Supreme Court Charter Decisions, 1984: An Analysis

In the three years that have followed proclamation of the *Canada Act, 1982*, many interpretations have been placed on the provisions of the *Canadian Charter of Rights and Freedoms (Charter)* by politicians, academics, lawyers and the judiciary. Such interpretations, however qualified and competent, are reasonably supplanted by the authoritative interpretation of the *Charter* by the Supreme Court of Canada.

In 1984 the Supreme Court rendered three long awaited judgments on the *Charter*. All were unanimous judgments and, interestingly, only one reversed the Court of Appeal below.[1]

Although these judgments are the first on the *Charter*, much can be learned from them and applied in future cases. Using these three decisions, an analysis of the Supreme Court's construction of the *Charter* will be undertaken, highlighting techniques of interpretation applied by the Court; the use of extrinsic aids to assist the interpretation; the use of academic writings and comparative jurisprudence, and the reality of the bilingual nature of the *Charter*.

THE CASES

Skapinker[2]

Joel Skapinker, a resident of Ontario, had successfully completed his academic and bar course requirements when he applied for admission to the Law Society of Upper Canada. He was refused admission on the basis that as a South African citizen he did not meet the Canadian citizenship requirement mandated by the Law Society.[3] Mr. Skapinker challenged the citizenship requirement on the basis that it conflicted with s.6(2)(b) of the *Charter*. This section provided Canadian citizens and, more importantly to Mr. Skapinker, permanent residents, the right to pursue the gaining of a livelihood in any province. The Ontario Court of Appeal upheld Mr. Skapinker's submission, but this decision was reversed on further appeal.[4] The Supreme Court supported the citizenship requirement. It held that s.6(2)(b) required movement into another province for the purpose of residing or working without residence before a person triggered the *Charter* right to pursue the gaining of a livelihood.

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[1] *Skapinker v. Law Society of Upper Canada* (1984), 53 N.R. 169 (S.C.C.).

[2] *Ibid.*

[3] *Law Society Act*, R.S.O. 1980, c. 233, s. 28(c).

[4] By the time the case had reached the Supreme Court, Skapinker had become a Canadian citizen. He was substituted in this action by John Calvin Richardson, an American citizen who had also applied for admittance to the Ontario Bar.

Protestant School Board[5]

In 1977 the Province of Quebec passed the *Charter of French Language*[6] (Bill 101) which required that educational instruction in that province be in French with an exception for children of restricted categories of parents.[7] The Supreme Court upheld the finding of the Court of Appeal of Quebec that the restrictive provisions of Bill 101 conflicted with the broader minority language education rights of s.23 of the *Charter*.

Southam[8]

Shortly after proclamation of the *Charter*, the Director of Investigation and Research of the Combines Investigation Branch authorized representatives of the Branch to enter upon the premises of Southam Inc., a newspaper publishing company. His orders were to examine and seize any record, paper, book or other document which could be used as evidence of Southam's involvement in a monopoly or any type of restricted trade practice leading to a lessening of competition.

Upon commencement of the search, Southam Inc. applied for an interim injunction stating that the powers given to the Director of Investigation and Research[9] were inconsistent with s.8 of the *Charter*. The trial division dismissed the application. The Court of Appeal of Alberta allowed the application, and the Supreme Court upheld the Court of Appeal. The Supreme Court held that the powers of search and seizure under s.10 of the *Combines Investigation Act*[10] were unreasonable.

APPROACH TO INTERPRETATION

Historically, courts have used three main approaches to interpret legislation. In his well-known article[11], John Willis identified these approaches as (1) the "liberal" rule: if the words used are plain and unambiguous, the court is bound to construe them in their ordinary sense even if that may lead to an absurdity;[12] (2) the "golden" rule: the ordinary meaning may be modified to avoid the absurdity but no further,[13] and (3) the "mischief" rule or purpose approach:[14] the words of the statute should be construed to "suppress the

[5]*Quebec Association of Protestant School Boards, Protestant School Board of Greater Montreal and Lakeside School Board* v. *Attorney General of Quebec and Attorney General of Canada* (intervenor) *and Island of Montreal School Council* (mis en cause) (1984), 54 N.R. 196 (S.C.C.).

