EFFECT OF THE CANADIAN CHARTER
OF RIGHTS AND FREEDOMS
ON NON-CRIMINAL FEDERAL AND
PROVINCIAL LAW ADMINISTRATION

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In the weeks immediately following the constitutional accord of November 4th, 1981, between nine premiers and the Prime Minister, it became increasingly apparent that the new constitutional provisions would, within the foreseeable future, come into effect. As this realization grew so also did curiosity (and, even, alarm) about its most significant set of provisions - the Canadian Charter of Rights and Freedoms. The result has been symposia, conferences, academic colloquia, panels, speeches and inter-governmental meetings about what the Charter's terms might actually mean and about what impact the Charter will have on law and government in Canada.

Steady consumption of this plethora of material produces confusion. The advent of an entrenched bill of rights will radically reorient the practice of law, some say. On the other hand, others say that the new Charter will produce an impact not much greater than that which followed the enactment of the Canadian Bill of Rights more than twenty years ago. When it comes to what the Charter's words actually mean, the views of this winter's commentators are awesomely diverse. Some believe that the terms of section 1 will rob the protections of the Charter of any real meaning. Most,
however, take the opposite view that the Charter's terms will effect wholesale disruptions of our law. This view is explified by those who speculate that restrictions on movement in granting bail will be disallowed as violating the right under section 6, "to enter, remain in and leave Canada".

Turning first to global considerations, what is likely to be the effect on the legal profession and the practice of law of this very ample set of entrenched rights and freedoms? I tend not to be a minimalist but, rather, see the effect as being profound. The Attorney General, one of the season's small army of expositors on the Charter, made these observations about its importance in a speech given last month at the Dalhousie Faculty of Law:

"Although constitutional amendments are always significant events, it is not often that amendments represent a shift in a nation's basic constitutional structure. That, however, is what has happened here. The entrenchment of a Charter of Rights has placed limits on governmental action which far exceed limits which may have arisen under present sections of the B.N.A. Act or under the theory of an implied Bill of Rights.

"From the perspective of the legal profession, it is clear that human rights considerations will play a larger part in the thinking of all lawyers. Our profession has always contained members who have devoted themselves to the protection of liberties, and the advancement of the interests of the power-
less or disadvantaged. But those have been consid-
ered specialized concerns. No longer. All lawyers, whatever area of law they work in, will now have cause to consider the impact of the Charter.

With entrenchment of the new Charter -- and the fundamental constitutional shift which that represents -- lawyers will come to realize that their job does not end when they come to a clear understanding of the relevant law. They must go on to address a second point: Does the law pass muster under the new constitutional standards? Of course, sections 91 and 92 have always been grounds for challenging law. But the vast ambiguities of the Charter, the range of possible applications, have produced not just a change in degree, but a change in kind, in lawyers' concerns about the validity of laws.

If my predictions are right, the Charter of Rights will be a part of every lawyer's consciousness. Lawyers engaged in company and commercial law; lawyers engaged in labour and employment law; lawyers engaged in criminal law.

The question that occurs is what will be the effect of what I anticipate will be a pervasive form of argument? Will government be better or worse as a result? I don't know. I do think, however, that some results can be anticipated.

For one thing, political and legal debate will be more intensive. Nothing is more certain to arouse passions than claims based on moral rectitude. There is all the difference in the world between saying "this is inefficient" and "this violates my rights".

Second, I see delays. Arguments based on a constitutional claim must, under our system, be determined by the courts. At present, opposition to, say, abortion in hospitals, will lead to hearings and meetings and letter-writing campaigns. Under the Charter, a group claiming that laws permitting publicly funded hospitals to perform abortions offend their right to freedom of conscience could place hospital boards and governments in the courts for a considerable length of time.
Third, I see the need for more lawyers. There can be no doubt that the potential pervasiveness of constitutional challenges not only adds new aspects to many legal problems, but also transforms many non-legal issues and decisions into matters of law. As I have mentioned, those who opposed an entrenched Charter did so on the ground that it transfers many questions from the political process to the legal process. If that is so, lawyers will be needed to steer these controversies through the legal system. One feature of this new business for lawyers will, of course, be increased costs — both private and public.

Fourth, there will be implications for government lawyers. In addition to designing the most effective ways of implementing government policies, they will have to be concerned with ensuring that none of the values expressed in the Charter are offended in the legislation they recommend or draft.

