HALF-FULL GLASSES, PENDULUMS AND INDIVIDUAL RIGHTS: THE FIRST TWENTY YEARS OF THE *CHARTER*

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Is the glass half-empty or half-full? Though this question is usually presented as an unanswerable dilemma, the right answer is easy, and simply depends on another question: what did the glass look like beforehand? On that basis there can be no question that our *Canadian Charter of Rights and Freedoms*[1] glass is half-full: individual rights are much better protected now than they were in 1982.

More than that, there is a sense in which the glass cannot be emptied out. By this stage in *Charter* analysis, certain shared presumptions have been worked deeply into the approach. Although there is still plenty of room for debate about whether particular laws or practices do or do not "cross the line", that debate is now premised on shared expectations about how we go about drawing the line in the first place. Individual decisions might be in doubt, but the range from which acceptable answers can be chosen is rarely in dispute.

What I hope to show in this short paper is the way in which the *Charter* has, in its first 20 years, had much of its most dramatic and long-lasting effect by creating a largely unconscious consensus about how *Charter* disputes are to be settled. In a number of important decisions between 1984 and 1986, the Supreme Court of Canada laid down ground rules for how *Charter* rights were to be interpreted and how *Charter* issues were to be analysed. In most of these cases the results were not easily predicted in advance, but are now so ingrained in us that it can be difficult to recognize that the decision could have gone the other way, or indeed to remember that a decision was involved. The result has been to remove from debate an

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[1] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

enormous potential range of issues. My intention here is to show how different *Charter* interpretation could have been today if any of those decisions had been made differently.

In pursuing this goal, I will undertake two steps. The first will be to describe what I see as the early cases most influential in setting this unconscious consensus. Secondly, I will consider three quite recent decisions, noting the approach to analysis taken and the issues *not* present. We are less likely to notice absences, but they can be enormously significant nonetheless. In essence, the early *Charter* cases set the terms within which later disputes must be settled, and apart from any other considerations they are extremely important for those structural reasons alone.

Early Structural *Charter* Decisions

In this section, I will discuss seven cases. They are not necessarily the most influential or most important, though good arguments could be made to place each of them on such a list. Rather, these seven cases are included because they are the ones most affecting the way in which *Charter* analysis is done today - partly by laying down the actual rules, partly by rejecting suggested rules. It is that structural effect on today's *Charter* analysis that I am most interested in describing. In particular, each is a case where the Court was presented with a choice between a broad or a restricted approach to *Charter* interpretation, and in each case the Court opted for the broader approach.

The first case on the list is *Hunter v. Southam*.[2] It concerned s. 8 of the *Charter*, and its basic rule "a warrantless search is *prima facie* unreasonable" has had a major impact on all subsequent search and seizure caselaw. More important, however, is the fact that in *Hunter* the Supreme Court clearly articulated that *Charter* rights had to be interpreted in a broad and purposive manner. Prior to *Hunter*, it could plausibly be argued that "the *Charter* does not intend a transformation of our legal system or the paralysis of law enforcement."[3] Following *Hunter*, there could be no real question that transformation was exactly what the *Charter* would effect. A constitution, the Court noted:

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[2] [1984] 2 S.C.R. 145 [*Hunter*].

[3] *R. v. Altseimer* (1982), 29 C.R. (3d) 276 at 282 (Ont.C.A.), quoted in Don Stuart, *Charter Justice in Canadian Criminal Law*, 3rd ed. (Scarborough: Thomson Canada Ltd, 2001) at 3.

> is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a *Bill* or a *Charter of Rights*, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers.[4]

This approach to *Charter* interpretation is *Hunter*'s real legacy. Indeed ironically the actual issue in *Hunter*, or searches in a regulatory context, is one of those about which there has been a certain ebb and flow in case law, and it is entirely possible that given later developments the bottom line result on those same facts today might be different.[5] But what seems now so ingrained into constitutional interpretation that it cannot be abandoned is the attitude of mind from *Hunter*: that the rights in the *Charter* are to be interpreted broadly, are to be given meaning according to the interests they are intended to protect, and are capable of upsetting years of prior practice.

A special instance of that approach, but one worth noting separately, is found in *R. v. Therens*.[6] It is the first right to counsel case, but once again its major significance does not relate to its findings on that specific right. Rather, it is the relationship between pre- and post-*Charter* case law that is of most significance. In *Therens*, the accused was stopped for a roadside screening test and was not informed of the right to counsel. The question was whether he had been under "detention" within the meaning of s. 10(b) of the *Charter*. What makes the case significant is that the same issue had come before the Court under the *Canadian Bill of Rights*,[7] and the conclusion had been reached that a person stopped for a roadside screening was *not* detained in the necessary sense. The Crown argued that in framing s. 10(b) of the *Charter* Parliament must have known the limits that had been put on the rights as phrased in the *Bill of Rights*: in adopting essentially the same wording Parliament must therefore have intended those same limits to apply to *Charter* rights. This was an entirely plausible argument which had persuaded four courts of appeal,[8] but the

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[4] *Hunter, supra* note 2 at 155.

[5] See the Court's later decision in *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627, for example.