[6]R.S.Q. 1977, c. C-11.

[7]*Ibid.*, ss. 72, 73.

[8]*Lawson A.W. Hunter, Director of Investigation and Research of the Combines Investigation Branch et al.* v. *Southam Inc.* (1984), 41 C.R. 97 (S.C.C.).

[9]R.S.C. 1970, c. C-23, ss. 9(2), 10.

[10]*Ibid.*

[11]J. Willis, "Statute Interpretation in a Nutshell" (1938), 16 *Can. Bar. Rev.* 1.

[12]*Ibid.*, at 9-10.

[13]*Ibid.*, at 10.

[14]E. Dreidger, *The Construction of Statutes* (Toronto: Butterworths, 1974) 61. In his text Dreidger uses the phrases "mischief rule" and "purpose approach" interchangeably.

mischief (and) advance the remedy ... according to the true intent of the makers of the Act ..."[15]

When will the courts use a particular rule of interpretation? Normally the purpose approach will be applied by the courts to resolve the problem of general phrasing in a constitutional document.[16] As a result, the court will focus on the object of the legislation. The literal rule will commonly be employed where the words are precise and narrow.[17] In the end, however, the court will use the rule which "satisfies its sense of justice."[18]

In a constitutional setting, it has been recognized that the purpose approach is the proper approach to interpretation.[19] Constitutions are intended to adapt to the future, to "operate in political, social, and economic conditions unimagined."[20] Therefore, of necessity, they tend to use language which is general, thus leading to a broader scope for judicial construction. In the Canadian constitutional context, Viscount Sankey indicated his preference for a purpose approach in *Edwards* v. *Attorney General of Canada*[21] where he affirmed:

> [The Constitution Act, 1867] planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant a constitution to Canada ... Their Lordships do not conceive it to be the duty of the Board — it is certainly not their desire — to cut down the provisions of this Act by a narrow and technical construction, but rather to give it a large and liberal interpretation.[22]

Such is the approach one would expect with the *Charter*. Unlike the *Bill of Rights*[23], the *Charter*, pursuant to *Constitution Act, 1982,* s.52 is part of the supreme law of Canada. Accordingly, any law which is inconsistent with the *Charter* is, to the extent of the inconsistency, of no force. This very entrenchment of the *Charter* indicates to the judiciary the need for a liberal interpretation. Any concerns that the *Charter* might suffer the same fate as the *Bill of Rights* — a narrow and technical interpretation at the hand of the judiciary — have been met by Dickson, J. in *Southam* where he restated the living tree approach:

> A constitution, ... is drafted with an eye to the future .... It must, therefore, be capable of growth and development over time to meet new social, political and historical realities unimagined by its framers. The Judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind.[24]

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[15] *Supra*, footnote 11, at 14.

[16] *Ibid.*, at 15.

[17] *Ibid.*

[18] *Ibid.*, at 16.

[19] *Supra*, footnote 8, at 111.

[20] D. Gibson, "Interpretation of the Canadian Charter of Rights and Freedoms: Some General Considerations", in W. Tarnopolsky and G. Beaudoin, *Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1982) 25 at 26.

[21] [1930] A.C. 124 (P.C.).

[22] *Ibid.*, at 136-37.

[23] S.C. 1960, C.44.

[24] *Supra*, footnote 8, at 110.

The use of the purpose approach by the courts will give the *Charter* a broad and liberal interpretation; it will not confine the court to construe the words in a particular provision of the *Charter* in a vacuum, but will allow the court to determine the purpose of the section in the eyes of the framers.

