The Legacy of the Supreme Court of Canada's Approach to the Canadian Bill of Rights: Prospects for the Charter

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The recent entrenchment of the *Canadian Charter of Rights and Freedoms* has prompted speculation that the judiciary may be entering an era in which it seeks to protect aggressively the civil liberties of individuals from infringement by legislatures and government officials. Such speculation may be premature, the author argues, because any attempt to discern the effect of the *Charter* must contemplate the approach taken by the Supreme Court of Canada to the *Canadian Bill of Rights*. The author undertakes to analyse many of the roughly thirty cases decided under the *Bill of Rights* and he concludes that the Court has adopted a position of judicial restraint. That position was not dictated by either the status or the wording of the *Bill*, but resulted from the Court's unwillingness to undertake the balancing of policy considerations and its desire to promote collective goals such as administrative efficiency and law and order, rather than individual rights. The new *Charter* cannot prescribe a change in judicial perspectives and the author suggests that the Court's attitude of judicial restraint may persist.

L'enchâssement récent de la *Charte canadienne des droits et libertés* fait penser que le pouvoir judiciaire pourra être engagé sous peu dans une nouvelle politique plus aggressive visant à protéger les individus des abus des législateurs et organismes gouvernementaux. L'auteur croit ce sentiment prématuré, compte tenu de la nécessité d'analyser tout d'abord l'approche qu'a prise la Cour suprême du Canada vis-à-vis la *Déclaration canadienne des droits et libertés*. Analysant une trentaine de jugements traitant de la *Déclaration*, l'auteur conclut que la Cour a régulièrement préféré l'interpréter strictement. Selon lui, cette approche n'aurait pas été justifiée, que ce soit par rapport au statut légal ou à la rédaction de la *Déclaration*. Il semblerait que la Cour n'aurait pas été disposée à examiner et peser les nombreuses questions de politique judiciaire qui se présentaient et ce, au profit de l'avancement d'objectifs collectifs tels le fonctionnement efficace des organes administratifs, ainsi que l'ordre et la justice. L'auteur souligne une forte possibilité que l'attitude restreinte prise par la Cour ne changera pas; la nouvelle *Charte* ne provoquera pas nécessairement une modification de cette perspective judiciaire fermement ancrée.

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Synopsis

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Introduction

The constitutional entrenchment of the *Canadian Charter of Rights and Freedoms* [1] has been hailed by many as presaging an era in which the judiciary aggressively protects civil liberties from infringement by legislatures and government officials. Whether this view proves to be correct will be determined ultimately by the judiciary itself; primarily, by the interpretation that the Supreme Court of Canada gives to the *Charter's* provisions. Predicting the Court's approach to the *Charter* is obviously a highly speculative venture. What must be kept in mind, however, is that for over two decades the Court has been interpreting and applying a bill of rights which had overriding effect at the central level of government. Any attempt to discern the effects of the *Charter* must take into account the approach adopted by the Supreme Court of Canada to the *Canadian Bill of Rights.*[2]

Analysis of the Court's decisions involving the *Bill* suggests that the proponents of the *Charter's* entrenchment may be disappointed. The Supreme Court of Canada has heard approximately thirty cases in which the interpretation and application of the *Canadian Bill of Rights* was a key issue. The general approach exhibited in these cases, evidenced not only by the results but also by the reasons given, was one of judicial restraint. Only once did the Court actually hold that a provision in a federal statute was rendered

[1] Part 1 of Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.).
[2] R.S.C. 1970, Appendix III.

inoperative by the *Bill*.[3] Moreover, even when using the *Bill* as a rule of interpretation or as a guide to the judicial review of administrative action, the Court refused to protect creatively and vigorously individual rights and freedoms. This cautious approach was not dictated by either the status or wording of the *Bill*. Rather, it was the result of an underlying philosophy of government adopted by a majority of the judges on the Court, a philosophy which holds that an elected legislature is the only appropriate forum for policy formation. To the extent that the judges continue to accept that philosophy, the case law on the *Bill* may foreshadow the Court's interpretation and application of the *Charter*. Only a radical change in the Court's view of its role in society, perhaps brought about as new appointments are made, will ensure that the entrenchment of the *Charter* is indeed a significant step toward the protection of civil liberties.

The first section of this paper outlines the approach taken by the Supreme Court of Canada to the *Canadian Bill of Rights*. In the second, I examine the extent to which the status and wording of the *Bill* influenced this approach. The third section attempts to identify other reasons which may have motivated the Court, and I conclude by discussing implications for the interpretation and application of the *Charter*.

I. Jndicial Restraint Illustrated

The *Canadian Bill of Rights*, which was enacted as an ordinary statute by the Parliament of Canada in 1960,[4] did not provide explicitly that laws of Canada which conflicted with the rights and freedoms recognized in the *Bill* were invalid or inoperative. Rather, it provided that "every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgement or infringement of any of the rights or freedoms herein recognized and declared".[5] These words indicated that the *Bill* was intended at least to provide a guide for the interpretation of federal statutes and to authorize the courts to review administrative action taken pursuant to the laws of Canada in light of the fundamental freedoms therein recognized and declared. The Supreme Court of Canada has acknowledged consistently these

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[3] *R.* v. *Drybones* [1970] S.C.R. 282, (1970) 9 D.L.R. (3d) 473 [hereinafter cited to S.C.R.].

[4] For a detailed account of the passage of the *Bill*, see W. Tarnopolsky, *The Canadian Bill of Rights*, 2d rev. ed. (1975) 11-4. This treatise also contains a detailed analysis of the case law up to 31 December 1973.

[5] R.S.C. 1970, Appendix III, s. 2.

functions of the *Bill*.[6] But, in *R.* v. *Drybones*,[7] the Court held that the *Bill* had an even more significant effect: it rendered inoperative any prior law validly passed by the Parliament of Canada which could not be construed or applied so as not to infringe the rights and freedoms recognized and declared in the *Bill*. Not only was that principle accepted consistently in later cases but the Court also indicated repeatedly that the *Bill* overrode statutes enacted by the Parliament of Canada after 1960 which could not be interpreted or applied so as to comply with the *Bill*.[8]

The Supreme Court of Canada, therefore, recognized that the *Bill* had three distinct functions. First, it stipulated the principles or values that the

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[6] See, *e.g.*, *Leiba* v. *Minister of Manpower and Immigration* [1972] S.C.R. 660, (1972) 23 D.L.R. (3d) 476; *Brownridge* v. *The Queen* [1972] S.C.R. 926, (1972) 28 D.L.R. (3d) 1 [hereinafter cited to S.C.R.]; *Lowry and Lepper* v. *The Queen* [1974] S.C.R. 195, (1972) 26 D.L.R. (3d) 224; *R.* v. *Burnshine* [1975] 1 S.C.R. 693, 714, (1974) 44 D.L.R. (3d) 584 *per* Laskin J. dissenting [hereinafter cited to S.C.R.]; *A.-G. Ontario* v. *Reale* [1975] 2 S.C.R. 624, (1974) 58 D.L.R. (3d) 560; *Mitchell* v. *The Queen* [1976] 2 S.C.R. 570, (1975) 61 D.L.R. (3d) 77 [hereinafter cited to S.C.R.]; *Jumaga* v. *The Queen* [1977] 1 S.C.R. 486, (1976) 68 D.L.R. (3d) 639 [hereinafter cited to S.C.R.]; *Chromiak* v. *The Queen* [1980] 1 S.C.R. 471, (1979) 102 D.L.R. (3d) 368 [hereinafter cited to S.C.R.]; and *R.* v. *Shelley* (1981) 123 D.L.R. (3d) 748, (1981) 37 N.R. 320 (S.C.C.).

[7] *Supra*, note 3. Cartwright C.J.C., Pigeon and Abbott JJ. dissented on this point.

[8] In *R.* v. *Drybones*, *supra*, note 3, 301, Mr Justice Pigeon noted in dissent that "different considerations may conceivably apply in the case of subsequent statutes". This statement has been the only recognition by the Supreme Court of Canada that the overriding effect of the *Canadian Bill of Rights* on subsequent statutes may present special constitutional problems. Despite the views which he held as a law professor (see *An Inquiry Into the Diefenbaker Bill of Rights* (1959) 37 Can. Bar Rev. 77, 132), Laskin C.J.C. has stated often that subsequent laws enacted by Parliament may be sterilized or rendered inoperative by the *Canadian Bill of Rights*. See *Curr* v. *The Queen* [1972] S.C.R. 889, 892-3, 900 and 903, (1972) 26 D.L.R. (3d) 603 [hereinafter cited to S.C.R.], Abbott, Hall, Spence, Pigeon, Martland and Judson JJ. concurring, although the latter two Justices reserved expressly for future decision the meaning of the phrase "due process of law" which was also discussed in these reasons. See also *A.-G. Canada* v. *Lavell* [1974] S.C.R. 1349, 1388, (1973) 38 D.L.R. (3d) 481 [hereinafter cited to S.C.R.], Hall and Spence JJ. concurring; and *Miller and Cockriell* v. *The Queen* [1977] 2 S.C.R. 680, 686, (1976) 70 D.L.R. (3d) 324 [hereinafter cited to S.C.R.], Dickson and Spence JJ. concurring. The cases of *R.* v. *Appleby* [1972] S.C.R. 303; *Curr* v. *The Queen* [1972] S.C.R. 889; *Duke* v. *The Queen* [1972] S.C.R. 917, (1972) 28 D.L.R. (3d) 129; *Brownridge* v. *The Queen*, *supra*, note 6; *Hogan* v. *The Queen* [1975] 2 S.C.R. 574, (1976) 66 D.L.R. (3d) 571 [hereinafter cited to S.C.R.]; and *Bliss* v. *A.-G. Canada* [1979] 1 S.C.R. 183, (1978) 92 D.L.R. (3d) 417 [hereinafter cited to S.C.R.] all involved legislation enacted after 1960. Yet, in none of the cases did any of the Justices suggest that legislation enacted subsequent to the *Bill* should be treated differently from that enacted before 1960. In *Bliss*, for example, the Court, at 185, simply stated the legal issue as follows: "Is s. 46 of the *Unemployment Insurance Act*, S.C. 1971, as amended, rendered inoperative by the *Canadian Bill of Rights*, R.S.C. 1970, Appendix III, as amended?" It has been suggested that the *Bill* is binding on future Parliaments as a law which specifies the manner and form by which law-making power will be exercised. See Tarnopolsky, *supra*, note 4, 143 and P. Hogg, *Constitutional Law of Canada* (1977) 437-8.

