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Two Hundred Years of Constitutionalism in the Americas: The Influence of the United States Constitution on the Legal Systems of the Americas-A Canadian Perspective

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TWO HUNDRED YEARS OF CONSTITUTIONALISM IN THE AMERICAS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ON THE LEGAL SYSTEMS OF THE AMERICAS — A CANADIAN PERSPECTIVE*

JOHN D. RICHARD, Q.C.**

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“Is life so dear, or peace so sweet, as to be purchased at the price of chains and slavery? Forbid, Almighty God! I know not what course others may take; but as for me, give me liberty, or give

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me death!"¹

Four score and seven years ago our fathers brought forth on this continent a new nation, conceived in Liberty, and dedicated to the proposition that all men are created equal. . . . It is for us the living . . . to be dedicated here to the unfinished work which they who have fought here have thus far so nobly advanced . . . that this nation, under God, shall have a new birth of freedom - and that government of the people, by the people, for the people, shall not perish from the earth.²

The simple faith, the unshakable conviction our colonial forebears held in man's individual rights and his equality before the law and God, is the most priceless jewel in all the vast spiritual and material heritage these men and women bequeathed to us. We cannot afford to lose their sharp sense of basic values — expressed by Patrick Henry in one imperishable sentence.³

I. INTRODUCTION

This year, we are celebrating the Bicentennial of the United States Constitution. This is a significant milestone in the struggle for democracy and human rights. The United States Constitution has had a very strong influence on the constitutions of other countries and on the concept of the supremacy of the rule of law.

The principle of the rule of law is at the root of constitutionalism. A constitutional government exists where the constitution effectively limits political power. Both Canada and the United States have a constitutional form of government limiting the means that can be legitimately employed to achieve objectives.

In this article, I propose to contrast the United States Constitution with that of Canada. Inevitably, there will be some comparisons with British institutions which have had an impact on Canadian political institutions and, through its common law, has had an impact on both the United States and Canadian Constitutions.

1. Address by Patrick Henry to the Virginia House of Burgesses (Mar. 23, 1775) reprinted in DIVISION OF HISTORICAL POLICY RESEARCH, OFFICE OF PUBLIC AFFAIRS, U.S. DEPT OF STATE, HUMAN RIGHTS, UNFOLDING OF THE AMERICAN TRADITION 48 (1949) [hereinafter HISTORICAL POLICY RESEARCH].

2. Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863) reprinted in HISTORICAL POLICY RESEARCH, *supra* note 1, at 52-53.

3. Address by Dwight D. Eisenhower, Columbia University Commencement (June 2, 1949) reprinted in HISTORICAL POLICY RESEARCH, *supra* note 1, at 60.

It is often said that the United States was born out of revolution and that Canada was born out of evolution. This is to say that the Canadian path to nationhood was through a process of discussion, negotiation and with the consent of the United Kingdom. Some also have contrasted the two constitutional approaches by comparing fundamental constitutional documents. For example, the Declaration of Independence proclaims that "all men have the right to life, liberty and the pursuit of happiness."⁴ The Canadian Constitution is more modest in its proclamations; its objectives are peace, order and good government.⁵

II. CANADA AND THE AMERICAN REVOLUTION

If the First Continental Congress had its way, Canada would have been part of the United States. On October 26, 1774, the Continental Congress approved the text of a letter to the people of the province of Quebec declaring that the English colonists should enjoy five specific human rights: representative government, trial by jury, liberty of person, easy tenure of land, and freedom of the press.⁶ The letter was an invitation to the people of Quebec to join the American colonies in seeking redress from English oppression. However, the French colonists who had enjoyed very few political freedoms under the French regime were more concerned with the preservation of their religious and linguistic interests. England recognized the right of the people of Quebec to their language (French), to their religion (Roman Catholic), and to their legal system (the old French civil law, the *Coutume de Paris*).⁷

The Act of Quebec, together with the restoration of the Ohio-Mississippi lands to Quebec displeased the English speaking American colonies. Prior to approving the letter to the people of Quebec, the members of the First Continental Congress, in an address to the people of Great Britain, protested such measures, describing them as the "worst of laws."⁸ Yet five days later, the same Congress sought to convince the French Canadians that their true interest lay in uniting with the American colonies.

4. The Declaration of Independence para. 2 (U.S. 1776).

5. CAN. CONST. preamble; The Constitution Act, 1867, 30 & 31 Vict., c. 3 § 91.

6. At the time of the American Revolution, French Canadians outnumbered the English speaking people of the Canadian colonies by thirty to one. The former French colony was conquered by the English in 1759.

7. Act of Quebec, 1774, 14 Geo. 3, ch. 3, § 12.

8. M. WADE, *THE FRENCH CANADIANS, 1760-1945*, at 65 (1956) [hereinafter WADE].

On April 19, 1775, unrest in the American colonies broke out into open rebellion at Lexington and Concord a few days before the Quebec Act went into effect on May 1, 1775. A letter from George Washington addressed to the people of Canada called for the cooperation of the French Canadians.⁹ Washington urged that the cause of liberty in America was a cause for all virtuous American citizens regardless of religion and ancestry. The French Canadians resisted the efforts of the American colonists to make Quebec the 14th American colony, and in 1775, an American army invaded Quebec and captured Montreal. Subsequently, the Americans attacked Quebec City.

In the spring of 1776, Benjamin Franklin was sent to rally French Canadians to the cause of the American invaders. However, British regulars arrived to re-enforce Quebec City, and the American volunteers retreated. In the ensuing years, the clergy in Quebec, shocked by the revolutionary attack on the Church in France and fearful of American influence, was moved to a greater loyalty to Great Britain.¹⁰

III. THE ESTABLISHMENT OF THE PROVINCE OF CANADA

In 1791, the province of Quebec was divided into Upper and Lower Canada, and England granted a form of representative government to its Canadian colonies.¹¹ At the time of its passage, the measure granting representative government was a liberal one, and was intended to extend to Canada a degree of the political liberty enjoyed by the people of Great Britain. In addition, there had been a large influx of English speaking immigrants mostly from the former American colonies and later from Europe, many of whom were loyalists to the British Crown.

In 1812, the Americans again attacked Canada,¹² but this time not without annexation in mind. The attack by the Americans was intended to strike a blow at Britons with whom they were at war; a war fought almost entirely in Upper Canada. In a much quoted phrase, Thomas Jefferson said that the seizing of British North

9. Letter from George Washington to the people of Canada (1775) (discussing French Canadian cooperation).

10. WADE, *supra* note 8, at 99.

11. Constitutional Act of 1791, 31 Geo. 3, ch. 31, § 2.

12. War of 1812 (between the United States and Great Britain (1812-1815)).

America was "a mere matter of marching."¹³ In 1812, three out of five settlers of Upper Canada were newly arrived Americans.¹⁴ It is a matter of conjecture, but nevertheless interesting to speculate that without the War, the colony of Upper Canada may have become another state in the Union. However, the War intervened and ultimately ensured that Canada would never become part of the United States. The invasion of 1812-1814 was the last American invasion of Canada.