The purpose approach was used by Dickson, J. in *Southam*. First he determined the purpose of the *Charter*, stating that it was to guarantee and protect the enjoyment of those rights and freedoms it enhances, within the limits of reason.[25]

Once he concluded this task, he went on to consider the purpose of s.8 and declared that it was "to protect individuals from unjustified state intrusion upon their privacy."[26] He concluded that ss.10(1) and 10(3) of the *Combines Investigation Act*[27] were inconsistent with the purpose of s.8 and therefore, to the extent of the inconsistency, were of no force.

A similar approach was taken by the Court in *Protestant School Board* when it concerned itself with the purpose of s.23 of the *Charter*. It determined that the framers did indeed have Bill 101 in mind when they enacted s.23. In fact, Bill 101 was the mischief which s.23 was trying to prevent. The court stated:

> By incorporating into the structure of s.23 of the *Charter* the unique set of criteria in s.73 of *Bill 101*, the framers of the Constitution identified the type of regime they wished to correct and on which they would base the remedy prescribed.[28]

In contrast (in *Skapinker*) Estey, J. used the literal rule to interpret s.6(2)(b). He determined the section's purpose from the meaning of its words and its heading, without determining the purpose of the section in the eyes of the framers. This approach was used because the words of the section and the heading were clear and precise and "no doubt arose upon the words themselves."[29] This seems to be a more restricted interpretation of the *Charter*, conflicting with the other two decisions of the Supreme Court.

Based on these three cases, the *Charter* is seen by the Court as a purposive document.[30] Therefore, because of its general language, the primary approach of the court should be to apply the "mischief" rule. It is submitted that the use of the literal rule should be confined to situations where the language of the provision in question is clear and unambiguous.[31]

EXTRINSIC AIDS TO INTERPRETATION

When a court is determining the purpose of a particular section of a con-

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[25] *Ibid.*, at 11.

[26] *Ibid.*, at 114.

[27] R.S.C. 1970, c. C-23.

[28] *Supra*, footnote 5, at 217.

[29] *Supra*, footnote 14, at 63.

[30] *Supra*, footnote 8, at 111.

[31] For example see s.3, 4, 5 of the *Charter*, where the purpose of the section can be determined by the words themselves.

stitution, it must look at the impact of its decision on social, political and economic concerns. The court must look not only at present impact, but, using the "living tree" approach, it has a duty to consider the consequences of its decisions as it relates to future generations.[32]

To help the court in this complex decision-making process, the use of extrinsic data is very influential. Courts generally have the capability to consult most types of extrinsic information necessary to assist in the interpretation of a constitution. They may take judicial notice of the non-controversial facts of history and economics.[33]

Earlier draft versions of the constitutional text may be consulted to assist in determining the meaning of the final copy.[34] Other background information such as Royal Commission reports, reports from Special Joint Committees of the Senate and House of Commons, and Public Inquiries are also very useful.[35]

In reference to this look into historical, cultural, social and economic concerns when courts are interpreting the *Charter*, one writer has commented:

> I hope, too, that our search will also lead us to seek light from disciplines other than law, for many of the questions we will have to consider transcend the legal system. Rights continue to emerge from the human experience.[36]

How much weight will the court give these forms of extrinsic evidence? Authorities stress that such evidence may only be employed to determine the mischief that the legislation was aimed to cure, and not as a direct aid to interpretation.[37] This means "no extrinsic aid is to be regarded as proof of the truth of its contents, or as conclusive in itself. The court must always be the final judge of meaning, after taking account of all relevant factors."[38]

The Supreme Court did not use any of these aids in *Southam* or *Protestant School Board.*[39] However, in *Skapinker,* Estey, J. accepted into evidence the history of s.6 of the *Charter* as it related to the drafting procedure. He stated that he did not take recourse to it in his judgment[40] because he was able to come to a conclusion without referring to it.

One form of extrinsic evidence which has not been used by Canadian

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[32] *Supra,* footnote 8, at 110, 111 where Dickson, J. makes comments on the need for the *Charter* to adapt to the future, and in *Skapinker, supra,* footnote 1, at 18 where Estey, J. states the *Charter* must accommodate the future.

