The Impact of an Entrenched Bill of Rights: The Canadian Experience*

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INTRODUCTION

On the 17th April 1982, amidst great pomp and ceremony, Queen Elizabeth II made a historic trip to Canada to officially proclaim in force the *Constitution Act* 1982.[1] That event marked the culmination of over 50 years of constitutional wrangling. The political intrigue and closed-door manoeuvring that led up to the enactment of the *Constitution Act* 1982 make for a fascinating study.[2] But it is not the purpose of this article to recount and unravel that interesting story. Instead, I will attempt to analyze the impact of the *Constitution Act* 1982 on the Canadian legal system, and by analogy, the impact that similar constitutional changes, i.e., the enactment of an entrenched bill of rights, might have on the Australian legal system.

The 1982 changes to the Canadian constitution, especially the entrenchment of a charter of rights, have had immense impact on the legal system, an impact neither predicted nore expected by most commentators. The volume of litigation has been immense, threatening to overwhelm court dockets in some jurisdictions and putting great stress on the judiciary. Further, greater resort is now made to the jurisprudence of non-Canadian jurisdictions, increasing the research requirements of *Charter* lawyers and stimulating the creativity of judges. Some would say that this creativity borders on overpoliticization of the judiciary; at the very least, there has been a shift in the policy formulation balance as between the courts and the legislatures.

In specific terms, the new constitutional provisions have left few areas of substantive law untouched. As might be expected, criminal law has been a fertile area, with attacks being made on police powers and procedures, pretrial and trial procedure, and sentencing provisions. But cases have also dealt with such varied issues as mandatory Sunday store closing, prayer in schools, the practice of witchcraft, the right of lawyers and other professionals to advertise, the right of unions to picket and strike, corporate rights and freedoms, and the constitutional validity of 'male only' sports teams and 'female only' social benefits.

In this article, I will examine the impact that an entrenched bill of rights has

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[1] The *Constitution Act* 1982 is actually a schedule to a short statute called the *Canada Act* 1982 (UK), 1982 c 11. See P Hogg, *Canada Act 1982 Annotated* (Toronto, Carswell, 1982).

[2] See, eg, E McWhinney, *Canada and the Constitution 1979–1982* (Toronto, University of Toronto Press, 1982).

had on the Canadian legal system in general, as well as its impact on a number of specific areas of law. I will also point to a number of the criticisms which have been levelled at Canada's entrenched *Charter of Rights and Freedoms.*

ENACTMENT OF THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

The *Constitution Act* 1982 achieved two major objectives. First, it represents 'the symbolic step of cutting the last vestigial constitutional link with Britain.'[3] Although Canada had, as a practical matter, ensured its full juridical sovereignty and independence with the *Statute of Westminister* 1931,[4] one vestige of British control remained. The Canadian Constitution, commencing with the *British North America Act* 1867,[5] did not contain any procedures for the amendment of the Constitution in Canada. Legally, the power to amend the Canadian Constitution still resided with the British Parliament, although that Parliament would, of course, only act at the request of and with the consent of the government of Canada. The *Constitution Act* 1982 provided Canada with its own constitutional amendment powers.[6] The British Parliament's power to amend the Canadian Constitution was expressly terminated.[7] Thus the constitutional amendments of 1982 achieved the symbolically important goal of patriating the Canadian Constitution.

The second achievement of the *Constitution Act* 1982 was the entrenchment of the *Canadian Charter of Rights and Freedoms*[8] in the Canadian Constitution. The *Charter* is a sweeping document. Its provisions apply to all legislative and executive activities, at both the federal and the provincial level, and to the activities of any body or person exercising statutory authority, such as a municipality, a law society, a university or any public official.[9]

Section 52 of the *Constitution Act* 1982 declares that the Constitution, and therefore the *Charter,* is the supreme law of Canada and any law that is inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect.

It is neither idle puffery nor extravagant hyperbole to claim that the *Canadian Charter of Rights and Freedoms* is the most significant legal development in Canada since Confederation. It has ushered in a new era of law in

[3] Id 100.
[4] 22 Geo. V c 4 (UK); ibid at x; Hogg, op cit 5–7.
[5] 30 & 31 Vict c 3 (UK), since renamed *Constitution Act* 1867 by virtue of the Schedule to the *Constitution Act* 1982 Item 1.
[6] The Constitution can be amended by resolutions of both Houses of Parliament and resolutions of legislative assemblies of at least two-thirds of the provinces which represent at least 50 per cent of the population of all the provinces. See *Constitution Act* 1982 ss 38–49.
[7] *Canada Act* 1982, s 2.
[8] Part I of the *Constitution Act* 1982 [hereinafter *Charter*]. The *Charter,* comprising ss 1–34 of the Act, was proclaimed in force April 17, 1982.
[9] Ibid s 32; Hogg, supra note 1 at 75–8.

Canada. Like an exploding bomb dropped in the middle of the Canadian legal system, it has destroyed a few laws, shaken up a host of other laws and generated an immense amount of activity and at least some anxiety.

The most significant aspect of the *Charter* is the fact that it constitutes a realignment of the balance of power between the legislature and the judiciary. Parliament and the provincial legislatures have reduced their powers and placed new powers — in essence political powers — in the hands of judges.[10] The *Charter* clearly changes the role of the judiciary. No longer can courts hide behind the doctrine of legislative supremacy. The *Charter* now requires courts to be the arbiter as to whether Parliament or the state can lawfully pursue a broad range of legislative and social policies.

It is true that Parliament has retained part of its legislative sovereignty by including an express opt-out or override provision in section 33 of the *Charter*. In other words, Parliament or a legislative assembly may enact a law which expressly declares that the law operates notwithstanding a potential violation of the Charter.