In the 1830's, reform was the spirit of the age in Canada and Britain. The distance of the colonial office in London, Lower Canada's proximity to the United States and the rise of Jacksonian democracy in the United States fueled the rising intolerance of the outmoded colonial system in Canada.¹⁵ In 1837, the British Parliament rejected the proposal of a responsible elected council; in that same year, a group of colonists in Lower Canada adopted twelve resolutions similar to the First American Congress' Declaration of Rights and Grievances of 1774.¹⁶

The rebellion of 1837-1838 in Lower Canada which ensued was a resort to arms in order to break the long constitutional deadlock between the colonists and the oligarchy which ruled both Upper and Lower Canada.¹⁷ The conflict, influenced by the American and French Revolutions, had a profound effect on England. Lord Durham was dispatched to Canada and made his famous Report on the Affairs of British North America, which led to the Union Act of 1840.¹⁸ In his report, Lord Durham called for the establishment in Lower Canada of an English population with English laws, language and a decidedly English legislature.¹⁹ The Union Act established the Province of Canada, and provided for a legislative council named for life along with an elected assembly composed of an equal number of members from Upper and Lower Canada.²⁰ Most importantly, the Union Act granted the power to form a responsible government under which the Province of Canada could function.

Additionally, some of the rebel leaders had sought aid and

13. P. BERTON, *THE INVASION OF CANADA, 1812-1813*, at 15 (1980).

14. *Id.* at 25.

15. WADE, *supra* note 8, at 152.

16. *Id.* at 160.

17. *Id.* at 158.

18. Union Act, 1840, 3 & 4 Vict., ch. 35.

19. Report on the Affairs of British North America (Lord Durham) (1839).

20. Union Act, 1840, 3 & 4 Vict., ch. 35.

support from the governors of New York and Vermont and even from President Van Buren. The President issued a Proclamation of Neutrality on January 5, 1838 which was later implemented by the Neutrality Act of 1838.²¹ Thus, by 1840, the American interest in Canada had transformed itself from one of annexation to one of neutrality and the Province of Canada had gained a representative as well as a responsible parliamentary government under the British Crown.

IV. CANADIAN FEDERATION

Motivated by mutual commercial ties and fear of absorption by the United States, representatives of the Maritimes and Upper and Lower Canada met at Charlottetown and at Quebec City in 1864 in order to consider the union of all British North America. A federal (as opposed to a legislative) union was decided upon in order to preserve the separate individualities of the provinces and to protect the cultural rights of the French Canadians. Interestingly, the conference was held at the same time the American Civil War was being fought in the name of states' rights. The conferring representatives decided that, unlike the American Constitution, all powers not specifically granted to the provinces would be reserved to the federal government.²² Moreover, the provinces maintained their desire to continue under the British Crown. These factors and events helped shape an alternative form of democracy in the northern half of the North American continent. Canada was born of an Act of Union between the provinces of Canada, Nova Scotia and New Brunswick on March 29, 1867, accompanied by a Constitution "similar in principle to that of the United Kingdom."²³ The British North America Act, which received the royal assent of Queen Victoria on March 29, 1867, created the Canadian federation.²⁴ One hundred and fifteen years later, Queen Elizabeth II gave royal assent to The Canada Act embodying the Constitution Act of 1982, by which Canada acquired full and complete national sovereignty.²⁵ Although for all practical purposes, Canada became

21. Neutrality Act of 1838, ch. 31, 5 Stat. 212 (Mar. 10, 1838).

22. British North America Act, 1867, 30 & 31 Vict., ch. 3 (renamed the Constitution Act, 1867 by the Constitution Act, 1982, Schedule B to The Canada Act, 1982, (U.K.) 1982, ch. 11).

23. *Id.*

24. *Id.*

25. The Canada Act, 1982, (U.K.), ch. 11 (granting Canada full and complete

an independent country in 1931, with the passage of the Statute of Westminster,²⁶ it is only as a result of the enactment by the British Parliament of The Canada Act in 1982 that Canada acquired complete national sovereignty and the ability to amend its own Constitution.

The new constitutional document includes a Charter of Rights and Freedoms as well as an amending formula, and the Constitution confirms the long-standing division of powers among governments in Canada. As then Prime Minister Pierre Elliott Trudeau remarked at the Proclamation of the Constitution Act of 1982: "Today, at long last, Canada is acquiring full and complete national sovereignty. The Constitution of Canada has come home. The most fundamental law of the land will now be capable of being amended in Canada, without any further recourse to the Parliament of the United Kingdom."²⁷

In a speech marking Law Day in Ottawa in 1987 the Right Honourable Brian Mulroney, Prime Minister of Canada, spoke of the Canadian experience in the following words:

The significant achievement of our form of government has been the gradual recognition of the supremacy of the rule of law — the concept that no one is above the law nor beneath its protection.

But the law is not just statutes and precedents, it is an instrument of social justice.

For the Fathers of Confederation, the law was a means to achieving peace, order and good government.

Bearing those principles in mind, we seek to widen the rule of law, to enhance the freedom of Canadians.²⁸

V. COMPARATIVE FEDERALISM

A. *American and Canadian Theories of Federal Government*

Canada borrowed from both the British and the American

sovereignty).

26. Statute of Westminster, 1931, 22 Geo. 5, ch. 4.

27. Address by The Right Honourable Pierre Elliott Trudeau, Prime Minister of Canada, upon the proclamation of the Constitution Act (Apr. 17, 1982).

28. Address by The Right Honourable Brian Mulroney, Prime Minister of Canada, Law Day Dinner, Ottawa, Ont. (Apr. 15, 1987).

models in framing its constitution and organizing its governmental institutions. Furthermore, Canada, like the United States, is based on a federal system. However, unlike the United States, Canada has a parliamentary rather than a presidential form of government; both are democratic in nature.