courts should strive to protect in interpreting ambiguous or open-ended federal legislation. Second, it authorized the courts to review administrative acts taken pursuant to federal statutes in order to ensure that certain procedural safeguards had been complied with even if the statutes themselves did not specify such safeguards. Third, it empowered the courts to rule that laws of Canada were inoperative where such laws conflicted with the rights and freedoms set out in the *Bill*. The first two functions did not require the courts to step outside of their traditional role. Courts have always been required to interpret legislation and they have developed many rules of interpretation in order to protect traditional civil liberties.[9] Courts have also been accustomed to reviewing administrative action to ensure that it was authorized by statute and in doing so, have imposed frequently procedures which accorded with the rules of natural justice. The *Canadian Bill of Rights* could be viewed simply as a statutory recognition and extension of judicially created rules which had developed, in theory at least, to help the courts discover the true intent of Parliament. One might have expected the Supreme Court of Canada, therefore, to embrace the *Canadian Bill of Rights* enthusiastically as a guide for the interpretation of federal legislation and for the review of federal administrative action.

A. *The Bill of Rights as a Guide to Interpretation*

Indeed, the five cases, other than *Drybones*, in which the Court applied the *Bill* so as to protect an individual's civil liberties all did involve the use of the *Bill* as a canon of construction or as a means of buttressing the imposition of the rules of natural justice in the application of the law. In *Leiba* v. *Minister of Manpower and Immigration* [10] the Court held unanimously that a deportation order was invalid on the ground, *inter alia*, that the failure to provide, at the initial hearing, an interpreter who spoke any of the languages understood by Leiba had deprived him of a fair hearing as guaranteed by s. 2(g) of the *Canadian Bill of Rights*. In the second case, *Brownridge* v. *The Queen*,[11] it was held that a police officer's denial of the appellant's request to speak to his

[9] For example, it is presumed that, in the absence of express words or necessary implication, Parliament did not intend to create a criminal offence which operates retrospectively or which does not require *mens rea*. Similarly, the courts presume that the legislature did not intend to authorize a statutory body to levy taxes, interfere with property rights without payment of compensation, make regulations that have retrospective effect, or delegate its decision-making powers. The principle upon which these rules of interpretation are based is that "statutes which encroach on the rights of the subject, whether as regards person or property, are subject to 'strict' construction". *A.-G. Canada* v. *Hallet and Carey* [1952] A.C. 427, 450 (P.C.).

[10] *Supra*, note 6.

[11] *Supra*, note 6. Abbott, Judson and Pigeon JJ. dissented.

lawyer, in the circumstances of that case, deprived him of his right to retain and instruct counsel without delay as set out in s. 2(c)(ii) of the *Bill* and, therefore, constituted "reasonable excuse" for the appellant's refusal to provide a breath sample for the purposes of a breathalyzer test. As s. 223(2) [now s. 235(2)] of the *Criminal Code* provided expressly that it was only an offence to refuse to comply without reasonable excuse, the appellant's conviction was overturned. Subsequently, the Supreme Court held unanimously in *Lowry and Lepper* v. *The Queen*[12] that the power of a Court of Appeal to impose sentence after allowing an appeal by the Crown from an acquittal could be exercised only after a fair hearing in accordance with s. 2(e) of the *Bill*. The case was remitted to the Manitoba Court of Appeal to permit the appellants to make submissions before a sentence was imposed. In *A.-G. Ontario* v. *Reale*,[13] s. 577 of the *Criminal Code*, which provided that "an accused other than a corporation shall be present in court during the whole of his trial", was interpreted, in the light of s. 2(g) of the *Bill*, to require translation of the judge's charge to the jury in order that the accused might understand it. Finally, the Court ruled four to three in *R.* v. *Shelley*[14] that, taking into account s. 2(f) of the *Canadian Bill of Rights*, the reverse onus clause contained in s. 248(1) of the *Customs Act*[15] applied only after the Crown established not merely the possession of imported goods having a dutiable value of $200 or more, but also some knowledge, or means of knowledge, of the circumstances of importation on the part of the accused.

Although the same results might have been achieved through the use of judicially created rules of interpretation and the doctrine of natural justice, these cases illustrate the potential effectiveness of the *Bill* as a guide for the interpretation of statutes or the judicial review of administrative action. However, even in this context, the Court did not use the *Bill* in other cases to protect aggressively individuals' rights and freedoms.

Most notably, the Court refused in several cases to use s. 2 of the *Bill* to impose minimum procedural safeguards in the exercise of administrative power under federal statutes. In *Guay* v. *Lafleur*,[16] it was held that an individual did not have the right to be present or to be represented by counsel during an inquiry by an official of the Department of National Revenue under s. 126 of the *Income Tax Act*.[17] Section 2(e) of the *Canadian Bill of Rights* was

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[12] *Supra*, note 6.

[13] *Supra*, note 6.

[14] *Supra*, note 6. Dickson, Estey and McIntyre JJ. concurred in the judgment given by Laskin C.J.C.; Ritchie, Martland and Chouinard JJ. dissented.

[15] R.S.C. 1970, c. C-40.

[16] [1965] S.C.R. 12, (1964) 47 D.L.R. (2d) 226 [hereinafter cited to S.C.R.].

[17] R.S.C. 1952, c. 148 as am. S.C. 1956, c. 39, s. 28, adding s. 126A.

said to be inapplicable because "no rights and obligations are determined by the person appointed to conduct the investigation" [18] in as much as the official merely reported his findings to the Deputy Minister. Noting that nothing in the *Act* precluded the official from making recommendations, Hall J., in dissent, stated: "One cannot ignore the reality of the situation that in such cases the decision is made by the subordinate but put in the name of the Deputy Minister." [19] The Supreme Court of Canada again interpreted s. 2(e) narrowly in *R.* v. *Randolph* [20] holding unanimously that it did not apply to interim orders even if they affected the rights of an individual. Accordingly, no hearing of any kind was required before the issuance of a prohibitory order under s. 7 of the *Post Office Act* [21] which had the effect of precluding the respondents' use of the mail service on an interim basis. Finally, in *Mitchell* v. *The Queen*,[22] the Court ruled six to three that s. 2(e) did not apply to the suspension or revocation of parole by the National Parole Board. The majority concluded that such action did not affect the rights of the parolee even though revocation caused the forfeiture of statutory and earned remission standing to his credit at the time of the parole.

The narrow interpretation of rights and freedoms evidenced in these cases was also adopted in most of the cases where the Court was asked to use the *Canadian Bill of Rights* to construe open-ended or ambiguous provisions in federal statutes in such a way that the civil liberties of the individual received maximum protection.[23] This restrictiveness was most obvious in the

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[18] *Guay* v. *Lafleur*, *supra*, note 16, 16 *per* Abbott J., Taschereau C.J.C., Fauteux, Martland, Judson, and Ritchie JJ. concurring. Cartwright and Spence JJ. also concurred in the result. Mr Justice Hall dissented.

[19] *Ibid.*, 20.

[20] [1966] S.C.R. 260, (1965) 56 D.L.R. (2d) 283.

[21] R.S.C. 1952, c. 212.

[22] *Supra*, note 6. Although Ritchie J., with Judson, Pigeon and Beetz JJ. concurring, decided the case on a procedural point, at 593 he expressed agreement with Mr Justice Martland's views on s. 2(c)(i) and s. 2(e) of the *Bill*. De Grandpré J. concurred in the reasons given by Martland J.; Laskin C.J.C., Spence and Dickson JJ. dissented.

[23] In addition to the cases discussed in the body of the paper, see *R.* v. *Appleby*, *supra*, note 8, where the Court unanimously interpreted s. 224A(1)(a) of the *Criminal Code* to require that the accused had to prove, on a balance of probabilities, that he did not enter the vehicle for the purpose of setting it in motion once the Crown established that he was found in the driver's seat; *R.* v. *Burnshine*, *supra*, note 6, 718, where Laskin J., dissenting, with Spence and Dickson JJ. concurring, would have interpreted s. 150 of the *Prisons and Reformatories Act*, R.S.C. 1970, c. P-21 so that the combined fixed and indeterminate sentences imposed under that *Act* had to be limited in their totality to the maximum term of imprisonment prescribed by the *Criminal Code* or any other federal enactment creating the offence and prescribing its punishment; and *A.-G. Canada* v. *Canard* [1976] 1 S.C.R. 170, 185, (1975) 52 D.L.R. (3d) 548, where Laskin C.J.C., dissenting, with Spence J. concurring, would have declared that s. 43 of the *Indian Act*, R.S.C. 1970, c. I-6 had to be applied so as to be consistent with s. 1(b) of the *Bill*.

subsequent refinements placed upon the Court's holding in the *Brownridge* case.[24] In *Hogan* v. *The Queen*,[25] all nine members of the Court recognized that the accused, who was charged under s. 236 of the *Criminal Code* for being in control of a motor vehicle while having a blood alcohol level greater than .08 *per cent*, would have had a "reasonable excuse" for refusing to provide a breath sample on the basis of the *Brownridge* decision. But seven members rejected the argument that the breath sample was inadmissible because it was obtained in violation of s. 2(c)(ii) of the *Canadian Bill of Rights*.[26]

Then, in *Jumaga* v. *The Queen*,[27] it was held that the appellant had not been deprived of his rights under s. 2(c)(ii) when the only opportunity afforded to and exercised by him to contact his lawyer was by use of the telephone in the main room of the police station while officers stood by and took notes. Accordingly, he did not have a "reasonable excuse" for his later refusal to provide a breath sample. In Mr Justice Pigeon's opinion, the appellant could not be considered to have been deprived of a right when he failed to demand it initially.[28] Mr Justice Pigeon also indicated that s. 2(c)(ii) could not be interpreted to require the consultation with a lawyer in private in these circumstances because

> there would be serious difficulties in allowing persons in the situation of the accused to have free use, unsupervised for any length of time, of a private room such as a sergeant's office. It would also be a serious matter to require the provision of safe and adequate facilities for private communication with legal counsel wherever [a] breathalyzer test is to be performed, failing which everyone would have a reasonable excuse for refusing it.[29]

The dissenting reasons of Laskin C.J.C.[30] illustrated a rather different approach to the interpretation of s. 2(c)(ii). In particular, he concluded:

> Once an accused has requested that he be permitted to consult counsel, that should carry with it, to the knowledge of the police, a right to have the consultation in private, so far as the circumstances permit. The right to counsel is diluted if it can only be secured by adding request to request. I would not put the police in an adversary position on this question; they are better placed than the ordinary person (who has been detained or arrested and is in

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[24] *Supra*, note 6.