However, the section 33 override power is limited. First, it can be used to override the fundamental freedoms in section 2 and the legal rights in sections 7 to 15, but cannot be used to override the democratic rights (ss 3–5), the mobility rights (s 6), the language rights (ss 16–23), the aboriginal rights (s 25), the multicultural rights (s 27) and the gender equality rights (s 28) in the *Charter*. Second, if the override is invoked in a statute, the override ceases to have effect after five years, unless it is expressly re-enacted every five years. Third, the use of the override is also limited as a practical political matter. Politicians will generally be reluctant to use it since they must expressly admit that their proposed legislation is in violation of the fundamental rights and freedoms, and not many politicians want to make such a statement. Apart from Quebec which still protests that the *Charter* and other constitutional changes of 1982 occurred without its consent, the override has not been used at all by the federal government and only once by a provincial government. Thus in both legal and practical terms, the judiciary has been given new and substantial powers.

In commenting on the new role the judiciary must play under an entrenched bill or charter of rights, Chief Justice Dickson of the Supreme Court of Canada noted that this new role was not requested by the judiciary but rather was thrust upon it by parliamentarians; that this new role places responsibility upon Canadian courts for the elucidation and resolution of some of the values most fundamental to the Canadian way of life; and that Canadian courts have accepted their new responsibilities and the vital role which they now play and will continue to play in determining the kind of society Canada is and will become.[11]

[10] See, eg, BL Strayer, 'Life under the Canadian Charter: Adjusting the Balance Between Legislatures and the Courts' [1988] *Public Law* 347. PH Russell, 'The Paradox of Judicial Power' (1987) 12 *Queen's LJ* 421.

[11] Speech of Chief Justice Dickson to the Mid-Winter Meeting of the Canadian Bar Association, Edmonton, February 2, 1985. See 'Court Needs Help in Charter Cases, Chief Justice says' *[Toronto] Globe and Mail* [February 4, 1989] 1; 'Charter Cases Challenge to

It is at first glance startling that politicians actually agreed to give up some of their parliamentary sovereignty, to limit their legislative and social policy making powers. It is probable that many politicians simply did not appreciate the potential breadth and scope of this transfer of power. For example, Roy Romanow, who was then the Attorney-General of Saskatchewan and a key player in the federal-provincial negotiations leading up to the enactment of the *Canadian Charter of Rights and Freedoms,* stated:

> What we did not fully realize was exactly how widespread that phenomenon of transfer of authority was actually going to be . . . What we did not foresee was the extent to which the basic rules of society for resolution of a broad range of social, economic and political issues were going to be fundamentally affected by the Charter.[12]

Those who may have opposed an entrenched charter of rights as a fetter on parliamentary sovereignty found that it was not politically feasible to resist a quite spontaneous and strong public demand by Canadians to guarantee fundamental rights. This strong, spontaneous public demand for a constitutional guarantee of fundamental rights arose out of certain political negotiations between the Prime Minister and the Premiers concerning the treatment of women's rights and aboriginal rights under the Constitution. Those events have been described elsewhere.[13]

In promoting the idea of an entrenched charter of rights and freedoms, the federal government was virtually silent on the new and increased role which the judiciary would assume under the *Charter.* Instead, the federal government promoted the *Charter* on the grounds that it was part of the symbolically important act of patriation of the Canadian Constitution and an important step toward national unity (especially by guaranteeing linguistic and cultural rights to French-speaking Canadians). And because the federal government did not want to acknowledge that the *Charter* might have a significant impact on existing laws and the existing legal system, there was virtually no preparation or planning for the systemic impact that an onslaught of *Charter* cases would have on the legal system.

ENTRENCHMENT IN AUSTRALIA

Whether it is a good or a bad idea to entrench a bill of rights in a constitution is a matter of considerable controversy. It is a question which has been actively debated in England since the mid-1970's. Nor is this debate unfamiliar to Australians. In 1985, the Australian government established a Constitutional

Courts, Dickson Says' *Winnipeg Free Press* [February 4, 1985] 1, 4. See also M Fitz-James, 'Justice Dickson Casts New Light on Parliamentary Supremacy Doctrine' *Lawyers Weekly* [July 26, 1985] 1, 12.

[12] See R Romanow, 'The Charter's Impact on Education, Policy and Parliament' in A Nicholls and T Wuester, eds, *Education and the Charter of Rights and Freedoms* (Vancouver, EduServ, 1986) at 10.

[13] McWhinney, supra note 2 at 102–14. See also P Russell, 'The Political Purposes of the Canadian Charter of Rights and Freedoms' (1983) 61 *Can Bar Rev* 30.

Commission and five Advisory Committees to examine several major constitutional issues. One of the issues which the Commission was asked to inquire into was whether the Constitution should be revised to ensure that democratic rights were guaranteed.[14] The Commission's Advisory Committee on Individual and Democratic Rights concluded that the few existing references to individual rights in the Australian Constitution were inadequate,[15] that Australia and New Zealand were the only parliamentary democracies left in which there were almost no constitutional limitations on excesses of power by governments over the functioning of individuals in society,[16] and that since unrestrained government is a threat to the well-being of society, this gap in the Australian Constitution should be remedied by including a guarantee of fundamental rights and freedoms in the Constitution itself.[17]

In 1988, in its Final Report, the Constitutional Commission recommended amongst other things:

[14] The terms of reference of the Advisory Committee on Individual and Democratic Rights (which were set by the Commission in consultation with the Committee) were as follows:

(1) What is the best way to ensure and advance the individual and democratic rights of the Australian people as citizens and as a society within the legislative, executive and judicial structure of Australian government?
(2) Should the Constitution spell out guarantees of individual and democratic rights?
(3) Are the guarantees already provided in the existing Constitution adequate for Australians today?
(4) Are we already sufficiently protected by existing laws and traditions, apart from the Constitution?
(5) If any Constitutional guarantees are desirable, which ones should be included, what form should they take, who should be bound by them and who would enforce them?

See *First Report of the Constitutional Commission*, Vol. II, at 685–6 (1988).

