## Book Reviews • Revue Bibliographique

# *Rights, Freedoms and the Courts*, A Practical Analysis of the *Constitution Act, 1982* Morris Manning, Q.C., Toronto: Emond-Montgomery Ltd., 1983. Pp. *lxiv*, 760. $75.00 (cloth).

An appropriate subtitle for this book would have been: "The Charter in an Age of Dictaphone Justice". And that is not meant by any measure to raise futuristic expectations. At least one expectation which might reasonably have been held for a self-proclaimed practical analysis by an author of Morris Manning's unique professional and academic qualifications would be that proposals be offered to enable the legal system to respond in practical terms to the social and political exigencies of the Charter. Instead Mr. Manning follows the *modus operandi* of so many other Charter commentators. He spells out a series of difficult choices raised by the Charter; discusses solutions as if diligent examination of Charter language and foreign precedents will yield a "true" response; and concludes with a now-familiar observation, "It is to the judiciary that the public must now look to determine the scope and extent of their fundamental rights and freedoms".[1]

The now-commonplace comment that difficult choices under the Charter rest in the hands of the judiciary is not, by itself, extraordinary. It recognizes a broadened mandate for judicial review and a concomitant imposition of limits upon the authority of legislatures and the executive. What such a comment fails to do is to state any underlying assumptions about the nature of legal argument or the kind of judicial decision-making which is appropriate under the regime of the Charter. These throwaway references to the power of judges could be interpreted in any of three ways:

> (i) that constitutional language is capable of faithful interpretation and application by judges who will discover its true meaning if only they have the advantage of result-oriented, adversarial pleadings from counsel, who will draw upon textual analysis, foreign precedents and pre-Charter caselaw;

[1]Manning, at 21.

(ii) that constitutional language is so ambiguous that it permits judges to decide tough cases according to their personal world-view but that lawyers should continue to operate as under the previous model, perhaps in the interest of not undermining the integrity of the courts, perhaps in the interest of being seen to do something for which they can be paid; or,

(iii) that constitutional language is open-ended but that judges, properly informed of the social and political implications of competing choices by diligent and politically sensitive counsel, will be able to make intelligent choices regarding substantive rights, reasonable limits and enforcement under the Charter.

Now it was not unreasonable to hope that Manning's book, introduced, as it was, as:

> a text which will guide and assist the busy practitioner in the analysis to be made of [the Charter's] provisions in order that the practitioner may know when to raise a Charter argument, and, if so, how such an argument may best be presented[2]

would make a significant contribution to the development of a practical approach to the Charter along the lines of the third model set out above. Instead it comes off as a rambling appellate brief, complete with the implicit assumptions regarding constitutional (or statutory) language and judicial reasoning which typify a style of advocacy and legal argument which belong to an age of dictaphone justice but which are completely inappropriate for Charter litigation.

My general criticism is that this book exemplifies a now-apparent tendency of lawyers, once having extended the hegemony of the legal profession to monopolize substantial aspects of what was formerly a legislative domain, to treat the Charter as if everything can be resolved by still more legal argument coupled with hand-waving references to judicial supremacy. Specifically, my first criticism is that this book and this type of argument relies fallaciously upon the objectivity of language. Secondly, informed by the general assumption that language prevails over political reality, it engages in casual comparisons with other jurisdictions. And thirdly it fails to do what a book for Charter practitioners ought to have done as a matter of first priority: propose a methodology, and consider the advantages and the risks, of a Canadian sociological jurisprudence.

Turning first to the question of constitutional interpretation, one does not have to be a linguistic nihilist to see the fallacy of the search for the intent of the Charter.[3] It is now forty-five years since John Willis wrote his tongue-in-cheek article "Statute Interpretation in a Nutshell" in which he says the search for the intent of the legislature in ordinary statutes is "at most a harmless, if bombastic, way of referring to the social policy behind the Act".[4] And of course the Constitution is not an ordinary statute in any

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[2] *Ibid.*, at vii.

[3] The search for intent in the Charter becomes quite bizarre when one asks "*whose* intent?" The drafters'? the Canadian Parliament? the U.K. Parliament?