[33] *Supra,* footnote 20, at 35. The admissibility of this evidence may be attacked on the ground of irrelevancy but should not be attacked merely because of its nature.

[34] *Ibid.*, at 35.

[35] *Ibid.*, at 36.

[36] G.V. La Forest, "The Canadian Charter of Rights and Freedoms: An Overview" (1983), 61 *Can. Bar. Rev.* 19 at 24.

[37] *Supra,* footnote 20, at 36.

[38] *Ibid.*

[39] Deschenes, C.J.S.C. at trial, (1983) 140 D.L.R. (3d) 33, took into account socio-economic factors, events of history and a government White Paper.

[40] *Supra,* footnote 1, at 198-99.

courts but which would play an important role in the interpretation of the *Charter*, is the use of legislative debates and statements of politicians. Historically, courts have interpreted the *Constitution* on its own without determining the intention of the politicians who enacted the document.[41] However, since the court must attempt to determine the purpose of a provision of the *Charter*, surely this type of information would be relevant to the court's purposive approach.

The Supreme Court, in *Reference re Anti Inflation Act*[42] "agreed to consult a Government of Canada White Paper tabled in the House of Commons by the Minister of Justice as an introductory statement concerning the legislation under review by the Court."[43] This decision has led some writers to the conclusion that there has been a movement in the direction of accepting this type of extrinsic evidence.[44]

Further support for this proposition can be found in *Skapinker*, where the Court allowed into evidence presentations in the House of Commons in 1980-81 by the Minister of Justice, and statements by the Premier of the Province of Quebec. Estey, J. stated, however, that although the Court accepted the material, he did not "take recourse to it in construing s.6", as he did not want this case to decide "the constitutional interpretative process of the admission of such material to the record".[45]

It would appear from these cases, then, that the Court is unwilling to admit this type of evidence where the use of the common law and accepted types of extrinsic evidence allow the court to extract an acceptable meaning from the language of the provision. Although the Supreme Court has not made a decision on the acceptability of extrinsic evidence of a political nature, it is submitted that it is important background material which may be used by counsel and the court alike where appropriate.

USE OF ACADEMIC WRITINGS

The *Charter* is a new document; because it is in its infancy, there is little or no precedent to follow. Academic writings could be a valuable source of information for the courts because they put forward other opinions as to the meaning of a provision in the *Charter* and may assist in the determination of the purpose of a section.

In *Skapinker*, Estey, J. resorted to two authors to find further support for his conclusion that s.6(2)(b) was a mobility rights section.[46] In *Protestant*

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[41] M. Manning, *Rights and Freedoms of the Court* (Toronto: Emond-Montgomery, 1983) 72.

[42] [1976] 2 S.C.R. 373.

[43] *Supra*, footnote 20, at 37.

[44] *Ibid.* See also E.G. Hudon, "Case Comment" (1977), 55 *Can. Bar. Rev.* 370 where he concludes that the Supreme Court may soon be willing to take the final step to accept this type of extrinsic evidence; and *Re S.E.I.U., Loc. 204 and Broadway Manor Nursing Home* (1983), 4 D.L.R. (4th) 231 (Div. Ct.) where reference was made to statements in the House of Commons and statements of cabinet ministers and legislators.

[45] *Supra*, footnote 1, at 199.

[46] *Supra*, footnote 1, at 198.

School Board, the court did not refer to academic writings as an aid to interpret the *Charter*.

Again, in *Southam*, Dickson, J. did not refer to such writings, but he did make the following extra-judicial comments to the Alberta Barristers' Society:

> ...[A]nd a vital part of this enterprise is ensuring that the decision makers — the judges — have the greatest depth, highest quality of resources at their disposal when faced with the intractable issues forced by the Charter ... I encourage all counsel to read these scholarly writings and hopefully use them, quote from them, refer to them in argument before our court.[47]

It would appear that academic writings are an important guide to interpretation of the *Charter*. Reference to them by counsel should add weight to their arguments before the court.