[15] The existing rights in the Constitution include a limitation on federal expropriation of property without just compensation (s 51), a guarantee of trial by jury for the trial on indictment of federal offences (s 80), a freedom of religion clause (s 116), and a guarantee of no discrimination against out-of-state residents (s 117). The first three rights are binding on the Commonwealth but not on the States; and the present guarantee of trial by jury for federal offences is ineffective and illusory. See *Australia's Constitution: Time to Update (Summary of the Reports of the Advisory Committees to the Constitutional Commission, 1987)* at 18.

[16] Id 15. The United Kingdom is now subject to the European Convention for the Protection of Human Rights and Fundamental Freedoms, although it is not part of the domestic law of the United Kingdom. In the 1960s New Zealand discussed and ultimately rejected the enactment of a bill of rights, principally on the ground that it would create too much uncertainty in the law and that any specific problems concerning individual rights were better dealt with by specific legislation on the subject matter in question. See JL Robson, *Sacred Cows and Rogue Elephants* (Wellington, NZ: Gov't Printing Office, 1987) at 236–40. Although New Zealand enacted a bill of rights in 1990, it is only an ordinary statute, neither entrenched nor supreme; see PT Rishworth, 'The Potential of the New Zealand Bill of Rights' [1990] NZLJ 68.

[17] The Advisory Committee does not refer to these constitutionally guaranteed rights as a 'Bill of Rights'. The Committee believed that a 'Bill of Rights' listing 'inalienable rights', though found in many countries and strongly favoured by many in Australia, does not readily fit within the Australian constitutional tradition. The Australian approach has been to limit the power of Governments rather than to proclaim the rights of citizens in abstract terms. The Committee therefore recommends the latter approach, not the former.'

(1) an extension and clarification of the rights and freedoms already protected under the Constitution;[18] and
(2) the insertion in the Constitution of a 'comprehensive statement of constitutionally protected rights and freedoms in a new chapter VIA.'[19]

The Commission's 'comprehensive statement of constitutionally protected rights and freedoms' was modelled in large part on the *Canadian Charter of Rights and Freedoms.*[20].

On Referendum Day, September 3, 1988, the Australian people were asked to vote on the Commission's first recommendation, that is, the extension of three rights already protected under the Constitution, namely the right to trial by jury, freedom of religion and no expropriation of property by government without just compensation. With a well-orchestrated (but largely inaccurate) lobby against the extension of these rights,[21] the Australian people rejected the proposed extension. The defeat had little to do with the merits of extending rights and everything to do with politics.[22] The Commission's second proposal for entrenching a new and comprehensive statement of rights and freedoms in the Constitution was not included in the 1988 referendum. At the moment, it remains politically dormant. But the debate on the proposal to entrench a bill of rights in the Constitution will no doubt arise once again in Australia, perhaps in response to some startling legal or political crisis or scandal.

The debate over whether Australia ought to have a bill of rights has also been conducted in legislative assemblies. For example, in 1985, the Commonwealth Parliament considered the enactment of a statutory bill of rights which would give effect at the federal level to the International Covenant on Civil and Political Rights (1976); to which Australia is a signatory. And in 1986, a legal and constitutional committee of the Victoria Legislature considered whether a bill of rights should be enacted for the State of Victoria.[23] In neither case did a bill of rights eventually come to fruition.

In the continuing debate in both England and Australia on the question of whether each country should enact an entrenched bill of rights, strong argu-

[18] *Final Report of the Constitutional Commission: Summary* (1988) at 34–9.

[19] Id 39. Although referred to as a 'comprehensive statement' of rights and freedoms, elsewhere the Commission acknowledges that

> 'we have deliberately omitted from the recommended guarantees rights and freedoms which, in our judgment, are likely to be controversial or whose aptness for constitutional protection is a matter on which there are likely to be sharp differences of opinion. It is largely for these reasons that we have not included an open-ended guarantee of a right to life or a right to hold and freely dispose of property, a right to freedom of contract, a general right to privacy or family rights.' Id 43.

[20] The new rights and freedoms are set out in *Bill No 17* which is reproduced in the *Final Report of the Constitutional Commission.*

[21] See, eg, the arguments against extending these rights as set out in the pamphlet *Yes or No? Referendums, Saturday 3 September, 1988* at 25–6.

[22] See, eg, J Goldsworthy and HP Lee, 'Constitutional Law' [1988] *Annual Survey of Constitutional Law* 1 at 11–12; E Campbell, 'Changing the Constitution — Past and Future' (1989) 17 *MULR* 1.

[23] See, eg *A Bill of Rights for Victoria? Some Issues* (Legal and Constitutional Committee, Discussion Paper No 1, 1986); P Bailey, *Human Rights: Australia in an International Context* (1990).

ments have been put forward both in favour of and against such a proposal. My purpose is not to analyse those arguments; that task has been done by several before me.[24] However, one way to examine the possible impact of an entrenched bill of rights on the Australian legal system is to study the impact that the *Canadian Charter* has had on the Canadian legal system. The Canadian experience is particularly relevant since the Australian Constitutional Commission's proposed statement of fundamental rights is very similar to provisions in the *Canadian Charter of Rights and Freedoms.*

In fact, the Australian Commission's proposals are nearly identical to provisions in the *Canadian Charter,* subject to four significant exceptions:

(1) the Australian Commission decided not to include a right to life, liberty and security of the person which appears in the *Canadian Charter*;
(2) the Commission proposed a narrower equality rights clause than in the *Canadian Charter*;
(3) the Commission did not provide for a specific exclusionary rule as exists in the *Canadian Charter* for evidence obtained in violation of constitutional rights; and
(4) the Commission by a three to two majority, also excluded an override clause.

Since the laws and legal systems of Australia and Canada are very much alike in many respects, the Australian Constitutional Commission's proposals could well have a somewhat similar impact on the Australian legal system as the *Canadian Charter* has had on the Canadian legal system.