[25] *Supra*, note 8.

[26] Ritchie J. gave the reasons for the majority. Fauteux C.J.C., Abbott, Martland, Judson, and Dickson JJ. concurred in these reasons. Mr Justice Pigeon gave separate, concurring reasons, while Laskin and Spence JJ. dissented.

[27] *Supra*, note 6. Laskin C.J.C., Spence, Dickson, and Beetz JJ. dissented.

[28] *Ibid.*, 497. Justices Martland and Judson concurred with the reasons given by Mr Justice Pigeon. Ritchie J., with de Grandpré J. concurring, gave separate reasons in which he expressed agreement with the reasons of Mr Justice Pigeon.

[29] *Ibid.*, 497-8.

[30] *Ibid.*, 488. Spence, Dickson and Beetz JJ. concurred in these reasons.

> police custody) to recognize what the right to counsel imports, and they should be alert to protect that right as an important element in the administration of justice through law, for which they are as much accountable as any others involved in the judicial process.[31]

Chromiak v. *The Queen*[32] again dealt with the relationship between s. 2(c)(ii) of the *Canadian Bill of Rights* and "reasonable excuse" for the refusal to provide a breath sample. The accused was stopped by the police, who suggested that he might be driving while impaired, and who asked him to perform certain sobriety tests. A police officer requested subsequently that Chromiak submit to a road-side breathalyzer test. The accused continued to ask questions and refused to provide a breath sample, stating that he wanted his lawyer to be present before he took the test. An appearance notice was then issued for impaired driving and for refusal, without reasonable excuse, to comply with a police officer's demand to provide a breath sample for the purposes of a road-side test contrary to s. 234.1(2) of the *Criminal Code*. Holding that the accused had never been arrested or detained, the Supreme Court of Canada ruled unanimously that s. 2(c)(ii) of the *Bill* was inapplicable.

B. *Inoperability in the Face of the Bill of Rights*

The restrictive interpretation given to the rights and freedoms recognized and declared in the *Canadian Bill of Rights* was even more obvious in those cases where the Supreme Court of Canada was asked to find that a law was inoperative because it conflicted with the *Bill*. In all of these cases, except *Drybones*, the Court concluded that the laws in question did not abrogate, abridge or infringe any of the rights or freedoms listed. For example, the Court refused to hold that s. 12(l)(b) of the *Indian Act*[33] or s. 46 of the *Unemployment Insurance Act, 1971*,[34] were rendered inoperative as denying equality before the law to women.[35] The former statutory provision specified that Indian women, unlike their male counterparts, who married non-Indians lost their status as Indians. The latter precluded a woman from collecting regular unemployment insurance benefits during a period commencing eight weeks before the week in which her confinement for pregnancy was expected and six weeks after the week in which her confinement occurred even though

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[31] *Ibid.*, 495.

[32] *Supra*, note 6.

[33] R.S.C. 1970, c. I-6.

[34] S.C. 1970-71-72, c. 48.

[35] In *A.-G. Canada* v. *Lavell*, *supra*, note 8, and *Bliss* v. *A.-G. Canada*, *supra*, note 8 respectively.

she might be available for work and otherwise eligible for the benefit. These results were achieved largely by adopting a relentlessly restrictive interpretation of the basic guarantees.

As noted earlier, the reasoning in many of the cases is even more illustrative of the adoption of a position of judicial restraint than the result reached. Of particular significance in this regard is the application of a principle of interpretation which Professor Tarnopolsky has labelled aptly the "frozen concepts" principle.[36] The first expression of this principle can be found in the following statement by Mr Justice Ritchie in *Robertson and Rosetanni* v. *The Queen*:

> It is to be noted at the outset that the *Canadian Bill of Rights* is not concerned with "human rights and freedoms" in any abstract sense, but rather with such "rights and freedoms" as they existed in Canada immediately before the statute was enacted. It is therefore the "religious freedom" then existing in this country that is safe-guarded by the provisions of s. 2... .[37]

This view caused him to examine the concept of religious freedom recognized in Canada before the enactment of the *Canadian Bill of Rights* and after the enactment of the impugned statute, the *Lord's Day Act*.[38] He concluded that the *Act* did not affect religious freedom as so defined because it did not affect the religious thought or practice of any citizen.

The "frozen concepts" principle of interpretation did not require the Court to conclude that the rights declared in the *Bill* were circumscribed and subject to the Canadian statutes in force at the date of its enactment.[39] This was made explicit in the *Drybones* case,[40] where the Court held that s. 94(b) of the *Indian Act*,[41] which was passed prior to 1960, was rendered inoperative because it conflicted with the right to equality before the law contained in s. 1(b) of the *Canadian Bill of Rights*. Nevertheless, by focusing the Court's attention upon the legislation in force in 1960 and the case law decided before

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[36] Tarnopolsky, "A New Bill of Rights in the Light of the Interpretation of the Present One by the Supreme Court of Canada" in *The Constitution and the Future of Canada* [1978] L.S.U.C. Special Lectures 161, 181-91.

[37] [1963] S.C.R. 651, 654, (1963) 43 D.L.R. (2d) 485 [hereinafter cited to S.C.R.]. Taschereau, Fauteux and Abbott JJ. concurred in the reasons given by Mr Justice Ritchie. Cartwright J. dissented.

[38] R.S.C. 1952, c. 171.

[39] Although the language used by Mr Justice Ritchie, with Martland, Judson, Pigeon, and de Grandpré JJ. concurring, in *Miller and Cockriell* v. *The Queen*, *supra*, note 8, 703-4 comes very close to stating this position. This view was, in fact, put forward by Mr Justice Pigeon, in dissent, in *R.* v. *Drybones*, *supra*, note 3, 302.

[40] *Ibid.*, 296, *per* Mr Justice Ritchie with Fauteux, Martland, Judson, and Spence JJ. concurring.

[41] R.S.C. 1952, c. 149.

that date in order to determine the accepted meaning at that time of the rights and freedoms recognized and declared in the *Bill*, the "frozen concepts" principle of interpretation frequently caused the Court to give such a narrow interpretation to those rights and freedoms that it became virtually impossible to conclude that a law, whether enacted before or after 1960, conflicted with them. For example, in *Curr* v. *The Queen*,[42] Mr Justice Ritchie relied upon his "understanding that the meaning to be given to the language employed in the *Bill of Rights* is the meaning which it bore at the time the *Bill* was enacted" to conclude that "the phrase 'due process of law' as used in s. 1(a) is to be construed as meaning 'according to the legal processes recognized by Parliament and the courts in Canada' ".[43] This principle of interpretation also led Mr Justice Ritchie to find that s. 1(b) did not contain the "equalitarian concept exemplified by the 14th Amendment of the U.S. Constitution as interpreted by the courts of that country" but simply required "equality in the administration or application of the law by the law enforcement authorities and the ordinary courts of the land".[44]

The influence of the "frozen concepts" principle of interpretation was not limited to s. 1 of the *Bill*. In *R.* v. *Burnshine*, Martland J. stated:

> Section 1 of the Bill declared that six defined human rights and freedoms "have existed" and that they should "continue to exist". All of them had existed and were protected under the common law. The Bill did not purport to define new rights and freedoms. What it did was to declare their existence in a statute, and, further, by s. 2, to protect them from infringement by any federal statute. . . . Section 2 did not create new rights. Its purpose was to prevent infringement of existing rights. It did particularize, in paras. (a) to (g), certain rights which were a part of the rights declared in s. 1. . . .[45]

Ritchie J. referred specifically to these statements in *Miller and Cockriell* v. *The Queen* to buttress his view that the words "cruel and unusual punishment" in s. 2(b) could not have been intended to exclude the penalty of death for murder. He noted:

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[42] *Supra*, note 8.

[43] *Ibid.*, 916. Fauteux C.J.C. concurred in the reasons given by Mr Justice Ritchie. Laskin J., with Abbott, Hall, Spence, and Pigeon JJ. concurring, gave separate reasons concurring in the result. He noted at 897: "It is obvious that to read 'due process of law' as meaning simply that there must be some legal authority to qualify or impair security of the person would be to see it as declaratory only". Martland J., with Mr Justice Judson's concurrence, expressed agreement with both the reasons of Mr Justice Ritchie and Mr Justice Laskin. He added at 914: "[I]n so doing, I do not adopt, as final, any specific definition of the phrase 'due process of law', as used in s. 1(a)".

[44] *A.-G. Canada* v. *Lavell*, *supra*, note 8, 1365-6, Fauteux C.J.C., Martland and Judson JJ. concurred in these reasons. Laskin, Abbott, Hall, and Spence JJ. dissented. Mr Justice Pigeon gave separate reasons agreeing with the result reached by Mr Justice Ritchie. This definition of "equality before the law" has been referred to in *R.* v. *Burnshine*, *supra*, note 6, 703-4 and *Bliss* v. *A.-G. Canada*, *supra*, note 8, 192.