I think these are not overblown predictions. When representing clients involved in any way with public administration or when applying legislation (either primary or subordinate) the criteria for legislative propriety spelled out in the Charter will become common currency.

Turning now to the main part of this paper, the impact of the Charter on non-criminal law and administration, I wish to make three general observations.

First, the new Canadian Charter of Rights and
Freedoms is not an innovative rights document. Its ideas are not an advance on the basic thrust of the Diefenbaker Bill of Rights; they, in fact, do not differ from the notions expressed almost two centuries ago in the American Bill of Rights. The underlying political philosophy of the Charter is not as modern as that which informs the Universal Declaration of Human Rights, or its progeny, the International Covenants of Economic, Social and Cultural Rights and Civil and Political Rights. And certainly the ideas of political and social oppression which are sought to be met by the Charter are rudimentary when compared to those addressed by the recent international covenants.

Second, and in the light of the Charter's lack of innovation, paradoxically, there is remarkably little to be learned from prior bodies of rights jurisprudence, whether Canadian or American. As for the Canadian cases, either they have been preoccupied with discovering the constitutional basis for rights and not with giving content to the rights (as in the implied Bill of Rights cases) or they contain reasoning which is distracted by the frankly bizarre wording and syntax of the Diefenbaker Bill of Rights.
American cases might prove to be illuminating in some instances, particularly with respect to the Legal Rights (sections 7 to 14), but the frequent narrow textual differences between the Charter and the Bill of Rights will, I believe, confound those who rely heavily on American jurisprudence. For instance, Canadian courts will have to filter American cases through unique features of the Charter: the preamble, the general limiting section, the perplexing addition of conscience, the ambiguous reference to freedom of religion, the convoluted set of limitations on mobility rights, the new formulation for due process found in section 7, the byzantine equality section, and the application section. Therefore, although the ideas of the Charter are familiar to readers of American jurisprudence, the process of interpretation and application will have to be indigenously developed.

The third general comment flows from the second and that is that we really have no idea what the Charter actually means or what level of restraint will be placed on government as a result of the first ten years, say, of its application. The terms of the Charter are either expressed vaguely (consider the repeated use of the word "reasonable") or are expressed so widely that it
is clear that they, together with the limitation section, really represent an open invitation to the judiciary to work out suitable political accommodations. So our inability to predict flows not just from our being faced with a new body of law but also from the nature and expression of the standards found in the law. Furthermore, we should recognize that clarity and certainty will not emerge quickly. There are too many judges in too many jurisdictions for any pattern of decision making to emerge. The Supreme Court of Canada will, of course, be significant but the most cursory glance at writings on the Charter or at the terms of the Charter itself will reveal that there are far, far too many points of interpretation for any coherent pattern to develop until years, or decades, have passed.

There is a positive side to those features of our attempt to constitutionalize rights: it will be hard to be labelled as foolish in advancing Charter arguments. There are no real experts who can ridicule interpretative ideas. A thoughtful reading of the Charter's words will suggest lines of argument without any prior need to be steeped in American case law. The interpretative problems, as well as the interpretative possibilities, are accessible to all.
Having suggested that there are no right answers to the questions of the Charter's meaning, and that it takes no special training or talent to illuminate its terms, let me assume the role of the ordinary observer of the Charter language. I wish to make a series of comments about some of its provisions.

1. The rights in the Charter have been categorized under various types. They are fundamental freedoms, democratic rights, mobility rights, legal rights, equality rights, official language rights and minority language education rights. Nothing rides on this scheme of characterization but it does provide a useful shorthand and conceptual framework when thinking about possible rights which might be claimed in the face of legislation or governmental activity.

2. Although it is sometimes thought that the rights of aboriginal peoples have been included in the Charter of Rights, in fact those rights are found in a separate part, Part II, of the Constitution Act, 1981. The purpose of separating these rights out from the other rights may be that aboriginal rights are not ones which flow to individuals as a necessary condition of living under government but rather arise simply by virtue of
belonging to an aboriginal group -- or a group which has been established prior to the extension of European settlement and institutions. However, that conceptual basis for the distinction is not likely the real basis. In the first place, not all the rights and freedoms found in the Charter are ones that arise out of liberal democratic notions of the state. Some, like the official languages right and the minority language educational right, are present because of the particular history of Canada. In the second place, the main effect of placing aboriginal rights in a distinct part is that those rights cannot be protected under the enforcement section of the Charter, section 24. Part II, in fact, has no enforcement section. However, the general enforcement section, section 52, states that the Constitution of Canada is the supreme law of Canada and any law that is inconsistent with the Constitution is, to the extent of the inconsistency, of no force or effect. Therefore, it is wrong to say that Part II has no teeth. But it is correct to say that the reasonably open-ended enforcement mechanism contemplated in the Charter of Rights is not available to protect aboriginal rights.

