COMMENTS
CHRONIQUE DE JURISPRUDENCE

Legitimizing Sexnal Ineqnality: Three Early Charter Cases

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The author maintains that the *Canadian Charter of Rights and Freedoms* draws its coherence and legitimacy from nineteenth century liberal ideology. Nowhere is this more apparent than in the early section 15 cases, in which courts have embraced a formal rather than a substantive vision of equality. As a consequence, men have been able to rely upon section 15 to challenge programmes providing special benefits for women. Moreover, those representing women in equality litigation have felt compelled to advance arguments that accept and reinforce liberal assumptions. The result is that the *Charter*, rather than promoting social equality, is more likely to legitimize the prevailing inequality of women and other disadvantaged groups.

Selon l'auteur, la *Charte canadienne des droits et libertés* tire sa légitimité et sa cohérence de l'idéologie du siècle dernier. Les litiges portant sur l'article 15 font particulièrement ressortir ce fait, car les cours visent l'égalité formelle et non substantive. Cela a permis aux hommes d'utiliser l'article 15 pour contester la validité de programmes qui confèrent des avantages aux femmes. De plus, dans les litiges sur l'égalité des sexes, les groupes de femmes se sont vues forcées de soutenir des arguments qui acceptent et même renforcent l'idéologie libérale. Il en résulte que la *Charte*, au lieu de contribuer à l'égalité sociale, servira probablement à légitimer les inégalités existantes, qui défavorisent les femmes et certains autres groupes.

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The purpose of this paper is to build upon a thesis that I have developed elsewhere.[1] That thesis, simply put, is that the *Canadian Charter of Rights and Freedoms*[2] is a regressive instrument whose coherence and legitimacy depend upon the values and assumptions of nineteenth century liberalism. Like other liberal rights documents, the *Charter* equips individuals with a

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[1]See A. Petter, "The Politics of the Charter" (1986) 8 Sup. Ct L.Rev. 473; A. Petter, "Immaculate Deception: The Charter's Hidden Agenda" (1987) 45 The Advocate 857; A.C. Hutchinson & A. Petter, "Private Rights/Public Wrongs: The Liberal Lie of the Charter" (1988) 38 U.T.L.J. 278.

[2]Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

formal set of negative rights enabling them to repel interference by the regulatory and redistributive arms of the state. At the same time, it provides no opportunity for challenging the major source of inequality in our society: unequal distributions of property. On the contrary, such distributions form the base line or "natural foundation" upon which *Charter* rights are grounded and against which the constitutionality of state action is judged.[3]

Nowhere has the liberal character of the *Charter* revealed itself more clearly than in the context of the early equality cases. In virtually all such

[3]The regressive nature of the *Charter* is evidenced by the judicial decisions that it has spawned. Six years of *Charter* litigation have established the following:

* The *Charter* applies to legislative measures that seek to alter or displace common law property entitlements, but does not apply to those entitlements themselves: *Retail, Wholesale and Department Store Union, Local 580* v. *Dolphin Delivery Ltd*, [1986] 2 S.C.R. 573, 33 D.L.R. (4th) 174, [1987] 1 W.W.R. 577, 9 B.C.L.R. (2d) 273, 71 N.R. 83, 38 C.C.L.T. 184.

* The purpose of the *Charter* is to curtail the regulatory and redistributive activities of modern government, not to repair or enhance them: *Hunter, Director of Investigation and Research of the Combines Investigation Branch* v. *Southam Inc.*, [1984] 2 S.C.R. 145, 11 D.L.R. (4th) 641, [1984] 6 W.W.R. 577, 14 C.C.C. (3d) 97 (*sub nom. Hunter* v. *Southam Inc.*), 41 C.R. (3d) 97, 55 N.R. 241, 27 B.L.R. 297 [hereinafter *Hunter* v. *Southam Inc.*].

*Individual rights are primary and principled while collective rights are secondary and political: *Société des Acadiens du Nouveau-Brunswick Inc.* v. *Association of Parents for Fairness in Education, Grand Falls District 50 Branch*, [1986] 1 S.C.R. 549, 69 N.B.R. (2d) 271, 27 D.L.R. (4th) 406, 177 A.P.R. 271, 66 N.R. 173 (*sub nom. Société des Acadiens du Nouveau-Brunswick Inc.* v. *Minority Language School Board Number 50*), *per* Beetz J.(distinguishing between provisions of the *Charter* protecting the rights of minority language groups and those protecting the rights of individuals). See also *Reference Re Public Service Employee Relations Act, Labour Relations Act and Police Officers Collective Bargaining Act*, [1987] 1 S.C.R. 313, 38 D.L.R.(4th) 161, 51 Alta L.R. (2d) 97, 78 A.R. 1, 74 N.R. 99 [hereinafter *Reference Re Public Service Employer Relations Act*], per McIntyre J. (concerning the individualist nature of the *Charter* right to freedom of association).

