beetz in his concurring opinion, agreed with Chief Justice Dickson that the requirements of fundamental justice were not met in the legislation. Madam Justice Wilson while similarly invalidating the section, went even further in her inquiry into the state's right to regulate abortions at any point in the second trimester.[211]

Chief Justice Dickson's opinion suggests that the administrative scheme that was set up to implement the abortions permitted in Section 251, had the effect of denying many women who would otherwise have wanted an abortion, the opportunity of having them. Dickson therefore concluded that Section 251 failed to meet the procedural standards required for fundamental justice. In his decision, Chief Justice enumerated the impractical and often cumbersome procedure as well as the vague definition of "health", which prevented him from concluding that the procedural requirements of fundamental justice had been met. In dealing with the Section 1 test, while Dickson accepted the statement of purpose in the abortion law itself, he nonetheless found that Section 251 could not meet the three prongs of the second part of the Oakes test. He found that the administrative scheme was rationally connected with the objective of the section, but it infringed upon the women's rights excessively, and the negative effects were disproportionate to the benefits.

Mr. Justice Beetz came to the same conclusion as Chief Justice Dickson but Justice Beetz was careful to stress the legitimacy of Parliament's desire to protect the fetus. While Chief Justice Dickson had been much more straight forward in his

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[211] Supra 207.

emphasis respecting the rights of women, Justice Beetz implied that new and corrected law could perhaps pass the test respecting what is acceptable under Section 1.

As was discussed in the last Chapter, while Chief Justice Dickson showed little timidity in utilizing the purposive approach under section 7, it was Madam Justice Wilson who truly sought to tackle the subject of abortion head on. She did so by attempting to find such a connected "right" in subsection 2(a) of the Charter, which provides for the "freedom of conscience." Madam Justice Wilson found that Section 251 violated the right to "liberty and security of the person." She further went on to determine whether or not such a violation of Section 7 could be considered in accordance with fundamental justice. It was her view that Section 251 violated the guarantee of freedom of conscience. That is, the decision of whether to have an abortion was a matter of conscience for the woman and as such no procedures could justify the infringement of that freedom. Madam Justice Wilson found that Section 251 failed to meet any of the three prongs of the second part of the Oakes test.

With the earlier Section 7 decisions "on the books" and while Chief Justice Dickson indicated that the decision was made on procedural grounds, it can be suggested that Dickson's concerns were nonetheless as substantive as Madam Justice Wilson. Christopher Manfredi suggested that:

> "Justice Wilson's reasons for judgment were at least candid enough to confront the substantive issue directly."[212]

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[212] Chapter 2, Supra 53, 119.

Manfredi further suggests that:

> Perhaps the most important lesson in Morgentaler, Smoling and Scott, then, is that it is unnecessary for the Court to engage in explicit substantive review, or to attach particularly extravagant meanings to liberty and security of a person, to have a significant impact on public policy when deciding cases under Section 7. The broad and open ended nature of Section 7 means that the Court can examine complex questions of substantive policy even in the course of deciding seemingly narrow issues of criminal procedure.[213]

It was Manfredi's view that Parliament had intended to liberalize access to legal abortions in 1969. Yet at the same time, it was clear that it was not Parliament's intention to remove its legal barriers all together from the procedure.[214] Manfredi also suggests that the regulation of individual conduct by any system of government regulation is inevitably going to produce some delays and perhaps prohibit that conduct. That is after all, why that conduct may be the subject of regulation. Manfredi points out that by failing to define health and by leaving it open for the provinces not to require the establishment of therapeutic abortion committees in all hospitals, Parliament was leaving enforcement of Section 251 largely within the realm of provincial control of administration of justice. So, while Parliament was providing some access to abortions in the various provinces, given the social divisiveness of the subject, it was also trying to permit pragmatic solutions reflecting local conditions in the provinces. [215] Trying to split the decision to regulate from the method of regulation, the Court

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[213] Ibid.

[214] Ibid.

[215] Ibid.

was able to make policy with the Charter without being seen to deal with the object of the legislation. In response to Chief Justice Dickson's declaration in Morgentaler that the Court is "now charged with the crucial obligation of ensuring that the legislative initiatives of our Parliament and legislatures conform to the democratic values expressed in the Canadian Charter of Freedoms," Manfredi points to the oddity which now sees the Court both defining and enforcing those "democratic values".[216]

Notwithstanding the developments and interpretations which permitted the Supreme Court of Canada to decide as it did in Morgentaler, it is perhaps well to recall a point of some significance. Irrespective of ones' position on the excessively difficult substantive issue, abortion like capital punishment was undeniably one of the two subjects mentioned in the discussion before the Parliamentary committee about which it was assured that such substantive outcomes would be left to Parliament.[217] In point of fact, the current policy of no policy respecting abortion, has been in part, shaped by the judicial formulations of that issue in Morgentaler.

4) **Schacter v. Canada [1992] 2 S.C.R. 679**

Haig and Birch v. Canada et al (1992) 57 O.A.C. 272

CHRC in Canada v. Mossop (currently unreported decision of Supreme Court of Canada, February 25, 1993)

These three cases need necessarily be discussed together since they represent

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[216] Ibid.

[217] Chapter 3, [217] Supra 59, 292-293.

what may be in some respect, a logical and an inevitable extension of the broad potential judicial power. These decisions contributed to the eventual application of a "reading in" doctrine which essentially permits the Courts in some cases to amend pieces of legislation. It is easiest to understand the development of this approach by reviewing chronologically the development of the cases.

In Schacter, the Court was asked to rule on provisions of the Unemployment Insurance Act that provided natural parents with less extensive parental leave benefits than those available to adoptive parents. The Act allowed for 15 weeks of maternity benefits to natural mothers or in the event of a mother's disability or death, those benefits could be transferred to the natural father. In the case of adoptive parents of either sex, they were able to claim 15 weeks similar leave as long as the claimant can demonstrate that it was reasonable for that claimant to remain at home. Mr. Schacter argued that these provisions of the Act denied him equal benefit of the law as guaranteed under Section 15. He argued that the Act created a distinction between natural fathers and natural mothers in the assumption that women should be unconditionally entitled to maternity benefits. As well, he argued that the Act created a distinction that was discriminatory to the extent that adoptive parents of both sexes claim parental leave benefits much easier than natural fathers.

At first instance in the trial division of the federal Court, the Court agreed with Schacter that this claim did constitute discrimination on the basis of Section 15. Having so found a violation of Section 15, the federal Court then faced the task of dealing with the impugned legislation. The trial judge decided not to proceed with a remedy

pursuant to Section 52 of the Constitution Act which would have declared the entire Unemployment Insurance Act invalid. Instead, the Court grounded its remedy pursuant to Section 24(1) and concluded that the appropriate and just remedy would consist in this case of extending to the natural parents the same benefits enjoyed by the adoptive parents, at least until Parliament had an opportunity to amend the Act. The Federal Court of Appeal upheld the trial judges' decision.

The Supreme Court of Canada, in its decision in Schacter, provided the Courts in Canada the power to repair unconstitutional law by "reading in" the necessary and required portions of the provision. The Supreme Court of Canada set out guidelines for remedying "under inclusive" legislation which would otherwise violate the Charter by granting benefits to some groups, but not to others. While the Court recognized that it did have the power to read in, it held that in Schacter's case, the facts were not clear enough and the Court instead called for the extension remedy used by the trial judge.

In Haig and Birch v. Canada, the Ontario Court of Appeal cited Schacter in support of its authority to essentially rewrite unconstitutional laws. In Haig, the Ontario Court of Appeal was dealing with a challenge to the Canadian Human Rights Act, by a gay activist and former Air Force Captain who argued that he was forced out of the Armed Forces because of his homosexuality. Mr. Birch sought to complain to the Canadian Human Rights Commission but could not because the relevant section (Section 3) of that Act did not include sexual orientation as a listed prescribed ground of discrimination. The Federal Department of Justice conceded in the Ontario Court of Appeal, that Section 15 does not list sexual orientation as a basis for discrimination

against which constitutional protection is guaranteed, and that sexual orientation is "analogous" to the grounds listed in Section 15 and thus should be carried by its provisions. But the Crown nonetheless argued that Section 3 of the Canadian Human Rights Act did not violate Section 15(1) because the failure to include sexual orientation as a prohibited ground for discrimination in the Act, did not have a discriminatory effect. The Court rejected that argument. The Crown in Haig did not attempt to argue that the infringement could be justified under Section 1. Accordingly, having found the violation and given the Crown's concession, the Court of Appeal had to chose the appropriate remedy in a case where there was a "benefit" deemed to be found in an "under inclusive" law. In referring to the guidelines set out in Schacter, Mr. Justice Krever of the Ontario Court of Appeal faced two possibilities: striking down Section 3(1) of the Act yet suspending the declaration of invalidity until such time as Parliament was able to amend the section; or reading in "sexual orientation" as an additional ground of discrimination. The Court determined that it would be preferable to "read in" given that the Court had determined that the criteria set out in Schacter had been satisfied. The Court of Appeal suggested that given a choice, Parliament would have extended the Act to protect gays and lesbians rather than choosing the only other constitutional permissable option, not to protect anyone. They made this assumption based upon earlier commitments from successive Federal Justice Ministers who they say suggested that such protections were soon to come. Justice Krever indicated that enlightened human rights legislation is now an "intricate part of our social fabric".

It is clear that Haig goes further than Schacter by actually using Section 52(1)

to read in and extend protection that would seem to have been excluded from listed forms of discrimination. It is interesting to note that while the Ontario Court of Appeal presumed what Parliament would do if given a choice, the amendment that had in fact been discussed by the Conservative government during the later portion of the 1980's, was still lying stagnant due to opposition within the party caucus and as a result of opposition in military circles. It wasn't until Haig was decided that Parliament was forced to act. It is reasonable to question just how voluntary and how willing the elected Parliament was in initiating a policy that was effectively made by the Ontario Court of Appeal.