[6] [1985] 1 S.C.R. 613.

[7] *Canadian Bill of Rights*, S.C. 1960, c. 44, reprinted in R.S.C. 1985, App. III [*Bill of Rights*].

[8] *R. v. Currie* (1983), 4 C.C.C. (3d) 217 (N.S. S.C. (A.D.)); *R. v. Trask* (1983), 6 C.C.C. (3d) 132 (Nfld. C.A.); *R. v. Rahn* (1984), 11 C.C.C. (3d) 152 (Alta. C.A.); *R. v. Simmons* (1984), 11 C.C.C. (3d) 193.

Supreme Court of Canada rejected it. They held in *Therens* that:

> the premise that the framers of the *Charter* must be presumed to have intended that the words used by it should be given the meaning which had been given to them by judicial decisions at the time the *Charter* was enacted is not a reliable guide to its interpretation and application.[9]

What was rejected here was not simply a particular approach to the interpretations of rights which are found in both the *Charter* and the *Bill of Rights*. Rather, *Therens* amounts to a broad scale rejection of the argument that rights were already sufficiently respected in Canada. It is as though an argument were made under s. 1 that a measure was demonstrably justified in a free and democratic society on the basis that it was a measure adopted in Canada and Canada is a free and democratic society. Put on that basis, the circularity of the argument is obvious and it is clear that it would render meaningless most of the *Charter*'s guarantees. It is worth reminding ourselves that the rejection of that possibility was not inevitable.[10]

Mentioning s. 1 leads to the next case on the list, *R. v. Oakes*.[11] The case is best known for the test used in deciding whether a law is justified under s. 1: a test that still bears its name, though the analysis has evolved since then. The major issues in the case were the constitutionality of a reverse onus provision in the *Narcotic Control Act*[12] and the Court's interpretation of the *Charter* guarantee of the presumption of innocence in s. 11(d).[13] The case is here, however, not for either of these issues, but for a different point about s. 1analysis: onus of proof. With essentially no discussion, the Court concluded:

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[9] *Therens, supra* note 6 at 638.

[10] Indeed, essentially that approach was taken to the *Bill of Rights*. In *R. v. Robertson*, [1963] S.C.R. 651 at 654, the Court held that:

> the *Canadian Bill of Rights* is not concerned with "human rights and fundamental freedoms" in any abstract sense, but rather with such "rights and freedoms" as they existed in Canada immediately before the statute was enacted.

[11] [1986] 1 S.C.R. 103.

[12] *Narcotic Control Act*, R.S.C. 1970, c. N-1.

[13] In which finding, it might be noted, it specifically rejected the argument which had prevailed in interpreting the similar guarantee in the *Bill of Rights*: see *R. v. Appleby*, [1972] S.C.R. 303.

> The onus of proving that a limit on a right or freedom guaranteed by the *Charter* is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation. It is clear from the text of s. 1 that limits on the rights and freedoms enumerated in the *Charter* are exceptions to their general guarantee. The presumption is that the rights and freedoms are guaranteed unless the party invoking s. 1 can bring itself within the exceptional criteria which justify their being limited.[14]

It needs little elaboration to demonstrate that onus of proof can be a significant factor in any judicial decision, *Charter* analysis or otherwise. In this case, it is most significant in dealing with rights that have no built-in limitations. Section 8, for example, is only a guarantee against "unreasonable" search and seizure, but many rights have no such internal limits. Fundamental freedoms in s. 2, democratic rights in ss. 3-5, mobility rights in s. 6, and some legal rights, such as the right to counsel in s. 10(b), are limited only by s. 1. As has frequently been noted, this contrasts with the approach in the United States, where no explicit equivalent to s. 1 exists, so the courts have been required to interpret rights in a limited fashion from the start.

This is not simply a question of whether a provision like s. 1 exists, however. Even given the provision's existence it was open to the Court to read s. 1 as inherently a part of each individual right. We accept today without second thought that *Charter* analysis is a two-step process: is there a breach? If so is it justified? That did not have to be so.

Freedom of expression provides a clear example of how significant this difference can be. In the United States, not all expression is equally guaranteed. For example, the United States Supreme Court has developed tests which afford commercial speech less protection than other forms of speech.[15] More generally, to fall under the First Amendment an applicant must show that his or her form of speech is of a type that should be protected, and must show what level of protection should be granted. This contrasts starkly to the approach taken in Canada, where the Court has concluded that anything intended to convey meaning is expression - even things like, if done in protest, parking a car. Thus in *Ford* the Court concluded that:

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[14] *Oakes, supra* note 11 at 136-137.

[15] See the discussion of this issue in *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712 [*Ford*].

> The issue in the appeal is not whether the guarantee of freedom of expression in s. 2(b) of the Canadian *Charter* and s. 3 of the Quebec *Charter* should be construed as extending to particular categories of expression, giving rise to difficult definitional problems, but whether there is any reason why the guarantee should *not* extend to a particular kind of expression...(emphasis added).[16]

Given this approach, there is clearly a great potential difference in the ultimate amount of protection for expression and many other rights. It would generally be more difficult for an applicant to show that his or her *Charter* rights were violated if that task also included showing that limits on those rights were not justified. These difficulties would be both practical (it might take considerable resources to lead the kind of evidence needed) and theoretical (the applicant would have to correctly anticipate all bases upon which the government or a court might decide that a limit is justified). Further, given that the onus is on the applicant to prove the *Charter* breach in the first place,[17] onus of proof itself might settle the dispute. There would be a greater chance in individual cases that in the end no *Charter* violation would be found if the applicant had to show that a limit was not justified, than if the Crown had to show that it was.