* Corporations are private persons that may invoke *Charter* rights beyond those enjoyed by their individual shareholders (*Hunter* v. *Southam Inc.*, *supra*), including rights (such as freedom of religion) that have no direct relevance to economic entities: *R.* v. *Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321, 3 W.W.R. 481, 18 C.C.C. (3d) 385, 13 C.R.R. 64, 37 Alta L.R. (2d) 97, 58 N.R. 81 [hereinafter *Big M*].

* Trade unions are statutory entities that may not invoke *Charter* rights beyond those enjoyed by their individual members, not even rights (such as the right to bargain collectively and to strike) that are central to union activities: *Reference Re Public Service Employee Relations Act*, *supra*.

* *Charter* rights to freedom of religion, expression and association and to privacy serve as proxies for protecting economic activities such as store openings [*R.* v. *Big M Drug Mart Ltd.*, *supra*], commercial advertising [*Irwin Toy Ltd.* v. *A.G. Quebec*, 32 D.L.R. (4th) 641, [1986] R.J.Q. 2441, 3 Q.A.C. 285, 26 C.R.R. 193 (C.A.) (leave to appeal to the S.C.C. granted (1986), 2 Q.A.C. 160n, 73 N.R. 400n); *Re Grier and Alberta Optometric Association* (1987), 42 D.L.R. (4th) 327, 53 Alta L.R. (2d) 289 (C.A.); *Royal College of Dental Surgeons (Ontario)* v. *Rocket and Price* (1988), 27 O.A.C. 52 (C.A.)], the formation of business partnerships [*Black* v. *Law Society of Alberta*, 27 D.L.R. (4th) 527, [1986] 3 W.W.R. 590, 44 Alta L.R. (2d) 1, 68 A.R. 259 (*sub nom. Black & Company* v. *Law Society of Alberta*) (C.A.)] and the protection of corporate records from government scrutiny [*Hunter* v. *Southam Inc.*, *supra*].

cases, the shared assumption of judges and most litigators has been that the equality guarantee in section 15 represents a wholly formal right to equal treatment, one that may occasionally take account of, but does not directly address or seek to rectify, real disparities in social condition. For this reason, among others,[4] section 15 litigation has been dominated by established groups and interests to the exclusion, and often to the detriment, of the socially disadvantaged. Consider the following:

* The majority of equality claims have been based upon grounds of discrimination not enumerated in section 15 (such as province of residence), which have little or nothing to do with underlying social disadvantage.[5] The equality seekers in such cases have tended not to be the disadvantaged, but rather professionals, business people and those charged with drunk driving;

* Although the *Charter* right to equality is restricted on its face to "individuals", the Supreme Court of Canada in *R.* v. *Big M* has paved the way for its use by corporations.[6] Indeed corporate access to section 15 has already been permitted by at least one provincial appellate court[7] and confirmed by another;[8]

* Even in cases involving grounds of discrimination enumerated in section 15, equality seekers have tended to represent socially dominant groups or interests. Age discrimination cases, for example, have been dominated by professionals who are opposed to mandatory retirement. The voices of blue collar workers and the unemployed — those who have the most to lose from the abolition of mandatory retirement[9] — have been absent from such cases. Similarly, of the first thirty-five sex discrimination claims brought under the *Charter*,

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[4]Another important reason is the prohibitive cost of *Charter* litigation. Of course, the fact that *Charter* rights, including equality rights, are exercisable only by those who command substantial economic resources is itself a powerful example of the centrality of formal equality to the operation and legitimacy of the Canadian legal system. Everyone formally possesses *Charter* rights, but only the rich can actually make use of them.

[5]See F.L. Morton & M.J. Whithey, *Charting the Charter, 1982-1985: A Statistical Analysis* (Occasional Paper Series, Research Study 2.1, Research Unit for Socio-Legal Studies, University of Calgary, Sept. 1986).