USE OF COMPARATIVE JURISPRUDENCE

The historical reluctance of the Canadian courts to refer to American jurisprudence when dealing with the Canadian *Bill of Rights* has been reversed in *Skapinker* and *Southam*.[48] Questions as to the propriety of an almost total acceptance and utilization of American case law have resulted in some interesting, albeit not new, recommendations for the future.

In order to discuss any recommendations regarding future use of comparative jurisprudence, a logical starting point is to review the practice as it now exists. In *Skapinker*, the two points to which American case law had been applied were:

A. How is a constitutional document to be interpreted?

B. What relevance, if any, is to be given to the headings of the various sections of the *Charter*? (for example, s.6 of the *Charter* begins with the heading "Mobility Rights")

Dealing with the first point, Estey, J. commented on the United States courts' long history of experience in regard to constitutional interpretation.[49] Then, from the case of *Marbury* v. *Madison*,[50] Estey, J. gleaned the constitutional foundation of the United States by reciting the words of Chief Justice Marshall: "Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation ..."[51] As to how a constitutional document is to be interpreted, Estey, J. once again referred to Chief Justice Marshall in the case of *McCullock* v. *State of Maryland:*

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[47] *The Montreal Gazette*, Monday, February 4, 1985, A-5. This address was a speech given in Edmonton to several hundred Alberta lawyers.

[48] With its language rights issue being unique to Canada, *Protestant School Board* contains no reference to American materials.

[49] *Supra*, footnote 1, at 180.

[50] (1803), 5 U.S. 173, at 175.

[51] *Ibid.*, at 176-77.

> A constitution... (with its futuristic scope) ... could scarcely be embraced by the human mind. It would probably never be understood by public. Its nature, therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves ... [W]e must never forget that it is a constitution we are expounding.[52]

Having utilized *only* the American response to this point, Estey, J. promptly moved on to resolve the question of the relevance of *Charter* headings. He did so in a dramatically different fashion by reviewing Canadian, American and English jurisprudence, along with academic writings. Based on these sources he determined the question to be open, as the sources discussed only the emphasis to be placed on headings in statutes, and did not refer specifically to headings contained in a constitutional document. Therefore, in order to come to decision, Estey, J. consider the question in its Canadian setting:

> ... It is clear that these headings were systematically and deliberately included as an integral part of the *Charter* for whatever purpose. At the very minimum, the court must take them into consideration when engaged in the process of discerning the meaning and application of the provisions of the *Charter*.[53]

Such a jurisprudential development based primarily on the Canadian context, as opposed to one which relies exclusively on American jurisprudence, would appear to be vital to the survival of our *Charter*.

In *Southam*, in dealing with s.8 of the *Charter*, Dickson, J. made no less than five references to American material.[54] He thc : :ched a decision employing a somewhat strict acceptance of this Americal ·rial, similar to the approach taken by Estey, J. in dealing with the first ; .a. in *Skapinker*.

In order to more fully comprehend the potential for problems when relying exclusively upon American jurisprudence, it is helpful to review the systems of the two countries. When one searches for comparisons between the American and Canadian systems, it is tempting to focus primarily on the American *Bill of Rights* and the Canadian *Charter*. A problem arises in that the *Charter* has yet to be adorned by numerous judicial interpretations in the Supreme Court of Canada. On the other hand, the *Bill of Rights*, dating from 1789, has been subjected to an enormous amount of authoritative judicial interpretation. One is therefore, to some extent, comparing apple seeds to apples — the comparison being made between a somewhat bare Canadian text at the beginning of its life, and an elaborate and complex system that has been intricately worked out through the years by the American courts.[55]

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[52](1819), 17 U.S. 316, at 407.

[53]*Supra*, footnote 1, at 192-93.