[45] *Supra*, note 6, 702 and 705. Fauteux C.J.C., Abbott and Judson JJ. concurred in these reasons.

> The declaration of the right of the individual not to be deprived of life which is contained in s. 1(a) is clearly qualified by the words "except by due process of law", which appear to me to contemplate a process whereby an individual *may* be deprived of life. At the time the *Bill of Rights* was enacted there did not exist and had never existed in Canada the right not to be deprived of life in the case of an individual who had been convicted of "murder punishable by death" by the duly recorded verdict of a properly instructed jury and, in my view, the "existing right" guaranteed by s. 1(a) can only relate to individuals who have not undergone the process of such a trial and conviction.
>
> Accepting as I do the proposition that s. 2 did not create new rights, it cannot be that Parliament intended to create anew the absolute right not to be deprived of life under any circumstances by providing that no law of Canada was to be applied so as "to impose or authorize the imposition of cruel and unusual treatment or punishment." If so construed the section would prevent the infringement of a right which had never existed and would thus run contrary to the purpose for which it was enacted.[46]

In this case, Mr Justice Ritchie also made reference to the fact that Parliament had amended the provisions of the *Criminal Code* defining the types of culpable homicide which were punishable by death on three occasions since 1960. Noting that none of these amendments contained a declaration providing that they were to operate notwithstanding the *Canadian Bill of Rights*, he observed that since Parliament "saw fit to retain the death penalty as part of the *Criminal Code* after the enactment of the *Bill of Rights*", this constituted "strong evidence of the fact that it had never been intended that the word 'punishment' as employed in paragraph 2(b) should preclude punishment by death".[47]

The logical conclusion which flowed from the reasoning of Mr Justice Ritchie in *Miller and Cockriell* was that the *Canadian Bill of Rights* could never be violated by a federal statute. If the statute pre-dated the *Bill*, then it could not infringe any of the rights and freedoms specified because the *Bill* only recognized "existing rights". If the statute was passed after the enactment of the *Bill*, then it created a presumption that Parliament had always intended the rights and freedoms listed in the *Bill* to be interpreted in such a way that the statute did not infringe them. The fact that the reasoning in other cases and the result in *Drybones* contradicted this analysis was not addressed by Mr Justice Ritchie.

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[46] *Supra*, note 8, 704. Martland, Judson, Pigeon, and de Grandpré JJ. concurred. Laskin C.J.C., Spence and Dickson JJ. concurring, wrote separate reasons which concurred in the result. He noted at 686-7 that "it is s. 2 of the *Canadian Bill of Rights* which gives force to s. 1 and hence, especially since the prescriptions of s. 2 are stated to be effective 'in particular', I would not diminish their import by reference to what is more generally prescribed in s. 1". Mr Justice Beetz also concurred in the result, adding at 714-5:"I do not find it necessary, for the purposes of this case, to express any view as to whether or not s. 2 of the *Canadian Bill of Rights* creates new rights or as to whether or not it is subordinate to s. 1. However, I do agree with Mr Justice Ritchie that s. 1 throws some light on s. 2".

[47] *Ibid.*, 705.

The Court used other reasoning techniques in addition to the "frozen concepts" principle of interpretation to ensure that federal legislation did not conflict with the *Bill*. These techniques were evident particularly in the cases where individuals challenged federal legislation on the basis that it violated "equality before the law". The Court held that discrimination on the basis of one of the categories listed in s. 1 of the *Bill* did not, without more, infringe equality before the law.[48] Even so, the Court was extremely reluctant to acknowledge that a law did, either directly[49] or indirectly,[50] discriminate in this way. It also seemed to take the view that s. 1(b) of the *Bill* did not apply if the law in question could be characterized as granting a benefit to a particular group or individual.[51] Again, s. 1(b) was treated as inapplicable where the legislation in question simply granted a discretion to an administrative official and it was alleged that this gave rise to at least the possibility that this discretion might be exercised in such a way as to infringe equality before the law.[52] Finally, the Supreme Court of Canada indicated on several occasions that, in order to establish that a law conflicted with s. 1(b) of the *Bill*, the individual challenging the law had to satisfy the Court that the Parliament of Canada was not seeking to achieve a valid federal objective in enacting the law.[53] This placed the individual in the difficult position of proving a negative

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[48] *A.-G. Canada* v. *Lavell*, *supra*, note 8, 1363 and 1364, *per* Mr Justice Ritchie. Fauteux C.J.C., Martland and Judson JJ. concurred in these reasons. Laskin, Abbott, Hall, and Spence JJ. dissented. Mr Justice Pigeon gave separate reasons agreeing with the result reached by Mr Justice Ritchie.

[49] In *A.-G. Canada* v. *Canard*, *supra*, note 23, 189, Mr Justice Martland, with Judson J. concurring, held that s. 43 of the *Indian Act*, R.S.C. 1970, c. I-6, which related only to the administration of estates of Indians ordinarily resident on reserves, could not be considered to discriminate on the basis of race.

[50] In *Bliss* v. *A.-G. Canada*, *supra*, note 8, the impugned legislation (s. 46 of the *Unemployment Insurance Act, 1971*, S.C. 1970-71-72, c. 48) precluded a woman from collecting regular unemployment insurance benefits during a period commencing eight weeks before the week in which the confinement for pregnancy was expected and six weeks after the week in which her confinement occurred even though she might be available for work and otherwise eligible for the benefit. Mr Justice Ritchie, *per curiam*, concluded at 190 that "[a]ny inequality between the sexes in this area is not created by legislation but by nature."

[51] See *R.* v. *Burnshine*, *supra*, note 6, 707 *per* Martland J., with Fauteux C.J.C., Abbott, Judson, Ritchie, and Pigeon JJ. concurring; and *Bliss* v. *A.-G. Canada*, *supra*, note 8, 191, *per* Ritchie J., for the Court.

[52] See *Smythe* v. *The Queen* [1971] S.C.R. 680, (1971) 19 D.L.R. (3d) 480 [hereinafter cited to S.C.R.].

[53] See *R.* v. *Burnshine, supra,* note 6, 707-8, *per* Martland J. with Fauteux C.J.C., Abbott, Judson, Ritchie, and Pigeon JJ. concurring; *Prata* v. *Minister of Manpower and Immigration* [1976] 1 S.C.R. 376, 382 (1975) 52 D.L.R. (3d) 383, *per* Martland J.; *A.-G. Canada* v. *Canard, supra,* note 23, 188-9, *per* Martland J. with Judson J. concurring; *Bliss* v. *A.-G. Canada, supra,* note 8, 186 and 194, *per* Ritchie J.; and *MacKay* v. *The Queen* [1980] 2 S.C.R. 370, 393-4, (1980) 114 D.L.R. (3d) 393 *per* Ritchie J. with Martland, Pigeon, Beetz, and Chouinard JJ. concurring. The concept of a valid federal objective might also explain the result

and the Court's apparent equation of a valid federal objective with any purpose which brought the legislation within the power of Parliament under s. 91 of the *Constitution Act, 1867* made it an impossible task.[54]

II. The Status and Wording of the Bill as Justification for the Supreme Court's Narrow Interpretation

A. *Status*

As noted earlier, the *Canadian Bill of Rights* was enacted as an ordinary statute by the Parliament of Canada. Accordingly, it could be amended or repealed by Parliament in the same way as any other statute. This caused the Justices of the Supreme Court of Canada to refer to the *Bill* as a "statutory" enactment[55] or a "quasi-constitutional instrument" representing a "half-way house between a purely common law regime and a constitutional one".[56] On several occasions, in an attempt to justify judicial restraint, the Court referred explicitly to the fact that the *Bill* was not an entrenched part of the constitution. The following statement by Laskin J. in *Curr* v. *The Queen* was particularly influential:

> Assuming that "except by due process of law" provides a means of controlling substantive federal legislation — a point that did not directly arise in *Regina* v. *Drybones* — compelling reasons ought to be advanced to justify the Court in this case to employ a statutory (as contrasted with a constitutional) jurisdiction to deny operative effect to a substantive measure duly enacted by a Parliament constitutionally competent to do so, and exercising its powers in accordance with the tenets of responsible government, which underlie the discharge of legislative authority under the *British North America Act*.[57]

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in *A.-G. Canada* v. *Lavell, supra,* note 8. In this regard, see the reasons of Mr Justice Beetz in *A.-G. Canada* v. *Canard, supra,* note 23.

[54] Compare the application of the valid federal objective test by Mr Justice McIntyre, Dickson J. concurring, in *Mackay* v. *The Queen, ibid.*, with the way in which that concept is used by Mr Justice Ritchie with Martland, Pigeon, Beetz, and Chouinard JJ.concurring in the same case.

[55] See, *e.g.*, *Curr* v. *The Queen, supra,* note 8, 899, *per* Laskin J.; *A.-G. Canada* v. *Lavell, supra,* note 8, 1360, *per* Ritchie J.; and *Morgentaler* v. *The Queen* [1976] 1 S.C.R. 616, 632, (1975) 53 D.L.R. (3d) 161, *per* Laskin C.J.C., dissenting. The passage from the reasons of Laskin J. in *Curr* where this characterization was made was quoted in *R.* v. *Burnshine, supra,* note 6, 707, *per* Martland J.; *Bliss* v. *A.-G. Canada, supra,* note 8, 193, *per* Ritchie J.; and *MacKay* v. *The Queen, supra,* note 53, 392-3, *per* Ritchie J.

[56] *Hogan* v. *The Queen, supra,* note 8, 597 *per* Laskin J., dissenting. See also *Miller and Cockriell* v. *The Queen, supra,* note 8, 690, *per* Laskin C.J.C.; and *Gay Alliance Toward Equality* v. *The Vancouver Sun* [1979] 2 S.C.R. 435, 467, (1979) 97 D.L.R. (3d) 577, *per* Dickson J., dissenting, with Estey J. concurring.

[57] *Supra,* note 8, 899.