A further point to be made about Part II is the
complete lack of common understanding of the meaning of the words "existing aboriginal rights of the aboriginal peoples of Canada". This phrase was clearly included not with the intention of achieving any specific policy but as a form of words which might satisfy both those who are seeking rights on behalf of aboriginal peoples and those who want to limit special rights for aboriginal peoples. The only policy being pursued in Part II is that of intentional ambiguity.

3. The Charter of Rights as a whole is conditioned by a preamble which states "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law". As is usually the case with preambles, it is not clear how the sentiments expressed may or may not condition the interpretation of the precise provisions. After all, the preamble does not say that the Charter of Rights is based upon these principles, yet, on the other hand, those principles being contained in the preamble become fundamental constitutional principles for the country and presumably, under the direction of section 52, courts are not free to stray too far away from them. For example, does the recognition of "principles that recognize the supremacy of God" mean
that section 2(a) (the right to freedom of conscience and religion) cannot be construed as a disestablishmentarian clause? Or must freedom of conscience be construed so as not to allow people to exercise their conscience when it is expressed in antideistic or atheistic ways? Perhaps we should be tempted to predict that the preamble will have as little effect on the interpretation of the Charter of Rights as the preamble in the Canadian Bill of Rights has had on the interpretation of that document.

4. It should be noted that the Charter of Rights is limited in its application by the terms of section 32. That section says that the Charter applies to Parliament or the legislatures in respect of all matters within the authority of each. It is worth noting that in the version of the Charter of Rights that was introduced on October 2, 1980, as well as in all subsequent versions up until November 4, 1981, it was stated that the Charter applied to the Parliament and legislatures and to all matters within the authority of each. The effect of the earlier wording is that the Charter would have been available to support actions between private citizens. Since the protections in the Charter applied to all
matters under federal jurisdiction and under provincial
jurisdiction, any time an individual acted so as to
abridge the speech of another individual or denied his
or her equality, presumably a remedy could be sought
under the enforcement section.

Of course it was possible that, notwithstanding the
seemingly clear language of the section describing the
scope of application, the courts would hold that a
constitutional Charter of Rights can do no more than any
other constitutional document does and that is serve as
a guideline by which governments are limited. This would
have been consistent with the state action doctrine de­
v eloped in the United States. However, the American
state action doctrine is based on the clear words of
the Bill of Rights which state in the early amendments
that "Congress shall make no law" and in the 14th amend­
ment that "the states" are subject to limitations. In
any event, possible meanings of the earlier section 32
are no longer relevant. It is enough to point out that
the state action doctrine has been included in the
version of the Charter which is coming into force.

What this actually means in operation is far from
clear. Consider, for instance, these two examples:
A. Suppose that a university were to pass a resolution forbidding its faculty members to speak on the issue of uranium mining. That may of course be impugnable on the basis that such a resolution exceeds the university's statutory powers. Is it also impugnable in that it violates the Charter of Rights? That depends on whether its ruling is an exercise of governmental power. Its powers do flow from statute, but that does not distinguish it from many other institutions which are clearly private institutions. Furthermore, its power to grant degrees derives from provincial legislation and it is heavily funded by the provincial government (with a little aid from the federal government). Does this render it a governmental institution so that its conduct can be said to fall within section 32? Under American jurisprudence the close linkages between governments and universities that are commonly found in the Canadian context would amount to sufficient state action to bring the American Bill of Rights into operation. It is not clear, however, whether under section 32 the same result would be reached. It would depend on whether the university could be said to be within the idea of the government of the province. If that phrase is used as a term of art to refer to the "Government", that is the Cabinet Ministers and their officials together with agents of the Crown such as
Crown corporations, then presumably universities are not within the government of the province. If, however, the phrase is interpreted to include those institutions through which the province implements its public policies, then there probably is a sufficient connection between universities and the government to bring the former's conduct within the ambit of the Charter of Rights.