[4] (1938), 16 Can. Bar Rev. 1, at 3.

event. It is well accepted that a constitution ought to be given a large and liberal interpretation as an "organic statute".[5] Moreover it can hardly be asserted that Canadian constitutional litigation has ever been confined to, or even been substantially based upon, a linguistic analysis. What do strict interpretivists say in the face of evidence that Canadian courts have been able to decide important constitutional cases by reasoning, for example, that a tax of 100% above a stipulated base price has a tendency to be passed on,[6] or that a person stopped to give a breath sample into a roadside screening device is not detained,[7] or that the word "shall" in section 23 of the *Manitoba Act* is directory and not mandatory?[8] Surely it must be acknowledged that the courts have been motivated not primarily by constitutional language but by what they have perceived as the political realities of each of these cases. One Canadian commentator who has written of the "teleological mandate" of the Charter is Noel Lyon who asks:

> Will our first question be "what is the true meaning of these words that have just been enacted?" or will it be "what results, in terms of realities and human values, are we trying to obtain by enacting these provisions"?[9]

In the United States the interpretivists have lost the struggle for the Constitution, at least insofar as their work sought to discover an original intention of the framers. Michael Perry says in his recent work on American constitutionalism: "I prefer to let the framers sleep. Just as the framers, in their day, judged by their lights, so must we, in our day, judge by ours".[10] And this sentiment is not necessarily based on the difficulties of historical reconstruction over a period of two centuries. Paul Brest makes the observation which John Willis made regarding statutory interpretation: how do you determine the intention of a collectivity of individuals, or is it appropriate to speak in terms of a collective intention at all?[11] Among the most skeptical of American commentators is Sanford Levinson, who says:

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[5]*Attorney-General for Ontario* v. *Attorney-General for Canada*, [1947] A.C. 127, at 154 (P.C.).

[6]*Canadian Industrial Gas and Oil Ltd.* v. *The Province of Saskatchewan* (1977), 18 N.R. 107, 80 D.L.R. (3d) 449 (S.C.C.).

[7]*R.* v. *Chromiak* (1979), 49 C.C.C. (2d) 257, 102 D.L.R. (3d) 368 (S.C.C.).

[8]*Bilodeau* v. *Attorney-General of Manitoba*, [1981] 5 W.W.R. 393 (Man. C.A.).

[9]"The Teleological Mandate of the Fundamental Freedoms Guarantee: What To Do With Vague but Meaningful Generalities" (1982), 4 Sup. Ct. L. Rev. 57, at 60. See also: R.A. Macdonald, "Postcript and Prelude—The Jurisprudence of the Charter: Eight Theses" (1982), 4 Sup. Ct. L. Rev. 321, at 350.

Most of the articles which set out to discuss interpretation of the Charter come off, perhaps by definition, as being bounded by a belief in the "truth" of language. See: Robin Elliot, "Interpreting the Charter—Use of The Earlier Versions As An Aid" (1982) U.B.C.L. Rev. Charter Edition 11; Dale Gibson, "Interpretation of the Canadian Charter of Rights and Freedoms: Some General Considerations" in Tarnopolsky and Beaudoin, eds. *Canadian Charter of Rights and Freedoms, Commentary* (Toronto: Carswell, 1982), at 25.

[10]Michael Perry, *The Constitution, The Courts and Human Rights* (New Haven: Yale University Press, 1982), at 75. Also: J. Ely, *Democracy and Distrust* (Cambridge: Harvard University Press, 1980); C. Black, *Structure and Relationship in Constitutional Law* (Baton Rouge: Louisiana State University Press, 1969); P. Brest "The Misconceived Quest for the Original Understanding" (1980), 60 B.U.L. Rev. 204.

[11]Brest, *ibid.*, at 214-15; Willis, *supra*, footnote 4, at 3.

> There are as many plausible readings of the United States Constitution as there are versions of *Hamlet*, even though each interpreter, like each director, might genuinely believe that he or she has stumbled onto the one best answer to the conundrums of the texts. That we cannot walk out of offending productions of our national epic poem, the Constitution, may often be anguishing, but that may be our true constitutional fate.[12]