By the time the Supreme Court of Canada was asked to decide the Mossop case, the Ontario Court of Appeal had relied upon the earlier Supreme Court of Canada decision in Schacter, to read in the rights to be protected in cases of discrimination based on sexual orientation (Haig). Moreover, by the time Mossop got to the Supreme Court, the then Federal Justice Minister Kim Campbell had already introduced a Bill into the House of Commons, which was to stipulate that sexual orientation was a right to be protected in the Canadian Human Rights Act. The amendment was to stipulate however, that "family" was to be defined so as to include only heterosexual couples. Such an amendment with the accompanying stipulated definition of family, was seen as a subtle compromise to a difficult issue that provoked serious debate not only within the Conservative caucus but across the country generally.[218] While there had been

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[218] The governmental bill introduced in the House of Commons (Bill C-108) is currently in a holding pattern at first reading. A similar bill (Bill S-15) was introduced in the Senate by Conservative Senator Kinsella. That bill is currently in a Senate Committee.

vague promises by previous Federal Ministers of Justice, there had been prior to the decision in Haig, no clear or definitive action taken. Rightly or wrongly, Parliament was cautious in providing what many saw as an expected negative freedom that would apply to homosexuals. Yet for many opponents, the real concerns were the broader and longer term claims which might arise with such an entrenched right, particularly in the area of spousal benefits and child adoption. The Court in Haig defined the speed with which Parliament would have to move. Minister Campbell's proposal was meant to address both the basic protection and the still unresolved concern respecting benefits. What is concerning about the Mossop decision, is the fact that notwithstanding what was perhaps a slow but pragmatic attempt by the Parliament of Canada to address a difficult and divisive social issue, the Supreme Court by its invitation for arguments under Section 7 and 15, appeared willing to confront the very issue about which Minister Campbell tried to shape a compromise.

In Mossop, the complainant was a federal government employee who took a day off work to attend the funeral of the father of the man Mossop described as his lover. The two men had known each other for over 10 years and resided together in a jointly owned and maintained home. The collective agreement between the Treasury Board and the complainant's union covering terms of employment provided up to four days leave upon the death of a member of an employee's "immediate family", a term that was defined as including a common-law spouse. The definition of "common-law spouse" was restricted to a person of the opposite sex. The day after the funeral, the complainant applied for bereavement leave pursuant to a collective agreement but his

application was refused. The grievancy file was rejected on the basis that the denial of his application was in accordance with the collective agreement. The complainant then filed complaints with the Canadian Human Rights Commission against his employer, Treasury Board and his union. The Human Rights Tribunal concluded that a discriminatory practice had been committed contrary to the Human Rights Act, which prohibited discrimination on the basis of "family status". It ordered that the day of the funeral be designated as the day of bereavement leave and that the collective agreement be amended so that the definition of common-law spouse include persons of the same sex who would meet the definition in its other respects. The Federal Court of Appeal set aside the tribunal's decision. An appeal was then launched to the Supreme Court of Canada to determine whether the Federal Court of Appeal erred in holding that any error of law by a human rights tribunal is reviewable under a Section 28 application under the Federal Court Act. Also to be determined was the Federal Court of Appeal's holding that the term "family status" in the Canadian Human Rights Act did not include a homosexual relationship. Importantly, no Charter issues were raised.

On the essential issue, the Supreme Court ruled that the Canadian Humans Rights Act did not prohibit discrimination on the basis of sexual orientation at the time the complainant was denied bereavement leave. The Court indicated that when Parliament added the phrase "family status" to the Act in 1983, it refused at the time to add sexual orientation to the list of prohibited grounds of discrimination. The Courts said that absent a Charter challenge of its constitutionality, when Parliamentary intent is clear, Courts and administrative tribunals are not empowered to do anything else but

apply the law.

Mossop is an instructive example of how the Supreme Court of Canada will often rhetorically defer to Parliament yet act in a way which sends precisely the opposite message. That is, the Supreme Court of Canada in Mossop clearly implied that had a constitutional challenge been brought against the Canadian Human Rights Act, irrespective of the Parliamentary intention and the difficulty of the issue, the Supreme Court's formulation and resolution of the issue might have been quite different. In Mossop the Supreme Court was limited by the nature of an appeal which turned on an issue of statutory interpretation rather than constitutionality.

It is important to keep in mind that when Chief Justice Lamer delivered his reasons, there was before the House of Commons the proposed compromise Bill C-108. The specific intention of that Bill was to provide guidelines that would otherwise have excluded Mr. Mossop's type of request. Notwithstanding the government's clear intention in Bill C-108 and its attempt at a compromise, the Court seemed especially anxious to deal with the constitutional challenge that would have pre-empted the results of Parliament's consideration. Chief Justice Lamer said:

> The question before this Court was thus strictly one of statutory interpretation...since then, as a result of two important decisions of Canadian Courts, the situation in this country has evolved with respect to the question at issue in this appeal. On July 9, 1992, this Court handed down its decision in Schacter v. Canada, confirming that, in a limited number of circumstances, the Courts may add to the text legislative provisions so that they conform to the requirements of the constitution. On August 6, 1992, the Ontario Court of Appeal, relying on the principals set forth in Schacter, added sexual orientation to the list of prohibited grounds of discrimination contained in Section

> 3 of the Canadian Human Rights Act, as it was of the view that without this addition, the provision was contrary to Section 16 of the Charter. The case in question was Haig v. Canada on November 9, 1992, Minister of Justice, Kim Campbell, announced her attention not to appeal that decision. As a result of these developments, the Court invited the parties to this appeal to submit new arguments. Relying on the reasons of the Court of Appeal in Haig, the appellant could then have challenged the constitutionality of Section 3 of the Act, on the basis of the absence of sexual orientation from the list of prohibited grounds of discrimination. This would have enabled this Court to address the fundamental questions argued in the Ontario Court of Appeal in Haig. It would then have been possible to give a much more complete and lasting solution to the present problem.[219]

While seemingly deferring to Parliament with respect to the more narrow issue of statutory interpretation, the Supreme Court of Canada was simultaneously urging the appellant to bring before it an issue which was at the time, the subject matter of some difficult and emotional Parliamentary debate. In addition to potentially pre-empting the legislative result in Bill C-108, the Supreme Court of Canada was also coming very close to disregarding one of the historical limitations placed on it; that judges were not to do any more than necessary in disposing of the case before them. [220] By inviting a challenge to the Act's constitutionality, the Court was essentially indicating its willingness to consider a matter currently before Parliament in first reading.

All three decisions (Schacter, Haig and Mossop), have been duly noted for the interpretive approach adopted. As Jeffrey Simpson has observed:

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[219] CHRC v. Mossop pp. 16-17.

[220] Chapter 3, Supra 8, 291.

> The "reading in" represents yet another example of Courts slowly moving beyond protecting rights into expanding them.[221]

Simpson sees these sorts of decisions as representing changes that could have implications beyond the abstract issue of increased judicial power. This is so, particularly in the grey areas of spending. Simpson questions the approach taken by the Courts in the above three case and such cases as Singh, whereby the Courts may have opened the way for obligations and requirements respecting government spending.[222] It was Madam Justice Wilson who said in the Singh case that: "administrative convenience should not stand in the way of proper interpretation of equal rights." In so ruling, the decision threw the refugee determination system into chaos at the cost of tens of millions of dollars.[223]

Commentators like Simpson are hardly consoled by Chief Justice Lamer comments in Schacter:

> In determining whether "reading in" is appropriate then, the question is not whether Courts can make decisions that

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[221] See: J. Simpson, "How the Courts Expand Rights and Whittle Away at Government", The Globe and Mail, (July 14, 1992): A-18, The expansive spirit of the court was never better represented than in Chief Justice Lamer's most recent public interview. See: Canadian Lawyer, (April 1993): 11. In commenting upon the "revolutionary changes" brought on by the 1982 of the Charter, Lamer stated: "It was a historical event, like the discovery of penicillin. It was like the discoveries of Pasteur. We completely revolutionized our legal system. The legal equations are no longer the same. From a legal standpoint, Canada was put on the map by the Charter. Our courts didn't assassinate it at the outset. Those first judgments were extremely important -- because that's where the debate took place. And because we breathed some life into the Charter, today in the international community Canada is a country that's looked up to in terms of human rights, and is sought out for consultation.....1982 changed our job description."

[222] Ibid.

[223] Ibid.

> impact upon the public budgetary policy; it is to what degree they can appropriately do so. [224]

Simpson concludes that Mr. Justice Lamer now seems to be saying that the Courts can "read in" when additional spending is small, but should not do so when it is large and thereby change the basic nature of the program.[225] Whatever the degree, the Courts in Schacter, Haig and Mossop have expanded rights and have further intruded into areas which had been previously the domain of the legislative branch.

5) KINDLER v. CANADA (1992) 6 C.R.R. (2d) 193

The appellant in this case was an accused convicted in the State of Pennsylavania of first degree murder, conspiracy to commit murder and kidnapping, all in the State of Pennsylavania. The jury which convicted had recommended the imposition of the death penalty. Before he was sentenced, the appellant escaped from prison and fled to Canada where he was subsequently arrested and committed for extradition. Article 6 of the Extradition Treaty between Canada and the United States provides that the country from which extradition of a fugitive has been requested, may seek assurances from the arresting country that the death penalty not be imposed. The offences in the Kindler case carried the possibility of capital punishment. The Minister of Justice in this case ordered final extradition pursuant to Section 25 of the Extradition Act, without any requests for such assurances. An application to review the Minister's

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[224] Schacter v. Canada [1992] 2 S.C.R. 679.