Although originally made in the context of an analysis of the due process clause as a basis for judicial interference with the substantive content of legislation,[58] this comment has been quoted in settings where the Court construed other rights and freedoms declared and recognized in the *Bill* in a narrow fashion.[59]

While obviously it cannot be denied that the *Bill* was enacted as an ordinary statute and that the Court sometimes emphasized this fact, the importance of the status of the *Bill* can easily be overstated in attempting to explain the Court's adoption of a position of restraint. In the first place, the status of the *Bill* did not prevent members of the Court from concluding that it should be accorded "paramountcy" [60] or "primacy to the guarantees of the Canadian Bill of Rights by way of a positive suppressive effect on the operation and application of federal legislation." [61] The Court indicated consistently that the *Bill* overrode federal statutes, whether enacted before or after 1960, which could not be interpreted or applied so as to comply with the *Bill*. Having accepted that an ordinary statute could have such a drastic effect on other legislation, the Court could easily have gone on to give it a broad, liberal interpretation.

Secondly, the refusal of the Court to characterize the *Canadian Bill of Rights* as a constitutional document was itself indicative of judicial restraint. The term "constitution" can be given a broad or narrow meaning. Used in a broad sense, it refers to all of the important rules, whatever their source, which establish, empower and regulate the principal institutions of government in a country.[62] The term has been used in this way by academics,[63] by the drafters of the recent constitutional reforms,[64] and by the Supreme Court of Canada itself,[65] albeit in a different context. It could therefore be argued that the *Canadian Bill of Rights*, though not part of the *Constitution Act, 1867*, was as much a part of the Constitution of Canada as a great many other statutes, both of the United Kingdom Parliament and the Canadian

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[58] And repeated in this context in *Morgentaler* v. *The Queen*, *supra*, note 55, 632-3.

[59] *R.* v. *Burnshine*, *supra*, note 6, 707, *per* Martland J.; *Bliss* v. *A.-G. Canada*, *supra*, note 8, 193, *per* Ritchie J.; and *MacKay* v. *The Queen*, *supra*, note 53, 392-3, *per* Ritchie J.

[60] *Hogan* v. *The Queen*, *supra*, note 8, 583, *per* Ritchie J. with Fauteux C.J.C., Abbott, Martland, Judson, and Dickson JJ. concurring.

[61] *Ibid.*, 589-90, *per* Laskin J., dissenting, with Spence J. concurring.

[62] See Hogg, *supra*, note 8, 2.

[63] See, *e.g.*, Hogg, *ibid.*, and Tarnopolsky, *The Supreme Court and the Canadian Bill of Rights* (1975) 53 Can. Bar Rev. 649, 672.

[64] See s. 52(2) of the *Constitution Act, 1982*, being Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.).

[65] See *Reference re Amendment of the Constitution of Canada (Nos. 1, 2 and 3)* (1981) 125 D.L.R. (3d) 1, (1981) 39 N.R. 187 (S.C.C.) [hereinafter cited to D.L.R.].

Parliament.[66] To refer to the *Canadian Bill of Rights* as a non-constitutional, or even quasi-constitutional, document in order to justify a narrow construction was result-oriented reasoning.

Thirdly, Justices of the Supreme Court of Canada occasionally indicated explicitly that their reasoning and the results produced would not have differed even if the *Bill* had been construed and applied as a constitutional document. In *Hogan* v. *The Queen*,[67] Mr Justice Ritchie relied heavily on the reasoning of the Privy Council in *King* v. *The Queen*,[68] to justify the admission of evidence obtained in violation of the *Canadian Bill of Rights*. In the latter case, the Privy Council had to consider whether evidence, which had been obtained in breach of the search and seizure provisions which were entrenched in the Jamaican Constitution, was nevertheless admissible. In a passage quoted by Mr Justice Ritchie in *Hogan*,[69] Lord Hodson stated:

> This constitutional right may or may not be enshrined in a written constitution, but it seems to their Lordships that it matters not whether it depends on such enshrinement or simply upon the common law as it could do in this country. In either event the discretion of the court must be exercised and has not been taken away by the declaration of the right in written form.[70]

In concurring reasons in *Hogan*, Mr Justice Pigeon was even more explicit:

> I agree with Ritchie J. that this appeal should be dismissed on the basis that, *even if the Canadian Bill of Rights is given the same effect as a constitutional instrument*, this does not mean that a rule of absolute exclusion, which is in derogation of the common law rule, should govern the admissibility of evidence obtained wherever there has been a breach of one of the provisions contained in that *Bill*.[71]

Finally, the constitutional status of the *Canadian Bill of Rights* was never an issue in those cases where the Court was asked to use the *Bill* as a guide for the interpretation of federal statutes or to review administrative actions taken pursuant to the laws of Canada in light of the fundamental freedoms therein recognized and declared. It has never been doubted that the Parliament of Canada could enact, as ordinary legislation, a canon of construction or a guide for the judicial review of administrative action. Nevertheless, even in this context, the Supreme Court did not use the *Bill* to protect creatively and vigorously individuals' rights and freedoms.

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[66] Regarding the latter, the majority in the *Reference re Amendment of the Constitution of Canada (Nos. 1, 2 and 3), ibid.*, 81, described the *Saskatchewan Act*, S.C. 1905, c. 42 and the *Senate and House of Commons Act*, R.S.C. 1970, c. S-8, as "part of the rules of the Canadian Constitution".

[67] *Supra*, note 8.

[68] [1969] 1 A.C. 304, [1968] 2 All E.R. 610 [hereinafter cited to A.C.].

[69] *Supra*, note 8, 584-5.

[70] *King* v. *The Queen*, *supra*, note 68, 319.

[71] *Hogan* v. *The Queen*, *supra*, note 8, 585 [emphasis added].

In summary, the references in the cases to the status of the *Canadian Bill of Rights* can best be viewed as attempts to justify an approach adopted for other reasons. They may also be considered as the only explanation given, albeit implicitly, for the out-of-hand rejection of American authorities as aids to the interpretation of the *Bill*.[72]

B. *Wording*

The wording of the *Canadian Bill of Rights*, while perhaps unfortunate and ambiguous in some respects, did not require the Court always to construe the rights and freedoms listed in a restrictive fashion. In the *Drybones* case,[73] the Court itself illustrated the extent to which judges could overcome any ambiguities in the *Bill* which appeared to present obstacles for judicial review of legislation. Although s. 2 read as if it were a canon of construction,[74] a majority of the Court concluded, by focusing upon the provision which permitted the Parliament of Canada to avoid the effect of the *Bill* through a *non obstante* clause, that the *Bill* was intended to override inconsistent federal statutes.[75] Having effectively dealt with what was undoubtedly the most important ambiguity in the *Bill*, the Court could have interpreted the rights

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[72] See, *e.g.*, *Smythe* v. *The Queen*, *supra*, note 52, 687, *per* Fauteux C.J.C.; *Hogan* v. *The Queen*, *ibid.*, 583-4, *per* Ritchie J. with Fauteux C.J.C., Abbott, Martland, Judson, and Dickson JJ. concurring; and *Miller and Cockriell* v. *The Queen*, *supra*, note 8. In the latter case, at 706-7, Ritchie J., with Martland, Judson, Pigeon, and de Grandpré JJ. concurring, asserted simply:

> Although the phrase "cruel and unusual punishments" is to be found in the English Bill of Rights of 1688 and the use of the words "cruel and unusual" in this context in both the *Canadian Bill of Rights* and the United States Constitution no doubt owes its origin to that source, I am nonetheless satisfied that these two latter documents differ so radically in their purpose and content that judgments rendered in interpretation of one are of little value in interpreting the other.

On one occasion, Mr Justice Ritchie did adopt a dissenting opinion of an American Justice. See *Robertson and Rosentanni* v. *The Queen*, *supra*, note 37, where he delivered the majority reasons.

Chief Justice Laskin, on the other hand, has been quite willing to analyze the American authorities to discover what light they might shed on the interpretation of the *Bill*. See, *e.g.*, *R.* v. *Appleby*, *supra*, note 8, Hall J. concurring; *Curr* v. *The Queen*, *supra*, note 8, Abbott, Hall, Spence, and Pigeon JJ. concurring; *Hogan* v. *The Queen*, *supra*, note 8, 574, Spence J. concurring in the dissent; *Morgentaler* v. *The Queen*, *supra*, note 55, Judson and Spence JJ. concurring in the dissent; and *Miller and Cockriell* v. *The Queen*, *supra*, note 8, Spence and Dickson JJ. concurring.

[73] *Supra*, note 3.

[74] This fact was stressed by Cartwright C.J.C., Pigeon and Abbott JJ., who dissented.

[75] Fauteux, Martland, Judson, Hall, and Spence JJ. concurred in the reasons given by Mr Justice Ritchie.

and freedoms broadly. It did not. It proceeded to construe the open-ended language restrictively and to focus on every phrase or word which would justify a narrow interpretation.

The *Canadian Bill of Rights*, as is true with most bills of rights, was filled with phrases and expressions whose meaning was "largely unlimited and undefined".[76] Because of this characteristic of bills of rights, the attitude of the courts, in particular of the ultimate appellate court, is much more important than the actual wording of the bill in determining its effect. A court which is prepared to engage actively in judicial review to protect civil rights and fundamental freedoms will give the open-ended concepts an expanded meaning; a court which is reluctant to act as the ultimate guardian of those rights and freedoms will interpret those same concepts narrowly. A comparison of the majority and dissenting reasons given in some of the Supreme Court of Canada decisions on the *Canadian Bill of Rights* illustrates this basic observation.[77] For example, in the *Mitchell* case,[78] the Court ruled six to three that s. 2(e) of the *Bill* did not apply to the suspension or revocation of parole by the National Parole Board under the *Parole Act*.[79] Mr Justice Martland explained the majority's view succinctly:

> The appellant had no right to parole. He was granted parole as a matter of discretion by the Board. He had no right to remain on parole. His parole was subject to revocation at the absolute discretion of the Parole Board.[80]

The majority also found that the requirements of s. 2(c)(i) of the *Bill* had been met because the appellant was made aware of the fact that his apprehension and subsequent detention occurred because of the suspension of parole and the later revocation.[81]

In dissent, Laskin C.J.C. concluded that the suspension and revocation of parole without reason or explanation violated both s. 2(c)(i) and s. 2(e) of

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[76] Mr Justice Pigeon in dissent in *R.* v. *Drybones*, *supra*, note 3, 306.