The conclusions of these American writers regarding the futility of the search for a true version of a constitutional text is irresistable.[13] So what does the Manning book offer to Canada's busy practitioners faced with the prospect of applying the Charter? In an introductory section entitled "The Judiciary's New Role", he appears to adopt a non-interpretive approach, where he says, for example: "The broad, vague language of the Charter is necessary . . . because our Charter as part of our Constitution must adapt to social and economic situations many years from now, some completely unknown to us".[14] In another part of the book it is argued that statements of intention by the drafters should be avoided because that would lead to "a stultifying of the words used and a freezing of the concepts".[15] However as one moves beyond these introductory passages it becomes apparent that the brief-writing nature of the exercise prevails and that the lawyer's penchant for textual analysis takes over. One such example can be found in the consideration of "reasonable limits" in section 1. Now it should be expected that if any provision of the Charter commands a frank recognition of an intensely political role for judicial review, it would be section 1. But Mr. Manning proposes that we approach "reasonable limits" as follows:

> In interpreting the phrase "reasonable limits" regard will undoubtedly be had to the dictionary definitions . . . It must also have been intended that the word "reasonable" means something different from "prescribed by law." To say a law is reasonable merely because it is set out in statutory form is to equate "reasonable" with "prescribed by law". The drafters cannot be assumed to have desired to draft redundant provisions.[16]

When dealing with the reference in section 7 to "principles of fundamental justice", Mr. Manning says it "raises an entirely different legal concept than the phrase law of the land or even the expression due process of law".[17] Or at another point we are offered the observation that: "The phrase 'principles of fundamental justice' means more than the phrase 'fundamental principles of justice' ".[18] Now how could anyone familiar with

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[12]"Law as Literature" (1982), 60 Texas L. Rev. 373, at 391-92.

[13]It would be misleading to leave the impression that all American commentators who reject the interpretivist fallacy are of a single view as to the appropriate alternative. Some, such as Levinson, adopt a resigned view approaching constitutional nihilism. Other like Ely or Perry, *supra*, footnote 9, propose process—based or rights—based theories respectively. Owen Fiss adopts an analysis which he calls "bounded objectivity." "Objectivity and Interpretation" (1982), 34 Stanford L. Rev. 739. See also Stanley Fish, *Is There A Text in This Class* (Cambridge: Harvard University Press, 1980).

[14]Manning, at 38. See also p. 36.

[15]Manning, at 71.

[16]Manning, at 146-47.

[17]Manning, at 260.

[18]Manning, at 256.

the evolution of natural justice and fairness, the rise and fall of the classification of functions, the judicial interpretation of privative clauses and, above all, the treatment accorded "due process of law" under the Canadian Bill of Rights put forward this kind of linguistic analysis as if it furnished anything remotely relevant to what judges really do with such mandates? Is it not by this time apparent that courts, given any of several formulations of procedural justice, are really striving for a doctrinally manageable policy which reflects their appraisal of an appropriate institutional equilibrium? And overriding all of this is some kind of rough assessment of the costs and benefits of imposing more or less procedure. It is noteworthy in all of this that Canadian courts have themselves now acknowledged the futility of trying to determine right from wrong in their revision of administrative interpretations of statutory language.[19] Instead they prefer an analysis which concedes that there is a range of reasonable interpretations and that the proper approach is to defer to the decision-maker who is more familiar with the relevant context. Now this should tell us something about constitutional interpretation, and about the central importance of having a decision-maker who is fully apprised of the social and political implications of a particular preference. Above all it should serve as a caution against a narrow, literalistic treatment of the Charter.

This discussion of constitutional interpretation through textual analysis, especially as a substitute for hands-on experience, must sound familiar to Canadians who know the legacy of the Privy Council. Have we not learned anything in the century since Sir Montague Smith decided that the power of the federal government to regulate trade and commerce could be interpreted by reference to the Act of Union between England and Scotland?[20] Have we forgotten the lessons of Dean MacDonald who was so critical of the Privy Council's "literalistic approach"[21] to constitutional interpretation, and who preferred the view that: "[C]onstitutions are not intended to be construed *in vacuo* but as living instruments of government."?[22] And then there is the conclusion of Professor Bora Laskin that if the Supreme Court were to mimic the Privy Council's approach to interpretation, it would be: "merely a judicial 'zombie', without soul or character".[23] But the Privy Council had an excuse. They *had* to resort to literalistic analysis because they didn't *know* anything about Canada. Viscount Haldane, clearly the Canadian expert if ever one sat on the Privy Council, visited Canada, or, as he referred to it, "The New World", once in his lifetime, for a two-

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[19]*Canadian Union of Public Employees, Local 963* v. *New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227, 97 D.L.R. (3d) 417; *Alberta Union of Public Employees, Branch 63* v. *Alberta Public Service Employees Relations Board and Board of Governors of Olds College* (1982), 42 N.R. 559, 136 D.L.R. (3d) 1 (S.C.C.).