[225] Supra 40.

decision was dismissed by the Federal Court, Trial Division, and an appeal from that dismissal to the Federal Court of Appeal was also dismissed. The appellant appealed to the Supreme Court of Canada where the constitutional questions before the Court were two-fold; 1) whether Section 25 of the Extradition Act, to the extent that it permits the Minister of Justice to order the surrender of a fugitive without first seeking assurances that the death penalty will not be imposed, infringes Section 7 or Section 12 of the Canadian Charter of Rights and Freedoms; 2) if so, whether Section 25 of the Act is a reasonable limit on the rights of a fugitive under Section 1 of the Charter. A majority of the justices dismissed the appeal. Writing for the majority (L'hereux-Dube and Gauthier) Justice Laforest ruled that the Minister's action did not constitute cruel and unusual punishment but that Section 7 of the Charter was the appropriate provision by which the actions of the Minister would have to be assessed. The majority ruled that extradition must be refused only where such a surrender of the prisoner would place the fugitive in a place so unacceptable as to shock the public conscience. The surrender of a fugitive who may ultimately face the death penalty, would not at in all cases shock the conscience of Canadians. The Court looked particularly at the brutal nature of the offences committed by the accused and the substantial protections provided to the accused during the trial process in the United States. They also looked at the danger that would be proposed by a contrary ruling, in terms of Canada becoming a destination for American fugitives. In summary, the majority concluded that the surrendering of the appellant unconditionally would not violate the principles of fundamental justice under Section 7.

By the time Kindler was before the Supreme Court of Canada, it should not have been surprising that the Court was considering the constitutionality of provisions found in a international extradition treaty duly passed by legislative branches. What is more surprising however, is the reasons offered in dissent by the three dissenting judges. Significantly, the Kindler decision was ultimately decided by a close margin of four to three, with Justices Sopinka, Lamer, and Cory writing in dissent.

Justice Sopinka in dissent stated, "while capital punishment per say constitutes cruel and unusual punishment, it is unnecessary to decide whether Section 12 of the Charter applies to the extradition process as Section 7 is the appropriate provision for the determination of the appeal." He went on to find that it offends the principles of fundamental justice not to seek assurances against the imposition of what would be a violation of Section 12 were it carried out in Canada. In writing a second dissenting opinion, Justice Cory added that the death penalty constitutes cruel and unusual punishment contrary to Section 12 of the Charter. If the appellant had committed his crimes in Canada said Cory, the provisions of Section 12 would prevent his execution.

What is interesting and significant about Kindler, is that the dissenting judges yet again demonstrated the Court's willingness to address issues not directly before it and which need not have been decided or commented upon. But in so commenting, Justices Sopinka, Cory and Chief Justice Lamer, clearly provided their opinions with respect to any future laws sanctioning capital punishment. The dissenting justices clearly indicated that such punishment would be contrary to Section 12. By so deciding, the dissent defines for the future, the parameters that will surround any

Canadian debate about capital punishment. For it is now clear that there are at least three Justices for whom capital punishment represents a violation of Section 12.

As was mentioned in Chapter 4 and in the context of the discussion of Morgentaler, the information base from the 1980-81 period, clearly indicates that capital punishment was one of the subjects along with abortion, not to be predetermined by the Courts. In the case of each of these subjects, the contrary seems to have occurred. [226] In any future decisions with respect to the capital punishment issue in Canada, it would seem clear that the Supreme Court given their strong comments in Kindler, will be unlikely to rule in the government's favour in terms of the Section 1 question. Accordingly, in order for Parliament to pass death penalty legislation, they would likely have to invoke the notwithstanding clause. While such action on the part of the government is not necessarily a bad thing for proponents of that clause (see Chapter 5), it nonetheless causes some concern given the early common understanding respecting how and when Section 33 would be used. As was discussed in Chapter 3, the inclusion of Section 33 was not understood as an invitation to the Courts to give the most expansive scope possible to Charter rights, knowing that the legislatures would be forced to invoke Section 33 in defence of collectivist interests.[227]

In his expansive reasons for dissent in Kindler, Justice Cory examines the international trends as well as the pre and post Charter conditions respecting capital punishment. Disregarding the common understanding surrounding the 1982

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[226] Chapter 3, Supra 59, 292-293.

[227] Chapter 1, Supra 2, 353.

compromise, Justice Cory in reviewing the free votes in Parliament in 1976 and 1987 respectively, commented:

> The rejection of the death penalty by the majority of the members of the House of Commons on two occasions can be taken as reflecting a basic abhorrence of the infliction of capital punishment either directly within Canada, or through Canadian complicity in the actions of a foreign state.[228]

Disregarding the extremely close result in 1987 (148-127), the specific direction to be gleaned from the common understandings of the framers of the Charter in 1982, and the continuing national debate on the subject, Justice Cory cited Chief Justice Lamer in British Columbia Motor Vehicle Reference and Justice Wilson in R. v. Morgentaler, to stress what he felt was the importance of human dignity in understanding the Charter and the protections that afford it.

Whether one agrees or disagrees with capital punishment, the Supreme Court of Canada in Kindler, has gone a long ways in shaping the parameters of any future debate and has perhaps pre-empted any decision respecting such future legislation.

6) **CANADIAN COUNCIL OF CHURCHES v. CANADA (M.E.I.)** (1992) 8 C.R.R. (2d) 45

The appellant was established as an organization and forum for the discussion by member churches of issues of common concern. There was a committee within that organization which co-ordinated church policies and actions with respect to the

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[228] Kindler v. Canada (1992) 6 C.R.R. (2nd) 193.

protection and re-settlement of refugees. In response to the amendments of the Immigration Act of 1976 which changed the procedures for determining whether refugee claimants came within the definition of convention refugee, the appellant organizations began an action in the Federal Court suggesting that the amendments in parts of the old Act, were unconstitutional as they were in conflict with the Canadian Charter of Rights and Freedoms. The key issue to be decided on appeal to the Supreme Court of Canada, related to the Federal Court of Appeal's earlier holding that the Canadian Council of Churches should be denied standing to challenge the provisions of the Immigration Act of 1976.

While the Supreme Court ruled that the appellant should be denied standing in this particular case, the case is important not so much because it finally sets a limit to the extent of public-interest standing, but rather because it clearly determines that the Canadian test (for public-interest standing), is the widest and most generous of all common law jurisdictions. The Supreme Court in CCCC v. Canada, reviewed and confirmed the development of the Charter law respecting standing and in so doing, the Court did a jurisdictional comparison with the United States, United Kingdom and Australia. In reviewing Canada v. Finlay [1986] 2 S.C.R. 607, the Court noted that the Courts now have the discretion to award public interest standing to challenge an exercise of administrative authority as well as legislation. In Finlay, Mr. Justice Ledain based that conclusion on the underlying principle of discretionary standing which he defined as a recognition of a public interest in maintaining respect for "the limits of statutory authority".

In deciding in Canadian Council of Churches whether the current test for public interest standing should be extended yet again, the Supreme Court, after consideration of Finlay and consideration of the other common law jurisdictions, concluded that:

> "A public interest litigant is more likely to be granted standing in Canada then in any other common law jurisdiction. Indeed if the basis for granting status were significantly broadened, these public interest litigants would displace the private litigant. The views of the public litigant who cannot obtain standing need not be lost. Public interest organizations, as they should be, are frequently granted intravener status. The views and submissions of intraveners on issues of public importance frequently provide a great assistance to the Courts."

Canadian Council of Churches can be seen to represent a case where the Supreme Court of Canada has drawn the line on the expansion of standing. However, that line is drawn only after it has been conceded that Canada now offers the most broad access to standing of all common law jurisdictions. Moreover, Justice Cory while finally drawing a line, showed no inclination to limit litigants who can satisfy the already very low threshold test. The fact remains that the rules of standing as described in Chapter 3 have now been affirmed and accepted and will continue to provide more litigants access to the Courts to deal with an ever increasing range of new "justiciable subjects."

It can be seen from some of the decisions discussed, that even in those cases where the court's ratio was more narrowly decided, the judges' "words in passing" (the obiter) often form the basis for a new way of looking at a "right" and a new basis for challenging legislation. The judiciary has thus been able to entertain new arguments concerning what is justiciable and to whom standing and access should be granted.

More directly, once the new parties and new subjects are before it, the judiciary has shown itself prepared to opt for the substantive and expansive approach to rights interpretation and rights creation. This has both directly and indirectly resulted in the judiciary shaping the parameters of debate respecting important matters of public policy. To the extent that these and other decisions define and constrain the governments approach to formulating a legislative solution for a politically relevant problem, the public's ideas, attitudes and perceptions about those problems and the appropriate areas of governmental and institutional action, can be affected. As discussed in Chapter 2, such ideas and attitudes may change the political culture.

CHAPTER 5

RESTORING THE BALANCE

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This chapter will briefly attempt to survey and consider some of the steps that could be taken by both the legislative and judicial branches with a view to restoring the institutional balance and equilibrium envisioned by the 1982 constitutional compromise. As has been suggested, that compromise was constituted on the basis of premises and common understandings, from which the traditional Canadian liberal and non-liberal value-mix could be preserved and maintained. This thesis has suggested that such a balance necessarily entails a vibrant and potent legislative branch. The thesis has also suggested that that branch has been increasingly less potent in an era when increased judicial review has taken place in a manner that threatens to shift the balance envisioned by that 1982 compromise. The following discussion is necessarily brief as each point or suggestion could itself require the focus of an entire study. By necessity then, the discussion will be general but presented with the hope that it might stimulate further discussion and examination.