IMPACT OF THE CANADIAN CHARTER

There are very few areas of human endeavour which the government does not attempt to regulate. Since the provisions of the *Charter* apply to all legislative and government activity, the potential impact of the *Charter* is sweeping; most lawyers, judges, academics and politicians vastly underestimated the possible breadth and scope of the *Charter.* In this section, I will comment first on the *Charter*'s general impact on the legal system and then on its impact on some particular areas of the law.

General Impact

Virtually every public law of Canada is open to challenge under some provision of the *Charter.* Since 1982, there have been more than 4,000 reported *Charter* cases, over 100 of which are decisions of the Supreme Court of Canada; and, of course, there is a vast but unknown number of unreported

[24] See, eg, ibid; M Zander, *A Bill of Rights?* (3d ed, London, Sweet & Maxwell, 1985); R Macdonald, 'Postscript and Prelude — The Jurisprudence of the Charter — Eight Theses' (1982) 4 *Sup Ct L Rev* 321; WJ Brennan, 'Why have a Bill of Rights?', (1989) 9 *Oxford Journal of Legal Studies* 425.

Charter cases.[25] This sheer volume was unexpected. By contrast, the European Court of Human Rights has only delivered about 100 reported judgments in 20 years under the European Convention for the Protection of Human Rights and Fundamental Freedoms; many claims are of course weeded out in advance by the European Commission of Human Rights.

In addition to the dramatic rise in the number of cases initiated as a consequence of the *Charter,* the *Charter* has brought a new complexity to legal arguments and generally slowed down the whole process of legal proceedings. The great increase in the use of *Charter* arguments and the corresponding judicial time which is required to dispose of those arguments both orally and in writing has been a significant factor in the huge backlog which currently plagues Canadian courts.

Ironically, though the *Charter* may be one cause of the backlog, the *Charter* right in section 11(b) 'to be tried within a reasonable time' has been successfully used in a number of cases to prevent the Crown from continuing a criminal prosecution against an accused due to an unreasonable delay in bringing the case to trial.[26] In six judicial districts in Ontario alone, 282 prosecutions were stayed under this *Charter* provision in 1988.[27]

It is not only at the trial level where the backlog and delay is being felt. The time which the Supreme Court of Canada takes to issue a judgment after oral arguments are completed doubled in the first three years after the enactment of the *Charter.* In 1980 and 1981, the average time was four months, while in 1984 and 1985 the average time was eight months, and by 1986 the average time had ballooned to over ten months. In 1980 and 1981 combined, only two judgments took more than 12 months to deliver, while in 1984 and 1985 combined, 33 judgments took 12 months or more to be delivered.[28] However, in the past three years the Supreme Court has made heroic efforts to reduce these lag times.[29] The overall increase in judicial time for judgment rendering

[25] See FL Morton & WJ Withey, 'Charting the Charter, 1982–85: A Statistical Analysis' (1987) 4 *Can Hum Rts YB* 65 [hereinafter 'Charting the Charter']. Professor Morton updated this research in a paper presented at the annual meeting of the Canadian Political Science Association, Quebec City, May 1989; see his related article 'Federal Character of Canada Being Eroded by Charter Rulings' *Financial Post* [June 3, 1989] 14. The most recent statistical analysis was prepared by Professors Morton, Withey and PH Russell and presented in a paper, 'The Supreme Court's First 100 Charter of Rights Decisions: A Quantitative Analysis,' at the annual meeting of the Canadian Political Science Association, Victoria, BC, May 27–29, 1990 [hereinafter 'Supreme Court's First 100 Charter Decisions'].

[26] For an analysis of the conflicting case law which has attempted to interpret and apply this right, see J Levesque, 'Trial Within a Reasonable Time' (1988–89) 31 *Crim LQ* 55. Section 124L(1) (e) of the Australian Commission's constitutional proposals provides for a right 'to be tried without delay'.

[27] JD Murphy, 'Response to Court Delays: A Canadian Practitioner's Perspective' paper presented at 11th Law Asia Conference, Hong Kong, September 16–21, 1989, citing a report by the Chief Justice of Ontario, (1989) 23 *Law Soc of Upper Can Gaz* 4 at 5.

[28] C Baar & E Baar, 'Diagnostic Adjudiciation in Appellate Courts: The Supreme Court of Canada and the Charter of Rights' (1989) 27 *Osgoode Hall LJ* 1 at 10–2.

[29] See, eg, 'Supreme Court's First 100 Charter Decisions' supra note 25 at 3. The most recent average elapsed times (in months) between the hearing of appeals and delivery of judgments are as follows (source: letter to the author, June 5, 1990, from Robert J Sharpe, Executive Legal Officer, Supreme Court of Canada):

1986–87 10.2

reflects the fact that the Supreme Court is being thoughtful and cautious in its interpretation of a very general document wherein each judgment could have implications reaching far beyond the facts of the individual case before the Court.

The *Charter* of course has not simply affected the work of judges; it has also had a dramatic and, for many lawyers, a very stimulating effect on their work. The enactment of the *Charter* has provided lawyers with a sumptuous smorgasbord of new arguments. One effect, of course, is that a lawyer's research and trial preparation time has increased, which ultimately raises the cost of litigation. The increase in research time is understandable when one considers the volume of *Charter* materials and the nature of *Charter* litigation.

As mentioned earlier, there are over 4,000 reported *Charter* cases to date, and this number is expanding by 500 to 1,000 every year. Depending on the *Charter* provision in dispute, a lawyer may have to sort through and deal with a very large number of cases when preparing a *Charter* argument. The Supreme Court of Canada has delivered over 100 *Charter* decisions in the last five years, and since many of these judgments lay down general principles for interpreting the *Charter,* a well-prepared lawyer must be fluent with many of these Supreme Court judgments.[30]

In addition to case law, a large volume of literature has been written by practitioners and academics analysing the *Charter.* Overwhelming is perhaps a better word. Since its enactment, there have been between 70 and 120 articles annually on various aspects of the *Charter,* with no let-up in sight.[31] In addition to the annual onslaught of law journal articles, there are now about 120 books and collections of essays which focus on the *Charter.* Even the most selective and discriminating practitioner can spend a good deal of time culling through the available *Charter* literature.