In addition, like the United States, Canada has a written constitution.²⁹ However, as in the United Kingdom, conventions and practices play an important role. The United States Constitution has been supplemented by conventions, judicial decisions and statutes which express fundamental principles. Likewise, the British also have a written component contained in documents such as the Magna Carta of 1215, the Habeas Corpus Act of 1679, and the English Bill of Rights of 1689. While the United Kingdom recognizes the rule of law, the principle of parliamentary supremacy allows it to amend or revoke any law by a simple Act of Parliament. On the other hand, amendment of the United States Constitution can only be achieved by a complicated, formal process that requires the participation of other institutions in addition to the U.S. Congress.³⁰ The Canadian Constitution incorporates an amending formula which requires the participation of other institutions in addition to Parliament.³¹ Therefore, in the case of Canada and the United States, the constitutional documents are burdened by special amending formulas which effectively limit the supremacy of the legislature. The concept of parliamentary supremacy in Canada has also been tempered by federalism and dealt a further blow by the entrenchment in the Constitution of a Charter of Rights.³²

Like the United States and the United Kingdom, Canada has a bicameral legislature. However, the Canadian Senate more closely resembles the United Kingdom's House of Lords. Its members are appointed³³ rather than elected, and it is dominated by the House of Commons. The Senate of Canada does reflect the federal nature of the country in its composition; Senate membership is determined by region although there is not an equal number of senators from each province as in the United States. Similarly, the governments of the provinces, like those of the states, reflect the federal institutions except that all of the Canadian provinces now

29. CAN. CONST.

30. U.S. CONST. art. V.

31. CAN. CONST. pt. V.

32. *Id.* at pt. I, § 5.

33. *Id.* at pt. IV, § 18.

have abolished the second house.

Canada, like the United Kingdom, has a parliamentary executive which divides the executive functions between a formal executive (*i.e.*, the Governor General) and a political executive (*i.e.* the Prime Minister and his cabinet).³⁴ It operates under the principle of collective and ministerial responsibility. The Executive branch in the United States is based on the principle of separation of powers. This contrast in executive power is illustrated by the fact that the revolutionary context in which independence was achieved in the United States resulted in a philosophy of limited government, as opposed to the British pattern of central authority. In an analysis of the U.S. system of government, Ronald B. Landes notes that "what most distinguishes the political systems of Canada and the United States is the separation of powers."³⁵ In Canada, as in the United Kingdom, the political executive is a member of and is responsible to the legislature.³⁶

Conversely under the presidential system in the United States, where there is strict separation of powers, the president and the members of his cabinet are not and cannot be members of the legislative branch and vice versa. The United States system is one of checks and balances where each branch of government jealously guards its prerogative. The political and constitutional independence of the three branches of government is explicitly provided for in the Constitution in sharp contrast to the Canadian and British parliamentary systems. The separation of powers, as well as the division of powers between the federal government and the states are major restrictions on the concentration of power. As James Madison stated:

But the greatest security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defence must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature that such devices should

34. *Id.* at pt. III, §§ 9-16.

35. R. LANDES, *THE CANADIAN POLITY, A COMPARATIVE INTRODUCTION* 25-28 (1983) [hereinafter LANDES].

36. CAN. CONST. pt. IV, § 17.

be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on governments would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed, and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary Precautions.³⁷

As noted by Professor Landes, these auxiliary precautions are fourfold: separation of powers, checks and balances, federalism and a bill of rights.³⁸ He goes on to say that "[t]he heart of American constitutionalism is reflected in the way the political structures embody these four principles, all of which seek to fragment and restrain the use and concentration of influence and power by the political elites."³⁹ The Professor notes that separation of powers in the United States prevents any individual from holding office in more than one branch of government at the same time.⁴⁰ For example, the President cannot be a member of the Senate or of the House of Representatives during his term of office. The concentration of too much power in one person or in one institution is thought to be a corruptive influence. Further, an established system of checks and balances was woven into the relationship among branches. For example, the President can veto any legislation passed by Congress,⁴¹ the Supreme Court can declare acts of Congress unconstitutional,⁴² the President appoints all members of the Supreme Court with the consent of two-thirds of the Senate,⁴³ and the Congress can impeach the President⁴⁴ and can override his veto by a two-thirds majority.⁴⁵

The President of the United States acts as Chief of State, Head of Government and leader of a major political party. In con-

37. THE FEDERALIST No. 51 (J. Madison).

38. LANDES, *supra* note 35, at 98.

39. *Id.*

40. *Id.* at 99.

41. U.S. CONST. art. I, § 7.

42. *Id.* at art. III, § 2.

43. *Id.* at art. II, § 2.

44. *Id.* at art. I, § 2.

45. *Id.* at art. I, § 7. See also R. VAN LOON & M. WHITTINGTON, THE CANADIANS POLITICAL SYSTEM, ENVIRONMENT, STRUCTURE & PROCESS 122 (1971).

trast, the Prime Minister of Canada is not its Chief of State; this function is entrusted in Canada to the Governor General and formally to the Queen of Canada.⁴⁶

The noted French political analyst, Maurice Duverger, characterizes the office of President of the United States as a temporary, non-hereditary, elected monarchy; he calls it a republican monarchy (*la monarchie republicaine*).⁴⁷

Formal executive power in Canada is vested in the Crown and, in a formal sense, Canada has a monarchic form of government. The Governor General exercises all of the prerogative rights and privileges of the Queen in right of Canada.⁴⁸ However, the real power is exercised by the Prime Minister and his cabinet. Executive decisions are made by the Prime Minister and his cabinet and are in effect rubber stamped by the Governor General. It is a well-established convention that the Governor General acts on the advice of the government of the day. However, the Governor General does have the exclusive right to recommend legislation involving the spending of public money or the imposition of a tax, and the formal right to prevent a bill from becoming law by withholding his assent or by reserving the bill for the signification of the Queen's pleasure. The Governor General also has the power to disallow any provincial legislation of which he disapproves.⁴⁹

It is interesting to note that a committee of United States citizens under the co-chairmanship of a former White House Counsel examining possible reforms to the U.S. constitutional system, has made recommendations which would move the United States towards a parliamentary system of federal government, akin to Canada's. In a January 1987 report, the committee said that the separation of powers, while it has served to prevent tyranny and the abuse of office, has done so by encouraging confrontation, indecision and deadlock, and by diffusing accountability, and said that members of Congress should be allowed to serve in the cabinet and other executive agencies.⁵⁰ The Canadian parliamentary system has also been criticized in some quarters for becoming too presidential in style. Committees of the House of Commons have been

46. CAN. CONST. pt. III, § 12.

47. M. DUVERGER, *LA MONARCHIE REPUBLICAINE* 100 (1974).

48. CAN. CONST. pt. III, § 10.

49. *Id.* at pt. III, § 12.

50. Lowther, *Prescription for Democratic Change*, *MACLEAN'S MAGAZINE*, Feb. 9, 1987 at 21.

granted greater legislative and investigative roles like those of the House of Representatives. In some respects, Canada is moving towards a form of republican government while a U.S. citizen committee is recommending that the United States move toward a parliamentary system of government. Clearly, both Canada and the United States engage in democratic form of government, have independent judiciaries, federal systems, and constitutionally entrenched guaranteed rights and freedoms. In Canada, there is developing support for an elected Senate. The Premier of Alberta has recently announced that he will seek wide support for senate reform proposing to make it an elected body with effective powers and equal representation from the provinces; a Senate along the lines of the United States Senate.⁵¹ The greatest differences between the two systems lie in the separation of powers between the executive and legislative branches of government, and in the power and influence of the second house.