[6]*Supra*, note 3. In *Big M*, the Court held that a corporation did not have to enjoy the right to freedom of religion in order to invoke that right to challenge a law that subjected it to penalties and threatened its economic interests.

[7]*Zutphen Brothers Construction Ltd* v. *Dywidag Systems International, Canada Ltd* (1987), 76 N.S.R. (2d) 398, 35 D.L.R. (4th) 433, 17 C.P.C. (2d) 149 (C.A.); leave to appeal to S.C.C. granted July 29, 1987.

[8]*R.* v. *CLP Canmarket Lifestyle Products Corp.*, [1988] 2 W.W.R. 170, 50 Man. R. (2d) 113 (C.A.).

[9]See A. Hutchinson & A. Petter, "Many Pay for Privilege of Few" (1986) 9 Perception, no. 4, 17 [Canadian Council for Social Development].

> twenty-five — over 70 percent — have been raised by male litigants. Of the eleven cases in which sexual equality claims have succeeded, seven — over 65 per cent — have involved male claimants.[10]

In this paper, I will look beyond these basic observations and statistics, and test my *Charter* thesis in a slightly different way. I intend to examine three early sexual equality cases in which women's organizations *have* had a voice. These cases are significant for two reasons. First, they are among the few in which there has been a concerted and sophisticated effort to mobilize *Charter* rights for progressive ends. Second, women, more than any other disadvantaged group, fought to include within the *Charter* mechanisms to redress long-standing discrimination and social disadvantage. Thus, if there were any hope of liberating *Charter* rights from the shackles of legal liberalism, one would expect to witness it in cases such as these.

Yet, as I shall try to demonstrate, these cases have actually done more to reinforce and legitimize the *Charter*'s liberal precepts than to undermine them. The arguments that have succeeded are arguments that have endorsed a formal vision of equality or have embraced an orthodox liberal dichotomy between public and private realms. Thus, far from challenging the liberal thematic structure that underlies the *Charter*, these cases provide compelling proof of just how powerful and pervasive a structure it is. They show that even those who enter the arena of *Charter* litigation with a conscious desire to resist or undermine that structure inevitably fall prey to its underlying values and assumptions.

I. *Shewchuk* v. *Ricard*

Much has been written by feminist theorists showing how liberalism's adherence to a formal vision of equality (*i.e.*, equality of treatment) serves to perpetuate and legitimize women's substantive inequality (*i.e.*, inequality of condition). Compelling evidence of this process has been provided by a number of section 15 cases in which men have invoked guarantees of sexual equality to attack legislative protections for women. Perhaps the most graphic example is *Phillips* v. *Social Assistance Appeal Board (N.S.)*, a case in which a single father challenged a provision in welfare legislation that provided special benefits to single mothers. Counsel argued that such legislation violated the *Charter* guarantee of sexual equality. The Nova Scotia Supreme Court[11] and the Court of Appeal[12] agreed. However, rather than

[10]These statistics are based upon the author's own survey of section 15 cases to date; similar statistics are reported in other studies (see Morton & Withey, *supra*, note 5).

[11]*Phillips* v. *Social Assistance Appeal Board (N.S.)* (1986), 73 N.S.R. (2d) 415, 27 D.L.R. (4th) 156, 26 C.R.R. 109 (S.C.).

[12]*Phillips* v. *Social Assistance Appeal Board (N.S.)* (1986), 76 N.S.R. (2d) 240 (C.A.) [hereinafter *Phillips*].

extending the benefits to men, they struck the provision down. Formal equality was achieved: equality of nothing.

The spectre of decisions like *Phillips* prompted the Women's Legal Education and Action Fund (LEAF) to intervene in a similar case before the British Columbia Court of Appeal. In *Re Shewchuk and Ricard*,[13] a man challenged legislation permitting affiliation and child support orders against fathers, but not mothers, of illegitimate children. Ricard's lawyer argued that the statute violated section 15 and sought to have it struck down.