Research efforts in *Charter* litigation are not necessarily confined to Canadian sources. Since provisions in the *Canadian Charter* are similar in part to provisions in the United States Bill of Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms and the International Covenant on Civil and Political Rights, resorting to the interpretation of those documents can provide a valuable guide in interpreting the *Charter.*[32] In addition, section 1 of the *Charter* directs courts to consider

1987–88 5.77
1988–89 8.25
1989–90 4.63 (as of June 1, 1990).

[30] Supra note 25.

[31] The *Index to Canadian Periodical Literature* lists the following number of articles annually under the heading 'Canadian Charter of Rights and Freedoms' (including case comments):
1983 109
1984 77
1985 90
1986 102
1987 101
1988 117
1989 108 (January to September only).

[32] See B Hovius, 'The Limitation Clauses of the European Convention on Human Rights: A Guide for the Application of Section 1 of the Charter' (1985) 17 *Ottawa L Rev* 2 13; J

whether any limitation to *Charter* rights is reasonable by reference to whether such limits 'can be demonstrably justified in a free and democratic society.' This clause invites counsel and the court to consider whether other free and democratic countries have any or similar limitations on such rights. The *Charter* has thus spawned a need for increased comparative research.

Prior to the enactment of the *Charter* in 1982, Canadian lawyers and judges rarely considered U.S. case law. That has changed dramatically. Lawyers and judges now frequently consider U.S. case law in light of that country's long experience in interpreting an entrenched bill of rights. Although the Supreme Court of Canada has been careful not to be overwhelmed with U.S. jurisprudence, or to blindly follow it, it is still fair to say that U.S. jurisprudence has exerted a significant influence on the interpretation of the *Canadian Charter.*[33] Needless to say, the tasks of judge and counsel alike are more difficult and demanding when the wealth (or perhaps swamp) of American constitutional law is brought to bear on a *Charter* case.

The *Charter* has also brought a need for more socio-economic and public policy research and evidence. The *Charter* prohibits the state from infringing on individual rights unless the infringement is a reasonable limit which can be demonstrably justified in a free and democratic society. The words 'demonstrably justified' suggest that there must be evidence or data supporting any proposed limitation on fundamental rights and freedoms. The Supreme Court has stated that 'cogent and persuasive evidence will generally be required to justify any limits.'[34]

Charter litigation has forced the courts to ask a number of questions. What is the purpose and effect of a particular law or legal scheme? Who does it affect and how? Will the proposed limitation work unfairly or unequally? Answers to questions like these are often found in social science, public policy or statistical data. Canadian courts have now indicated a willingness to consider such evidence.[35] Although this may be desirable, it does raise serious problems in regard to issues such as admissibility, relevancy, statistical probability and causality.[36]

As one practitioner recently said, 'the development and presentation of the evidence required to prove facts in *Charter* litigation calls for imagination, innovation and thorough analysis.'[37] The same practitioner adds: 'It is clear

Clayton, 'International Human Rights Law and the Interpretation of the Canadian Charter of Rights and Freedoms' (1982) 4 *Sup Ct L Rev* 287; G Zellick, 'The European Convention on Human Rights: Its Significance for Charter Litigation' in RJ Sharpe, ed, *Charter Litigation* (Toronto, Butterworths, 1987) at 97.

33 See, eg, ER Alexander, 'The Supreme Court of Canada and the Canadian Charter of Rights and Freedoms (1990) 40 UTLJ 1 at 22–7; J Cooper, 'The Influence of US Jurisprudence on the Interpretation of the Candian Charter of Rights and Freedoms: An Initial Survey' (1986) 9 *Boston College Int'l & Comp L Rev* 73; R Harvie and H Foster 'Ties that Bind? The Supreme Court of Canada, American Jurisprudence, and the Revision of Canadian Criminal Law under the Charter' (1990), 28 *Osgoode Hall LJ* 1.

34 *R* v *Oakes,* [1986] 1 SCR 103 at 138, 26 DLR (4th) 200, 24 CCC (3d) 321.

35 See K Swinton, 'What Do the Courts Want From the Social Sciences?' in *Charter Litigation,* supra note 32 at 187.

36 J Hagan, 'Can Social Sciences Save Us? The Problems and Prospects of Social Science Evidence in Constitutional Litigation' ibid at 213.

37 B Morgan, 'Proof of Facts in Charter Litigation', id 159.

that courts expect counsel to be more thorough and imaginative in their presentation of factual material in constitutional litigation.'[38] The American practice of filing a 'Brandeis brief' has also occurred in a few *Canadian Charter* cases.[39] A Brandeis brief normally contains background information on legislative history and policy, statistical data, scientific discussions and government reports relating to the legislative scheme under attack. It is not in the form of sworn testimony and is not subject to cross-examination, so it must be used cautiously by a court.