1. THE QUESTION OF UNREGULATED LEGISLATIVE SUPREMACY AND THE PUBLIC'S SEARCH FOR CHECKS

While the focus of this thesis has largely been on the excesses of the judiciary's approach to Charter interpretation, it cannot be argued nor should it be assumed that the basis of support for the Charter, was rooted in questionable or non-existent political and constitutional theory. In fact, at the root of such support was the notion of checks and

balances. It should similarly not be assumed, nor is it argued, that the legislative branch had always been the effective deliberative body that heroically represented what was the clear "popular will". Such a proposition would be naive in the extreme. Yet even acknowledging those realities, what is still worthy of further examination is the following question: Why is it that in this post-1982 period, such an activist and non-interpretivist judicial review has been so able to gain acceptance with the vast majority of the Canadian people?[229] For even if one realistically accepts that the legislative branch was not always the noble, deliberative body which was representative of the popular will, the Canadian Parliament and the general legislative branch has nonetheless always tried to work within the constraints of politics and has attempted to come to reasonable positions and compromises on difficult complex issues. So even if one acknowledges that such irritants as "party discipline" and "domineering governmental majorities", have caused Parliamentary government to fall short of its practical ideal, it can still be said that most legislative policies have been created after caucus, party, committee and inter-party debate and negotiation.[230]

What is it, then that was at work in 1982 and that now continues to justify this increased and activist judicial review? That question can be addressed and ultimately answered only if one acknowledges a perceptible decline in the confidence enjoyed by some of the institutions in the legislative branch and the tainted credibility of its

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[229] For a general discussion of how the Charter and its developing interpretation and application have caused it to be regarded more as a "citizens constitution" than a "government's constitution" See: A.C. Cairns, Supra 79, 108-139.

[230] Supra 5, 4.

political actors. If it is too strong to refer to this as a crisis of legitimacy, it would seem fair to at least characterize it as a crisis of confidence.[231] In terms of the legislative-judicial interaction, it is submitted that were the decline in confidence to be somewhat abated, then it might be possible to build upon any such improvement in a way that would permit the legislative branch to commence the process of regaining some of the lost policy-making role; a loss which its own decline in legitimacy and the propitious arrival of the Charter seems to have made possible.

The discussion that follows largely adopts and draws upon the valid connection made by Rainer Knopff and F.L. Morton concerning the public frustration with what were perceived as inadequate internal checks in the Canadian legislative branch, and the commensurate assumption of power by the judiciary, to more fully regulate and shape the public policy process.

While it has been argued that a more Burkean orientation inspired the traditional Canadian approach to rights protection, it need be acknowledged that by 1982, in addition to the international trend towards Charters and Bills of Rights, there was in Canada, support for the view that the legitimacy of an increased judicial review could be justified on the basis of the concept of institutional "checks and balances". [232] It could be said that Canadians were receptive to the purpose which underlies "checks and balances," which is to promote relatively "deliberate, balanced, and moderate policy

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[231] See the sentiments expressed in The Citizen's Forum on Canada's Future: A Report to the People and the Government of Canada, (The Citizen's Forum on Canada's Future 1991), 1, 96, 134; See also: The Globe and Mail, June 29, 1991.

[232] Supra 72, 197-198.

outcomes by insuring that differential institutional perspectives are effectively brought to bear on public affairs".[233] As Morton and Knopff suggest, one of the justifications for judicially enforced "rights", is that they address "the absence of effective checks and balances within and among the other branches of government."[234] In the context of Parliamentary government, the suggestion is that Parliament is able to check neither the executive nor the "wilful majorities" and consequently the courts must step in to fulfil the gap.

> Thus the dangers of executive power and majority tyranny are brought together in a new and fearsome alliance, for which Parliament is a tool rather than a check. From this perspective it follows that effective checks on power must be sought elsewhere -- particularly in a judicially enforceable bill of rights.[235]

It would seem unhelpful to respond to the abstract question of whether entrenched rights are preferable to non-entrenched rights, given the fact that in Canada, the Charter of Rights and Freedoms is now entrenched and it continues to enjoy the legitimacy that comes with popular support. The question being addressed here, is simply: What must the legislative branch do to respond to this initial justification for judicial review, which might in turn permit the legislative branch to regain some of the lost legitimacy or confidence, that seems to have given rise to a transferal of confidence to the judicial branch? For the fact remains that supporters of judicially enforced and entrenched rights, point to the inadequacies of the institutional checks and balances

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[233] Ibid., 197.

[234] Ibid.

[235] Ibid., 201.

which they feel burden a Parliamentary system. These supporters suggest that in the context of modern democratic politics, the reality of "disciplined" parties and the inevitable interdependence of members of the caucus, has enabled the executive to "turn the tables and control the house".[236] Those who support Bills of Rights say that even more effective control of the executive is not the answer that will solve the problem relating to insufficient checks, because such control would still leave unaddressed the other worry which relates to the "tyranny of the majority".[237] Charter supporters at this point, see no adequate replacement for entrenched rights.

Thus, it can be suggested that to a large extent one of the building blocks upon which the activist judiciary has been able to justify and legitimate its behaviour relates to the international trend towards "rights" protections generally. As well, there has been the more fundamental desire by the Canadian voters for checks and balances (apart from electoral) on their non-responsive governing institutions. For the reasons discussed in Chapter 3 in the context of the events and attitudes leading up to the 1982 compromise, a feeling did exist by the late 1970's that governments had become too removed, too inert and perhaps most importantly institutionally irreproachable. Acknowledging these realities, it is still the position of this thesis that part of this concern could have been addressed with a judiciary that could have acted utilizing the premises and common understandings of the 1982 agreement. While more limited than the non-interpretivist judicial activism actually experienced in Canada during these past

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[236] Ibid., 200.

[237] Ibid., 200-201.

number of years, such a judicial review would still have offered (as compared to the earlier pre-1982 judicial legislative relationship) a more active and vigilant judicial watch-dog respecting the specific enumerated rights outlined in the Charter.

Leaving aside what could have been, attention must now turn to re-legitimating the political process and the legislative branch. Trite though it may sound, that can only be achieved with the perception that politicians are acting honestly in the representation of their constituents.[238] It is suggested that such honest and complete representation need encompass not only credible and publicly respected behaviour, but also a new institutional freedom that will afford members of Parliament the opportunity to more frequently vote outside the restrictions of the party whips. It must be remembered that for the Parliamentary compromises and consensus-based solutions to be seen as legitimate, the surrounding debate, negotiations and trade-offs need be seen as having included as many legitimate points of view as possible. It would seem that the perception continues to exist that party discipline seriously restricts the type of representation that otherwise ought to be considered in such debate and consensus-based solutions.

When in discussing ways to re-legitimate the legislative branch, it would seem useful to urge a continuing re-examination respecting the possible options for a more effective or at least a more representative upper house. For their part, Morton and Knopff suggest that Canada has never really investigated the contribution of

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[238] The Citizens Forum and the cynical nature of much of the popular discourse, reflect a profound distrust vis-a-vis the efficiency and honesty of existing political institutions, Supra 231.

bicameralism as a means of providing for a system of Parliamentary checks and balances. With that in mind they ask "might an effective upper house support a claim, much like the one made by Dixon and Menzies, that Parliament enjoys sufficient checks and balances, so that the addition of constitutional judicial checks remains unnecessary?"[239]

Given the fact that the thesis suggests a new equilibrium between the judicial and legislative branches as opposed to a turning back of the clock to a pre-1982 reality, the question of a more effective and more legitimated upper house is a question at least worthy of examination. This would seem further supported by the apparent opinion of many in Canada who favour either a different sort of upper house or the abolition of the institution altogether. For the purpose of restoring the confidence in the legislative branch, it would seem unnecessary for the renewed or new upper house to be a legislative rival or equal to Parliament. It would be enough if the upper house could be seen to provide additional checks on Parliament and which would in the end make it less easy for both the judiciary and citizenry to rely on the sometimes unspoken argument that an activist judiciary remains the only effective check of the legislative branch. With a new upper house that was more equally and or effectively represented,

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[239] Supra 72. 199. Sir Owen Dixon, an Australian jurist asserted that his country had "consciously studied" and rejected the principle behind the American Bill of Rights. Former Australian Prime Minister Menzies wrote: "With us, a Minister is not just a nominee of the head of the Government. He is and must be a Member of Parliament, elected as such, and answerable to Members of Parliament at every sitting. He is appointed by a Prime Minister similarly elected and open to regular question. Should a Minister do something which is thought to violate fundamental human freedom he can be promptly brought to account in Parliament. If his Government supports him, the Government may be attacked, and if necessary defeated. And if that, as it normally would, leads to a new General Election, the people will express their judgment at the polling booths. In short, responsible government in a democracy is regarded by us is the ultimate guarantee of justice and individual rights." Ibid., 201.

there would be a new legitimated forum to assist in the legislative function of producing reasonable solutions after negotiation, debate and compromise.

Morton and Knopff found it interesting to observe the 1988 Australian debate respecting whether there should be the expansion of constitutionally protected rights. It was a debate which saw those who were defending Parliamentary supremacy (as against judicial supremacy), point to the Senate as an example of an institution affording checks which make entrenched rights unnecessary. [240] Many senators who spoke out in support of a continued Parliamentary supremacy and against the proposed Bill of Rights, spoke similarly to Senator Harradine, who quoted Stanley Verberay, the former Chief Justice of Tasmania:

> I would prefer the democratic control of legislation through the political sanction of the ballot box and a strong second chamber to handing over a substantial measure of control of the legislation to a judicial tribunal of a few men, eminent in their profession though they may be. Judges are but men and are as subject to subtle corruption by the exercise of great power as other men.[241]

In the end, the proposed extension of constitutional protective rights was not accepted in Australia, perhaps because of the availability of what was perceived to be a strong second chamber.