It might be thought that LEAF's response to such an argument would be to attack the assumption of formal equality on which it was based. If maleness is a characteristic of demonstrable social advantage, why should the *Charter*'s guarantee of sexual equality be available to males at all? If one's goal is to promote equality of condition, formal differences in legislative treatment should be amenable to *Charter* challenge only if they reinforce or exacerbate real social disadvantage. Thus, from the perspective of those seeking substantive equality, claims alleging discrimination based on "maleness" should command even less attention than claims based on such innocuous characteristics as the colour of one's car or the kind of material used in the manufacture of beer cans.[14]

Yet LEAF decided against this approach. Instead, the LEAF factum voiced unqualified support for the view that all sexual distinctions in legislation should be treated alike:

> Reference to the legislative history of ss. 15(1) and 28 confirms that their purpose is to put into effect strong and positive equality rights between the sexes rendering *prima facie* unconstitutional all distinctions based on sex. Thus all such distinctions should be unconstitutional unless justified according to the rigorous standards whether under s. 1 or otherwise.[15]

What prompted LEAF to embrace this formal vision of equality? Certainly it was not oversight or *naïveté*. The reason, it seems, is that the litigators representing LEAF felt that it would weaken their credibility to argue that sexual equality rights should not be available to males. Since

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[13]28 D.L.R. (4th) 429, [1986] 4 W.W.R. 289, 2 B.C.L.R. (2d) 324, 1 R.F.L. (3d) 337 [hereinafter *Shewchuk*].

[14]See *Re Aluminum Company of Canada Ltd and Ontario (Ministry of Environment)* (1986), 55 O.R. (2d) 522, 29 D.L.R. (4th) 583, 19 Admin. L.R. 192 (Div. Ct.). Of course, a substantive interpretation of section 15 would not preclude a man from invoking another ground of discrimination that pertains to some real social disadvantage on his part. It would, however, prevent him from using the guarantee of sexual equality as a proxy for that other ground. Besides, in this instance, there was no evidence that Ricard was in any way socially disadvantaged.

[15]Paragraph 19. The factum was submitted jointly on behalf of the West Coast LEAF Association and a number of other intervenors in the case, including the Vancouver Status of Women and the Federated Anti-Poverty Groups of B.C.

such an argument was bound to fail, they were better off conceding the point and devoting their energies to the question of remedies. This they did, arguing that in male equality cases the appropriate remedy was not to strike down benefits for women (as was done in *Phillips*), but rather to extend benefits to men.[16]

In other words, there were sound strategic reasons for LEAF to adopt the position it did. But that, of course, is precisely the point. In the *Charter* scheme of things, arguments that challenge liberal assumptions concerning the formal nature of equality rights are likely to be viewed as marginal or perverse. Moreover, the availability of alternative approaches to formal equality rights, some of which will be less damaging to women's interests than others, provides a strong inducement to groups such as LEAF to play the *Charter* game on its own terms—even if doing so legitimizes a view of equality that disregards women's real social disadvantage and supports the ability of men to claim an even greater share of scarce social resources. Indeed, it is a telling irony that one of LEAF's major initiatives in its first few years of operation has been to argue in favour of better legislative protections for men, for fear of losing the inadequate protections currently enjoyed exclusively by women.[17]

II. *Re Blainey and Ontario Hockey Association*

One of the dangers identified by critics of formal equality rights is that such rights, in addition to benefiting men at the expense of women, could serve to benefit extraordinary or elite women at the expense of ordinary women. The danger is a real one. While the guarantee of "equal treatment" serves to entrench the subordination of the majority of women who languish at the bottom of the social ladder, it promises tangible benefits for those few women who have ascended to higher rungs.

Under the *Charter*, this danger is exacerbated by two variables. The first is that the formal claims of extraordinary or elite women are much easier to litigate and more likely to attract judicial sympathy than the sub-

[16]Ironically, the Court of Appeal rejected Ricard's claim. Two judges held that the legislation, when read in light of other statutory provisions, could be justified under section 1 of the *Charter*. A third held that the scheme could be upheld under section 15(2) as an affirmative action program.

[17]It is worth noting, however, that LEAF has recently modified the position that it adopted in *Shewchuk*, *supra*, note 13. In *Andrews* v. *Law Society of British Columbia*, 27 D.L.R. (4th) 600, [1986] 4 W.W.R. 242, 2 B.C.L.R. (2d) 305 (B.C.C.A.) (affirmed, February 2, 1989 (S.C.C.)), LEAF argued before the Supreme Court of Canada that the Court should adopt a definition of equality that was responsive to the substantive inequality of women and other disadvantaged groups. At the same time, the LEAF factum fell short of denying altogether the legitimacy of male sexual equality claims.

stantive claims of most women. This makes it tempting for women's rights activists to seize upon such claims, assuming them to be opportunities for advancing the interests of women generally. The legal system restricts those representing *Charter* litigants in court to persons who, by virtue of their training and professional status, occupy a privileged position within society. Thus, there may be a proclivity on the part of those arguing equality cases on behalf of women to identify with the claims of extraordinary or elite women, and to discount the possibility that such claims might actually be detrimental to the majority of women.