In making distinctions between the two systems one must also take into account the differences in the division of legislative powers between the central government and the individual states or provinces. The Canadian federal government has restricted powers over the regulation of trade and commerce and the implementation of international agreements as compared to those powers enjoyed by the federal government in the United States.⁵² As a result, the governments of the provinces are key elements in the implementation of many treaties. In addition, federal provincial meetings at all levels, including first ministers, are a frequent occurrence in Canada.

In Canada, as in the United States, the judiciary is independent of the other branches of government.⁵³ As in the United States, the Canadian judiciary can declare laws to be unconstitutional if they are *ultra vires*.⁵⁴ Both the Canadian and United States Constitutions provide for the division of legislative powers between the federal government and the various states or provinces.⁵⁵ The courts in both countries have the power of judicial review to determine that a law has been properly enacted within

51. *Getty to Seek Wide Support in Bid for Reform of Senate*, The Globe and Mail, Apr. 7, 1987.

52. H. FAIRLEY, CONSTITUTIONAL ASPECTS OF EXTERNAL TRADE POLICY (1986).

53. CAN. CONST. pt. VII.

54. The Constitution Act, 1867, §§ 91, 92.

55. U.S. CONST. amend. X. CAN. CONST. pt. III, § 12.

constitutional parameters.⁵⁶ The United States, following the adoption of the Bill of Rights in 1791, and Canada, following the adoption of the Charter of Rights and Freedoms in 1982, have guarantees of certain rights and freedoms entrenched in their Constitutions. The judiciary of each country can review law enacted by the federal government or its states or provinces to determine whether such laws violate any of the rights or freedoms guaranteed in the respective Constitutions.⁵⁷

B. The Canadian Charter of Rights and Freedoms Compared with the American Bill of Rights

In 1960, the Parliament of Canada adopted the Canadian Bill of Rights⁵⁸ which provides that no law of Canada (meaning laws enacted by the Parliament of Canada) can operate or be construed so as to abrogate, abridge or infringe any of the rights or freedoms recognized and declared in the Bill.⁵⁹ However, this enactment was limited in scope in that (1) it applied only to laws enacted under the legislative authority of the parliament of Canada and not to those enacted by the legislatures of the provinces; and (2) it was directory in nature only.

In 1980, the government, led by the Right Honourable Pierre Elliott Trudeau, proposed to entrench in the Constitution a Canadian Charter of Rights and Freedoms. A great deal of debate arose in Canada concerning the desirability of such an enactment. Some feared that once rights were defined in the Constitution, those rights which were not specifically referred to would cease to exist and would thus receive no protection. Others feared that the Charter of Rights would politicize the courts and weaken the legislative authority of elected representatives since the courts would be the final arbiter as to whether a law denied or infringed upon a fundamental freedom or right. Still others referred to what they considered to be the undesirable results of the American experience. These critics referred, in particular, to the decisions of the United States Supreme Court concerning the non-admissibility of evidence illegally obtained and the United States Supreme Court's

56. U.S. CONST. art. III, § 2; CAN. CONST. pt. VII. See also *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

57. *Id.*

58. An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms (Canadian Bill of Rights), 1960, 8 & 9 Eliz. 2, ch. 44.

59. *Id.*

broad interpretation of the freedom of speech provision contained in the first amendment. Further, some of those critical of the Charter pointed to Britain as a model of a state governed by a parliamentary government in which human rights were protected without an entrenched Bill of Rights. Following lengthy hearings and debates, all of the provinces, with the exception of Quebec, passed a resolution which provided for an amending formula to the Constitution and which entrenched the Charter of Rights and Freedoms into the Constitution.

Just as the United States Constitution is a document which derives meaning through judicial interpretation, the Canadian Charter also must be given texture by the Canadian courts. The Supreme Court of Canada recently addressed this issue in *Hunter v. Southam, Inc.*,⁶⁰ stating:

A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power, and when joined by a *Bill* or a *Charter of Rights*, for the unrelenting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended.

It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind. Professor Paul Freund expressed this idea aptly when he admonished the American courts "not to read the provisions of the Constitution like a last will and testament lest it become one."⁶¹

In *Hunter*, the Court further noted that "[t]he task of expounding a constitution is crucially different from that of construing a statute."⁶² The Court cited an English decision construing the Bermudian Constitution, which stated that a constitution is a document *sui generis* calling for principles of interpretation of its own, suitable to its character, and that as such, a constitution incorporating a Bill of Rights calls for a generous interpretation,

60. [1984] 2 S.C.R. 145.

61. *Id.* at 155.

62. *Id.*

thus avoiding what has been called "the austerity of tabulated legalism suitable to give individuals the full measure of the fundamental rights and freedoms referred to."⁶³ The Supreme Court commented that "[s]uch a broad, purposive analysis, which interprets specific provisions of a constitutional document in the light of its larger objects is also consonant with the classical principles of American constitutional construction enunciated by Chief Justice Marshall in *McCulloch v. Maryland*."⁶⁴ The Court's decision in *Hunter* contains the following enlightening passage:

The *Canadian Charter of Rights and Freedoms* is a purposive document. Its purpose is to guarantee and to protect, within the limits of reason, the enjoyment of the rights and freedoms it enshrines. It is intended to constrain governmental action inconsistent with those rights and freedoms; it is not in itself an authorization for governmental action.⁶⁵

In an earlier decision, the Ontario Court of Appeal had stated that:

The Charter as part of a constitutional document should be given a large and liberal construction. The spirit of this new 'living tree' planted in friendly Canadian soil should not be stultified by narrow technical, literal interpretations without regard to its background and purpose; capacity for growth must be recognized.⁶⁶

United States Supreme Court Justice Hugo Black expressed his judicial philosophy as follows:

I cannot consider the Bill of Rights to be an outworn 18th century 'strait jacket'. . . . Its provisions may be thought outdated abstractions by some. And it is true that they were designed to meet ancient evils. But they are the same kind of human evils that have emerged from century to century wherever excessive power is sought by the few at the expense of the many. In my judgment the people of no nation can lose their liberty so long as a Bill of Rights like ours survives and its basic purposes are conscientiously interpreted, enforced and respected so as to afford continuous protection against old, as well as new, devices

63. *Hunter*, [1984] 2 S.C.R. at 156 (citing Lord Wilberforce in *Minister of Home Affairs v. Fisher*, 1980 A.C. 319, 328).

64. *Hunter*, [1984] 2 S.C.R. at 156 (construing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819)).

65. *Id.* at 156.