Not only has the *Charter* increased the amount of litigation, and the research and preparation time put into that litigation, but *Charter* litigation has also increased the number of lawyers and parties involved in any one *Charter* case. Because *Charter* cases deal with fundamental values and have the potential for affecting a wide range of social interests, it has become common for there to be a number of intervenors in non-criminal *Charter* litigation. Although the Supreme Court, for a few years in the mid-1980s, drastically reduced the number of cases in which third parties were allowed to intervene, the practice is once again very much alive, with intervenors in 15 of the 29 Supreme Court cases reported in 1989.[40] In the United States, there are intervenors in well over 50% of constitutional cases and there are four or more intervenors in 25% of those cases.[41]

In the early years of the *Charter* (1982–1985), the Canadian economy was in a serious slump. Investment and profits were way down; bankruptcies and unemployment were way up. It is not surprising, in light of the enormous amount of litigation the *Charter* has spawned, that more than a few people cynically suggested that the government enacted the *Charter* simply to get lawyers back to work. After all, the Prime Minister and half his Cabinet were lawyers! Of course no one seriously believes that that was one of the purposes of the *Charter,* but it is hard to deny that it has been one of the *effects* of the *Charter.*

Another effect of the *Charter,* perhaps unanticipated by most people, is the great strain which *Charter* decision-making has put on judges. *Charter* decisions often require judges to make difficult choices amongst competing and conflicting principles involving society's most fundamental values. These choices, under the guise of legal reasoning, may have far-reaching social, economic and political implications. The strain and pressure of trying to carefully and fairly make such choices has been cited as a significant factor in a number of instances where judges have fallen ill.[42]

[38] Id 186.

[39] Id 177–8.

[40] K Swan, 'Intervention and Amicus Curiae Status in Charter Litigation' in *Charter Litigation,* supra, note 32 at 27. In *Andrews* v *Law Society of British Columbia* [1989] 1 SCR 143, 71 NR 255, 56 DLR (4th) 1, [1989] 2 WWR 289, 34 BCLR (2d) 273, the first case on the equality rights under section 15, there were 10 intervenors (five were Attorneys-General and five were public interest groups). Likewise, there were three intervenors in *Borowski* v *Canada (Attorney-General* [1989] 1 SCR 342, 47 CCC (3d) 1, [1989] 3 WWR 97, dealing with the issue of abortion, and nine intervenors in *Tremblay* v *Daigle* [1989] 2 SCR 530, dealing with the legal status of the foetus.

[41] Swan, ibid.

[42] See, eg, 'Supreme Court's First 100 Charter Decisions', supra note 25 at 3.

Some commentators predicted that the *Charter* would not have much impact on Canadian law since the *Charter* simply entrenches values which are already well-ingrained in our political and legal system.[43] Although some trial and appellate judges initially attempted to give credence to that view, the Supreme Court of Canada quickly and forcefully buried that approach. Especially in its first two years of *Charter* judgments, the Supreme Court gave a very activist and liberal interpretation to the *Charter*. In its first 16 *Charter* judgments, the Supreme Court upheld the *Charter* claims in 11 cases.[44] And even in cases where the *Charter* claim failed, the power and significance of the *Charter* was obvious.[45] These first judgments contained a strong message for lawyers and judges of the lower courts that there was to be no presumption that existing laws and practices were consistent with *Charter* rights and freedoms. Although *Charter* claims were successful in only a quarter of the Supreme Court's *Charter* judgments in the following two years, the earlier message has not been lost on lower courts.[46]

Between 1982 and 1989, the Supreme Court of Canada nullified eight federal and 12 provincial statutes for violating the *Charter*. The Court upheld 16 federal and 15 provincial statutes during the same period.[47] Provincial appellate courts, on the other hand, struck down 82 statutes, or statutory provisions for *Charter* violations between 1982 and 1988.[48] In some cases, the legislation struck down was politically very sensitive.

Striking down legislation is only the tip of the iceberg. In the majority of *Charter* cases, the applicant is not challenging the validity of legislation but instead is alleging that the conduct of public officials violates some provision of the *Charter*.[49] In these cases, when *Charter* rights have been violated, the

[43] This prediction was no doubt conditioned by the almost total failure of the earlier, non-entrenched *Canadian Bill of Rights* RSC 1985, Appendix III (originally proclaimed in force August 10, 1960 as SC 1960, c 44).

[44] Baar, supra note 28 at 12–4; P Russell, 'Canada's Charter: A Political Report' [1988] *Pub L* 385 at 388–90 [hereinafter Russell, 'Canada's Charter']; P Russell, 'The First Three Years in Charterland' (1985) 28 *Can Pub Admin* 367. See also note 47 and accompanying text.

[45] See, for example, *Operation Dismantle Inc* v *The Queen* [1986] 1 SCR 441, 59 NR 1, 18 DLR (4th) 481, where a national anti-war organization used the right to life and security of the person in section 7 of the *Charter* as a basis to argue that testing of the cruise missile in Canada should be stopped on the grounds that such testing would increase the nuclear arms race and the likelihood of war. The section 7 claim failed (the link between the alleged harm and the testing was too nebulous) but the case did establish that Cabinet decisions (even in sensitive areas of military defence) are not immune from *Charter* review by the judiciary.

[46] Russell, 'Canada's Charter' supra note 44 at 281; Morton et al report the following annual success rates for *Charter* challenges heard by the Supreme Court of Canada ('Supreme Court's First 100 Charter Decisions', supra note 25, Table 2):

1984 75%
1985 64%
1986 27%
1987 26%
1988 32%
1989 37%.

[47] Id, 'Supreme Court's First 100 Charter Decisions' Table 8.

[48] 'Charting the Charter', supra note 25.

[49] At the Supreme Court of Canada level, there were 54 *Charter* challenges against the conduct of government officials and 50 challenges of statutes between 1982 and 1989. At

courts render a variety of remedies: exclusion of illegally obtained evidence, stay of proceedings, injunctions, declarations, orders of mandamus and damages. Taking into account the large number of cases where these other *Charter* remedies have been granted, it is clear that the *Charter* has had significant impact, at least in the 4,000 to 5,000 reported cases where it has been raised.