Number four on the list is *R. v. Big M Drug Mart Ltd.*[18] This case is included here not for its findings about freedom of religion or Sunday closing laws, but because it first laid down the rule that laws could violate the *Charter* not only because of their purpose but also because of their effect. In pre-*Charter* division of powers analysis, the key question was the purpose of the legislation in question: a valid purpose would generally save a law, even if that law had effects, sometimes quite significant effects, on matters not directly within the jurisdiction of the level of government in question. Thus a provincial law imposing a particular tax rate on banks was upheld even though s. 91 of the *Constitution Act 1867* gives the federal government authority over banking.[19] Effects were primarily relevant to this analysis

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[16] *Ibid.* at para. 47.

[17] The text of the *Charter* is not explicit on this point either, but the Court reached this conclusion in *R. v. Collins*, [1987] 1 S.C.R. 265

[18] [1985] 1 S.C.R. 295 [*Big M*].

[19] See *Bank of Toronto v. Lambe* (1887), 12 App. Cas. 575.

only to the extent that they might indicate the actual purpose of legislation, and perhaps show that the purpose was something other than the stated one.[20] Focusing on the purpose of legislation and giving only secondary attention to its actual effects was an approach that would have come quite naturally to the Court when it was first confronted with the *Charter*.

Nonetheless the Court decided in *Big M* that "both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation."[21] This conclusion is so ingrained at this stage that it is almost difficult to recognize it as a choice which was made. And yet, where at one point it was clear that purpose was a much more important consideration, developments since *Big M* have not only made effects equally important, they have actually tended toward eliminating the distinction entirely. In the division of powers context, the Court has now come routinely to talk about both purpose and effect from the start as the single method of settling the pith and substance of legislation.[22] In the human rights context, the Court has recently done a major overhaul on its approach, consciously eliminating the distinction between direct discrimination and adverse effect discrimination.[23] A primary impetus for this change was the Court's conclusion that the distinction is:

> unrealistic: a modern employer with a discriminatory intention would rarely frame the rule in directly discriminatory terms when the same effect -- or an even broader effect – could be easily realized by couching it in neutral language.[24]

In other words the stated purpose of a policy might be notably different from its actual purpose. In really getting at the merits of a policy - or law - it is therefore necessary to look not merely at the purpose but also at the effects of the law.

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[20] See *e.g. Re Upper Churchill Water Rights*, [1984] 1 S.C.R. 297.

[21] *Big M, supra* note 18 at 331.

[22] See *R. v. Morgentaler*, [1993] 3 S.C.R. 463 or *Reference re Firearms Act (Can.)*, [2000] 1 S.C.R. 783 [*Firearms Reference*].

[23] See *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 [*BCGSEU*].

[24] *Ibid.* at 19.

Restricting *Charter* review to testing whether the purpose of legislation was to violate a right, therefore, would have greatly reduced the potential impact of the *Charter*. Not having done so has been instrumental in expanding the scope of the *Charter*. Further, whether relying directly on *Big M*'s conclusion about purpose and effects or not, in deciding *Morgentaler*, the *Firearms Reference* and *BCGSEU*, the Court seems to demonstrate an attitude towards interpretation that has completely internalized the approach first clearly articulated in the *Charter* context in *Big M*.

The next case among the seven to be presented here is *Re B.C. Motor Vehicle Act*.[25] Once again the Court was faced with a choice between two approaches to interpretation and opted for the broad approach. This case differs from the previous in two notable ways. First, it is slightly narrower than the previous decisions because it is more closely focused around a particular right, s. 7. Second, there is a strong argument that the approach taken by the Court was not simply unexpected, but was specifically against the intention of the drafters. This is of course one of the central points in the decision, and the Court runs through at some length the evidence suggesting that "the principles of fundamental justice" were only intended to include procedural rules. Nonetheless they are unmoved and extend the scope of s. 7 to substantive issues as well.

The *Charter* unambiguously provides some substantive guarantees: the right to vote, mobility rights, or the right to be free from cruel and unusual punishment would have virtually no meaning if they did not have substantive content. It does not follow, however, that s. 7 was required to have substantive content. It is particularly significant that it does, however, given the "over-arching" nature of the right. Even if one does not view s. 7 as Justice Lamer (as he then was) describes it in *Re B.C. Motor Vehicle Act*, as a general guarantee of which ss. 8-14 are specific instances, it is still among the legal rights the one with the broadest potential scope. To allow courts to decide that Parliament and legislatures are simply not allowed to bring about some specific results, no matter what procedures are used to get there, opens the grounds of judicial review quite dramatically.