[77] Compare the reasons of Mr Justice Ritchie with those of Mr Justice Laskin, who concurred in the result, in *R.* v. *Appleby*, *supra*, note 8, regarding the interpretation of s. 2(f). Compare also the reasons of Mr Justice Laskin and Mr Justice Ritchie, concurring in the result, in *Curr* v. *The Queen*, *supra*, note 8, regarding the definition of the phrase "due process of law" used in s. 1(a), and those of Mr Justice Ritchie and Mr Justice Laskin in dissent in *A.-G. Canada* v. *Lavell*, *supra*, note 8, regarding the meaning of "equality before the law" in the *Bill*.

[78] *Supra*, note 6.

[79] R.S.C. 1970, c. P-2.

[80] *Mitchell*, *supra*, note 6, 588. De Grandpré J. concurred in these reasons. Mr Justice Ritchie, with Judson, Pigeon and Beetz JJ. concurring, decided the case on a procedural point, but expressed agreement, at 593, with Mr Justice Martland's views on s. 2(c)(i) and s. 2(e) of the *Bill*.

[81] *Ibid.*, 587 *per* Martland J.

the *Bill*.[82] Noting that the "uncontested facts on which the application was based tend to shock from their mere narration",[83] he reasoned:

> Counsel for the respondent urged that there was no violation of s. 2(c)(i) because the appellant was made aware that his parole had been suspended, and this satisfied the obligation to give a reason. This is rather serious because, if the Board has acted properly, any arrest in the circumstances is an arrest upon a suspension, and hence it is the reason for the suspension that must be provided if s. 2(c)(i) is to have more than an empty meaning. I am of the opinion that the same objection must be maintained in respect of the continued detention of the appellant following the revocation of parole. He was given no reason for the suspension of parole, nor a reason for the revocation of parole. I would add that the enforcement of s. 2(c)(i) would have the virtue of providing a basis for judicial review, even if it be a limited one, so as to bring the National Parole Board to that extent into the class of accountable statutory bodies.[84]

Regarding s. 2(e), he pointed out that the phrase "rights and obligations" had particular significance in the context of a parole revocation and that a hearing for the purposes of the *Bill* did not have to be a full-fledged adversarial proceeding.[85]

In this case, therefore, the Court was required to give meaning to the terms "rights and obligations" and "reason for his arrest or detention". These terms were undefined in the *Bill* and it was open to the Court to adopt a narrow or broad construction. By opting for the former, the Court held effectively that the suspension or revocation of parole was completely unreviewable by the courts.

The Court's reliance on the wording of the opening paragraphs of ss 1 and 2 of the *Bill* to justify the application of the "frozen concepts" principle of interpretation to the rights and freedoms listed therein can also be viewed as a deliberate strategy by which the Court could avoid engaging actively in judicial review to protect civil rights and fundamental freedoms. As explained earlier, this principle was adopted in light of the fact that s. 1 of the *Bill* specified that the enumerated human rights and freedoms "have existed and shall continue to exist". It was then extended to the rights listed in s. 2 because the opening paragraph referred once again to "the rights and freedoms recognized and declared". The wording of the *Bill* may, therefore, have lent itself to a technique of interpretation which was used to justify a narrow construction of the rights and freedoms listed in both ss 1 and 2. Nevertheless, it would be a mistake to conclude either that the *Bill* dictated the adoption of the "frozen

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[82] *Ibid.*, 574, Dickson J. concurring. Although Spence J. gave separate dissenting reasons, be expressed agreement with the Chief Justice's views on the effect of the *Canadian Bill of Rights*. *Ibid.*, 598.

[83] *Ibid.*, 575.

[84] *Ibid.*, 583-4.

[85] *Ibid.*, 584-5.

concepts" technique of interpretation or that that principle resulted necessarily in a narrow interpretation of the rights and freedoms.

It is worth repeating that the Court itself held in the *Drybones* case [86] that the rights and freedoms guaranteed in the *Bill* were not circumscribed by, or subject to, Canadian law in force at the time of the *Bill's* enactment. Therefore, the "frozen concepts" principle of interpretation, properly understood, simply allowed the Court to take into account the legislation in force in 1960 and the case law decided before that date in order to determine the accepted meaning at that time of the rights and freedoms recognized and declared in the *Bill*. To suggest, as did Mr Justice Ritchie in *Miller and Cockriell* v. *The Queen*,[87] that the wording of s. 1 required the Court to interpret the rights and freedoms so that laws in existence in 1960 could not possibly violate the *Bill*, was an unwarranted extension of the principle which contradicted a number of majority judgments of the Supreme Court itself, most obviously that in *Drybones*. It was also contrary to the text of the *Bill*, which indicated clearly in s. 5 that laws in existence in 1960 were subject to the rights and freedoms listed.

The use of even the more limited version of the "frozen concepts" principle may be questioned. No doubt, it was quite proper for the Court to examine the legal framework of contemporary Canadian society for guidance in the interpretation of the open-ended concepts contained in the *Bill*. It is probable that the Court would have done so even if s. 1 of the *Bill* had not stipulated that the enumerated rights and freedoms "have existed and shall continue to exist". But to conclude that these words required the Court to adopt the meaning of the concepts contained in the *Bill* which would have been accepted in 1960 is, as Professor Tarnopolsky has pointed out,[88] reminiscent of the approach taken by the Supreme Court of Canada in 1928 when it decided that the word "persons" in s. 24 of the *British North America Act, 1867*, as it was then known, did not include women.[89] When that case was heard on appeal by the Judicial Committee of the Privy Council,[90] Lord Sankey held that the Court had erred in attempting to discover what the word could possibly have meant in 1867. Describing the *British North America Act, 1867* as a "living tree capable of growth and expansion within its natural limits", he suggested that it "should be on all occasions interpreted in a large,

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[86] *Supra*, note 3.

[87] *Supra*, note 8, 704.

[88] Tarnopolsky, *supra*, note 36, 184-5.

[89] *Reference re Meaning of the Word "Persons" in Section 24 of the British North America Act, 1867* [1928] S.C.R. 276.

[90] *Edwards* v. *A.-G. Canada* [1930] A.C. 124, [1929] All E.R. Rep. 571 (P.C.) [hereinafter cited to A.C.].

liberal and comprehensive spirit, considering the magnitude of the subject with which it purports to deal in a few words".[91] A similar approach to the *Canadian Bill of Rights* would have required the courts to give contemporary meaning to the concepts contained in it.

Even if the Court was justified in attempting to discern the 1960 content of Canadian rights and freedoms, this approach hardly explains why, on occasion, it felt obliged to turn to nineteenth century authorities for guidance. In *A.-G. Canada* v. *Lavell*,[92] Mr Justice Ritchie noted that "the meaning to be given to the language employed in the *Bill of Rights* is the meaning which it bore in Canada at the time when the Bill was enacted, and it follows that the phrase 'equality before the law' is to be construed in the light of the law existing in Canada at that time". He added:

> In considering the meaning to be attached to "equality before the law" as those words occur in section 1(b) of the *Bill*, I think it important to point out that in my opinion this phrase is not effective to invoke the egalitarian concept exemplified by the 14th Amendment of the U.S. Constitution as interpreted by the courts of that country. . . . I think rather that, having regard to the language employed in the second paragraph of the preamble to the *Bill of Rights*, the phrase "equality before the law" as used in s. 1 is to be read in its context as part of the "rule of law" to which overriding authority is accorded by the terms of that paragraph.[93]

Thereupon, he considered the definition of the phrase "rule of law" given in *Stephen's Commentaries on the Laws of England*,[94] which, in turn, led him to the definitions given to the phrases "rule of law" and "equality before the law" by Dicey in 1885. He concluded that the latter concept involved simply equality in "the administration or application of the law by the law enforcement authorities and the ordinary courts of the land".[95] This definition was referred to in two subsequent cases [96] where the Court refused to find conflict between a federal law and s. 1(b) of the *Bill*.

This definition is extremely difficult to justify, even if one accepts that "equality before the law" should be interpreted as that concept was understood in 1960. In the first place, it ignores the juxtaposition of the "equality before the law" clause with the non-discrimination clause in the opening

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[91] *Ibid.*, 136.

[92] *Supra*, note 8, 1365. Fauteux C.J.C., Martland and Judson JJ. concurring. Mr Justice Pigeon gave separate reasons agreeing with the result reached by Mr Justice Ritchie. Laskin, Abbott, Hall, and Spence JJ. dissented.

[93] *Ibid.*

[94] L. Warmington, ed., *Stephen's Commentaries on the Laws of England*, 21st ed. (1950).

[95] *Lavell*, *supra*, note 8, 1366.

[96] *R.* v. *Burnshine*, *supra*, note 6, 703-4, and *Bliss* v. *A.-G. Canada*, *supra*, note 8, 192 *per* Ritchie J.

paragraph of s. 1.[97] Secondly, the interpretation suggested by Mr Justice Ritchie ignored the fact that by 1960 Canada had signed the Universal Declaration of Human Rights which indicated clearly that non-discrimination was the core of the concept of equality before the law. Finally, even Mr Justice Ritchie had applied an egalitarian concept in *Drybones*.[98] The Court never attempted to explain how the Diceyan definition, which appears to focus upon the equal treatment of those to whom the law applies, is to be reconciled with the *Drybones* case where the Court rejected explicitly the proposition that equality before the law meant only equal treatment in the application of the law. Indeed, in subsequent cases, the Court again struggled to give meaning to the term "equality before the law" as an egalitarian concept.