As mentioned, although such renewed legitimacy could perhaps ensue from a strong second chamber and despite some popular support for the idea, such a wholesale

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[240] Ibid.

[241] Ibid., 203.

proposal is not currently realistic in Canada without formal constitutional amendment. The current Senate now plays a rather insignificant role in Canada's political life. Because of the political nature of the appointments and the party discipline which is similarly enforced in the Senate, legitimacy is always lacking. Yet even working within the practical realities of Canada's current political situation, Morton and Knopff ask rhetorically, "If a reformed Canadian Senate was less subject to the strict party discipline found in the House of Commons, could we expect the version of the Australian debate about the relative merits of bicameralism and judicial checks?"[242] Morton and Knopff suggest that such a debate could also arise after reform of the House of Commons and the unicameral provincial legislatures.[243]

The obvious problem or obstacle respecting the loosening of party discipline in the federal upper house relates to the remaining problem of the politically appointed nature of the senators. Can such senators even if acting "undisciplined" by their parties, expect to enjoy more legitimacy without electoral accountability? A negative answer to this question necessarily implies a return to the frustrations of the constitutional table. Perhaps an interim and halfway solution (without risking the fatigue and national disruption of a new constitutional round), is the one most recently discussed by Jeffrey Simpson. His proposal comes in response to what he saw as an excessive obsession with wholesale constitutional amendments. Instead of risking the national divisions and disappointments where "a deal can be reached only by giving everyone almost

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[242] Ibid.

[243] Ibid.

everything they desire", modest modifications to the Senate could take place within the context of re-focusing "energies into pragmatic solutions building on consensus already achieved, rather than trying again for the ultimate". [244] In the context of such possible, pragmatic, non-constitutional changes to the current upper house, Simpson suggests:

> There is widespread agreement on the desirability of electing senators, but gaps still exist on the powers and composition of the Senate. So Ottawa could agree that all new senators will be elected. To give the electoral drive more push, the federal government could reduce the retirement age for existing senators to 65 thus freeing up posts for elected senators.[245]

Taken in tandem with Morton and Knopffs', this approach might go a distance in advancing for the citizenry a comforting and legitimate institutional check not previously present. Whatever new complications may arise in the relationship between such a Senate and the House of Commons, they will be visible for all to see and ultimately evaluated by members of the voting public. These voters will know that the Senators' contribution and behaviour in the policy-making process, remains accountable.

For the House of Commons, Roger Gibbins proposes reforms that would decrease executive prominence and weaken party discipline.[246] He foresees and envisions a situation where legislators could be more "generously resourced" and where

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[244] Jeffrey Simpson, "Let's Shut Up About the Constitution", The Globe and Mail, August 6, 1992, A-17.

[245] Ibid.

[246] Supra 72, 204-205; see also: R. Gibbins, "Beyond Quebec: The Need For Structural Reform". A presentation to the Institute for Political Involvement, (University of Toronto, February 6, 1991), 5.

they more autonomously operate in a more "open and influential committee system".[247] A similar proposal in that regard contemplates the more serious treatment of any defeat suffered to a legislative proposal in the context of the non-confidence motion. It would be a reform that would result in more frequent governmental resignations and resulting elections. Similarly, Gibbins contemplates, a constitutional amendment setting election dates at more regular intervals.[248] In commenting upon Gibbins' proposals, Morton and Knopff acknowledge the "Americanizing" potential of them, but nonetheless indicate that Canada has already adopted a "presidential" and thus American flavour to its politics but without the correspondingly "vital" legislative branch. In this regard, Canadians are now subjected to the predominant role of first Ministers without the countervailing legislative checks. Gibbins states that, "...in Canada the presidentialization of politics has had the effect of strangling rather than strengthening the legislative process."[249] So, while the Gibbins proposals may be at first blush Americanizing, such a more superficially American flavour could be tolerated if it was seen to provide checks that made more likely, a greater legislative potency with respect to maintaining what is most distinctly Canadian, the liberal-communitarian value-mix. The fundamental difference would be that although the institution might appear somewhat more American, the "results" given the nature of the legislative product, would be infinitely more Canadian than the sort of policy now often

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[247] Ibid., 203.

[248] Ibid., 204.

[249] Ibid., 204.

produced through judicial Charter interpretation.

There does seem to be some validity to the claim made by Morton and Knopff that "the strangled system of checks and balances between Canadians executives and legislatures has strengthened the claim for judicial checks."[250] As has been discussed, such things as more courageous and credible behaviour on the part of the politicians, and general institutional reform may work to increase and renew the legislative branches legitimacy. Without such reform, as Manfredi suggests, the perception may persist that our "legislative process lacks the formal and informal institutional checks on the majorities' will found in the United States," or as Morton and Knopff add, in Australia.[251]

Like Morton and Knopff, this thesis concedes that the Charter is now too well entrenched and embedded in the English Canadian psyche for some sort of revival of opposition to such an entrenched constitutional instrument. It may however, be possible through more effective internal legislative checks and balances, to encourage judicial restraint. It may be enough to work towards effective reform in one or perhaps both legislative chambers in the hope that such reform would create a new foundation for the legitimacy of the legislative branch and thus weaken support for what had been perceived as the much needed judicial checks. Such restored confidence in the legislative branch could perhaps revive some of the legitimacy in Section 33, which has de facto suffered not only because of its invocation in the emotionally charged linguistic

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[250] Ibid.

[251] Ibid.

issue, but also because of the respective ascendancy and descendency of judicial review and legislative supremacy. In short, if greater legitimacy is provided the legislative institutions as a result of better internal checks and balances then the citizenry may be more inclined to rely on judicial review for protection rather than policy assistance.

2. JUDICIAL FIDELITY AND THE 1982 COMPROMISE

As has been explained, the Constitution Act 1982 came to pass as a result of a political compromise that posited certain common understandings and premises. [252] It is suggested that the judiciary in its decision-making need be more mindful of and faithful to these background premises and understandings, all of which are accessible and apparent through the public debate of 1980/81.

Since 1982, the judiciary in Canada has proceeded to expand its policy-making role by seemingly ignoring the 1982 compromise. They often ignored the attempt at the communitarian and liberal balance, the necessarily limited number of rights that were specifically protected, and the specific understanding with respect to the procedural as opposed to the substantive nature of some of the Charter sections. To complicate matters further, the judicial pronouncements on constitutional issues have more often than not, taken on an aura of "oracular finality". [253]

In dealing with such issues as justiciability, the non-interpretative approach to

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[252] See Chapter 3 and The Legal and Political Compromise of 1982.

[253] Supra 72, 225.

substantive rights, standing and access, the judiciary need re-examine the extent to which the checks it is attempting to provide correspond with those checks that were desired by the 1982 compromise. It has already been documented just how far the Supreme Court of Canada has been prepared to go in using the doctrine of the living tree; an approach which had been previously and exclusively used only with respect to interpreting the law of federalism. The living tree doctrine, as was seen in Chapter 3, emphasizes a progressive and liberal interpretation of the Charter while allotting secondary importance to the notion of original intent. While the Supreme Court continues to make mention of the "purposive approach", practice has shown the court to be decidedly innovative and creative. Such creative interpretation has permitted the court to deal with the very amorphous Section 7 in a way so as to allow for substantive as opposed to solely procedural rights. While the court may not reconsider the entire gamut of the interpretative approaches thus far used in Charter law, it can and ought to reconsider some of its flawed reasoning which has permitted it to defend such practices as its substantive approach to interpreting Section 7. Similarly, the court ought to revisit its earlier rejection of the "political questions" test.

The perceived "oracular finality" of many of the judiciary's decisions concerning constitutional matters, requires re-thinking on the part of members of the public. It need be remembered that judicial policy-making possesses drawbacks which may be harder to see if there is an over-riding reverence for "constitutionality" and broad policy as seen and made by judicial opinions.[254] Even with some form of judicial review

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[254] Ibid., 225.

present and working as a means of checking or balancing another institution, it still must be acknowledged that:

> Checks and balances, after all are designed to put different political perspectives, granted in different institutional structures, against each other in the hopes of securing more moderate, consensus based policy outcomes. Logically, there is no place in this perspective for the oracular claim that judicial pronouncement on matters of general policy are final and authoritive because judges, and only judges, can accurately give voice to the constitution. The constitutional law is usually contestable, and if disagreements among the government branches about its correct interpretation are generally reasonable disagreements among equally legitimate interpreters, then there is no basis for the claim of judicial finality. The courts lack a policy-making capacity and their tendency to promote polarization rather than moderation only strengthens this conclusion.[255]

There is no question but that even the compromise of 1982 envisioned a much larger judicial role with an entrenched Charter. Still what is required to rectify what has been described as the unbalanced relationship between the judicial and legislative branches, is a re-invigorated and legitimated legislative branch along with a more moderate judiciary, less inclined to produce policy which takes on an aura of "oracular judicial finality". This is a view which acknowledges the contribution judges can make in a moderate way to the policy-making process, but on the condition set forward by Morton and Knopff: that these contributions "are seen as precisely that: contributions, not legalistic trumps."[256]

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[255] Ibid.

[256] Ibid., 230.

3. SECTION 1 (THE LIMITATION CLAUSE)

Section 1 of the Charter reads:

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

This section of the Charter was intended to provide judges with a discretion when it came to the issue of delineating limits to prescribed Charter rights. Section 1 in principle is to serve as a check on the potential excesses, the sort of which could include those herein described as non-interpretivist and substantive. While a comprehensive review of the evolution of Section 1 is neither possible nor necessary for the purpose of this Chapter, an understanding of the legal test and its practical application, would seem helpful.