66. *Southam Inc. and the Queen* (No. 1), [1983] 41 O.R. (2d) 113, 123.

and practices which might thwart those purposes.⁶⁷

In 1803, the United States Supreme Court asserted its jurisdiction to fix the limits of the constitutional jurisdiction of the legislative and executive branches of government. Chief Justice John Marshall in *Marbury v. Madison*,⁶⁸ said that the court's power to enforce the Constitution followed from that document's own declaration that the Constitution was the supreme law of the land.⁶⁹

From the outset, the Canadian courts have recognized that the Charter is the supreme law of Canada. Less than five months after the proclamation of the Charter, Justice E. Smith, in striking down a provision of a federal statute which had been in effect for over seventy-five years, said that "[w]ith the advent of entrenchment of basic rights and freedoms, the court now has a constitutional responsibility to deny effect to a measure adopted by Parliament that contravenes the Charter. Such measure would very simply be unconstitutional and beyond its competence."⁷⁰ Further, in 1985, the Supreme Court of Canada held that:

[I]f a court or tribunal finds any statute to be inconsistent with the Constitution, the overriding effect of the [Charter], section 52(1), is to give the Court not only the power, but the duty, to regard the inconsistent statute, to the extent of the inconsistency, as being no longer of force or effect.⁷¹

It is in the area of constitutionally guaranteed rights and freedoms that the United States has had the greatest impact on the Canadian Constitution. The Canadian Charter of Rights and Freedoms was inspired not only by the United States Bill of Rights, but also by other documents such as The International Covenant on Civil and Political Rights,⁷² the United Nations' Universal Declaration of Human Rights⁷³ and the European Convention for the

67. *Adamson v. California*, 332 U.S. 46, 89 (1947) (Black, J., dissenting). See also M. SILVERSTEIN, *CONSTITUTIONAL FAITHS: FELIX FRANKFURTER, HUGO BLACK AND THE PROCESS OF JUDICIAL DECISIONMAKING* 167 (1984).

68. 5 U.S. (1 Cranch) 137 (1803).

69. R. DWORKIN, *LAW'S EMPIRE* 356 (1986).

70. *The Queen v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, 359-60 (Wilson, J. concurring) (the Court invalidated a statute prohibiting the sale of goods on Sunday as being violative of the right to religious freedom since the statute had the effect of compelling observance of Christian beliefs).

71. *Id.* at 353.

72. G.A. Res. 2200, 21 GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966).

73. G.A. Res. 217 A, U.N. Doc. A/810 (1948).

Protection of Human Rights and Fundamental Freedoms.⁷⁴ It is however, the U.S. jurisprudence which has had the greatest influence on the interpretation of the Canadian Charter of Rights and Freedoms.

The Canadian Charter of Rights and Freedoms is a very significant document. The preamble of the Charter states that "Canada is founded upon principles that recognize the supremacy of God and the rule of law."⁷⁵ It sets out those rights and freedoms which are guaranteed:⁷⁶

1. Fundamental Freedoms, including freedom of conscience and religion; freedom of thought, belief, opinion and expression; freedom of peaceful assembly; and freedom of association (section 2);

2. Democratic Rights, including the right to vote in an election; the maximum duration of legislative bodies without an election and the annual sitting of legislative bodies (sections 3, 4, and 5);

3. Mobility Rights, including the right of its citizens to enter, remain in and leave Canada and the right to move and gain livelihood (section 6);

4. Legal Rights, including life, liberty and security of the person; protection from unreasonable search and seizure; protection from arbitrary detention or imprisonment; specific rights upon arrest or detention; freedom from cruel and unusual treatment or punishment; freedom from self-incrimination; the right to the assistance of an interpreter; and rights upon being charged with an offence (sections 7 to 14);

5. Equality Rights, recognizing equality before and under the law and equal protection and benefit of the law (section 15);

6. Rights to speak and conduct affairs in either of the official languages of Canada (section 16 to 22);

7. Minority Language Educational Rights (section 23); and

8. Certain general rights including Aboriginal Rights (section 25), the right to the preservation of the multicultural heritage (section 27), and rights granted equally to both sexes (section 28).

74. Nov. 4, 1950, 213 U.N.T.S. 222.

75. CAN. CONST. preamble.

76. *Id.* pt. I.

The Charter also specifies that its guarantee of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada (section 26). In addition, many of the rights and freedoms guaranteed by the Charter are available to all persons in Canada, whether citizens or not.⁷⁷ On the fifth anniversary of the Proclamation of the Charter of Rights, the Chief Justice of Canada expressed his views on the Charter:

As to the Charter, there is no doubt that it is an absolutely fundamental constitutional document. Speaking personally, I take great pride in the Charter. For one thing, it puts Canada in the mainstream of the post-World War II movement towards conscious recognition of, and protection for, fundamental human rights. For another thing, the Charter is the logical culmination of Canadian developments in the field of human rights — it builds on provincial and federal human rights codes and the Canadian Bill of Rights. At bottom, the Charter protects those basic values which most Canadians share and cherish. I am pleased that, in my professional capacity as a judge, I can play a role in protecting and promoting those values.

I am pleased to say that the Bar in this country has always been particularly respectful of, and vigilant to protect, the Canadian Constitution. I believe that the same deep respect for the Constitution lives in the legislative, executive and judicial branches of government. So too for the press which must perform, and perform well, its role as watchdog of the activities of all three branches of government.

At the end of the day, the Constitution is our most important guarantor that the rule of law will be the heartbeat of the public life of this country. All branches of government must accept and respect that fundamental precept of Canadian life.⁷⁸

The Charter applies to the Parliament and Government of Canada including its two territories and to the legislature and government of each province. Furthermore, the courts have held that this application extends not only to laws enacted by the Parliament of Canada or the legislative assemblies of the provinces or territories, but to governmental actions such as orders in council or cabinet decisions. Therefore, cabinet decisions are reviewable under the

77. *Id.* pt. I, § 2.

78. Address by The Right Honourable Brian Dickson, Chief Justice of Canada, Law Day Dinner, Ottawa, Ont. (Apr. 15, 1987) at 3-4.

Charter.

The Supreme Court of Canada has held that the executive branch of government bears a general duty to act in accordance with the dictates of the Charter.⁷⁹ The Charter also applies to the courts themselves.⁸⁰ Thus, the Charter applies to a broad range of governmental activity but does not apply to private activity. Private activity continues to be governed by specific statutes and, in particular, by the human rights legislation of the federal government and of each of the provinces of Canada.