The five cases listed so far are all circumstances where the Court has had a choice between a broad and a narrow approach to interpretation and has adopted the

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[25] [1985] 2 S.C.R. 486.

broader approach. *Operation Dismantle v. The Queen*[26] is similar, but involves the Court adopting a broad approach to the scope of issues capable of being reviewed, rather than to the method of that review. The actual challenge in the case - a claim that the government's decision to allow cruise missile testing by the United States in Canada violated s. 7 of the *Charter* - was not successful. Far more significant, however, was the fact that the Court agreed the challenge could be brought at all.

The Crown argued that certain matters fell within the prerogative power of Parliament, rather than being powers derived from statute, and accordingly were not subject to review under the *Charter*. Justice Wilson, writing for herself but with the concurrence of the rest of the Court on this point, analysed the issue in the terms of the "political questions" doctrine in the United States: "It is a well established principle of American constitutional law that there are certain kinds of 'political questions' that a court ought to refuse to decide."[27] In Canada, she held, the same should not be true. Although courts ought not simply to substitute their own opinions on policy matters for those of Parliament, a court cannot "relinquish its jurisdiction either on the basis that the issue is inherently non-justiciable or that it raises a so-called 'political question'."[28]

The effect of this conclusion is obvious, though easily overlooked today. First, as Justice Wilson notes, there has been inconsistency in the application of the doctrine in the United States, and dispute over its proper scope: rejecting the doctrine spares us that level of confusion. More significantly, the decision removes from the Crown the argument that particular issues are non-reviewable, and therefore opens to *Charter* scrutiny an expanse of government decision-making that could have remained untouched. Today, precisely because it has become a non-issue, it is easy not to notice the number of cases that might not have been before the courts in the first place had *Operation Dismantle* been decided differently.

Finally, the last case on the list is *Singh v. Minister of Employment and*

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[26] [1985] 1 S.C.R. 441 [*Operation Dismantle*].

[27] *Ibid.* at 467.

[28] *Ibid.* at 472.

Immigration.[29] Like *Operation Dismantle* this case is slightly more restricted in its scope of application: it not only is specific to s. 7, it is primarily of significance to questions of immigration and deportation, and other situations where a person might be subject to particular treatment in another country. Nonetheless it is worth including on the list because its effect was to allow s. 7 claims to be asserted in many situations where they might simply have been unavailable.

Singh was appealing a refusal of a decision, both by the Minister of Employment and Immigration and the Immigration Appeal Board, to grant him refugee status.[30] The basis of his claim was that he would face threats to his life, liberty and security of the person if he were returned to India. It is tempting to think about the case as having decided that Singh was entitled to assert a s. 7 claim on the basis that "everyone" in s. 7 includes everyone present in Canada, including non-Canadians, and certainly that is one conclusion reached in the case. However, although important, that finding was not disputed by the Crown.

The more central issue was whether a violation of s. 7 could be found based on actions of another government at a future time. The Crown relied on a previous lower court finding that:

> If the applicant is deprived of any of those rights after his return to his own country, that will be as a result of the acts of the authorities or of other persons of that country, not as a direct result of the decision of the Board. In our view, the deprivation of rights referred to in section 7 refers to a deprivation of rights by Canadian authorities applying Canadian laws.[31]

Singh rejects that approach to s. 7. Disapproving of the approach taken under the *Bill of Rights*, and casting a passing aspersion on the political question doctrine, the Court reads s. 7 broadly in several ways. First, it finds that life, liberty and security

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[29] [1985] 1 S.C.R. 177 [*Singh*].

[30] The case actually involved seven claimants with various factual differences concerning where they had first asserted their claim and so on, but the Court held that these differences were not significant to the *Charter* analysis.

[31] *Singh v. Minister of Employment and Immigration*, [1983] 2 F.C. 347 349, cited in *Singh*, *supra* note 29 at 203.

of the person are separate interests, any one of which can be the foundation for a claim. Further, the Court finds that a mere threat to one of those interests is sufficient to bring s. 7 into play. Finally, the Court concludes that where the actions of the Canadian government can lead to a person being sent to a country where he or she faces such a threat, the actions of the Canadian government itself implicate the interests protected by s. 7, and therefore must accord with the principles of fundamental justice. This has obvious impacts on issues such as immigration,[32] but the reading of s. 7 interests as being separate interests, each invoked only by a threat, also gives the section much greater scope of application.

In each of the seven cases above, a realistic choice about the general approach to the *Charter* or how to interpret specific rights in the *Charter* was presented to the Court. In each case the Court opted for the approach which allowed *Charter* review in more instances, and maximized the scope of that *Charter* review. Although the Court did not adopt this broader approach in every single instance in which such choice was available,[33] it is fair to say that the broader approach characterized the early *Charter* decisions.

Nothing is ever constant, of course, and the Court's approach to individual *Charter* rights has ebbed and flowed over the subsequent years. *Askov*[34] gave real content and significant effect to the right to a trial within a reasonable time, but the Court changed its analysis of that right in *Morin*[35] to leave it of little real consequence. In *Smith*[36] the Court adopted an analytical approach depending on hypothetical cases to deciding whether a punishment was cruel and unusual, but largely backed away from that decision in *Morrisey*.[37] Having set a *Charter*

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[32] I understand that the Federal Department of Justice was required to hire a significant number of new lawyers specifically to deal with immigration cases in the wake of *Singh* - in effect, that the decision created a new field of practice for that Department.