In a summary of Section 1 jurisprudence, Ian Greene rightly advanced the three most important features which appear to have emerged.[257] First, the words: "Demonstrably justified have been interpreted to impose the onus on the party that wants to restrict or limit the right. It is usually the government that wishes to so limit the right. The onus rests on showing that the desire for limitation is reasonable. Pursuant to Hunter et al v. Southam Inc. [1984] 2 S.C.R. 145, in the absence of proof to the contrary, there will be a presumption of unreasonableness. Second, the words prescribed by law have been interpreted to intend that unless the limit was expressly

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[257] Supra 11, 54-55.

provided for by the statute or regulation, or can be seen as a result or by-product of the terms of statutory regulation, it is not a limit prescribed by law. This quite clearly calls for government to take action only after proceeding through statutory or regulatory instrument.[258] Third, the test for "reasonable limits" that can be "demonstrably justified in a free and democratic society", has been set out in the case of The Queen v. Oakes [1986] 1 S.C.R. 103. That test contains essentially two important aspects. First to be examined is the objective of the government. The objective must be important enough to justify the infringement. Second, the limit desired must be proportional to the government objective, which is to say it must be reasonable and demonstrably justified. In satisfying the second aspect, three criteria must be met: 1) the limit must be rationally connected to the government objectives; 2) the limit should involve as slight an infringement as necessary for the obtainment of government objectives; 3) assuming satisfaction of the above, the effects of the limit are to be in proportion (not out of proportion) to what is supposed to be accomplished by the government objective. [259] In spite of the interpretations that have led to clarification of some of the aspects of the Oakes test itself, the fact remains that in addition to the added onus the government must discharge under this section, the government is further subjected to the tremendous discretion that the courts possess by the very nature of the section. In fact, the various outcomes and the divisions within the court on issues involving both Sections 1 and 24(2), demonstrate just how subjective

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[258] Ibid.

[259] Ibid.

the decision making has been under these sections.[260] Morton, Russell, and Withey suggest that, "the Oakes guidelines may have structured judicial discretion a little, but they certainly have not removed it or even significantly reduced it."[261]

Despite the potential of Section 1 for limiting the potential excesses of non-interpretivist, substantive judicial review, the section has not had this effect. Manfredi offers two reasons for this. First, because of some significant criticism that occurred between 1980-82, the drafters of the Charter altered Section 1 somewhat, to dilute its potential strength as a limitation clause. That is, changes added the phrase "prescribed by law" and substituted the phrase "as can be demonstrably justified" for "as our generally accepted" and removed specific reference that had been included to "a Parliamentary system of government."[262] These changes and adjustments were made as proponents of the Charter believed that Section 1 was potentially too restrictive.[263] The second reason offered by Manfredi relates to the court's significant discretion. Manfredi suggests that the impact of Section 1 has been limited and restrained primarily because it is the courts and the judges who are applying Section 1. As they do with every other Charter provision, it is the courts which give Section 1 its operational meaning and its judicial definition. Manfredi believes that Section 1 has

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260 Supra 168.

261 Ibid., 17, "The decisions which have developed within the court over the court's proper role under the Charter can be understood as both cause and effect of its changing and divided record on Section 1 and 24(2) issues.

262 Supra 77, 61.

263 Ibid.

been limited by the Supreme Court of Canada in three ways:

> By distinguishing between the limitation of rights (which can be justified under Section 1) and their complete aberration (which cannot be so justified); by narrowly defining the phrase "prescribed by law"; and by
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> establishing a relatively rigid test for determining when limits are "reasonable" and "demonstrably justified.[264]

Manfredi suggests that when you leave the details of the Oakes case aside, the general nature of the Oakes test is very much in keeping with the pattern judicial review has taken in the United States. The American approach sees a "balancing" which relates to a manner of interpretation that identifies, evaluates and compares the various and competing interests.[265] Manfredi acknowledges that the results of this balancing is often varied and difficult to predict. Moreover, he sees the balancing inherent in the Oakes test as symbolic of one of the important questions surrounding judicial review:

> What makes balancing controversial is that its emphasis on interest balancing and cost benefit analysis fits uncomfortably within any traditional conception of the judicial function. Moreover, the balancing process raises important questions about whether courts are institutionally equipped to engage in this traditionally legislative function.[266]

This discretion and "balancing" has resulted in a particular trend. When the judiciary utilized Section 1 in its first 100 decisions, the court used it to "save" only a small 15%

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[264] Ibid.

[265] Ibid.

[266] Ibid.

of the constitutional violations that had been found.[267]

In terms of the Section 1 consideration and the hope that it might have a more moderating effect, the best antidote for a judiciary inclined to find violations based on an expansive and substantive interpretation of entrenched rights, is the careful enactment of legislation which is sufficiently clear and self-critical. This is particularly important at the Section 1 stage of examination. The legislation must be clear so that the legislative intention can be understood both objectively and contextually. In that regard, the legislators must become more vigilant in providing their intentions, with sufficient policy background that can be expressed along with legislative objectives, in a clean and eloquent preamble. In addition to symbolically re-affirming Parliament's comfort with its bold seizing of the legislative initiative, such an expansive preamble might make more likely a positive application of the Oakes test. At the very least, it will force the judiciary to decide in an obvious way against a clearly stated and explained legislative intention. In that regard, it should be noted that a recent and important government victory under Section 1 occurred in Wholesale Travel Group inc. (1981) 67 C.C.C. (3d) 193. In that case a reverse onus provision of the Competition Act was challenged.[268] It is significant to note that the Act contained a rather expansive pre-amble which could be seen to adequately explain in a few paragraphs the "purpose" of the Act. The preamble reads:

> The purpose of this Act is to maintain and encourage

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[267] Ibid., 38.

[268] This Act may be cited as the Competition Act, R.S.C. C-23, s.1; R.S.C. 1985 c.19 (2nd Supp) s.19.

> competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in the world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium size enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.[269]

In addition to providing a bold and defiant clarity, such statements, have a legitimating function to the extent that like all explanations when made and understood, the subsequent government action is rendered easier to justify. Such legitimating clarity in terms of policy background maybe all important in the court's decision on the Section 1 issue. Depending upon the court's ruling on Section 1, it may be equally important respecting the necessity of an eventual invocation of Section 33 by the legislative branch. Mindful of Section 1, the government must be self-critical in drafting the legislation. That is, the legislation must attempt to accommodate the obvious and previously defined protective rights. Assuming the legislative branch does not wish to provoke a conflict with the judiciary (depending upon the importance of the legislation to the legislative branch and the possible invocation of Section 33), failure to accommodate the previously defined protective rights amounts not just to sloppy drafting, but more dangerously, to bad public relations. Once a poorly or badly drafted

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[269] Ibid., see preamble. See also E.A. Driedger, Construction of Statutes 2d, (Toronto: Butterworths, 1983), 146. "It is clear from the Prince Augustus case that a preamble may be looked at even if no doubt or ambiguity is found in the enacting part. Viscount Simonds, after referring to the "bald proposition that where the enacting part of a statute is clear and unambiguous, it cannot be cut down by the preamble", said: "I wish at the outset to express my dissent from it, if it means that I cannot obtain assistance from the preamble in ascertaining the meaning of the enacting part." A preamble may set out the object of the Act or the circumstances giving rise to the Act, and these factors must be taken into account in reading the Act."

and explained piece of legislation has been invalidated by a court decision, subsequent defence of the policy or perhaps invocation of Section 33 becomes more difficult with a public who has by then, come to understand the issue by virtue of the courts conception of the Charter violation. With a combination of careful and fair wording in the precise proposal of the policy initiative, the legislative branch need not fear a debate about competing values and objectives. As Janet Hiebert has said:

> While it requires a more sensitive and careful tailoring or drafting of legislative objectives, it does not prevent governments from pursuing values that do not easily accommodate in the language of the Charter.[270]

Assuming the collective and national importance of a particular piece of legislation, if despite statutory clarity, the provision of policy background and the general care in the drafting, the legislation can still not survive a Section 1 evaluation, then it may be possible and necessary for a reformed and newly legitimated legislative branch to turn to the subject next discussed, the legislative override.

4. SECTION 33: THE LEGISLATIVE OVERRIDE

If the legislative branch can successfully invigorate itself either through unicameral or bicameral reforms, then Section 33 can perhaps regain its legitimate place as an effective means of preventing what Manfredi calls the "slide from constitutional supremacy into judicial supremacy". Section 33 reads:

> Parliament or the legislature of a province may expressly

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[270] Supra 10.

> declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in Section 2 of Sections 7 to 15 of this Charter.

Section 33 gives the federal or provincial governments an opportunity to stipulate in a clause of a particular statute, that the statute will operate notwithstanding Sections 2 and 7 through to and including 15 of the Canadian Charter of Rights and Freedoms. The override expires at the end of a 5 year period but it can be renewed. While the section is very much a product of the compromise of 1982, the section has thus far not been utilized in a way or with a frequency that would accustomize the public and the politicians to its general purpose. Section 33 has in fact been used only 3 times. In the early 1980's, the ruling Parti-Quebecois invoked the section in all of its new legislation, in protest of their exclusion from the 1982 constitutional accord.[271] In 1986 the Saskatchewan government used Section 33 in anticipation of a finding by the Supreme Court of Canada of a right to strike pursuant to Section 2 of the Charter. The override was used in that case, concerning legislation that had settled the Saskatchewan Public Services strike.[272] Finally, in December 1988, the Quebec government used Section 33 to sustain legislation which was designed to regulate the use of English on commercial signs in Quebec (Bill 178).[273]

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[271] Supra 11, 56.

[272] Ibid.