These variables appear to have been at work in *Re Blainey and Ontario Hockey Association*.[18] In that case, Justine Blainey, a twelve year old girl, wished to play hockey in a league that was restricted to boys by a regulation of the Ontario Hockey Association. Evidence led by the Association suggested that most girls twelve years and older would have difficulty competing successfully in a boys hockey league.[19] Blainey, however, was an exceptional athlete. The evidence showed that she would have qualified for the league were it not for the regulation prohibiting girls from competing.

LEAF brought a *Charter* claim on behalf of Blainey, arguing that the "boys only" regulation, and the provision of the Ontario *Human Rights Code, 1981*[20] that permitted it, violated Blainey's right to sexual equality under section 15 of the *Charter*. The argument was based largely upon the principle of formal equality and, not surprisingly, it succeeded (at least with respect to the attack on the *Human Rights Code, 1981*).

Yet what was the impact of this ruling? While it may have benefited a few extraordinary female athletes, the ruling did nothing to address the underlying, substantive inequalities experienced by a majority of female athletes—inequalities that stem from lack of funding, training and equipment (not to mention more deeply rooted social and political causes of sexual subordination). More importantly, by endorsing a formal vision of sexual equality, the decision in *Blainey* may actually have served to reinforce and legitimize the substantive inequality experienced by the majority of women athletes and of women generally. As Kathleen Lahey has remarked, judicial adherence to a formal concept of equality makes it "virtually impossible to argue that the Charter is designed to eliminate the social, eco-

[18](1986), 26 D.L.R. (4th) 728, 54 O.R. (2d) 513, 14 O.A.C. 194 (C.A.) [hereinafter *Blainey*]; leave to appeal to S.C.C. refused, 10 C.P.R. (3d) 450n.

[19]The extent to which this is due to physiological differences between males and females or to lack of training and other sociological factors is a contentious issue that is beyond the scope of this paper.

[20]S.O. 1981, c. 53.

nomic or legal causes of actual inequality".[21] At the same time, she observes, "[e]ach and every victory for women on this basis makes it easier for men to win equality claims than it is for women."[22]

III. *Re Tomen and F.W.T.A.O.*

The authenticity of these concerns was driven home in *Re Tomen and Federation of Women Teachers' Associations of Ontario*.[23] In *Tomen*, the arguments that LEAF had successfully put forward in *Blainey* were appropriated by the Ontario Public School Teachers Federation (OPSTF), an organization dominated by males, to front an attack by Margaret Tomen, a woman principal, against the Federation of Women Teachers Associations of Ontario (FWTAO).

FWTAO had fought long and hard on behalf of the interests of women teachers and, in doing so, had become quite a thorn in the side of the male organization. As part of an ongoing campaign to weaken the women's federation, OPSTF challenged a regulation of the Ontario Teacher's Federation requiring Tomen and all other women teaching in public schools at the elementary level to belong to FWTAO. The regulation was key to preserving the strength of FWTAO, yet OPSTF argued that it discriminated against Tomen on the basis of sex and therefore violated section 15 of the *Charter*.[24]

What is especially significant about the case are the parallels between the argument that OPSTF put forward on behalf of Tomen and the argument that LEAF had put forward on behalf of Blainey. Just as LEAF had argued that it was a denial of sexual equality to forbid Blainey access to the boys' hockey league on the basis of her sex, OPSTF argued that it was a denial of sexual equality to compel Tomen to belong to the women teachers' federation on the basis of her sex. Just as Blainey, an extraordinary athlete, felt that it was discriminatory to compel her to compete in a girls' league which was underfunded and did not cater to persons of her ability, Tomen, a principal, thought that it was discriminatory to force her to belong to a women's organization whose primary concern was the plight of ordinary women teachers.

These parallels were hardly coincidental. OPSTF drew heavily on *Blainey* to bolster its case. Moreover the same lawyer who represented OPSTF in *Tomen* had in *Blainey* represented the Canadian Association for Ad-

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[21]K.A. Lahey, "Feminist Theories of Equality" in K.E. Mahoney & S. Martin, eds, *Equality and Judicial Neutrality* (Toronto: Carswell, 1987) 71 at 82.