[33] In first interpreting the s. 2(d) right to freedom of association, for example, the Court took an approach which left the right virtually without content: see *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313 [*Alberta Reference*].

[34] *R. v. Askov*, [1990] 2 S.C.R. 1199.

[35] *R. v. Morin*, [1992] 1 S.C.R. 771.

[36] *R. v. Smith*, [1987] 1 S.C.R. 1045.

[37] *R. v. Morrisey*, [2000] 2 S.C.R. 90.

minimum standard for access to complainant records in *O'Connor*,[38] the Court in *Mills*[39] described that test as a mere common law one which Parliament could depart from if it chose. *Morales*[40] struck down the public interest criterion regarding bail as too vague, but *Hall*[41] quite recently found an extremely similar provision to be acceptable. Thus, some individual advances in *Charter* protection are later lost.[42]

What I will pursue in the second half of this discussion, however, is my earlier claim that although the protection of particular individual rights might wax and wane, the kind of basic framework decisions made in the seven cases discussed above operate at so fundamental a level that they are virtually immune from being revisited. Those decisions create the structure within which we now analyse whether particular *Charter* claims are meritorious or not, and operate at a nearly "subconscious" level in the analysis. Although parties might dispute whether a law is or isn't justified, they don't dispute that the onus of justification is on the Crown. Although the Crown might claim that a Minister's decision deserves deference, they do not argue that the decision is not open to review at all. Appellant and Crown might disagree over what purpose a law ought to try to achieve, but don't dispute that purposive analysis is the approach to take. Those types of decisions are simply part of the way things are done. As a result, no matter how the debate ebbs and flows, some gains almost cannot be lost.

Recent Illustrative *Charter* Decisions

This section of the paper will attempt to show the current significance of the cases

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[38] *R. v. O'Connor*, [1995] 4 S.C.R. 411.

[39] *R. v. Mills*, [1999] 3 S.C.R. 668.

[40] *R. v. Morales*, [1992] 3 S.C.R. 711.

[41] *R. v. Hall*, 2002 SCC 64.

[42] Although the general tendency recently has been to narrower readings of *Charter* rights, that is not a perfectly consistent trend. *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016, for example, suggested that there might yet be some role that freedom of association could play despite the effective gutting of that right in the *Alberta Reference*, *supra* note 33, while *United States v. Burns*, [2001] 1 S.C.R. 283 offered stronger protection under s. 7 against extradition to face the death penalty than had *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779, a decade earlier.

mentioned above. Where all of those cases were from the first two years of Supreme Court *Charter* jurisprudence, the cases here will be drawn from the last two years. They do not of course "prove" that the cases above are the most significant: it would be naive to think that in general such a proposition could be proven by a few examples. By its nature my claim is not easily proven in any ordinary sense. One might, of course, point to the number of *Bill of Rights* decisions which were not followed[43] in order to show the significance of *Therens*. However, to do so would miss the broader point that it is the difference in basic approach between *Bill of Rights* decisions and *Charter* decisions which has had the most significant impact. My argument would not be proven by a broad-ranging analysis of, for example, the number of later decisions in which the early cases mentioned above are relied on. A large part of my point is that these early cases have removed issues from consideration: they do not need to be relied on because the arguments to which they would relate simply do not occur. The cases which follow, therefore, should be considered illustrative only.

Three cases will be discussed, for three slightly different reasons. *Suresh v. Canada (Minister of Citizenship and Immigration)*[44] will show the many different ways in which *Charter* arguments might have been pursued today had the early cases been decided differently. Many issues do not arise, or alternatively are permitted to arise, in the Court's reasoning in that case because of the cases above. *Sierra Club of Canada v. Canada (Minister of Finance)*[45] will show how early *Charter* decisions have affected the Court's approach to a wide range of issues: in particular, that even the results in non-*Charter* cases are now frequently affected by *Charter*-based considerations. Finally, *Sauvé v. Canada (Chief Electoral Officer)*[46] will show how the basic structural decisions about how to reason under the *Charter* can be the deciding factor in a case, independent of the actual issue. *Sauvé* will also show, however, that despite the fundamental gains in protection for individual rights gained in the early decisions, it is never safe to be complacent.

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[43] For example *R. v. Robertson*, *supra* note 10 on Sunday closing laws or *R. v. Appleby*, *supra* note 13 on the presumption of innocence.

[44] [2002] 1 S.C.R. 3 [*Suresh*].

[45] 2002 SCC 41 [*Sierra Club of Canada*].

[46] 2002 SCC 68 [*Sauvé*].

Suresh is widely regarded as a decision of some importance in immigration jurisprudence. The appellant was a convention refugee who applied for landed immigrant status, but who faced deportation proceedings. The Minister of Immigration, based on information she received from an immigration officer, first gave notice to the accused that she might, then actually did, issue an opinion that he might be a danger to the security of Canada. He was ordered deported to Sri Lanka. The Minister's opinion was based on information suggesting that Suresh was a member of the Tamil Tigers, a group alleged to be engaged in terrorist activities in Sri Lanka. Members of the Tamil Tigers were subject to torture in Sri Lanka.