[54]*Supra*, footnote 8, at 158. For example, he refers to the Fourth Amendment to the United States Constitution and points out its dissimilarity with s.8 of the *Charter*. Notwithstanding this dissimilarity, Dickson, J. goes on and looks at the American case of *Katz* v. *U.S.*, (1967), 389 U.S. 347 which enunciates the broad right given to citizens by the Fourth Amendment to be secure from unreasonable search and seizure. Then Dickson, J. reviews the decision of the Supreme Court of the United States in *U.S.* v. *Rabinowitz*, (1950), 339 U.S. 56 pertaining to the balancing of state and personal interests.

[55]P. Bender, "The Canadian Charter of Rights and Freedoms and the U.S. Bill of Rights: A Comparison" (1983), 28 *McGill L.J.* 811 at 814.

How then should the courts utilize comparative jurisprudence when construing the *Charter*? A conclusion drawn by Edward McWhinney is appropriate:

> While foreign legal experience, properly proven as to its relevance and applicability to Canada in doctrinal but also sociological terms, may be of great interest and help to us, there is every reason to believe that we can develop our own distinctive national jurisprudence on an empirical, case-by-case basis. This will mean a much more overt policy-making role for the Supreme Court and, in consequence, much greater public visibility for the court and its judges and much greater exposure to public study and criticism of court decisions, and a somewhat more nuanced relationship than heretofore to co-ordinate executive and legislative arms of government.[56]

Furthermore, the newest member of the Supreme Court of Canada, Mr. Justice Gerard V. La Forest, stated prior to his appointment:

> I might add, interstitially, that the *Charter* forces us to look at questions differently than before. However clear a statute or its purposes may be, courts will be asked to make a value judgment about it, a duty that is very different from the traditional role of the court. This should profoundly affect the sources on which the courts must rely for guidance. In particular, reference to judicial decisions in other jurisdictions, notably the United States, and under the United Nations Covenant on Civil and Political Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms. Not that I think we should blindly follow these. Our courts must be guided by the felt needs and traditions of our own society....[57]

OTHER COMPARATIVE MATERIALS

The reliance upon American material is a natural tendency owing to the geographic proximity of the United States to Canada and the sheer volume of supportive American precedents. Nonetheless, in view of the constitutional and systemic discrepancies between the United States and Canada, perhaps more appropriate comparative materials can be employed in construing the *Charter*. There have been suggestions that Canadians study the European and United Nations jurisprudence in the area of human rights, as their respective constitutional documents more closely resemble the *Charter* than does the *Bill of Rights*[58]. Studies undertaken by the United Nations have concluded that many constitutional documents on human rights around the world were either wholly or in part inspired by the *Universal Declaration of Human Rights*.[59] One could add Canada to that list, as there are rights laid down in the *Charter* which clearly correspond to the rights in the *Universal Declaration*, the *International Covenant on Civil and Political Rights* and the *European Convention of Human Rights*.

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[56] E. McWhinney, "Rights and Freedoms: Lessons of Comparative Jurisprudence" (1983), 61 *Can. Bar. Rev.* 55 at 68.

[57] *Supra*, footnote 36, at 24.

[58] *Supra*, footnote 44, at 280-81 where O'Leary, J., of the Divisional Court of Ontario referred to the United Nations' *International Covenant on Civil and Political Rights* and the *Conference on Security and Co-operation in Europe Final Act* when construing s.2(d) of the *Charter*. See also *Dolphin Delivery Ltd.* v. *R.W.D.S.U., Loc. 580* (B.C.C.A.) March 5, 1984 (unreported). The court approved of O'Leary, J.'s use of European and United Nations jurisprudence.

[59] E. Schwelb, "The Influence of the Universal Declaration of Human Rights on International and National Law," [1959] *Am. Soc. Int. Law* 217.