[20]*The Citizens Insurance Company of Canada* v. *Parsons* (1881), 7 A.C. 96, at 112-13.

[21]Vincent C. MacDonald, "The Privy Council and The Canadian Constitution" (1951), 29 Can. Bar Rev. 1021, at 1029.

[22]*Ibid.*, at 1030.

[23]"The Supreme Court of Canada: A Final Court of and for Canadians" (1951), 29 Can. Bar Rev. 1038, at 1057.

day stop in Montreal in 1913.[24] The Privy Council truly did operate *in vacuo*. All they had to enlighten them was the pleading of English barristers assisted by Canadian counsel who sailed to London to make the kind of argument one can see in the case report of *Parsons*.[25] For all the members of the Privy Council knew Canada might have been made of blue cheese. A 1921 address by Viscount Haldane to the Cambridge University Law Society, indicating that Canada owed a great debt to Lord Watson and that "there is no part of the Empire where his memory is held in more reverence in legal circles",[26] is evidence of the narrowness of the Privy Council's peephole on Canada, permitting as it did only the limited exchange which might take place between senior Canadian counsel, appropriately wigged and robed, and members of a part-time court with one-quarter of the globe as their jurisdiction.[27]

It may be supposed that we no longer have the problems of judicial isolation now that our final court of appeal is on-shore. Well it can only be hoped that the patriation of judicial personnel is a complete solution, because little else has changed. The kind of pleading and the type of legal argument proposed by Mr. Manning to resolve Charter issues are virtually indistinguishable from that which was presented to the Privy Council in *Parsons*. This type of analysis adheres to the view that if lawyers talk long enough and think hard enough about constitutional language, the right solution will emerge. Well, for my part, to use a now familiar arboreal metaphor, I am very skeptical about the prospects of our living-tree constitution taking root in such arid soil.

I turn now to my second criticism of Mr. Manning's book, its reliance upon comparative jurisprudence. It may be said, by way of response to my comment above that nothing has changed since *Parsons*, that there is now the innovation in legal analysis of reference to foreign sources. But to what end? To assist in interpreting language?[28] If so it will only compound the fallacy of the interpretivist exercise. And if the exercise in comparison is intended to aid in a search for politically sound solutions, solutions which are sensitive to the socio-cultural context, then the undertaking will be doubly difficult, requiring a sophisticated analysis of the respective environments and backgrounds. There is nothing in Mr. Manning's work to indicate a willingness to undertake this latter endeavour. Indeed he more or less disclaims it. At one point he says there is a need for "great care"

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[24]*Richard Burdon Haldane: An Autobiography* (Garden City, N.Y., Doubleday, Doran and Co., 1929) at 276-80.

[25]*Supra*, footnote 20.

[26]"The Work for the Empire of the Judicial Committee of the Privy Council" (1921), 1 Camb. L.J. 143, at 150.

[27]In his autobiography Viscount Haldane describes his workload as Lord Chancellor, sitting in both the House of Lords and the Privy Council, at which time he also attended Cabinet and sat on a Committee for Imperial Defence, served as Chairman of a Royal Commission on the University of London and attended to the work of the War Office in the House of Lords. In this schedule the writing of judgments was said by Haldane to be "a heavy burden," but the task was managed "by the aid of a strong constitution" (his, not ours), *supra*, footnote 24, at 273.

[28]See Manning at 80: "The Amendments to the American Constitution now provide us with some assistance in determining the meaning, in our Charter, of certain similar phrases."

because: "While the language of other constitutions may be similar, it may vary sufficiently to produce completely different results in a particular case".[29] Still the literalistic fallacy. In search of meaning, not solutions. He goes on to say that there are now enough countries having "both judicial review and a value system comparable to the Canadian system"[30] that Canadian courts can borrow their jurisprudence. Well the list of countries having a comparable "value system" includes *inter alia* the United States, Nigeria, India and Papua New Guinea. And then we get the final disclaimer:

> Nor should there be any need for a complete identity of political, social and economic conditions before the court can learn from the lessons of other lands . . . .[31]