In essence, the *Canadian Bill of Rights* did not demand a narrow construction of the open-ended concepts it contained. A court which favoured judicial activism could have defined those concepts broadly. In particular, the adoption of a "frozen concepts" principle of interpretation and the peculiar way in which it was applied in some of the cases was not a natural result of the wording of the *Bill*. Other reasons need to be discerned if the judicial restraint exhibited by the Supreme Court of Canada is to be explained.

III. Reasons for Judicial Restraint

If the Supreme Court's narrow construction of the rights and freedoms recognized and declared in the *Canadian Bill of Rights* cannot be explained by either the status or the wording of the *Bill*, then changes in the way those rights and freedoms are expressed in the new *Canadian Charter of Rights and Freedoms* and the entrenchment of the *Charter* in the *Constitution Act, 1982*[99]

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[97] In *The Supreme Court and the Canadian Bill of Rights*, *supra*, note 63, 671, Professor Tarnopolsky argues that

> the majority views in the cases since the *Drybones* case, with their reference to 1960 definitions, merely camouflage the fact that the judges are giving their *own* interpretations of the words used, instead of following the rules of statutory interpretation to see *what Parliament intended*. If one follows the dictionary rule, one must include the non-discrimination clause in the opening paragraph of section 1 as being plainly a part of the definition. If one follows the "golden" rule, interpreting clauses not in isolation from each other but in the context of the whole, one must again take note of the very direct relationship between the opening paragraph and section 1(b). If one applies the "mischief" rule, then one cannot overlook the fact that the Parliament of Canada and the legislatures of Canada, during the decade of the 'fifties, were concerned with overcoming the inequality which arises from discrimination. Therefore, even applying 1960 concepts, one cannot exclude the modern twentieth-century notions of egalitarianism.

[98] *Supra*, note 3.

[99] Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.).

will not necessarily cause a modification of the Court's approach to civil liberties issues. If there were other reasons for the adoption of a position of judicial restraint in the cases involving the *Canadian Bill of Rights*, these reasons might continue to influence the Court in the future. Any attempt to discern such influences must, of necessity, be speculative because the Court almost always referred to the status or wording of the *Bill* to justify a restrictive interpretation.

It is submitted that two fundamental reasons can be discovered for the tendency of the Court to read the *Canadian Bill of Rights* narrowly. The first relates to the nature of the issues presented for judicial determination in those cases where the Court was asked to find that a law of Canada conflicted with the *Bill*. A broad, liberal construction of the *Bill* in those cases would have required the Court to make policy decisions which involved determining the priority that should be given to competing, but perhaps equally legitimate social values. For reasons which remained largely unarticulated, a majority of the Court appears to have concluded that such decisions are more appropriately made in our society by the legislature than by the judiciary. The dissenters in the *Drybones* case expressed this view explicitly.[100] Appealing to tradition, Mr Justice Pigeon focused upon the changed role of the courts under a bill of rights which has overriding effect on inconsistent legislation:

> [T]he judgments below hold in effect that Parliament in enacting the *Bill* has implicitly repealed... the fundamental principle that the duty of the courts is to apply the law as written and they are in no case authorized to fail to give effect to the clearly expressed will of Parliament. It would be a radical departure from this basic British constitutional rule to enact that henceforth the courts are to declare inoperative all enactments that are considered as not in conformity with some legal principles stated in very general language, or rather merely enumerated without any definition.
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> The meaning of such expressions as "due process of law", "equality before the law", "freedom of religion", "freedom of speech", is in truth largely unlimited and undefined. According to individual views and the evolution of current ideas, the actual content of such legal concepts is apt to expand and to vary as is strikingly apparent in other countries. In the traditional British system that is our own by virtue of the *B.N.A. Act*, the responsibility for updating statutes in this changing world rests exclusively upon Parliament.[101]

Chief Justice Cartwright shared these concerns, noting that the new role would be "imposed upon every justice of the peace, magistrate and judge of any court in the country who is called upon to apply a statute of Canada or any order, rule or regulation made thereunder."[102] Mr Justice Abbott's misgivings regarding the majority's interpretation of s. 2 of the *Bill* were expressed in

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[100] *Supra*, note 3.
[101] *Ibid.*, 305-6.
[102] *Ibid.*, 287-8.

language which also alluded to the different functions performed by the courts and the legislature in our system of government.[103] Although he later accepted that the *Drybones* case had established that the *Canadian Bill of Rights* rendered inoperative any conflicting legislation, Mr Justice Abbott continued to view this result as "undesirable".[104]

The majority in *Drybones*,[105] finding that the intent of Parliament was clear, were compelled to hold that the *Canadian Bill of Rights* did have overriding effect. This conclusion, therefore, was based itself on the doctrine of Parliamentary sovereignty which required the Court to give effect to the *Bill* as an expression of Parliament's intention. Nevertheless, subsequent decisions of the Court suggest that successive majorities shared the views of the dissenters in *Drybones* on the desirability of a *Bill of Rights* which empowered the judiciary to review legislation duly passed by Parliament. Although the Court continued to pay lip-service to the principle that the *Bill* overrode inconsistent legislation, a majority in each case interpreted the *Bill* in such a way that Parliament retained the ultimate responsibility for the protection of fundamental rights and freedoms. In one sense, this was a refusal to adhere to the doctrine of Parliamentary sovereignty as, arguably, the Court refused to construe the *Bill* in the manner and spirit intended by Parliament. On the other hand, the Court's approach ensured adherence to the principle which might be said to underlie the doctrine of Parliamentary sovereignty: namely, that it is the role of Parliament, not of the courts, to weigh countervailing interests and values and then to make the final decision of what the law of the land should be.[106] The Court's reluctance to undertake such a role was especially obvious when the cases involved such basic and controversial matters as the loss of Indian status by Indian women who married non-Indians[107] and the imposition of the death penalty for certain crimes.[108] Regarding the latter, Mr Justice Ritchie stated explicitly that "the

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[103] *Ibid.*, 299.

[104] *A.-G. Canada* v. *Lavell*, *supra*, note 8, 1374, dissenting.

[105] *Supra*, note 3. Fauteux, Martland, Judson, Hall, and Spence JJ. concurred in the reasons given by Mr Justice Ritchie. Hall J. added some "observations".

[106] It is, of course, true that if the Court had actively engaged in judicial review of Parliament's legislation, the Parliament of Canada could have responded by amending or repealing the *Bill* or by inserting *non obstante* clauses into its legislation. However, as Mr Justice Abbott observed when dissenting in *A.-G. Canada* v. *Lavell*, *supra*, note 8, 1374, such a response was highly unlikely.

[107] *A.-G. Canada* v. *Lavell*, *supra*, note 8. In that case, Mr Justice Ritchie at 1358-63, with Fauteux C.J.C., Martland and Judson JJ. concurring, also expressed grave concerns regarding the possibility that a broad definition of "equality before the law" would eventually require the Court to find the whole *Indian Act* inoperative.

[108] *Miller and Cockriell* v. *The Queen*, *supra*, note 8.

abolition of the death penalty is a matter for Parliament".[109] He rejected the view that, in order to determine whether or not the death penalty could be considered "cruel and unusual", the Court should assess current community standards of morality and the deterrent effect of the death penalty. Such an assessment was said to raise only "questions of policy" which were "of necessity considerations affecting the decision of Parliament as to whether or not the death penalty should be retained".[110] As a retired Justice, Ronald Martland was even more forthright. In a newspaper interview,[111] he acknowledged that he did not favour the entrenchment of a bill of rights because it could potentially transfer enormous power to the courts. It would be better, in his view, for the legislatures to pass specific enactments protecting rights and freedoms in particular contexts.

The view that the legislature, not the judiciary, is the appropriate institution to make ultimate policy choices and to work out the necessary compromises between conflicting values is, of course, a controversial one.[112] Nevertheless, it is generally in keeping with the traditions of our legal system and the history of Canada's political structure.[113] Theoretical justifications can also be put forward. Legislative bodies are better equipped to collect the relevant economic and sociological data than the courts are. Perhaps most important, legislators are democratically elected and hence accountable to the people for their decisions, while judges are appointed and insulated from political pressures by the doctrine of judicial independence and all that it entails. Whether or not these concerns about judicial review under a *Bill of Rights* are legitimate is largely irrelevant to the thesis advanced in this paper. What is important is that a majority on the Supreme Court of Canada appears to have been influenced by them.

The Court's narrow interpretation of the rights and freedoms listed in the *Canadian Bill of Rights* was evident not only in the policy-laden cases where

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[109] *Ibid.*, 704. Justices Martland, Judson, Pigeon, and de Grandpré concurred in the reasons given by Mr Justice Ritchie. Chief Justice Laskin, with Dickson and Spence JJ. concurring, gave separate reasons concurring in the result.

[110] *Ibid.*, 705-6 *per* Ritchie J.

[111] *Charter a Poor Safeguard for Citizens, Ex-Justice Says*, The [Toronto] Globe and Mail (13 February 1982) 11, col. 1-2.

[112] For an analysis of the appropriate roles of the legislature and the judiciary which supports this view, see D. Schmeiser, *Civil Liberties in Canada* (1964); Russell, *A Democratic Approach to Civil Liberties* (1969) 19 U.T.L.J. 109; Willis, *Foreign Borrowings* (1970) 20 U.T.L.J. 274; Schmeiser, *The Case Against Entrenchment of a Canadian Bill of Rights* (1973) 1 Dal. L.J. 15; and Schmeiser, *The Entrenchment of a Bill of Rights* (1981) 19 Alta L. Rev. 375. For the arguments against this position, see the works of Tarnopolsky, *supra*, notes 4, 36 and 63; and P. Trudeau, *Charte canadienne des Droits de l'homme* (1968).