B. The same problem would be present if the Human Rights Commission or a Board of Inquiry acting under the Human Rights Code were to make an order in respect of hiring conduct in a private employment situation. For instance, suppose that the Human Rights Commission gives considerable latitude in discrimination in hiring in private or intimate employment such as housekeeping, nursing care, or, even secretarial services for individuals. Could a person denied a job on the basis of such discrimination seek a remedy under section 24 on the basis that that person had been denied equality before the law and that the province had given its imprimatur to this discrimination by virtue of the Human Rights Commission order? Will this amount to governmental discrimination because it has been sanctioned by the government? The answer to these questions is a
probable yes. The next question that would arise in this fact situation is whether a section 24 remedial action could be brought against the individual hirer, rather than the Human Rights Commission. The discrimination has taken place because of a governmental order and, ultimately, because the legislation permits this form of discrimination. Perhaps the remedy should be sought against the Commission or the Province. However, in my view, an action could be brought directly against the private discriminator on the basis that his or her conduct has become governmental conduct in that a governmental agency has ordained the conduct to be consonant with the government's policies. There is, however, an anomaly in this view; if there had been no Commission order because the person discriminated against, recognizing the lawfulness under provincial law, of the hiring conduct does not lay a complaint, it could again be said the conduct accords with provincial public policy but there would be no direct governmental order mandating it. In this latter case the government will not have had a hand in the discriminatory conduct and the test under section 32 would not be satisfied. The result is that the Charter is available only in respect of those instances in which the government has acted.
This may be, as I have suggested, anomalous, but it is not unfortunate. This interpretative view forces complainants in private discrimination cases to exhaust statutory remedies before invoking sections 15 and 24 of the Charter.

4. The freedoms and rights which are found in the six categories are all conditioned by section 1 which state that the rights and freedoms are subject "to such reasonable limits prescribed by law as may be demonstrably justified in a free and democratic society". This raises a number of interpretative questions. The first is whether a limitation on a right must be one which is expressly authorized by legislation as opposed to being the result of administrative interpretation of primary or secondary legislation, or the application of wide discretionary power granted by legislation to the executive branch. The section might seem to require that if a court were to conclude that a right found in the enumeration of rights had been violated, the limitation of the right could not be accepted without express statutory mandate for the limitation. If this is correct judges are not invited in all cases to weigh competing demands of order and freedom. Only in cases in which
there is an express statutory limitation can they evaluate whether limitations on the bare right are appropriate. If this were the result it is arguable that section 1 is less of a limitation on rights than if no limitation were expressed at all. In the absence of a section 1, clearly the judiciary would fashion a compromise view between the strict dictates of many of the substantive sections of the Charter and the need to allow social controls. Is the result of including the phrase "prescribed by law" to require that limitations be spelled out in legislation, phrased in terms of an express limitation on rights? This seems to be an undesirable result. To avoid it the phrase "prescribed by law" will need to be interpreted to mean only that the legislative or administrative limitation is one which, apart from the Charter, is competently imposed. In short, "prescribed by law" entails only that the rule of law be satisfied.

Second, we should note that under section 1, any limitation must be a reasonable one and, in addition, it must be demonstrably justified in a free and democratic society.
As for the test of whether the limitation is reasonable, there is obviously no great wisdom that can be imparted. In fact, despite the syntax of the section, I suspect the courts will declare there to be only one test, that is, that a limitation is reasonable if it is demonstrably justified in a free and democratic society and unreasonable if it is not. As mentioned earlier, there has been concern that the phrase "demonstrably justified in a free and democratic society" will render the Charter of Rights to a nullity since it will be argued that the passing of a limitation on a right is itself demonstration that the free and democratic society (e.g. Saskatchewan, or Canada) considers this to be a justified limitation.

For example, an analysis prepared by the Ministry of the Attorney General in Ontario says about this phrase:

"The court must hold that the duly constituted elected representatives of the public were not acting in a manner which could be justified in a free and democratic society when they passed the enactment in question. A court should be very reluctant to make such a declaration. A cornerstone of our parliamentary democracy is representative democracy."