[273] Bill 178 and the Bourassa government's use of the notwithstanding clause to sustain it, have become the example most often cited to inflame hostility against Section 33. As Peter Russell and Paul C. Weiler have said, "The Bourassa government's use of the notwithstanding clause in the Charter of Rights response to the Supreme Court's ruling against French-only signs, has triggered a strongly negative reaction in English Canada against the override clause itself." P.H. Russell and P. C. Weiler, "Don't Scrap the Override Clause -

Notwithstanding the above mentioned cases, the fact remains that in Canada the federal and provincial legislatures have usually responded to Charter decisions not by use of the override, but rather by attempts to re-write legislation. This is often inadequate. It is often inadequate for three reasons. First, it has been observed that after the initial striking down by Charter decisions of legislation or parts of legislation, the new legislation proposed is sometimes so careful and timid that it may not realize the legislative branch's initial objective. Second, it has been pointed out that where subsequent to an invalidation by the courts, new legislation is not enacted, the situation may arise as in the case respecting the now absent national abortion policy that the result is in fact no law or policy. In addition to the legislative silence on a matter of national concern, there is now the ironical result which sees an even greater diversity and inconsistency with respect to the abortion services provided, than when the Supreme Court of Canada decided Morgentaler (ostensibly on that very basis). Third, it has been suggested that even if new legislation is introduced, there is no certainty that the new legislation won't itself be challenged.[274]

It is unfortunate that the notwithstanding clause has not found the legitimacy that even the cautious supporters in 1982 expected. This would seem to rest in part with the fact that the most well known public invocation of the clause has occurred in cases

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- It's a Very Canadian Solution," The Toronto Star, June 4, 1989.

[274] Supra 77, 197. Such was the case with Parliaments new immigration policies and its various attempts at new sexual assault provisions. In terms of attempts at new legislation in response to earlier rulings of invalidation see Re: Singh and MEI [1985] 1 S.C.R. 177, and Morgentaler, Smoling and Scott v. The Queen [1988] 1 S.C.R. 30.

where the public is less than sympathetic with the legislative intent.[275] It has been suggested by Peter Russell and adopted by Morton and Knopff, that the notwithstanding clause should be more objectively assessed so as to recognize the section's potential strengths.[276] It is suggested by Russell that Section 33 represents a method by which the perhaps difficult to challenge judicial power can be checked. For example, if the judiciary seems unwilling to reassess its approach to Charter interpretation and application and if such interpretation and application lead to results that are unacceptable and untenable to the democratically elected legislative branch, then Section 33 would seem to represent the least cumbersome option.

A less agreeable but alternative approach would be to use what has been called "court packing" or "court bashing". This means threatening to change the composition of the court through additional or ideologically selective nominations.[277] Russell suggests that such "court packing" would seem like a less appropriate device than legislative debate and discussion while is a more democratic and less devisive means

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[275] Supra 273; see also Russell and Wieler, "We hope that when the first Ministers meet to discuss the Constitution, those who condemned the override will have some second thoughts on this score and recognize how essential this mechanism is for maintaining a healthy balance between the judicial and legislative branches of government". To the extent that Section 33 is fast becoming seen as an illegitimate constitutional mechanism, one can look at the negative mythology surrounding the section and the perpetuation of it by national politicians. Prime Minister Mulroney has referred to Section 33 as "that major flaw which reduces your rights and mine...." He has also suggested that as long as the section exists, the Charter is "not worth the paper it is written on" quoted in R. Knopff and F.L. Morton's "Charter Politics" Supra 72, 231. The NDP's, Howard McCurdy, has written: "...we desire the total elimination of Section 33 from the Constitution..." See H.D. McCurdy and G.E. Clarke, "The Demolition Clause in the Charter of Rights," Policy Options 13, no. 3 (April 1992): 17.

[276] Russell and Weiler, Supra 273: "Nothing is quite so American as absolute judicial supremacy over the nation's rights and nothing is so distinctly Canadian as this manner of reconciling the British tradition of responsible government with the American tradition of judicially enforced constitutional rights."

[277] Supra 72, 229.

for challenging judicial decisions on issues pertaining to fundamental rights."[278]

Moreover, invocation of Section 33 would be much more simple to use than judicial appointments. Morton and Knopff support Russell's perception of Section 33 as a more desirable foundation for an inter-institutional dialogue "in which courts and legislatures issue reasoned responses to each others initiatives, thereby improving the quality of both public deliberation and its policy outcomes."[279] Russell summarizes his position as follows:

> Both courts and legislatures are capable of being unreasonable and, in their different ways, self-interested. By providing a legislative counter-weight to judicial power the Canadian Charter establishes a prudent system of checks and balances but recognizes the fallibility of both the courts and legislatures and gives closure to the decision of neither. The legislature's decision to use the override, it must be remembered, is not ultimate. It is good for only 5 years. After 5 years it can be reviewed but not without re-opening the issue for public debate and discussion.[280]

Morton and Knopff rightly assert out that one of the important values or features of the override, particularly for Russell, is that it ensures a role for discussion and democratic participation in the making of public policy. As they say: "thus while judicial decisions can enrich public deliberation, they should not be allowed to surplant it."[281]

To address the question of the override's legitimacy, Russell underlines the

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[278] Ibid.

[279] Ibid.

[280] Peter H. Russell, "On Standing Up for Notwithstanding," in Contemporary Political Issues ed. M. Charlton and P. Barker (Scarborough: Nelson, 1991), 76.

[281] Supra 4, 230.

importance of reasoned debate in the legislature and informed public participation. To ensure that there is adequate clarity and accountability, Russell suggests that the legislators "identify the specific legislative provision which in their judgment needs protection or the right or freedom which in their view should not be given priority over the rights and interests to be secured by its legislation."[282]

Russell and Weiler have made one additional important proposal with respect to amending Section 33 with a view to increasing its legitimacy. They suggest the amendment:

> Require that any use of the override be subject to enactments, one before and one after an election. This would ensure a cooling off period and time for second thoughts. What is even more important, it would also ensure broad citizen involvement in the resolution of rights issues thus contributing to the fundamental process and value of the override.[283]

It is suggested that Section 33 ought to be used more frequently in the provision

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[282] Supra 280, 76; see also: T. Macklem, "Engaging the Override" dialogue, National Journal of Constitutional Law, v. 1 and 2 (November 1991): 275. Macklem in his forceful and able response to the Russell and Weiler defence of Section 33, suggests, "if it is important for supporters of Charter rights to remember that they would never have been entrenched without the notwithstanding clause, it is equally important for supporters of the notwithstanding clause to remember that its use must be reconciled with the existence of the Charter itself." Macklem goes on to ask "By what criteria can a decision to be said to be unsound or awry?" and "A right that is entrenched so as to make it more or less fundamental simply cannot be coherently overridden by what amounts to legislative insistence." Macklem in his attack, while acknowledging a compromise, chooses to ignore or minimize the fact that the substance of that compromise contained only a limited number of rights that were entrenched. To the extent that the judiciary has "found" or "read in" new rights using sections that were specifically deemed to be other that what the courts have rendered them, their decisions can be characterized as "fundamentally unsound."

[283] Ibid., see also D. Greshner and K. Norman for an interesting exploration into the question of appropriate judicial response to invocation of a Section 33 override. They argue that "when faced with an invitation to review the invocation of a Section 33 override, courts ought not to draw quite as fully back as the opponents would have them do. The writer takes the position that such a judicial review of a Section 33 review has no basis in law and would only add to the examples whereby the 1982 compromise has been violated. D. Greshner and Ken Norman, "The Courts and Section 33", Owens Law Journal 12 (1987): 157.

of positive and bold legislative leadership. The section might with such frequency, become what Morton and Knopff term "an explicitly political checks and balances approach to the Charter..."[284] Obviously this will be made easier with a legitimated legislated branch. While the maintenance of the appropriate judicial and legislative institutional roles must take place, the legislatures must be able to invoke the clause on a more regular basis.[285] But like all of the suggestions relating to the restoration of confidence in the legislative branch, such action implies and requires a bold willingness to tackle issues as opposed to side-stepping them. Such a bold and assertive willingness to provide public policy positions and to then clearly explain and justify them, may (more than a dependence on Section 1 or the hope of more self-regulation and moderation by the judiciary) permit the elected political leaders to regain their principal policy making role. Such a reassertion by the legislative branch will still acknowledge the increased role to be played by the courts under the Charter (within the parameters of the 1982 compromise). It will also serve to redirect the judiciary to it's traditional function; a function which involves primarily the interpretation and application of the law.

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[284] Supra 72, 231.

[285] If the section is not used in a more regular way, Manfredi suggests that: "Whether by explicit amendment or through the emergence of a new constitutional convention, there is a real possibility that Section 33 will become a non-operative part of the Charter". Supra 77, 38.

CHAPTER 6

CONCLUSION

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This thesis has examined the new and potentially unbalancing interaction currently taking place between the legislative and judicial branches. This uncertain interaction dates back to the entrenchment of the Canadian Charter of Rights and Freedoms. The reason for the examination was rooted not in an abstract interest with the apparently increasing power of the judicial branch, but rather the commensurate threat posed by the decreasing potency of the legislative branch to perform its traditional function. It has been argued that it was a previously potent legislative branch that had been largely responsible for the preservation and reflection of what was described as the traditional Canadian political culture. With the two fundamental elements of our system (Parliamentary supremacy and judicial review) still seeking to find an equilibrium, the fate of the traditional political culture remains very much uncertain.