Consider, for example, s.1 of the *Charter*. Its framers decided to follow the *International Convenant on Civil and Political Rights* by inserting a general limitation clause in that section.[60] The *Charter*, therefore, has an express limitation on the rights enumerated therein; such a limitation, although drafted in an extremely vague fashion, reflects the philosophy of the Canadian people.[61] Contrast this with the *Bill of Rights* which declares the entrenchment of fundamental civil and political rights in absolute terms. The American judiciary slowly developed limitations on these rights — limitations that could be said to reflect the values of the American society. If Canadian courts rely on these American precedents, the result may be an adoption of American values in Canada.

It is therefore submitted that the European and United Nations jurisprudence would likely be of more relevance and value when interpreting the *Charter* than would American jurisprudence.

A BILINGUAL CONSTITUTION

A unique feature of the *Charter* is its bilingual nature. Equally authoritative in English and French, it is the supreme law of the land, superimposing itself on both the common law provincial systems and the civil law system of Quebec.

In *Skapinker*, Estey, J. discussed the relevancy of the English heading "Mobility Rights" for the purposes of contruing s.6 of the *Charter*. He interpreted the English heading as giving the person the right to move within and outside the national boundaries. He did not make any reference to the French text of the *Charter*.

Implicitly, as an anglophone, Estey, J. would probably have prepared his decision in English with the French version of the judgment being translated from it. However, it could be argued that "Liberté de circulation et d'établissement" may import an element of a right to establish (d'établissement) oneself anywhere in Canada as well as a right to mobility. The French text may provide a broader right than the English, but this possibility was not considered by the Court.

Estey, J. in passing, noted that s.6(3) permits provinces to impose "reasonable" residency requirements before the receipt of social services is allowed. The French version of s.6(3), however, employs the word "juste". As Alain Gautron points out:

> ...'juste' is a word heavily imbued with a sense of moral justice and fairness while 'reasonable' which may include a similar meaning, also connotes some elements of reason and rationality in addition to fairness. Thus what might be 'reasonable' might not be 'juste'.[62]

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[60]Section 1 of the *Charter* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[61]E.P. Mendes, "Interpreting the Canadian Charter of Rights and Freedoms: Applying International and European Jurisprudence on the Law and Practice of Fundamental Rights" (1982), 20 *Alta. L.R.* 383.

[62]A. Gautron, "French/English Discrepancies in the *Canadian Charter of Rights & Freedoms 1982*" (1982), 12 *Man. L.J.* 220 at 225.

The heading "Liberté de circulation et d'établissement" reinforces this element of a right to establish oneself and enjoy the benefits of a particular province's social services. The court could justifiably use a test that includes reason, rationality and fairness when examining a challenged provincial residency requirement for receipt of social services.

The French version of the rights under s.6 does provide a more expansive view, but this was not recognized by Estey, J. The learned judge looked no further than the English text with its "reasonable" approach, thus limiting the meaning that both versions together might provide. Yet he stated: "Narrow and technical interpretation of the constitution can stunt the growth of the law and hence the community it serves."[63] The only allusion made to the French version was with respect to the exclusion of the conjunction "and" appearing between ss.6(2)(a) and (b) of the English version but not in the French. The context was technical; but no consideration was made respecting the interpretation of the French version of s.6 in its own right.

The Court's judgment in the *Protestant School Board* is not problematic in its interpretation of the French and English versions s.23 of the *Charter*. The corresponding sections appear to speak harmoniously in that the intent of the effect of that section upon minority language educational rights in the province of Quebec was the same for both versions of s.23.

Dickson, J., delivering the judgment in *Southam*, made no mention of differences between the two versions of s.8 of the *Charter*, dealing with the English "unreasonable search and seizure" and the French "les fouilles, les perquisitions ou les saisies abusives".