The sort of tautological interpretation implied in this passage was far more likely under the Charter as
it existed when introduced on October 2, 1980. In that
version, rights were "subject only to such reasonable
limits as are generally accepted in a free and democratic
society with a parliamentary system of government".
Under this formulation it could have been argued that
the mere enactment of a limitation is proof of its
general acceptance within a free and democratic society.
However, even under the original wording, I believe that
such a content-depriving interpretation was highly
unlikely. Under the present words, it is not possible.
If anything, the impact of section 1 will be the other way;
it will place on governments a very high burden of show­
ing that the limitation is justified. It may be that
the debate in courts over the propriety of any limitation
can be conducted at an abstract level. For instance,
what are the appropriate controls to place on cults who
are preying on the gullibility, or romanticism of young
people? But when the word "demonstrably" appears in the
formula to be applied it seems that the government must
not only demonstrate in a conceptual way that there are
wise limits on freedom but must also show that the
absences of such limits have produced real risks and
real harms. In other words, it is likely that judges
will not be satisfied by speculation about the appropriate
accommodation between freedom and protection of the interests of others but will want to receive evidence about actual injuries flowing from unregulated and unrestrained conduct.

If we consider this sort of procedure in the context of emergency legislation, it may mean that Parliament, when exercising powers under the War Measures Act in a way which limits freedom of association and legal rights (as happened during the October Crisis of 1970), will have to show that the situation of apprehended insurrection is such that the precise limitations on rights which are in effect are appropriate and responsive to, the circumstances. If this had been the situation in October, 1970, presumably the Government of Canada would have had to produce evidence that social society in Quebec was sufficiently near to collapse that the regulations which were put in place were required. It would, of course, be inconsistent with our understanding of how emergencies are managed to require the government to reveal precise information about the nature and scope of insurrectionist influences.

Canadian jurisprudence on the emergency power, which
derives from the federal government's jurisdiction over peace, order and good government, has been consistent in maintaining that the court cannot inquire into the legitimacy of a declaration that an emergency has arisen, that it continues, or that meeting it requires the exercise of certain powers. There is, at least, a plausible argument that this pattern of judicial deference to executive declaration of emergency is inconsistent with the text of the new section 1.

Perhaps I am reading section 1 too literally; the courts may not engage in this parsing of the language. They may take a general impression of the section and conclude that they have been delegated the authority to weigh the competing interests in the absence of evidence and in the absence of any onus being placed on governments. This is, of course, entirely possible but it does make meaningless the final phrase "as can be demonstrably justified in a free and democratic society". That general delegation would have been effected simply by stating that the rights were subject to reasonable limits prescribed by law.

5. Related to the problem of trying to assess the impact of section 1 on the Charter is the question of
whether that section represents an exception or derogation from the rights listed or, alternatively, whether it forms part of the definition of the rights listed. If the latter is correct, then the rights which have been guaranteed are those listed in this Charter after being discounted by reasonable limitations.

This semantic conflict is not trivial. For instance, when interpreting section 28 - the section which states that the rights of the Charter are guaranteed equally to male and female persons - it is important to know whether the guarantee extends to the rights as they are articulated in the various substantive sections or to the rights as they exist after the limiting operation contemplated by section 1. Suppose that three years after the Constitution Act, 1981 comes into effect (that is when section 15 comes into force) a litigant wished to say that legislation forbidding the recognition of actuarial differences between men and women violated his right to equality under the law. Suppose also that the judge before whom the challenge was made was inclined to regard the law as a reasonable limitation on the strict idea of equality between the sexes enacted for valid political purposes. Would the judge then be required to say that since section 28
guarantees the right to equality equally between the sexes the derogation from pure equality, allowable under section 1, cannot survive? Alternatively, would the judge say that the right to be considered to be guaranteed by section 28 is the right to equality defined to include the concept of reasonable limitation under section 1?

This interpretative problem is not resolved by the opening words of section 28: "Notwithstanding anything in this Charter". If the rights guaranteed equally by the section are the "net" results (that is, the listed rights understood in light of section 1) then this phrase cannot make them greater. If the rights which are guaranteed are the bald rights prior to the operation of any derogation then the notwithstanding phrase will preclude an argument based on section 1. But the phrase is not helpful in getting over the initial problem.

The problem of understanding section 1's role is further demonstrated by considering section 52. That sections says that the Constitution is the supreme law and that any law "inconsistent with the provisions of the Constitution" are, to the extent of the inconsistency, of no force and effect. Is a reasonable legislative restriction on speech and association - the sort of restriction which is commonplace in labour legislation -
inconsistent with section 2's guarantees of freedom of expression and freedom of association? This depends on whether those provisions grant these freedoms subtracted by reasonable limitations or, on the other hand, simply grant the freedoms with the concomitant provision allowing them to be overridden in circumstances which satisfy section 1. If the latter view is adopted, those legislative restrictions would be inconsistent with terms of the Charter.