The thesis described how the nature of the 1982 political compromise and the acknowledged common understandings about the constraints that were to govern the judiciary, provided a perspective that now enables one to see how unanticipated some of the subsequent interaction between the two branches has been. In that regard, the thesis described a newly expanded role for the judiciary which saw this increased power manifested most obviously in the areas of justiciability, interpretation and standing. The policy-making potential emanating from such an expanded role was theoretically described and later empirically explained. The entrenching of the Charter and the resulting potential of the judiciary to make or at least shape policy was described as changing the Canadian societal orientation. Part of this change it was argued, will

necessarily impact upon the traditional Canadian political culture. In so far as political culture deals with a certain set of beliefs and values relating to politics, the Charter can be said to have dramatically affected the way the citizenry now looks at its political system and many of the political issues which arise therein. To the extent that those attitudes are changing and redefining the manner in which the issues are being discussed, the political culture now mirrors the uncertainty and changes taking place within the judicial and legislative institutional relationship.

The most obvious manifestations of the change appear with respect to the Canadian public discourse and the slightly less potent function of the state and its legislation. It was argued that the ideological openness and the traditional liberal, non-liberal value-mix in Canada was previously fostered via the political conduit that is the Parliamentary system. Notwithstanding some of its imperfections, it was suggested that such a system permitted the less dominant ideological strains (the communitarian and collectivist strains) to remain influential in the formulation of public policy. This was assured by the manner in which the political parties participated in the system and the manner in which those parties remained adaptive to and representative of their foundation ideologies. The judiciary, having chosen an interpretive approach which provides itself with policy-making and policy-shaping potential, now possesses the potential to set parameters for social and political questions which may indeed be quite different from those set by the consensus based forum that was the legislative branch. Accordingly, the thesis asked whether there still remains the necessary conduits for the pursuit of the traditional Canadian commitment to the notion of a larger community.

Given some of the concerns discussed in this thesis, why has there not been a response from the legislative branch with respect to its own reduced potency and the newly enhanced power of the judiciary (based on an infidelity to the 1982 compromise)? There would seem to be at least three plausible reasons. First, it is not unreasonable to suggest that there is an apparent lack of appreciation amongst many politicians for the common understandings, premises and constitutional mechanisms which accompanied the "Patriation Package" of 1982. Second, much of the institutional imbalance arising from the inconsistent and ignored common understandings of 1982, occurred incrementally, decision by decision. Third, even had the political players in the legislative branch voiced an urgent concern and had they wanted to reassert their role (pursuant to the 1982 agreement), the unprecedented dissatisfaction and in some cases distrust (surrounding politics and by extension the legislative branch) would have seriously undermined any such meaningful response.

The continuing development of Charter law and the necessarily abstract judicial reasoning and legal formulations which flow from judicial analyses and which routinely characterize Charter litigation, will likely continue to precipitate an inexorable flight from politics. Canadians may become increasingly adversarial and may increasingly adopt these rights-driven judicial formulations; formulations which are often seen as representing an "oracular finality". The resulting preoccupation with a more narrow legalistic conception of constitutionality may if it is not addressed, diminish both the citizens' and the legislators' previously more broad conception of the common good. The more narrow conception which will regularly flow from the Charter resolutions of

social and political issues, may be increasingly accepting of the assumptions which lie at the foundation a more American liberal-rationalist approach to rights protection. It is an approach which views the entrenchment of enumerated rights as a method of giving expression to a "distrust of government by removing areas from its sphere of action and influence". It is suggested that had such a distrust of government been the norm in Canada, the ideologically open and accommodating Canadian political culture, would not have developed as it did. Although the theme of much of Canadian history has been the "assertion and survival of this distinctive Canadian identity in North America", [286] it remains very much uncertain whether the shared institutional policy-making can continue to nurture and maintain those distinguishing traits which have constituted such an important part of traditional Canadian political culture.

The discussion of the threat to a distinct Canadian culture is not new. It has been the lament of many Canadian nationalists for some time that there was indeed such a threat. Even if one acknowledges the peculiar events and circumstances that led to the entrenchment of the Charter, the earlier and more general concerns of such writers as the late Canadian historian Donald Creighton, still contain much that is relevant in the Charter era. Creighton, in much of his later work, observed with considerable regret, what he saw as the cumulative erosion of Canadian political, economic and cultural sovereignty. It was his thesis that this erosion had moved Canada away from the political and institutional vision that historically helped constitute the foundation for a distinct British American country on the North American continent. Writing in 1970,

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[286] Supra 5, 287.

twelve years before the Charter, Creighton asserted:

> By 1967, these institutions were already on the defensive, and these convictions and assumptions were losing their vital force. Their decay, in fact, had gone so far that Canadians were almost incapable of realizing that their great nineteenth-century creations had been lost or destroyed and that they had literally nothing of their own to replace what had irrevocably vanished. They had permitted their government to turn its back on their past and to repudiate their history; and in the bankruptcy of their own national philosophy, they turned instinctively to the nearest available creditor, the United States. The distinctive features of Canadian federalism, already eroded by legal decisions and provincial exactions, were attacked for their failure to conform to "classical" - that is, American - federal principles. The critics of the monarchy, parliamentary institutions, and the common law simply took over their proposed improvements from the checks and balances of American congressional government and the principles of the American Bill of Rights. Imitation and plagiarism had become deep-seated Canadian instincts; economic and political dependence had grown into a settled way of life.[287]

While there is no question but that the 1982 political legal compromise contemplated a much more active role for the courts in the judicial review of legislation, it has been argued that the unanticipated and rather unjustified departure from certain important common understandings and fundamental premises has caused a potentially destabilizing imbalance and has resulted in a long-term threat to the preservation of what had been the traditional Canadian political culture. With that in mind, the thesis proposed steps that can still be taken by both the legislative and judicial branches with a view to restoring a balance which would more plausibly be

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[287] Donald Creighton, Canada's First Century. (Toronto: MacMillan of Canada, 1970), 356.

able to preserve the discussed liberal, non-liberal value mix. If the newly legitimated legislative branch was able to work with a slightly more restrained judicial branch in using the available and envisioned balance of the 1982 compromise, it would seem more likely that the court could temper "its individualistic liberalism with a recognition of the claims of government and community".[288] Such a recognition in turn would still acknowledge the legitimacy of a judicial review, but one that would more appropriately mesh with Parliamentary supremacy and whose jurisprudence could offer in a Canadian context, a "more defensible version of the liberal vision".[289]

The Charter era, with its increasing rights-inspired and judicially shaped discourse and policy, highlights the need for a Canadian social life that better balances between the individual and the group. The traditionally more broad Canadian focus appears in this era to have been diverted, to the extent that as George Bain observed:

> Canadians have a lamentably limited capacity to see a national interest broader than the membership list of the occupational, economic, cultural, ethnic, gender, environmental, or other groups of which they identify in spirit, if not formally.[290]

The sought-after institutional balance that has been mentioned in this thesis has yet to be found in this post-1982 period. Yet, it is this balance that represents Canada's best hope for retrieving and preserving what Monahan has called the Canadian sense

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288 Gold, Supra 69, 410.

289 Ibid., 410.

290 R. Bibby, Mosaic Madness (Toronto: Stoddart Publishing Co., 1990), 8.

of "membership in an organic community".[291] Such an institutional equilibrium would better permit the legislative branch to once again perform its function of nurturing a vision where the good of the individual cannot be conceived without some regard for the good of the whole. Such a restored and more potent legislative branch, would assist as it always had, in maintaining the ideological openness and diversity for which Canadians so regularly congratulate themselves. Importantly, this legislative function would need to remind Canadians of the benefits and burdens as well as the rights and responsibilities which as Monahan has suggested, "are implicit in membership in a larger community."[292] Without such a vibrant and active legislative branch, the threat posed by this judicial-legislative imbalance becomes a threat to the Burkean idea that every nation must be guided in its policies by the ideals, institutions and traditions that have historically helped shape it.

Canada's political culture has long been distinctive, partly because of the relationship that existed between citizen and government. Canadians, unlike their American neighbors, have not generally viewed government as a threat to their interests. In fact, Canadians have always had a rich and well-rooted tradition of looking toward government to safeguard broader societal interests, as well as certain basic values. Such interests and values are well represented in the form of such things as: social and income support programs, equalization payments, and regional diversification initiatives. It has been said that the Charter need not represent a radical departure from this

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[291] Monahan, Supra 104, 92.

[292] Ibid.

tradition assuming that it can be interpreted in a way that is consistent with this important aspect of the Canadian experience. In that regard, it is important that the Charter be used as a shield and not as a sword or as a bulwark against the state. Kim Campbell has suggested that the Charter must be interpreted in a way that is consistent with seeing the Canadian experience as being a statement of the relationship between citizens and state, a relationship in which citizens have sought to invoke state power as much as they have sought to limit it. It is well then to conclude by quoting former Federal Justice Minister Kim Campbell, who in speaking on the occasion of the 10th anniversay of the Charter, summarized well the stakes and the challenges involved in this essential but new institutional relationship:

> This is why I think it essential that the Charter be interpreted in a manner which is consistent with the Canadian experience, recognizing that the protection of rights is not the exclusive domain of the courts. Parliament and the executive have fundamental roles to play in ensuring that the Charter's underlying values are achieved. In fact, I would argue that rights will not be achieved unless our democratic institutions act -- and are allowed to act -- to make them so.
>
> This proposition has two important corollaries. First, it imposes a weighty responsibility on Parliament, parliamentarians and the executive to ensure that democratic institutions live up to the trust we place in them as protectors -- indeed, promoters -- of rights. Second, it suggests an appropriate framework of institutional relationships between Parliament, the executive and the courts based on a functional allocation of responsibilities. Each organ of government should encourage and assist the others to fulfill their roles while at the same time respecting the proper limits of its own function.[293]

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[293] Supra 3.

The success or failure in attaining this new balance, will to a very large degree determine the fate of the traditional political culture. The end result will determine whether this drift can be halted, or whether it inexorably develops into a quiet but definitive change.

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