As the Chief Justice of Canada said after being inducted into the American College of Trial Lawyers, the enactment of the Charter of Rights and Freedoms will most certainly contribute to closer relations between Canadian lawyers and judges and their American counterparts:

The jurisprudence which has developed under the Bill of Rights in the United States Constitution is also certain to be of assistance. There are a number of similarities and differences between the Canadian Charter of Rights and the American Bill of Rights. The paramount similarity is that both documents protect those rights and freedoms considered fundamental in a free and democratic society. Protection of the individual from arbitrary treatment in the criminal process, freedom of expression and religion, and protection against unreasonable search and seizure, are just a few of the guarantees afforded by both documents.⁸¹

The Chief Justice pointed out however, that there are considerable differences between the American Bill of Rights and the Canadian Charter: "Most striking is the inclusion in the Charter of certain rights which do not exist in the American Bill of Rights, and the exclusion of some that do."⁸² As an example, the Chief Justice indicated that the second amendment right to bear arms and the fifth and fourteenth amendments guarantees of property rights are absent from the Charter, and further pointed out that there are provisions included in the Charter that have no parallel in the American Bill of Rights such as the provisions relating to mobility rights, language rights and minority education rights, the rights of aboriginal people, equality of the sexes, and a general rec-

79. *Operation Dismantle, Inc. v. The Queen*, [1985], 18 D.L.R. (4th) 481.

80. *R. v. Begley, Cunningham, Delaney, Seguin and Rontcliffe*, [1982], 38 O.R. (2d) 549.

81. 6 AM. C. OF TRIAL LAW., AUTUMN BULL. 3 (1986).

82. *Id.*

ognition of Canada's multicultural heritage. He stressed that these provisions manifest a distinctively Canadian social experience, one marked by a recognition of cultural identity, as well as an awareness of the importance of equality in a multicultural confederation and said that differences between the Charter and the American Bill of Rights are not confined to the relative inclusion and exclusion of particular rights and freedoms.⁸³ There are also differences in the wording of provisions that deal with the same general subject matter, for example, "The Canadian Charter of Rights refers to 'freedom of religion, while the American Bill of Rights prohibits Congress from making laws respecting an establishment of religion, or prohibiting the free exercise thereof.'"⁸⁴ Moreover, there are in the Charter, three provisions of general application which have no parallel in the American Bill of Rights. There is a section which makes Charter rights and freedoms subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."⁸⁵ As the Chief Justice noted, the Charter rights are therefore not absolute.⁸⁶ Further, many of the rights and freedoms addressed in the Charter are subject to a legislative override (or opting-out) provision, and Parliament or the legislature may expressly declare an Act shall operate notwithstanding the Charter.⁸⁷ The result of these two provisions is that the government may limit protected rights provided that either the legislature can be persuaded expressly to do so, by invoking the override or opting out provision, or that the Courts can be persuaded that the limit is reasonable and demonstrably justified in a free democratic society. There also is a further specific provision dealing with the exclusion of evidence in the event of constitutional violations.⁸⁸ Where a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by the Charter, the evidence must be excluded, but only if it is established that with regard to all of the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.⁸⁹ The Chief Justice concluded with the following:

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

In spite of differences between the Bill of Rights and the Charter, American jurisprudence will undoubtedly be helpful in interpreting the scope of the Canadian Charter. I believe it will almost always be useful to review American decisions on a Charter point. At the very least, they provide food for thought, a place to begin forming ideas. We may not always agree with the approach taken by the American courts or feel that their conclusions are applicable in the different social and historical context of Canada. Nonetheless, there is, for us, much to be learned from the jurisprudence and the academic writing that has developed under the American Bill of Rights over the past 200 years.⁹⁰

In a speech delivered during a Conference on the Supreme Court of Canada, the Chief Justice of Canada stated:

Nor should counsel hesitate to look to the body of jurisprudence accumulated in the United States over some 200 years from which we can learn, not only the positive points but also from the errors which have been made. . . . In addition to Canadian and American jurisprudence, recourse may also be had to international legal materials like the International Covenant on Civil and Political Rights and to decisions rendered by the European Human Rights Commission and Court.⁹¹

On August 27, 1982, one of the first authoritative decisions in Canada concerning the application of the Charter, the Ontario Court of Appeal declared that a section of the Juvenile Delinquents Act, which required that all trials of children take place in-camera, was *ultra vires* as infringing section 2(b) of the Charter (i.e., freedom of expression, including freedom of the press and other media of communications.)⁹²

In its analysis, the Court reviewed the United States Supreme Court Chief Justice Burger's majority opinion in *Richmond Newspapers v. Virginia*,⁹³ an opinion which discussed at some length the Anglo-American history of openness in judicial trials. The Canadian Court concluded that even though free access to the courts is not specifically enumerated under the fundamental freedoms in the Charter, public access to the courts was an integral and im-

90. *Id.*

91. Address given during a conference on the Supreme Court of Canada (1985) (conference held at the University of Ottawa).

92. *Southam Inc. and The Queen* (No. 1), [1983] 41 O.R. (2d) 113.

93. 448 U.S. 555 (1980).

PLICIT part of the guarantee given to everyone of freedom of opinion and expression which, in terms, includes freedom of the press.⁹⁴ The Court also considered that the guaranteed freedom of the press had been denied and proceeded to determine whether the exclusion of the public was a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society.⁹⁵ The Court held that the complete burden to proving justification under section 1 of the Charter rests on the party claiming the benefit of the exception or limit.⁹⁶

In addition, the Court reviewed the decision of the Supreme Court of the United States in *Globe Newspaper Co. v. Superior Court for County of Norfolk*,⁹⁷ where the majority held that the right of access to criminal trials could not be denied generally by a mandatory closure rule but the interests of minor victims could be by requiring the trial court to determine, on a case-by-case basis, whether the minor victims' well-being necessitated closure.⁹⁸

Finally, the Canadian court examined juvenile court legislation in a number of American states (including North Dakota, Mississippi, Massachusetts, Maine, Minnesota, Wisconsin, Washington, Oregon, Alabama, California, Illinois, Connecticut, Alaska, Virginia, Colorado, New York, Michigan, Texas, Montana, Indiana, Arizona, Missouri, Nebraska, New Jersey, Ohio, and Pennsylvania) as well as legislation of six Australian states and the legislation of New Zealand and England. The Court suggested that the words "freedom of expression" would seem to have a wider or larger connotation than the words "freedom of the press."⁹⁹

In *Hunter v. Southam Inc.*,¹⁰⁰ the Supreme Court of Canada had to consider the Charter's guarantee against unreasonable search and seizure. The Court noted that while the guarantee is vague and open, "the American courts had the advantage of a number of specific prerequisites articulated in the fourth amendment to the United States Constitution, as well as a history of colonial opposition to certain Crown investigatory practices, from

94. *Southam Inc.*, [1983] 41 O.R. (2d) 113.

95. *Id.* at 119.

96. *Id.*

97. 457 U.S. 596 (1982).

98. *Id.*

99. *Southam Inc.*, [1983] 41 O.R.(2d) 113, at 122. The Court implied that freedom of expression has a larger connotation than freedom of the press because expression is not simply limited to the medium of the press.