To put the issue this way is to compel the answer. Section 1 must be understood to form part of the definition of all rights contained in the Charter. Yet the words of section 1, when considered in isolation, do not clearly lead to this conclusion. We see here what has previously been noted, that interpretation of the Charter of Rights will follow general ideas about what is tolerable by way of constraints on governmental activity and what is tolerable in terms of delegating authority to courts. The Charter's words do not provide a coherent, self-sufficient code of law which, by itself, will guide the judiciary. The Charter, because of its generalities and ambiguities, will drive judges back on their general conceptions about law and government.
6. Some of the categories of rights are, as is well known, subject to override by provincial or federal legislation under section 33 of the Charter. The classes of rights subject to the override are fundamental freedoms and legal and equality rights. There has been a great deal of debate about whether the override has rendered the victory of Prime Minister Trudeau, in obtaining a Charter of Rights, purely pyrrhic. I do not think so. To claim that the Charter is hollow by virtue of section 33 misrepresents the likely effect of this section. It is true that, by the inclusion of section 33, the basic and perhaps ultimately irresolvable conflict between entrenched fundamental rights and majoritarianism has been resolved in favour of majoritarianism at least in respect of those three categories of rights. However, that is true at a theoretical level and not operationally. In almost all cases, legislative will will be interpreted and limited in light of the terms of the Charter including the terms found in fundamental freedoms and legal and equality rights. This will not, of course, be the case if the use of an override clause becomes common, if a non obstante clause becomes a boilerplate term in all legislation which could conceivably give rise to a Charter of Rights challenge. If this is the result then those who say that the anti-Charter provinces have
destroyed the idea of entrenchment through insistence on the override clause will be correct.

The reason I think that the terms of the Charter will seldom, if ever, be legislatively overridden is that section 33 is designed to generate maximum political attention for any legislation which contains an override provision. In the first place, the paramountcy of the legislative provisions over the Charter of Rights must be expressed and, second, the override clause in any legislation can relate only to that statute or some provision of it. This means that Parliament or the legislatures will be forced to address in precise terms the competing values at stake between the terms of the Charter and the limitations imposed by the proposed legislation. The ensuing debate will be rigorous and divisive. One suspects that governments will seek to avoid this sort of debate, especially when they would, in such a dispute, necessarily be identified with anti-libertarian views.

Finally, the five year limitation signals the fact that overrides are meant to be politically self-conscious acts which must be repeated every five years in order to be sustained. This temporal limitation serves to under-
score the anomalous quality of an override.

7. It should be noted that the rights and freedoms spelled out in the Charter are subject to a series of interpretive conditions. These are found in sections 25 to 29. These provide that the rights and freedoms are not to be construed so as to deny aboriginal, treaty or other rights of aboriginal peoples, or so as to deny the existence of rights and freedoms that otherwise exist in Canada, and must be consistent with the preservation and enhancement of the multicultural heritage of Canadians, and are guaranteed equally to male and female persons, and cannot derogate from rights or privileges guaranteed in the Constitution in respect of denominational schools. These conditions pose interesting questions of application.

Clearly the motive for section 25, the section which precludes the Charter from denying aboriginal, treaty or other rights, is the anxiety that section 15, the section containing the equality rights, may be construed so as to take away the citizen plus rights of native peoples in Canada. That does not exhaust the motive, however. Indians and native peoples themselves felt that when some of their claims, based on aboriginal rights, get translated
into increased governmental powers, they did not wish to be constrained by some of the terms of the Charter. For instance, many organizations promoting governmental powers for Indians do not wish the power to determine who enjoys status under Indian government to be limited by the requirement of equality between the sexes.

Likewise, section 27, the section which states that the Charter shall be interpreted in a manner consistent with Canadian multiculturalism, was included at the request of multicultural organizations so that traditional social and political patterns could not be attacked as violating basic rights. The most likely form of violation would come, presumably, from the denial of equality. In many ways the need to include section 27 in the Charter dissipated when section 32 was amended to limit the application of the Charter to governmental activity. Section 27 was included as a result of a strong lobbying effort in the winter of 1980-81 when it appeared that the Charter might well reach private conduct.