[22]*Ibid.*

[23](1987), 61 O.R. (2d) 489, 43 D.L.R. (4th) 255 (H.C.) [hereinafter *Tomen*].

[24]For a summary of the factual background to the case, see M. Lansberg, "The Charter: herald of fairness or weapon against women?", *Globe and Mail* (30 May 1987) A2.

vancement of Women and Sport, an intervenor supporting LEAF's position in that case.

Thus, while the lawyers representing FWTAO struggled to persuade the court that recognition of Tomen's formal equality rights would weaken the majority of women teachers' hopes of attaining substantive equality, the arguments that LEAF had put forward and the court had adopted in *Blainey* stood in their way. Of course, it is true that these same arguments would have been advanced in *Tomen* with or without the earlier case. At the same time, there can be no doubt that the *Blainey* decision substantially enhanced their credibility and legitimacy.

As a consequence, the lawyers for FWTAO felt compelled to seek a more secure line of defence. Fearing that they would lose the equality argument, they took the position that section 15 of the *Charter* did not apply to the by-law in question because the Ontario Teacher's Federation, although regulated by statute, was a private rather than a governmental agency. This position was accepted by the judge at trial and now forms FWTAO's main argument before the Court of Appeal.

The irony of a woman's group invoking the public/private distinction to prevent application of the *Charter* is almost too obvious to require comment. However, three brief observations are in order. First, the position is one that is completely at odds with LEAF's argument in *Blainey* that the *Charter* ought to apply to the Ontario Hockey Association. Second, it is a position that seeks to prevent the application of the *Charter* to all nongovernmental agencies, even those extensively regulated by government; yet, it is these agencies that proponents of women's rights have traditionally maintained are most in need of *Charter* scrutiny. Third, it is a position that embraces the greatest liberal myth of all: the belief in a natural separation between public and private spheres of activity—a myth that has consistently been attacked by both feminist and critical theorists as being a means for perpetuating patriarchy and reinforcing "private" power at the expense of "public" good.[25]

IV. Conclusion

What are we to make of these three cases? When combined with the observations and statistics offered at the beginning of this paper, I suggest that they provide compelling evidence of the strength of liberal ideology that underlies the *Charter*. More particularly, they show that attempts by

[25]For a discussion of the feminist literature on point, see H. Lessard, "The Idea of the 'Private': A Discussion of State Action and Separate Sphere Ideology" (1986) 10 Dalhousie L.J., no. 2, 107 at 120. See also A. Hutchinson & A. Petter, "Private Rights/Public Wrongs: The Liberal Lie of the Charter", *supra*, note 1.

disadvantaged groups to reshape the *Charter* in some other ideological image are destined to fail. In the world of *Charter* litigation, such groups are permitted to succeed only if they play the game according to liberal rules—rules that are calculated to create divisions between elite and ordinary women and to translate short-term gains into long-term losses. As we have seen, even when women's groups win under section 15, they lose. For every step that women take forward, they are subsequently required to take two backward.

This does not mean that it is never worthwhile for women and other disadvantaged groups to engage in *Charter* litigation. Appropriate interventions by these groups may help limit the damage that unbridled liberal rights might otherwise inflict. In addition, there may be cases in which the forces of liberalism can be harnessed to a beneficial end.[26] Such cases, however, will be exceptional. For the most part, the *Charter* will serve to channel and neutralize discontent, thereby reinforcing and legitimizing the existing social order.

In sum, if Marx was right in characterizing religion as the opium of the people in the last century, then the *Charter of Rights and Freedoms* may yet qualify as the cocaine of Canadians in the next. From "high" priests to "high" courts. With religious worship in decline, the advent of the *Charter* may have come not a moment too soon.

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[26]An obvious example is *R.* v. *Morgentaler*, [1988] 1 S.C.R. 30, 44 D.L.R. (4th) 385 [hereinafter *Morgentaler*] in which the Supreme Court of Canada struck down criminal restrictions on abortion. Yet *Morgentaler* also illustrates the limits of liberal rights theory. In striking down government-imposed barriers to abortion services, the majority strongly endorsed a negative conception of liberty (*i.e.*, one that equates liberty with an absence of governmental interference). While this conception worked to the advantage of women in *Morgentaler*, it will have the opposite effect in future cases. In particular, it will serve to undermine arguments that seek to impose positive obligations on governments to enhance women's liberty. With respect to abortion services, for example, the decision cuts against claims that governments have a positive obligation to ensure that such services are actually provided and to guarantee women access to them.