100. *Hunter v. Southam, Inc.*, [1984] 2 S.C.R. 145.

which to draw out the nature of the interests protected by that amendment and the kinds of conduct it proscribes."¹⁰¹ To assess the nature of the interests meant to be protected by the guarantee against unreasonable search and seizure, the Supreme Court of Canada examined the broad right set forth in the fourth amendment of the United States Constitution and the manner in which this had been construed by Mr. Justice Stewart of the United States Supreme Court in *Katz v. United States*.¹⁰² The Court adopted Mr. Justice Stewart's approach as being equally appropriate in construing the similar protection in the Charter.¹⁰³

In a recent decision, the Ontario Court of Appeal examined the constitutional validity of section 177 of the Criminal Code of Canada which provides for the offence of spreading false news.¹⁰⁴ The accused claimed that the provision was unconstitutional because it infringed the fundamental freedom of expression guaranteed by the Charter.¹⁰⁵ However, the Court held that the provision of the Code was not unconstitutional.¹⁰⁶ In arriving at its decision, the Ontario Court of Appeal devoted a major part of its opinion to the consideration of freedom of speech under the American Constitution. It stated that in considering the interpretation to be given to freedom of expression in the Charter, it may be of assistance to examine the corresponding provisions of the United States Constitution and consider how the American courts have dealt with them.¹⁰⁷ The Court cautioned that it is imperative to bear in mind that there are fundamental structural differences between the Canadian Constitution and the U.S. Bill of Rights. Most importantly, the latter had no provision corresponding to Section 1 of the Canadian Charter.¹⁰⁸ Moreover, the Court noted that the words "freedom of speech" rather than "freedom of expression" are used in the first amendment, but that the American courts had extended the protection of the first amendment to expressive conduct as "symbolic speech," for example "desecration of a flag."¹⁰⁹ It further noted, however, that neither criminal libel nor obscenity were

101. *Id.* at 154-55. Section 8 of the Canadian Constitution is the equivalent of the U.S. Constitutional guarantee against unreasonable searches and seizures.

102. 389 U.S. 347 (1967).

103. *Hunter*, [1984] 2 S.C.R. at 158-59.

104. *Regina v. Zundel*, 58 O.R. (2d) 129 (Ont. C.A. 1987).

105. *Id.* at 143.

106. *Id.* at 157.

107. *Id.* at 151-55.

108. *Id.* at 151.

109. *Id.* See *Spence v. Washington*, 418 U.S. 405 (1974) (desecration of flag).

protected by the first amendment.¹¹⁰ The Court concluded that American constitutional cases support the position

that freedom of speech is not an absolute freedom; that there are certain well-defined and limited classes of speech such as obscene or libelous or knowingly false statements, which are not constitutionally protected because any slight social value as a step to truth that they may entail, is clearly outweighed by the social interest in order and morality.¹¹¹

Applying these principles to the case at hand, the Court reached the judgment that spreading falsehoods knowingly is the antithesis of seeking truth through the free exchange of ideas:

It would appear to have no social or moral value which would merit constitutional protection. Nor would it aid the working of parliamentary democracy or further self-fulfillment. In our opinion an offence falling within the ambit of s. 177 lies within the permissibly regulated area which is not constitutionally protected. It does not come within the residue which comprises freedom of expression guaranteed by s. 2(b) of the Charter.¹¹²

However, in *The Queen v. Big M Drug Mart Ltd.*,¹¹³ the Supreme Court of Canada stated that the "American jurisprudence was not particularly helpful in defining freedom of conscience and religion under the Charter,"¹¹⁴ the American jurisprudence is based on the wording of the first amendment concerning laws respecting an establishment of religion or prohibiting a free exercise thereof, where the protection in the Charter extended to freedom of conscience and religion.¹¹⁵ The Court noted that what unites the freedoms in the American first amendment and the Charter "is the notion of the centrality of individual conscience and the inappropriateness of governmental intervention to compel or to constrain its manifestation."¹¹⁶

Furthermore, the Supreme Court of Canada, in *R. v. Oakes*,¹¹⁷ stated that "although there are important lessons to be learned

110. *Id.* at 152. See *Beauharnais v. Illinois*, 343 U.S. 250 (1952) (criminal libel not protected); *Roth v. United States*, 354 U.S. 476 (1957) (obscenity not protected).

111. *Id.* at 155.

112. *Id.* at 155-56.

113. [1985] 1 S.C.R. 295, 339.

114. *Id.*

115. *Id.*

116. *Id.* at 246.

117. [1986] 1 S.C.R. 103.

from the Canadian Bill of Rights jurisprudence, it does not constitute binding authority in relation to the constitutional interpretation of the Charter."¹¹⁸ The Court held that "the Charter, as a constitutional document, is fundamentally different from the statutory Canadian Bill of Rights, which was interpreted as simply recognizing and declaring existing rights."¹¹⁹

R. v. Oakes was a case involving a statutory presumption of having possession for the purpose of trafficking upon proof of possession.¹²⁰ The Supreme Court of Canada held that this provision of the Criminal Code violated an accused's right to be presumed innocent.¹²¹ In arriving at its decision, the Court examined U.S. jurisprudence, and the European Convention on Human Rights. It noted that in the United States, protection of the presumption of innocence is not explicit but has been read into the due process provisions contained in the fifth and fourteenth amendments of the American Bill of Rights.¹²² In his reasoning, the Canadian Chief Justice highlighted jurisprudential developments in the United States including *Tot v. United States*,¹²³ *Leary v. United States*,¹²⁴ and *County Court of Ulster County, New York v. Allen*.¹²⁵

The *Oakes* decision is also notable for the manner in which the Court dealt with section 1 of the Charter. At the outset, the Chief Justice observed that section 1 has two functions: 1) it constitutionally guarantees the rights and freedoms set out in the Charter provisions that follow; and 2) it states explicitly the exclusive justificatory criteria against which limitations on these rights and freedoms must be measured.¹²⁶ He stated that the burden of proving that a limit on a right or freedom guaranteed by the Charter is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation.¹²⁷ The presumption is that the rights and freedoms are guaranteed unless the party invoking section 1 can bring itself

118. *Id.* at 124.

119. *Id.*

120. *Id.* at 103.

121. *Id.* at 104.

122. *Id.* at 129.

123. 319 U.S. 463 (1943).

124. 395 U.S. 6 (1969).

125. 442 U.S. 140 (1979).

126. *Oakes*, [1986] 1 S.C.R. 103.

127. *Id.* at 136-37.

within the exceptional criteria which justify their being limited. The standard of proof under section 1 is proof by a preponderance of probability. The Court, by reference to section 1 of the Charter, has avoided the classification tests which the United States Supreme Court has used in interpreting violations to the Bill of Rights.