The Supreme Court ordered that Suresh should receive a new deportation hearing, in large measure because appropriate procedural protections were not in place. In particular, although Suresh had notice of the issue the Minister was considering and was able to make his own submissions, he did not have copies of the material provided to her by the immigration officer and was not able to respond to it.

The decision was not an unalloyed victory for Suresh nor for those seeking greater limits on deportation. The Minister's decision itself was not said to be unreasonable, and the Court affirmed that deference should be given in future cases to decisions by a Minister as to whether a particular refugee's presence constitutes a danger to Canada, or whether the refugee faces a substantial risk of torture if deported. Nonetheless, it had a noteworthy impact on the way in which the deportation process is conducted. Much of that impact, and the way in which the decision was made, can be traced to the cases outlined above.

For example, although Suresh's ultimate remedy was a procedural one - a new hearing with notice of the case to meet – the central s. 7 issue was a substantive one. Lower courts had found that possible deportation to face torture did not violate the principles of fundamental justice: the Supreme Court of Canada found that it did. The central point to note is not which level of court is correct, nor why the Supreme Court reached the conclusion it did, but that the issue would not have been before the Court at all had it not been for the approach taken in *Re B.C. Motor Vehicle Act*. The issue was not whether torture would violate Suresh's life, liberty or security of the person; it was whether deportation to face torture was a substantive violation of the principles of fundamental justice.

Similarly, had it not been for *Singh*, the case would likely never have occurred. The Court explicitly notes that refugee claimants fall among "everyone" in s. 7. More significantly, if the findings of lower courts in *Singh* that subsequent actions of foreign governments could not be the foundation of a s. 7 claim had prevailed in the Supreme Court, Suresh would have had no plausible s. 7 claim from the start.

Further, the focus of the case was a decision by the Minister of Immigration, a decision based on whether Suresh was a threat to Canada. The Court observes that this is a political question,[47] and one of the important issues in the case is the appropriate standard of review of the decision. Had *Operation Dismantle* been decided differently, however, the issue would not simply have been the standard against which to review the Minister's decision: there would have been the prior question of whether the decision was reviewable at all. Indeed, had *Operation Dismantle* opted to create a political questions doctrine, the applicability of the doctrine might not have been in dispute in this case, because the case might never plausibly have been brought.

Note as well that it was open to the Minister to seek assurances that Suresh would not be tortured if he was returned to Sri Lanka. If intent to violate rights were the only issue, or even the most important issue, seeking such an assurance would be virtually determinative of the case. In fact, however, because the effect of the Minister's action is equally important, the Court indicates the need to weigh in the balance not just whether such assurances are sought or given, but whether such assurances are of any value. Torture is an illegal process, and the Court says there should not be heavy reliance on assurances from states which have a past record of allowing torture. Further, they note, torture can result because of the inability of a state to control the behaviour of its officials.[48] Though the Court does not put it in this context, much of this discussion is relevant only because of the conclusion in *Big M* concerning *Charter* violations through effects.

It should also be noted that the case is very much one of balancing competing interests and deciding how to weigh a risk of torture, assurances that it will not occur, the inability of a foreign government to fulfil such a promise, threats to the

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[47] *Suresh, supra* note 44 at para. 85.

[48] See *ibid.* at paras. 123-125.

security of Canada, obligations under international agreements, and so on. It seems likely, therefore, that the initial onus being on the accused to show a *Charter* breach followed by the Crown having the onus of justification under s. 1 could be relevant. This consideration is of course less prevalent in s. 7 cases, which already involve considerable balancing at the initial stage. Still, when the final question the Court asks is whether the government can "justify the failure of the Minister to provide fair procedures where this exception involves a risk of torture",[49] it is difficult to believe that onus of proof as set out in *Oakes* has not played some part.[50]

The second recent case, *Sierra Club of Canada*, is particularly interesting because it is not a *Charter* case at all. The actual issue was whether under Rule 151 of the Federal Court Rules[51] a crown corporation, in this case Atomic Energy of Canada Ltd., could obtain a confidentiality order with regard to documents that it was required to file with the Court. Under the order sought the public would be allowed access to the trial and the documents would be made available to the parties, but no copies of the documents would be otherwise available. Ultimately the Court laid down a test for deciding in general when such confidentiality orders should be available, and granted the order in this case.

The Court's approach to deciding this question - a question which involved no *Charter* claim - was to rely quite directly on consideration arising from *Charter* issues and tests laid down in *Charter* cases. Primarily, the Court considers the importance of free expression, and the value implied thereby of free access to information by the public generally. Further, they rely on the importance of the right to a fair trial: a *Charter* right they acknowledge is not actually invoked by the

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[49] *Ibid.* at para. 128.