To provide a specific example of how casually Mr. Manning proceeds with this comparative exercise I return to his treatment of "reasonable limits" in section 1 of the Charter. In addition to the textual analysis outlined above we are offered some comparative experience. One proffered parallel is the decision of the U.S. Supreme Court in *American Communications Association* v. *Douds*[32] where it is said the Court responded to the "delicate and difficult task"[33] of balancing free expression against other societal interests in the following manner:

> When particular conduct is regulated in the interest of public order, and the regulation results in an indirect, conditional, partial abridgements of speech the duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented.[34]

Now a quick reading of this quotation might give some hint that it proposes a more permissive balancing than one would hope will emerge from section 1. But going behind the test to its application in the *Douds* case, one quickly sees just how facile this kind of casual borrowing can be. The *Douds* litigation involved a challenge to a provision of the *National Labor Relations Act* which imposed restrictions on unions whose officers failed to file affidavits stating that they were not members of the Communist party. The court did not review the evidence of the claimed harm which would be caused by allowing Communists to hold union office. Instead it deferred to Congress, saying there had been a great mass of material to prove that Communist party members would subordinate legitimate union objectives to Party interests, often under the dictation of a foreign government. Well whatever may be

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[29]Manning, at 78.

[30]Manning, at 80.

[31]Manning, at 80.

[32]339 U.S. 382 (1950).

[33]Manning, at 155.

[34]*Supra*, footnote 32, at 399.

the historical view of *Douds* in the United States,[35] it did not even in the 1950's have any relevance in Canada. Our Supreme Court, to its credit, came to the defence of the liberty of Communists in the 1950's, and that *without reliance upon a written Bill of Rights*.[36] So what does that tell us? That we had a less deferential court; a greater societal value respecting political dissent; a lower level of hysteria over the Communist threat? Well it may have been any combination of these and there were undoubtedly further contributing factors. But one thing is certain. We achieved a greater level of protected liberty in the 1950's without a Bill of Rights than did the United States with one. So the reference to *Douds*, especially to interpret section 1 of the Charter, is historically inappropriate and intellectually careless. This instance confirms a fear that comparative jurisprudence in Charter litigation will be undertaken not as a means of facilitating a better understanding of our Canadian dynamic but as a substitute for such understanding.

It would be impossible to undertake a consideration of each of Mr. Manning's comparisons on its merits. The reference immediately preceding *Douds* is to a pair of cases decided under the Nigerian constitution and the reference following is to a 1958 decision of the Indian Supreme Court.[37] All of this in the space of two paragraphs. This type of cavalier grasping at anything which sounds like a legal argument, all the while failing to even address the issue of a comparative analysis of the respective socio-political settings, is indicative of an attitude which fails entirely to meet the challenges of the Charter. So far from assisting in elucidating the political context which is so all-important to Charter analysis, it is sure to confuse the issue. As Edward McWhinney says:

> Recourse to comparative law, in any case, in order to be scientifically meaningful and legally relevant to Canadian courts under the new Charter, must proceed from, and be based upon, comparative sociology of law—comparative sociological jurisprudence. For these purposes, it is not enough to demonstrate a purely verbal similarity or even textual identity between the new Canadian Charter and another, foreign charter. One must indicate, in addition, the particular societal conditions—cultural, social, economic—under which the particular foreign legal principle or rule developed in its own country. Then demonstrate a basic identity with, or parallelism to, distinctive Canadian societal conditions today.[38]

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[35]Loyalty oaths were struck down by the Warren Court in *Keyishian* v. *Board of Regents of U. of St. of N.Y.*, 385 U.S. 589 (1967); *Elfbrandt* v. *Russell*, 384 U.S. 11 (1966). See also *United States* v. *Robel* 389 U.S. 258 (1967).

[36]*Smith and Rhuland Ltd.* v. *The Queen*, [1953] 2 S.C.R. 95; *Switzman* v. *Elbling*, [1957] S.C.R. 285. Cf. *Martin* v. *Law Society of British Columbia*, [1950] 3 D.L.R. 173 (B.C.C.A.).

[37]These case reports are rarely held in Canadian law libraries, and are hardly accessible to busy practitioners. As for reliance upon twenty-five year-old Nigerian and Indian precedents, one would hope that a "case update" would not overlook the fact that both countries have experienced significant limitations on fundamental freedoms since 1960, the most recent example being the suspension of the Nigerian constitution at the end of 1983. See: *Globe and Mail*, January 2, 1984, at 2.