[113] See McWhinney, "Legal Theory and Philosophy of Law in Canada" in E. McWhinney, ed., *Canadian Jurisprudence [:] The Civil and Common Law in Canada* (1958) 1; Weiler, *Two Models of Judicial Decision-Making* (1968) 46 Can. Bar Rev. 406; P. Weiler, *In the Last*

it was invited to hold legislation invalid, but also in the cases where it was asked to use the *Bill* as a rule of interpretation or as a guide to judicial review of administrative action. These latter cases did not raise the spectre of the Court overruling legislative judgments regarding the relative merits of competing values. Moreover, they usually involved the definition and application of the legal rights set out in s. 2 of the *Bill*, a task for which the judiciary appears eminently qualified. The concerns regarding judicial review of legislation outlined above, therefore, were not present. Accordingly, there must be at least one other underlying cause for the Court's narrow construction of the *Bill*. It is submitted that this second reason was simply the Court's greater concern for what Professor Schmeiser has called "the collective good of society, whether expressed in terms of needs of the State, administrative efficiency, or law and order" than for the protection of individual rights.[114] As Schmeiser has demonstrated, this attitude of the Court was not confined to cases involving the *Canadian Bill of Rights*.[115] It was evident in the leading cases in all areas of public law including administrative law,[116] criminal law,[117]

Resort [:] A Critical Study of the Supreme Court of Canada (1974); Leavy, "The Structure of the Law of Human Rights" in R. MacDonald & J. Humphrey, eds, *The Practice of Freedom [:] Canadian Essays on Human Rights and Fundamental Freedoms* (1979) 53; McCarter, *The Decision-Making Process in Constitutional Decisions of the Supreme Court of Canada* (1979) 37 U.T. Fac. L. Rev. 209; and Gold, *Equality Before the Law in the Supreme Court of Canada: A Case Study* (1980) 18 Osgoode Hall L.J. 336.

In the 1950's, the Supreme Court of Canada did strive actively to uphold civil liberties and, in effect, substituted its policy for that which underlay provincial legislation. For an analysis of this approach, which appears now to have been a relatively short-lived aberration, see McWhinney, *Federal Supreme Courts and Constitutional Review* (1967) 45 Can. Bar Rev. 578; Gibson, *—And One Step Backward: The Supreme Court and Constitutional Law in the Sixties* (1975) 53 Can. Bar Rev. 620; and Berger, *The Supreme Court and Fundamental Freedoms: The Renunciation of the Legacy of Mr. Justice Rand* (1980) 1 Supreme Court L.R. 460.

[114] Schmeiser, *The Role of the Court in Shaping the Relationship of the Individual to the State [:] The Canadian Supreme Court* (1980) 3 Can.-U.S. L.J. 67, 67.

[115] *Ibid.*, *passim*. See also Gibson, *supra*, note 113; Maloney, *The Supreme Court and Civil Liberties* (1975) 18 Crim. L. Q. 202; Grant, *The Supreme Court of Canada and the Police: 1970-76* (1977) 20 Crim. L.Q. 152; and MacPherson, *Developments in Constitutional Law: The 1978-79 Term* (1980) 1 Supreme Court L.R. 77.

[116] See, *e.g.*, *Harelkin* v. *The University of Regina* [1979] 2 S.C.R. 561, (1979) 96 D.L.R. (3d) 14.

[117] See, *e.g.*, *R.* v. *Carker* [1967] S.C.R. 114, [1967] 2 C.C.C. 190; *Lemieux* v. *The Queen* [1967] S.C.R. 492, (1967) 63 D.L.R. (2d) 75; *R.* v. *Stenning* [1970] S.C.R. 631, (1970) 10 D.L.R. (3d) 221; *Knowlton* v. *The Queen* [1974] S.C.R. 433, (1973) 33 D.L.R. (3d) 755; *R.* v. *Biron* [1976] 2 S.C.R. 56, (1975) 59 D.L.R. (3d) 409; *R.* v. *Kundeus* [1976] 2 S.C.R. 272, (1975) 61 D.L.R. (3d) 145; *Schwartz* v. *The Queen* [1977] 1 S.C.R. 673, (1976) 67 D.L.R. (3d) 716; *Leary* v. *The Queen* [1978] 1 S.C.R. 29, (1977) 74 D.L.R. (3d) 103; *Rourke* v. *The Queen* [1978] 1 S.C.R. 1021, (1977) 76 D.L.R. (3d) 193; *Moore* v. *The Queen* [1979] 1

and evidence.[118] Again, one may not agree with the Court's tendency to favour the common good over individual rights, but it must be taken into account if one is to explain the Court's approach to the *Canadian Bill of Rights*. This general attitude must also be considered in any speculation regarding the Court's future performance in civil liberties cases.

Conclusion

The Supreme Court of Canada attempted to explain its narrow construction of the *Canadian Bill of Rights* by references to the *Bill's* status and wording. The entrenchment of the *Canadian Charter of Rights and Freedoms* and the drafting of its substantive provisions largely will preclude the Court from relying on these reasons to justify a restrictive approach to the *Charter*. The constitutional status of the *Charter* and its overriding effect is spelled out explicitly in ss 52(1) and (2) of the *Constitution Act, 1982*.[119] Unlike the *Bill*, the *Charter* specifically empowers the courts to fashion any remedy considered "appropriate and just in the circumstances" for an infringement or denial of the rights and freedoms guaranteed in it.[120] More particularly, s. 24(2) provides a modified version of the American exclusion of evidence rule which was rejected in the *Hogan* case.[121] The rationale for the "frozen concepts" technique of interpretation has also disappeared because the rights and freedoms in the *Charter* are expressed in the present tense only.[122] By joining the non-discrimination clause and the "equality before the law" guarantee,[123] the *Charter* attempts to ensure that the meaning given to that guarantee cannot be confined as it was by Mr Justice Ritchie in *Lavell*.[124] Finally, s. 15(1) refers to the "equal benefit of the law without discrimination" thereby suggesting that the courts can no longer simply dismiss the "equality

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S.C.R. 195, (1978) 90 D.L.R. (3d) 112; and *R.* v. *Guimond* [1979] 1 S.C.R. 960. Exceptions to the trend are: *Kienapple* v. *The Queen* [1975] 1 S.C.R. 729, (1974) 44 D.L.R. (3d) 351; *R.* v. *Corp. of the City of Sault Ste Marie* [1978] 2 S.C.R. 1299, (1978) 85 D.L.R. (3d) 161; *R.* v. *Prue* [1979] 2 S.C.R. 547, (1979) 96 D.L.R. (3d) 577; and *Chartier* v. *A.-G. Québec* [1979] 2 S.C.R. 474, (1979) 104 D.L.R. (3d) 321.

[118] See, *e.g.*, *De Clercq* v. *The Queen* [1968] S.C.R. 902, (1968) 70 D.L.R. (2d) 530; *R.* v. *Wray* [1971] S.C.R. 272, (1970) 11 D.L.R. (3d) 673; *Faber* v. *The Queen*, [1976] 2 S.C.R. 9, (1975) 65 D.L.R. (3d) 423; *Morris* v. *The Queen* [1979] 1 S.C.R. 405, (1978) 91 D.L.R. (3d) 161; and *Rothman* v. *The Queen* [1981] 1 S.C.R. 640, (1981) 121 D.L.R. (3d) 578.

[119] Schedule B, *Canada Act 1982*, 1982, c.11 (U.K.).

[120] Part I of Schedule B, *Canada Act 1982*, 1982, c.11 (U.K.), s. 24(1).

[121] *Supra*, note 8.

[122] See, *e.g.*, s. 2 which begins with these words: "Everyone has the following fundamental freedoms".

[123] Part I of Schedule B, *Canada Act 1982*, 1982, c.11 (U.K.), s. 15(1).

[124] *Supra*, note 8.

before the law" argument whenever the legislation in question can be characterized as conferring a benefit.

Nevertheless, the *Charter* does not, and indeed could not, prescribe a judicial attitude to its administration. The operating ideals of the judges, especially at the level of the Supreme Court of Canada, will continue to play an important role. The entrenched provisions, containing largely undefined concepts which are sometimes subject expressly to open-ended qualification,[125] will still have to be given specific meaning in particular contexts by the judiciary. Furthermore, s. 1 provides plenty of scope for judicial discretion in the application of the *Charter*. It specifies that 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". If a majority on the Supreme Court of Canada continues to favour judicial restraint, it can either define the rights guaranteed by the *Charter* narrowly or conclude that s. 1 permits considerable infringement of the rights.

Therefore, the fate of the new *Charter* will turn ultimately on the judiciary and the particular philosophy that the judges on the Supreme Court of Canada adopt regarding its provisions. The Court's record in relation to the *Canadian Bill of Rights* suggests that its philosophy will be one of judicial restraint. That attitude may change as new appointees take their places on the Court. Indeed, to some extent, a change in approach could already be discerned in the most recent *Canadian Bill of Rights* cases heard by the Court. In *MacKay* v. *The Queen*,[126] Mr Justice McIntyre indicated a willingness to assess the merits of federal laws in his use of the "valid federal objective" test in order to determine if the "equality before the law" guarantee was violated. A majority of the Court in *R.* v. *Shelley* [127] used the *Canadian Bill of Rights* to interpret a federal law in a way which protected the rights of the accused. The contrast between that case and earlier cases dealing with similar legal rights is striking. If a change in philosophy does, in fact, occur, the Court will have little difficulty in distinguishing the earlier *Canadian Bill of Rights* cases because the reasons in those cases, whatever the underlying rationale, focused simply upon the status of the *Bill* and its wording to justify a narrow construction.

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[125] In the *Canadian Charter of Rights and Freedoms*, Part I of Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.), see, *e.g.*: "*unreasonable* search and seizure" in s. 8; "*arbitrarily* detained or imprisoned" in s. 9; and "*unreasonable* delay" in s. 11 [emphasis added].

[126] *Supra*, note 53. Mr Justice Dickson concurred in the reasons given by Mr Justice McIntyre. The Chief Justice's dissent, Estey J. concurring, illustrates an even greater willingness to examine the wisdom of the legislation. The majority reasons given by Mr Justice Ritchie, with Martland, Pigeon, Beetz, and Chouinard JJ. concurring, continue to exhibit great deference to Parliament's judgment in these matters.

[127] *Supra*, note 6. Laskin C.J.C., with Dickson, Estey and McIntyre JJ. concurring, gave the majority reasons. Ritchie J., with Martland and Chouinard JJ. concurring, dissented.