Professor Monahan has reported that, up to the end of 1985, *Charter* claims were successful in almost one out of every three reported cases (at all court levels) in which they were raised, and that this high success rate was gradually increasing each year.[50] He further reported that the success rate for attacking statutes was 24% and the success rate for attacking the conduct of public officials was 34%, again for the years 1982 to 1985 at all court levels. The Supreme Court of Canada, after an initial period of strong *Charter* activism, has settled into a general rate of about 25 to 35% for upholding *Charter* challenges.[51] Between 1982 and 1989 the Court upheld 38% of *Charter* challenges against statutes and 37% of challenges to the conduct of officials.[52]

It is a separate and more complex question whether successful *Charter* litigation has had a large impact on the way the law is administered in general by public officials. Has the conduct of public officials really changed much or do they find new ways of avoiding *Charter* requirements? The question of the general impact of the *Charter* on Canadian society requires more detailed and long-term empirical research.

Specific Impact of Various Charter Provisions

The number of *Charter* cases to date is too large to permit a thorough summary of the different types of laws and administrative actions that have been subjected to *Charter* challenge, but it is possible to say that the breadth and scope of *Charter* litigation has been surprisingly broad. If Australia were to adopt the statement of rights and freedoms proposed by the Australian Constitutional Commission, Australian laws and actions of public officials would be open to the same types of constitutional challenges as have occurred in Canada.

In general, the *Charter* has had the most obvious impact on criminal law, which includes police and prosecutorial behaviour, criminal procedure, rules of evidence, substantive criminal law and sentencing. Of the 4,000 or so reported cases on the *Charter*, perhaps 3,000 or more deal with criminal law.[53]

lower court levels, the volume of 'conduct challenges' far outweighs challenges to the *Charter* validity of statutes. See 'Supreme Court's First 100 Charter Decisions', supra note 25, Table 7.

[50] P Monahan, 'A Critics' Guide to the Charter' in *Charter Litigation,* supra note 32 at 389–97. Monahan arrived at these figures by analyzing all cases summarized in All Canada Weekly Summaries (ACWS) and Weekly Criminal Bulletin (WCB) up to the end of 1985.

[51] Supra note 46 and accompanying text.

[52] Ibid, calculations based on Table 7.

[53] This number not only includes traditional criminal law cases but also a number of cases dealing with the policing of administrative statutes. In Professor Monahan's study, supra note 50, approximately 80% of the *Charter* cases were in the criminal law area.

Since the Australian proposals and the *Canadian Charter* are nearly identical in regard to the rights granted to persons detained, arrested or charged with an offence, Australia would likely experience a similar avalanche of constitutional litigation in criminal law cases. This is not necessarily a bad thing. Criminal law is one area where many people believe that entrenched rights are necessary and that courts can apply an entrenched bill of rights without getting excessively involved in political decision-making.

GENERAL CRITIQUES OF THE CHARTER

What, then, has been the effect on the Canadian legal system of the *Canadian Charter of Rights and Freedoms* in its first eight years of operation? At least formally, the judicial function has shifted from a political theory based on parliamentary supremacy to one based on constitutional supremacy. But many legal academics and others have claimed that the *social* role of the judiciary is unchanged: there has been no shift in the ideology of judging and '[t]he clear tendency of *Charter* cases has been in favour of the dominant class.'[54] While judges officially adhere to the theory of judicial neutrality in applying the *Charter,* they continue to impose their own values and priorities, those of the elite. The only change has been judicial modes of expression, for example the development of new 'tests' which give the implementation of old values a purely technical appearance in the new constitutional regime. As a result, some writers claim, the *status quo* is being reinforced and the values of the elite are actually being *promoted* under the *Charter.*[55] For example, by clothing corporations with *Charter* rights, yet insulating corporate actions from certain types of *Charter* challenges, the courts may have 'facilitated the coercion of individuals in the name of privacy and freedom.'[56] This is so, it is said, even in the area of equality rights under section 15, the enactment of which was thought at the time to be an immense victory for feminists, especially in view of the earlier failure of American feminists to obtain an Equal Rights Amendment.[57]

One legal academic, agreeing that the *Charter* does nothing to eliminate the veil of legal reasoning which masks the implementation of judges' personal values, has attempted to statistically demonstrate the biases of the various Supreme Court judges. He concludes that the result of any one case depends on which judges hear it, and argues that 'the lottery of panels seems to involve

[54] R Martin, 'Ideology and Judging in the Supreme Court of Canada' (1988) 26 *Osgoode Hall LJ* 797 at 827.
[55] Id pp 832–3.
[56] J Fudge 'The Public/Private Distinction: The Possibilities of and the Limits to the Use of Charter Litigation to Further Feminist Struggles' (1987) 25 *Osgoode Hall LJ* 485 at 553.
[57] Id pp 485–6.

an undesirable uncertainty in the pronouncement of our highest court about the content of our constitutionally protected rights.'[58]

This combination of promotion of the *status quo* and some uncertainty about the potential outcome of *Charter* challenges may have serious effects at the legislative level. It has been suggested that *Charter* challenges by wealthy, advantaged interest groups hinder the attempts of progressive governments to develop innovative legislation. Legislatures' fears of well-financed *Charter* challenges impose high transaction costs and:

> subtly shift the debate within government from a debate over the merits of policy to a debate over its constitutional adequacy [which] has more to do with second-guessing the courts than with . . . sensitive balancing.[59]

In a similar vein, one judge has suggested that the *Charter* has led to a certain amount of 'buck passing' between the legislative and judicial branches of government, especially where difficult moral issues are involved. She cites as an example the recent turmoil in Canada surrounding the abortion issue, in which the Supreme Court of Canada and the federal Parliament have both avoided taking a stance.[60] The Supreme Court of Canada struck down Canada's criminal law regulating abortion, but refused to set out the *Charter* rights, if any, of the foetus. The federal government has been extremely slow to enact a new statute and claims that the Supreme Court gave it little guidance as to the minimum constitutional standards required of any such abortion legislation.