[38]"The Canadian Charter of Rights and Freedoms: The Lessons of Comparative Jurisprudence" (1983), 61 Can. Bar Rev. 55, at 64. See also: O. Kahn-Freund, "On Uses and Misuses of Comparative Law" (1974), 37 Mod. L. Rev. 1.

Other commentators on the Charter have recognized the hazards of casual comparisons. Andrew Roman says that United States decisions "cannot be taken from their constitutional context and simply transplanted into ours".[39] In Manning's book it is more than just a failure to consider the context of foreign decisions which offends. It is not that he didn't get around to doing the comparison; it is that he doesn't seem to care. There is in this at once a denial of the domestic political vitality of constitutional law and a presumption that whatever lawyers decide in any corner of the world will be useful in Canadian Charter litigation. It is this presumptousness which is most offensive. Who are these people, judges and lawyers, who are now responsible for making important political choices about the limits of governmental powers? Is it their ability to discover the meaning behind constitutional language and to find new cases, of course confining themselves to countries with similar "value systems", which entitles them to make these significant new choices? Whatever it is that "busy practitioners" are going to contribute to the development of the Charter, one can only hope that it will be more useful than the kind of quick comparative law set out in Mr. Manning's book.

So what is left? Perhaps that's all we can expect from our legal system in the application of the Charter. A lot of smoke and mirrors about Charter language and foreign precedents. After pleading cases in these terms we can leave it to judges to settle the matter by a seat-of-the-pants appraisal of the political requirements of the situation—based ultimately on their own experience. Maybe Bob Samek has it right when he says: "[A]re we not merely going to pass from one stage of jargon to another without changing the real rules of the game?"[40]

Well if the rules of the game were going to be changed one might have thought that Mr. Manning was eminently qualified for the task. For about two years now Canadian legal academics have been busy churning out the kind of linguistic and comparative analysis[41] which is so tiresome and unconvincing in this book. But it was not unreasonable to expect that an academically inclined practitioner like Manning would roll up his sleeves and say:

> Look, there's just too much at stake here to simply carry on making lawyer's arguments as we know them. We may have been able to get away with it in the past because we more or less discovered the mother lode and created the metier. Now it's a new ball game and the kinds of societal choices in which we are implicated demand that we legitimate our participation by bringing forward legislative facts which will at once assist judges in making these choices and constrain the range of choices.

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[39] "The Charter of Rights: Renewing the Social Contract" (1983), 8 Queen's L.J. 188, at 192. See also: Timothy J. Christian, "The Limitation of Liberty: A Consideration of Section 1 of the Charter of Rights and Freedoms" (1982), U.B.C. L. Rev. Charter Edition 105, at 128-30.

[40] Robert A. Samek, "Untrenching Fundamental Rights" (1982), 27 McGill L.J. 755, at 756.

[41] E.g.: D.C. McDonald, *Legal Rights in the Canadian Charter of Rights and Freedoms: A Manual of Issues and Sources* (Toronto: Carswell, 1982); and, Tarnopolsky and Beaudoin, *supra*, footnote 9. For articles which approach the Charter in a more realistic way, see: H. Scott Fairley, "Enforcing the Charter: Some Thoughts On An Appropriate and Just Stand For Judicial Review" (1982), 4 Sup. Ct. L. Rev. 215; Noel Lyon, *supra*, footnote 9.

**But we didn't get that candid, down-to-earth approach. Instead we got more of the same, language and precedents.[42]**

**What I wanted from Mr. Manning was a frank acknowledgement of the political vitality of Charter litigation and a programme for introducing into the decision-making process the kind of legislative facts which are essential. Maybe I'm all wrong about this and the reality is that judges are so socially and politically aware of the implications of their decisions that tacit judicial notice of legislative facts will suffice. That is the message implicit in Manning's book.**

But there are many passages in Mr. Manning's discussions where one might justifiably expect that legislative facts would help and where one might legitimately question the reliability of judicial notice. One is the passing reference to challenges to prison conditions under the section 12 guarantee against cruel and unusual punishment.[43] In the United States, prison conditions cases have resulted in extraordinarily complex fact-finding and remedial litigation.[44] Another likely point for at least recognizing a need for this kind of information is in a special chapter devoted to obscenity.[45] Instead of an analysis of the constitutionality of pornography laws as "reasonable limits" we are offered thirty-nine pages recounting the jurisprudence of obscenity in Canada, the United States, England and "Europe". But when Manning reaches the critical question of whether such laws can be demonstrably justified as a reasonable limit on freedom of expression, he says there is no "real evidence" of societal harm from pornography and that it will be incumbent upon the state to justify such restrictions. Having said that, he goes on to comment that "*narrow, specific* and *certain* language is necessary".[46] So there it is again, we can resolve everything by a return to our faith in language. Somewhere in that analysis there must have been judicial notice taken of the right of the state to control at least *some* pornographic expression. Mr. Manning is evidently prepared to leapfrog over sociological facts in order to fight the good fight for "narrow, specific and *certain* language".