If, however, there were governmentally mandated activities which discriminated on the basis of sex, or which denied freedom of association and these were
justified through claims based on ethnicity, the question would arise whether section 27 would defeat the claim based on the Charter. For this to happen the court would need to conclude that the conduct was important for the preservation and enhancement of multiculturalism and, in my view, a court, at least in a clear case of violation of the terms of the Charter, would hold that the conduct neither enhanced multiculturalism nor was particularly conducive to its preservation.

It is through discovering the motives for the inclusion of sections 25 and 27 that one can understand the real purpose behind section 28, the section guaranteeing rights equally to male and female persons. During the time of the Joint Parliamentary hearings in Ottawa, women's rights groups lobbied strenuously and effectively for an equality section which was much stronger than that originally proposed on October 2, 1980. Both native rights organizations and multicultural organizations saw in the strong equality section that resulted a threat to their autonomy. Consequently, they attempted to trump the equality section with sections which recognized their particular values. The women's rights groups in turn sought to trump these two sections by the inclusion of
section 28. Their attempts were totally successful. There is no doubt in my mind that law or governmental conduct which denies equality before the law on the basis of sex cannot be sustained by resort to either section 25 or section 27.

Another active and successful campaign during "the season of lobbying" was conducted by organizations of separate school trustees. Their efforts resulted in section 29 which precludes the application of the terms of the Charter in a manner which undermines the constitutional rights in Canada in respect of denominational schools. Without such a section, these school systems would, of course, have been placed in considerable jeopardy under, possibly, the freedom of religion section and, certainly, the equality rights. Section 29 is, to my mind, a reasonable condition to place on the Charter in light of Canada's special constitutional history. Its presence in the Charter will perpetuate what has become, apart from Charter considerations, an interesting and growing body of jurisprudence on the exact nature of the privileges and rights of denominational schools under various constitutional enactments.
The final section in this series is section 26 which states that the guarantees in the Charter are not to be construed to deny other rights that exist in Canada. This is a perplexing section in that it suggests that there are other rights of equal constitutional weight to those rights listed in the Charter. The section could not be talking about normal statutory rights, nor the general proposition that a person is free to act unless constrained by valid law, because clearly the Charter is not to be construed so as to preserve those types of rights and freedoms. The whole idea of the Charter is to establish a set of limitations on legislation; legislative rights, therefore, should not be determinative in giving meaning to the Charter's provisions. What, then, are these other rights mentioned in section 26? This is one instance in which the American Bill of Rights might provide some guidance since the Ninth Amendment is similar to section 26. It states:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Unfortunately, in looking for aid from experience under the Ninth Amendment, it is not totally helpful. In the first place the Ninth Amendment has been labelled as
"almost unfathomable" and a Supreme Court Justice has written:

"The Ninth Amendment rights which are not to be disserved by the federal government are still a mystery to me."

On the other hand, American jurisprudence has, in fact, given great scope to the Ninth Amendment and the Supreme Court in the United States has held that there are rights not listed in the other amendments which are fundamental and constitutional and which can form the basis of striking down Congressional acts and state legislation. These rights have been discerned by looking to "the traditions and collective conscience of our people to determine whether a principle is so rooted so as to rank as fundamental". The process has also been described as an inquiry into whether "a right involved is of such a character that it cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions".

The Ninth Amendment is, therefore, at the same time unfathomable and expansive. Section 26 is also unfathomable but will, I dare say, not be given an expansive interpretation. It is not the Canadian judicial style
to look into the soul of the nation to discover those principles which are deeply rooted.

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I have left unexamined in this paper virtually every issue of substantive interpretation. Everyone of the sections of the Charter granting specific rights and freedoms invites almost infinite speculation about what might be meant. The surveys of provincial laws and federal laws being done in the capitals of this country are throwing up a dazzling array of questions about the laws of the provinces and of Canada. The identification of potential challenges to these laws has become easy sport. What is not so easy is to develop either a general theory under which individual freedoms and social order may be reconciled, or a general view of the judicial attitude that will be taken toward these challenges.

Most lawyers suspect that the general judicial attitude will be one of caution. But that hardly means that we will not discover that our laws need modification and revision as we discover the ways in which they intrude, perhaps only slightly, on the values expressed in the Charter. During the course of the seminars in
Saskatoon and Regina, I intend to look at some of the instances in which federal and provincial laws impinge on our liberties as identified in the Charter. Such an examination will, however, reveal only the scale of uncertainty and not the guidelines or principles which will resolve our complexities.