However, while agreeing that the *Charter* may hinder rather than enhance social change, Professor Hutchinson suggests that the social impact of *Charter* litigation may have been greatly exaggerated. He argues that adjudication is not as important as both right and left ideologies have traditionally supposed, and that:

> [w]hen the courts speak, the world does not sit up and listen, let alone change . . . The only way to win the legal battle is by not taking part and/or by applying pressure to other limbs of the body politic.[61]

But all is not doom and gloom. Many respected Canadian judges, lawyers and legal academics argue that the enactment of the *Charter* has been beneficial. Professor Russell points out that judges have always helped shape public policy and a great benefit of the *Charter* is that it has increased Canadians' awareness of judicial power. At the same time, he argues that,

[58] AD Heard, 'The Charter in the Supreme Court of Canada: The Importance of Which Judges Hear an Appeal' (unpublished paper presented at the Annual Conference of the Canadian Political Science Association, Victoria, BC, May 29, 1990).

[59] AJ Petter & PJ Monahan, 'Developments in Constitutional Law: The 1986–87 Term' (1988) 10 *Sup Ct L Rev* 61 at 133. The authors cite campaigns by lawyers against Ontario's attempts to introduce no-fault car insurance and a similar challenge by doctors opposed to Ontario's attempts to ban 'extra-billing' a practice by which doctors directly bill their patients for a premium over the maximum payable by the government health plan.

[60] KM Weiler, 'Of Courts and Constitutional Review' (1988–89) 31 *Crim LQ* 121.

[61] AC Hutchinson, 'Charter Litigation and Social Change: Legal Battles and Social Wars' in Charter Litigation, supra note 32 at 378–80.

although the *Charter* has increased that judicial power, it has hardly been a quantum leap.[62] Mr Justice Strayer of the Federal Court of Canada makes a similar argument. The *Charter* has not given the courts a completely new role. There has always been judicial review in Canada, and the *Charter* has merely enlarged the scope of that review, but this amounts to no more than an 'adjustment' of the balance between parliamentary supremacy and judicial review.[63] Mr Justice Strayer argues that the *Charter* has inspired Canadians by identifying and enforcing widely shared values and by providing new remedies for infringements of individual rights by the legislative and executive branches of government.

However, both writers point to some potential dangers of the *Charter*. First, there is the risk of overloading the judiciary by requiring them to solve fundamental issues which properly belong to the legislatures. Such decisions are controversial and hard to enforce, and assigning them to the judiciary tends to turn essentially political decisions into technical legal questions. Second, while it is clear that the judiciary has always had a role in policy formulation, there is a risk of over-politicizing judges. This may lead to political scrutiny of, and interference with, judges and, as Russell puts it, 'we are apt to drag the judiciary into the heart of our political storms — into the very cockpit of partisan political struggle.'[64] At its worst, Canada could sink to the same partisan, ideological depths as the United States in the appointment of superior court judges.

Quite apart from the potential for over-politicization, Madame Justice McLachlin of the Supreme Court of Canada has pointed to more immediate challenges posed to the judiciary by the implemention of the *Charter*. Judges are now required to answer questions not traditionally within the purview of the courts. These decisions 'must be generally in accord with the expectations and needs of our society' and '[in] accord with [reasonable citizens'] perception of a "just" society.'[65] Yet judges have had few useful precedents, a paucity of evidence to assist them in making fundamental value choices, and difficulty fashioning suitable remedies. Chief Justice Dickson of the Supreme Court has put it this way:

> [T]he entrenchment of rights in the charter has been a good thing for the country, but it has made life for the judges more difficult, because balancing the rights of the individual against the rights of the collectivity is sometimes very difficult.[66]

Both judges might well have mentioned yet another problem: the crushing workload facing the Canadian judiciary. Other writers are not so reticent. One has said that the Supreme Court of Canada:

[62] Russell, supra note 10.
[63] Strayer, supra note 10.
[64] Russell, supra note 80 at 436.
[65] B McLachlin, 'The Charter of Rights and Freedoms: A Judicial Perspective' (1989) 24 *UBCL Rev* 579 at 590. At the time of writing, Madam Justice McLachlin was Chief Justice of the Supreme Court of British Columbia.
[66] EK Fulton, 'A Legal Legacy: Chief Justice Brian Dickson Steps Down' (April 16, 1990) 103 *Maclean's* 52.

> 'has risen to the formidable challenge that the *Charter* poses with dignity and humility, with intelligence and restraint, and often with a measure of grace and eloquence which few of us realized it possessed.'[67]

Professor Morton declares that 'both in their words and deeds, Canadian judges have begun to carve out a bold new constitutional jurisprudence' and he compliments the Supreme Court of Canada, in particular, for its energy and innovativeness.[68]

CONCLUSION

Whatever one's ideological stance, the Canadian experience clearly demonstrates that an entrenched bill of rights can have a substantial impact on the legal system. First, many new avenues of legal argument are opened, making the work of *Charter* lawyers and legal academics particularly interesting, challenging and innovative. New forms of legal research are developed, incidentally increasing the cost of litigation. Many formerly acceptable laws and administrative actions are struck down as a violation of the *Charter,* requiring redrafting of offensive statutes and regulations and reformulation of directives, procedures and policies implemented by the executive. Another result, of course, is an explosion in the volume of litigation. In Canada, this has contributed to a severe backlog in court dockets and, coupled with the new challenges discussed earlier, placed immense stress on the judiciary. However, with proper planning, these systemic problems could be significantly alleviated.

Opinions on the advisability, effect and effectiveness of an entrenched charter cover the full spectrum of political and social ideology. Were Australia to enact an entrenched bill of rights along the lines proposed by the Australian Constitutional Commission, it is likely that much of the Canadian experience would be replicated and that at the end of the day there would still be passionate disagreement on whether an entrenched bill of rights is a good or bad thing.

[67] Alexander, supra note 33 at 40.
[68] FL Morton, 'The Political Impact of the *Canadian Charter of Rights and Freedoms*' (1987) 20 *Can J Pol Sci* 31.