[50] There is one further indication of the importance of the cases I mention, though I present it with some hesitation, because it threatens to make the argument broad enough that it might appear incapable of being disproved. Still, it is noteworthy that in interpreting the concept of "danger to the security of Canada" in deportation legislation, the Court indicates that it must adopt a "fair, large and liberal interpretation" of the phrase (*ibid.* at para. 85). On the face of it this shows the language of *Hunter* and of purposive interpretation. In effect, of course, it moves in the opposite direction, since *Hunter* wanted a broad interpretation of rights and *Suresh*'s approach would constitute a broad interpretation of *limits on* rights. Still, it does demonstrate that the terminology within which debate must take place has been partly settled by *Hunter*.

[51] *Federal Court Rules, 1998*, r. 51.

proceedings, but which they see as having guiding effect nonetheless. Finally, they stress the importance of open courts and public and media access to their proceedings, as an aspect of the s. 2(b) right.

Unlike *Suresh*, little explicit reference can be made to points in the reasoning in *Sierra Club of Canada* which would have been different but for the cases listed above. Nonetheless, it is worth noting that the interpretation even in the *Charter* context of all of the rights relied on in *Sierra Club of Canada* owes a great deal to the broad interpretive approach laid down in *Hunter*, *Therens*, and *Big M*. First, that free expression received the very wide meaning it has been given, rather than a narrow one where protection for particular forms of expression needs to be justified, was noted above as one of the instances of the approach to onus adopted in *Oakes*. Further, note that the latter two principles relied on in *Sierra Club of Canada* are not explicitly found in the *Charter*: they have been taken to be implied by s. 7 and s. 2(b) respectively. That the *Charter* should contain implied rights at all is an indication of its vigour: that those implied rights should be given controlling influence in private disputes where the *Charter* is not directly in issue stresses that point further still.

The influence of *Charter* cases can also be seen in the actual test laid down by the Court for granting confidentiality orders under the Federal Court rules. The test created mirrors quite closely and consciously the common law test for publication bans created in *Dagenais v. Canadian Broadcasting Corp.*[52] *Dagenais* itself was a conscious adaptation of the balancing in the *Oakes* test into the particular context of common law publication bans. Quite directly, then, the provenance of the interpretation of the Federal Court Rules in a non-*Charter* context, both at the level of principle and at the "black letter" stage, can be traced to the approach to *Charter* interpretation laid down in the early cases.

The final case to consider here is *Sauvé*, which deals with inmate voting rights. The case certainly could serve as an example of the importance of the broad and purposive approach laid down in *Hunter*, or as one where the political questions doctrine could have arisen. However, it is presented here to show the significance of onus of proof at different stages as laid down in *Oakes*.

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[52] [1994] 3 S.C.R. 835 [*Dagenais*].

Section 51(e) of the *Canada Elections Act*[53] denies the right to vote to "every person who is imprisoned in a correctional institution serving a sentence of two years or more." This section replaced an earlier provision which had denied the right to vote to all inmates in federal institutions, and which had been struck down for violating the right to vote guaranteed in s. 3 of the *Charter*.[54] The new provision was also challenged as a violation of s. 3, and once again was struck down, by the narrow margin of five to four.

At a level of policy, the dispute about whether inmates should have the right to vote rests on the question of how one best promotes respect for democracy. On the one hand, it is possible to argue that those guilty of serious offences have shown an unwillingness to be bound by the rule of law. Accordingly, it is appropriate temporarily to remove those persons from the group establishing what law should rule. If one chooses to place oneself outside the system, the argument goes, then one must suffer the negative consequences of having done so. On the other hand, the counter-argument is that the concept of democracy does not depend on extending the right to vote to people who are sufficiently worthy to be entitled to it: rather, by its very nature democracy assumes everyone gets to take part. The power of lawmakers flows from their legitimacy as elected representatives, and removing the right to vote from inmates tends to undermine rather than enhance the claims to legitimacy of the system. Allowing participation in the system is the correct method, this argument goes, of promoting respect for it.

In the decision, the latter reasoning persuades five of the judges, and so the majority strikes down the law. The four dissenting judges would have upheld the law, for reasons relating to deference to Parliament in the area of "competing social or political philosophies." They argue that both of the lines of argument outlined above share the common goal of promoting respect for democracy: the two approaches simply disagree about how best to achieve that goal. Further, the two theories rest on fundamentally unprovable assumptions. In such circumstances, the dissenters suggest, the Court should defer to Parliament's view about which philosophy to adopt.

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[53] R.S.C. 1985, c. E-2, s. 51(e).

[54] See *Sauvé*, *supra* note 46.

In addition, the dissenting judgment suggests, it is important to recognize that the s. 3 guarantee is subject to s. 1 and so it is a qualified, not an absolute right. The dissent's reasoning on this point is a little obscure. It is of course true that no *Charter* right is an absolute right, because of the existence of s. 1. However, as noted earlier it is worth recognizing the different types of guarantees found in ss. 2 through 14: some, such as freedom of expression, have no internal limits, while others, such as freedom from unreasonable search and seizure, are restricted before one ever reaches the justification stage at s. 1. It is clear the dissent would like to move as much as possible in the direction of reading limits into s. 3. They note the existence in an earlier draft of s. 3 of the phrase "without unreasonable distinction or limitation", and quote Professor Hogg to the effect that "the reason for the deletion was, no doubt, that the words were redundant having regard to s. 1."[55] Still, they are forced to acknowledge that justificatory concerns do not play a role in defining the content of s. 3, and that the right to vote is not one that "necessarily has inherent limitations within it."[56]

This is a key point. Strictly in terms of content, of course, it is arguable that internal limits on a right are redundant if those same limits will arise at the s. 1 stage. But precisely the effect of the distribution of onus from *Oakes* is that although those limits *might* arise later, they are much less likely to do so. *Sauvé* itself is the ideal example of this fact.