Mr. Manning's preference for language over legislative facts probably reflects the position of many lawyers, judges and academics in the face of the Charter. We respond to this new challenge by playing the old game at

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[42]For an example of the kind of judicial reasoning one will get under the literalistic approach adopted by Manning see the judgment of the Ontario Court of Appeal in *Re Skapinker and Law Society of Upper Canada* (1983), 3 C.C.C. (3d) 213 where the majority and the dissent differ over the proper use of section headings in interpreting the Charter. Leave to appeal to the Supreme Court of Canada was granted February 21, 1983.

[43]Manning, at 443-44.

[44]See e.g., Note, "Complex Enforcement: Unconstitutional Prison Conditions" (1981), 94 Harv. L. Rev. 626; Special Project, "The Remedial Process in Institutional Reform Litigation" (1978), 78 Col. L. Rev. 784. For a Canadian view see: Jeffrey S. Leon, "Cruel and Unusual Punishment: Sociological Jurisprudence and the Canadian Bill of Rights" (1978), 36 U. of T. Fac. L. Rev. 222.

[45]Manning, at 641-81, especially at 679-80.

[46]Manning, at 680. Emphasis added.

a more frenzied pace. One explanation for this preference may be that we resist giving up the game of language and precedent because it would amount to a confession that we have been involved in political choices all along. At a more pragmatic level there is understandably the problem for practitioners of keeping the meter running at $100 per hour while they develop the expertise to make the kind of socially aware arguments which are necessary. And then there is the problem of persuading judges to admit this type of evidence.[47] For academics, who ought to be best situated to consider law in its social context, the reluctance to undertake such research must be a product of bare inertia.[48] Perhaps we all fall subject to the conclusion of Geoffrey Hazard who said in response to the observation that the findings of behavioural science are more satisfying to the modern mind:

> That, however, is not much consolidation for law men, whose concerns are for immediate, cheap, and significant decision making. For them there are continuing attractions in the Delphic Oracle.[49]

That must at least be the case for Morris Manning. And presumably for those busy practitioners who will refer to his book with the intention of hastily dictating a brief on some significant point arising under the Charter. However they should be on notice, once they accept this *modus operandi*, that they run the risk of losing their client's case on an interpretation of "reasonable limits" or "fundamental justice" not contemplated, or a Nigerian precedent not uncovered. Above all they should be forewarned that they accept the risk that a judge will "notice" some legislative fact which, given an intelligent presentation of relevant social evidence, she might have been persuaded to view otherwise. But these, after all, are the travails of dictaphone justice.

H. WADE MacLAUCHLAN*

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[47]For discussion of current Canadian treatment of extrinsic evidence, see: Joseph E. Magnet, "The Presumption of Constitutionality" (1980), 18 Osgoode Hall L.J. 87, at 131-45; Jeffrey S. Leon, *supra*, footnote 44.

The Leon article discusses the development of sociological jurisprudence and the admissibility of legislative facts in United States. See R. Pound "The Scope and Purpose of Sociological Jurisprudence" (1912), 25 Harv. L. Rev. 489; V. Rosenblum, "A Place for Social Science Along the Judiciary's Constitutional Law Frontier" (1971), 66 N.W.U. L. Rev. 455; Symposium, "The Courts, Social Science, and School Desegregation" (1975), 39 Law and Contemporary Problems 1-427; Symposium "Social Science and the Judicial Process in Education Cases" (1977), 6 J. of Law and Ed. 1-40.

[48]See: *Law and Learning*, Report to the Social Sciences and Humanities Research Council of Canada by the Consultative Group on Research and Education in Law (Ottawa: Supply and Services, 1983).

[49]"Limitations in the Uses of Behavioral Science in the Law" (1967), 19 Case W. Res. L. Rev. 71, at 77.

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