The Court determined that a limit regarding a constitutionally guaranteed right is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be of sufficient importance to warrant overriding a constitutionally protected right or freedom. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain section 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.¹²⁸

Second, once a sufficiently significant objective is recognized, the party invoking section 1 must show that the means chosen are reasonable and demonstrably justified; this involves a form of proportionality test. Although the nature of the proportionality test will vary depending on the circumstances, in each case the courts will be required to balance the interests of society with those of individuals and groups. There are three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question; they must not be arbitrary, unfair or based on irrational considerations. In short, the measures must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair as little as possible the right or freedom in question. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of sufficient importance.¹²⁹

The Chief Justice went on to say that a wide range of rights and freedoms are guaranteed by the Charter, and in this context

128. *Id.* at 138-39.

129. *Id.* at 139.

an almost infinite number of factual situations may arise in respect of these. Some limits on rights and freedoms protected by the Charter will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation, and the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society. Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the effect of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.¹³⁰

The Chief Justice concluded that another important element in section 1 is provided by the words "free and democratic society." Inclusion of these words as the final standard of justification for limits on rights and freedoms refers the Court to the very purpose for which the Charter was originally entrenched in the Constitution: Canadian society is to be free and democratic. The Court must be guided by the values and principles essential to a free and democratic society which embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.¹³¹

The Charter articulates a standard to justify the infringement or denial of a guaranteed right or freedom. The American Bill of Rights does not give any such explicit direction. As a result, the United States Supreme Court has applied a variety of standards depending on the nature of the right or interest asserted. With respect to the first amendment rights the standard is generally characterized as "the compelling state interest."¹³² The State must also show that the law serving that interest is precisely drawn to serve

130. *Id.* at 139-40.

131. *Id.* at 136.

132. *See, e.g., Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (holding that with respect to judicial proceedings, interests in personal privacy fade because of a compelling state interest in making court records available for inspection by the public even when revealing a rape victim's name).

that interest.

With respect to the fourteenth amendment there are three tests applied by the United States Courts. First, there is the strict scrutiny test which is applied to inherently suspect classifications such as race, religion and nationality.¹³³ Second, there is the minimal scrutiny test where the classification does not involve an inherently suspect group or a fundamental constitutional right.¹³⁴ Finally, there is the intermediate scrutiny test which has been applied to gender-based classifications.¹³⁵

In the latest Charter decision by the Supreme Court of Canada,¹³⁶ a divided court held that the freedom of association guaranteed in section 2(d) of the Charter does not guarantee the right to bargain collectively or to strike.¹³⁷ Speaking for the majority, Mr. Justice Le Dain said that modern rights to bargain collectively and to strike are not fundamental rights or freedoms.¹³⁸ In a concurring opinion, Mr. Justice McIntyre said that the right to strike was an invention of the 20th Century and as such had not become so much a part of our social and historical traditions that it had acquired the status of an immutable, fundamental right.¹³⁹ He relied on the approach adopted in the United States, that freedom of association is a right to join with others to pursue goals, independently protected by the first amendment.¹⁴⁰ In particular he relied on the judgment of Mr. Justice Brennan in *Roberts v. United States Jaycees*.¹⁴¹ Writing the minority opinion, the Canadian Chief Justice argued that the purpose of the constitutional guarantee was to protect individuals from state-enforced isolation in pursuit of his or her ends and cautioned that the meaning of the provision of the Charter is not to be determined solely on the basis of

133. See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967) (racial minorities); *Graham v. Richardson*, 403 U.S. 365 (1971) (aliens).

134. See, e.g., *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973) (education and wealth discrimination do not provide any adequate basis for invoking strict scrutiny); *Railway Express Agency v. New York*, 336 U.S. 106 (1949) (traffic regulations are inherently local and do not involve more than a rational basis standard of review).

135. See, e.g., *Craig v. Boren*, 429 U.S. 190 (1976) (intermediate level of scrutiny for gender-based cases).

136. *Alberta Union of Provincial Employees v. Attorney General of Alberta* (S.C.C., Apr. 9, 1987, unreported).

137. *Id.* at 2.

138. *Id.* at 3.

139. *Id.* at 24.

140. *Id.* at 10.

141. 468 U.S. 609, 618.

pre-existing rights or freedoms.¹⁴²

This case vividly illustrates the important role that the Canadian courts will play in defining those freedoms and rights guaranteed by the Charter. In this sense, the Canadian courts, like the U.S. courts, will become more active in determining political and social questions. This role is a new one for the Canadian courts because of the recent proclamation of the Charter, but it is one which the U.S. courts have been called upon to play for many years. Undoubtedly the experience of the U.S. courts will help guide the Canadian courts. As stated by Mr. Justice Estey in *Law Society of Upper Canada v. Skapinker*:

With the *Constitution Act, 1982* comes a new dimension, a new yardstick of reconciliation between the individual and the community and their respective rights, a dimension which, like the balance of the Constitution, remains to be interpreted and applied by the Court.

The courts in the United States have had almost two hundred years experience at this task and it is of more than passing interest to those concerned with these new developments in Canada to study the experience of the United States.¹⁴³

VI. CONCLUSION

One of the beneficial effects of an entrenched Charter of Rights is that the legislator must take account of it when adopting new legislation and when reviewing existing legislation. Since 1982, governments in Canada have been more careful in drafting laws. Mr. Justice Antonio Lamer of the Supreme Court of Canada stated that while a number of laws have been struck down under the Charter, Canadian governments have been more careful in drafting laws. "I don't think there is going to be much of this law knocking-down once those laws that are on the books have been cleaned up. And the legislatures are cleaning them up. Whole teams are going through the books."¹⁴⁴

The adoption of a Charter, similar to that of the United States Bill of Rights, has given an expanded role to the Canadian courts and a new era has dawned for the Canadian legal system. The

142. *Alberta Union* (S.C.C., Apr. 9, 1987, unreported).

143. [1984] 1 S.C.R. 357, 366-67.

144. *Judges Grapple with Charter's Mandate*, *The Globe and Mail*, Apr. 14, 1987.

principle of the supremacy of Parliament in the Canadian Constitution has been dealt a blow by the adoption of the Charter and were it not for the existence of the opting out provision in section 33 of the Charter, that blow would be even more definitive. The Canadian Bar Association has called for the repeal of section 33 to ensure that the freedoms and rights enshrined in the Charter not be subject to any legislative override by either the federal government or the government of each of the provinces. In retrospect, it is likely that section 33 was a compromise which made the adoption of the Charter possible. However, five years after the passage of the Charter, the time has come to review the need and even the desirability of such a provision which does not exist in the United States Bill of Rights.

A constitution guaranteeing political and social rights with the power of review of government actions by an independent judiciary is not a guarantee against all the ills which afflict our modern society. It does, however, effectively impose a brake on government action and it does provide recourse for individuals against infringing activity by the state. The Constitution represents the supremacy of the rule of law over government actions. For this legacy and example, we should be grateful to the founding fathers of the United States. They have provided an example of constitutionalism on which other countries have built and continue to build.

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