The majority does not accept the view that deference to Parliament's choice of social philosophy would be the right answer, or for that matter is even an answer to the right question. Parliament is not entitled to decide whether respect for democracy is better promoted through denying or guaranteeing the right to vote:

> The *Charter* makes this decision for us by guaranteeing the right of "every citizen" to vote...short of a constitutional amendment, lawmakers cannot change this.[57]

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[55] *Ibid.* at para. 85, quoting from Peter W. Hogg, *Constitutional Law of Canada*, looseleaf (Scarborough: Carswell, 2001) vol. 2 at 42-2, fn. 12.

[56] *Ibid.* at para. 86.

[57] *Ibid.* at para. 37.

In other words, it is too late now to be picking among competing social philosophies. We did that already - it's called the *Charter*.

This argument only succeeds, however, because the onus at the s. 1 stage rests with the government. Section 3 is, *prima facie*, an absolute right. It does not say, as it might have, that there is a right to vote without unreasonable restriction, a wording which based on *Collins* would require the applicant to show that the limitation was not reasonable. Rather, given the wording of s. 3 and *Oakes*, the Crown must show that the limit *is* reasonable. In situations where, as the dissent suggests here, the competing theories rest on inherently unprovable assumptions, that method of dividing responsibility settles the case.

Although *Sauvé* ultimately shows the significance of this point from *Oakes*, it is also appropriate to see it as sounding a note of caution. All nine judges accept the general approach that the government bears the burden of justification under s. 1. However, the dissenting decision, subscribed to by four of the nine judges, would in large measure have undone that approach if it had succeeded in creating what was effectively an exception to that rule in cases of "competing social or political philosophy." If in general the Court ought to defer in its s. 1 analysis to the judgment of Parliament when a case concerns competing philosophies, we would find a sudden and dramatic increase in the number of issues of philosophy arising. In effect, it would amount to a version of the "political questions doctrine." Questions resting on competing social and political philosophies would not be immune from review, but the onus regarding justification would effectively be reversed. Since virtually all law could plausibly be argued to be a matter of social and political philosophy, the argument would arise routinely. It would frequently succeed, leading to a diminution of *Charter* protection.

In this regard, it should not only be a source of concern that four of nine judges were willing to create such a rule. Of less concern, but a concern nonetheless, is that even the five judges in the majority frequently treat the decision as though it were a question of choosing the appropriate social and political philosophy. Really, to have said that the *Charter* had settled the point by attaching no internal limits (beyond citizenship) to the right to vote was a sufficient answer. In fact, though, the majority argues at some length that Parliament adopted the *wrong* social philosophy, and that the more inclusive philosophy was the correct one. To do this is to imply that it is worth doing this: that it somehow needed to be demonstrated that the denial

of the s. 3 right was not justified. That counsel for Sauvé would attempt to do this in the course of argument is of course understandable as a strategic consideration: for the Court to do so in its decision is unnecessary and misleading. To the extent that it implies that the issue is one of choosing the correct social philosophy, it risks creating the undesirable exception argued for by the dissent.

Conclusion

Pendulums always swing. It is inevitable that in interpreting rights, courts over the years will be more inclined to give expansive readings at some points and narrower readings at others. That process is already easily observable with *Charter* rights. However, the *Charter* pendulum swung first in the right direction. We are far better off to have had early broad decisions which were later confined, than to have had early restrictive decisions which courts later had to struggle to go beyond.

Indeed, the better way to frame the analogy is to say that the early cases fixed the point from which the pendulum would hang. Whatever oscillations happened after had to happen within the arc allowed by those decisions. Had early results created a different structure, the area within which *Charter* disputes could take place would be entirely different.

Today, parties dispute whether a result will or will not go too far in advancing a broad purposive approach to *Charter* rights, but do not dispute that a broad purposive approach is necessary. They dispute whether effects violate rights, whether particular laws violate substantive principles of fundamental justice, and whether the Crown can justify a limit on rights: they dispute the answers to those questions, but not that those are the questions to be asked.

On the other hand, parties do not argue that matters are immune from review because they are political questions, or because they have already been settled pre-*Charter*. Such arguments could have existed, and could have been significant, but are happily absent from our constitutional scene.

These types of issues about how to analyse *Charter* claims have enormous importance, simply by the way they establish the terms of debate and issues open for dispute. They shape the questions to be asked and the way we will go about asking

them. In doing so they limit the range of potential answers, or make particular results more likely. The ultimate effect is to prevent the glass from being drained below a certain point, to fix the period of the pendulum so that it cannot swing too far, and to provide a certain minimum protection via the *Charter* that, despite almost any later variation in individual cases, virtually cannot be lost. That is the true legacy of those early *Charter* decisions.