Morris Manning, recognizing some of these differences, noted:

> Sections 56 and 57 of the constitution ensure that both the English and French versions of the constitution are 'equally authoritative'. Problems will arise where different meanings are ascribed to the same sections. For example, the English version of s.8 refers to 'search and seizure' while the French text is much more descriptive in dealing with 'les fouilles, les perquisitions ou les saisies abusives'.[64]

Francois Cheverette takes this a step further. He writes:

> The word 'search' refers indiscriminately to both searches of the person and searches of a place and it is rendered in French by the word 'les fouilles, les perquisitions'. The word 'fouilles' has the same double sense as search. But the fact that 'fouilles' is followed by the word 'perquisitions' which refers to searches in a place, indicates all the more clearly that the basic protection of the section applies not only to the latter but to searches of the person as well. On this point there appears no room for doubt.[65]

Dickson, J. did not refer to the French version as authority for recognition of rights against search and seizure of the person as well as the person's place. Instead, he relied on American case law dealing with the Fourth Amendment of the United States *Constitution* as his authority for recognition of the

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[63] *Supra*, footnote 1, at 190.

[64] *Supra*, footnote 41, at 70.

[65] F. Chevrett, "Protection Upon Arrest and Detention and Against Retroactive Penal Law", in W. Tarnopolsky and G. Beaudoin, *supra*, footnote 20, 291 at 292.

rights of persons as well as places under s.8 of the *Charter*. Again, it appears obvious that the English judgment was written first and the French version is merely a translation.

To illustrate, Dickson, J. in the English version wrote: "the guarantee of security from *unreasonable* search and seizure only protects a *reasonable* expectation." (emphasis in the original)[66] The corresponding French version reads: "La garantie de protection contre les fouilles, les perquisitions et les saisies *abusives* ne vise qu'une attente *raisonnable*." (emphasis added)[67] The learned judge wrote from a decidedly English perspective. The question of whether an unreasonable search and seizure has the same connotation as "les fouilles, les perquisitions et les saisies abusives" was just not addressed.

Remi M. Beaupre points out the second major problem with bilingual legislation:

> Choosing between two constructions that may reasonably be placed on a single set of words in a manner compatible with a single legal system cannot be said to be a problem of the same magnitude as that presented by two equally authentic linguistic versions of a statute that must be applied uniformly within the context of two legal systems.[68]

Such sensitivity to the bi-legal and bilingual nature of our country should be within the Court's awareness.

In *Southam*, Dickson, J. relied heavily on common law principles to resolve the arguments before the court. However, the *Charter* affects both common law and civil law systems. It is submitted that such singular common law constructions should not set a norm for future *Charter* considerations.

CONCLUSION

The following conclusions have been drawn from this analysis of the 1984 Supreme Court *Charter* judgments. Directly resulting from the Court's broad and liberal approach to interpreting the *Charter*, it is suggested that the purpose approach will be applied whenever the phraseology of the *Charter* is indefinite enough to warrant it. Conversely, the literal rule will be used where language is clear and concise. The use of extrinsic aids such as past versions of the *Charter*, Royal Commission reports and other various studies will be most helpful. While the use of parliamentary debates and speeches of politicians cannot be used as evidence presently, there has been a weakening of this position and one might expect that such evidence will play a role in future *Charter* interpretations. The judiciary has stated categorically that reference to academic writings is encouraged and welcomed.

There is heavy reliance on American jurisprudence when interpreting the provisions of the *Charter* and such reliance will likely continue. However, development of a Canadian approach to interpretation of the *Charter* is hoped

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[66] *Supra*, footnote 8, at 114.

[67] *Southam*, French version, slip judgment, at 20 (unreported).

[68] R.M. Beaupre, *Construing Bilingual Legislation in Canada*, English ed. (Toronto: Butterworths, 1981) 4.

for with a greater reliance on European and United Nations jurisprudence on human rights.

Finally, the Court seemingly has relied almost exclusively on the English version of the *Charter* for interpretation purposes without referring in any depth to the French version. The courts should be aware of the bi-legal and bilingual interests that the *Charter* protects and serves.

In relation to the *Charter*, these cases are but the tip of the iceberg. An enormous challenge faces the Canadian judiciary as the consequences of this unique entrenchment further reveal themselves. It is hoped that the foregoing analysis may be of assistance to those who, in the future, confront the problem of *Charter* interpretation.

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