*THE MANITOBA LANGUAGE REFERENCE: JUDICIAL CONSIDERATION OF "LANGUAGE CHARGED WITH MEANING"**

S. J. Whitley**

Je suis métisse et je suis orgueilleuse
D'appartenir à cette nation;
Je sais que Dieu et sa main généreuse
Fait chaque peuple avec attention
Les Metis sont un petit peuple encore
Mais vous pouvez déjà voir leurs destins;
Etre hais comme ils sont les honore,
Ils ont déjà rempli de grands desseiuns***

— Louis Riel
1870

Introduction: Language Charged with Meaning

Poetry, like law, is capable of conveying with economy of expression the essence of a society's attempts to grapple with matters central to its being. Even where verbosity is the hallmark, it often reflects an urgency to communicate that transcends the chosen words, and tells us much about the value system which produced it.

Solzhenitsyn made the same remarks of art and literature: they possess a wonderful ability. "Despite distinctions of language, custom, social structure, they can convey the life experience of one whole nation to another".[1] He went on to say, in the smuggled-out version of his 1970 Nobel Prize acceptance speech, "And literature conveys ineffable condensed experience in yet another invaluable direction — from generation to generation. Thus it becomes the living memory of a nation".[2] And so it is with the law. Its memory is continuous, fluid and unbroken; it is referred to in its effect simply as 'the rule of law'.

In the metaphor chosen and the repetition of apparent fragility in the above passage from Riel, there is a yearning for recognition. Despite oppression and comparative weakness, there is reflected in the piece an endurance of spirit which will yet triumph, partly through faith and partly by historic warrant. One need not know by whom it was written to understand the piece, but viewed in context, it takes on greater meaning and may be seen from different perspectives. Precisely the same point may be made for contemporary constitutional interpretation.

---

* This passage is from Ezra Pound, *How To Read* (1931) at Part II: "Great literature is simple language charged with meaning to the utmost possible degree".

** Of the Manitoba Bar. Mr. Whitley is Director of Constitutional Law for the Province of Manitoba, and was counsel for the second phase of the Language Reference. Appreciation of discussions with R. Ronn and V. Matthews-Lemieux of the Manitoba Bar, which led to the development of some of the ideas of this essay is acknowledged. The views expressed are those of the author.

*** I am a maid of the small Metis nation/And with great pride this heritage I share;/I know that God when He shaped His creation/Made every race with equal love and care./Though the Metis are not many in number, great is the destiny which they command;/Proud of the hate that the world heaps upon them,/Yet they have played a great role in this land.

1. Speech published by the Nobel Foundation, excerpted in *Atlantic*, December, 1971.

2. *Supra* n. 1.

The constitutional document of any polity says much about the organization of that society. And more than the written word is expressed, for like art, it may be viewed in a number of modalities. There is invariably an aspirational mode in which the choice of language reveals the aspirations of the polity. There is a geographic mode by which the state is fragmented according to boundaries and manageable units. The organizational mode distributes jurisdiction or power to the units which will disperse it. There are historic and cultural modes which are reflected in language choices as well as institutions. The institutional mode, of course, sets up the institutions which will give effect to the powers enumerated in the document, and sets out which social purposes shall have primacy. Each of these facets is capable of being given legal effect, though some, like the aspirational mode, undoubtedly have a quality which may at first seem more metaphysical than the others.

These modes may be considered as a series of transparencies. Laid one over the other they produce a three-dimensional image of the society which brought them into being. From this a natural paramouncy obtains, but in the case of the Canadian constitution, the pre-eminence of constitutional documents is stated in subsection 52(1) of the *Constitution Act, 1982*:

> The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.[3]

It seems important to observe that this passage does not grant the *Charter*[4] sole hegemony; rather the *Charter* takes its place equal in status with other constitutional materials in Schedule I,[5] including the entire *Canada Act*.[6] In other words the document (the Constitution) as a whole may require examination.

It is critical to make one other perhaps obvious comment: Unlike *Magna Carta*, or to a lesser extent perhaps the American Constitution, the *Canada Act*,[7] which erected the *Charter* to legal paramountcy alongside other bills of the British Parliament, is not so much an *inceptive* document. Rather, it is a statement produced by a nation already in existence for over one hundred years, and as such, it must be examined closely for any hint that change is signalled. Is there an indication that aspirational, institutional, or any other dimension of the constitutional process is significantly altered?

The observation that there is an organic relationship between the state and its fundamental legal documents aligns itself comfortably with Kelsen's view of the law as a dynamic system of norms. The reason for the validity of a particular norm is not necessarily its conformity to reality or its efficaciousness, but simply the assertion that something *ought* to occur as part of a larger, more general norm. Kelsen said this: "A norm is a valid legal

3. *Constitution Act, 1982*, s. 52(1), being Schedule B to *Canada Act 1982*, c. 11 (U.K.).
4. *Canadian Charter of Rights and Freedoms*, being Part I of *Constitution Act, 1982*, s. 10(b), being Schedule B to *Canada Act 1982*, c. 11 (U.K.) (hereinafter referred to as the *Charter*).
5. There are thirty constitutional documents referred in Schedule I.
6. *Canada Act 1982*, c. 11 (U.K.).
7. *Canada Act 1982*, c. 11 (U.K.).

norm by virtue of the fact that it has been created according to a definite rule and by virtue thereof only."[8] That definite rule he later describes as a 'basic norm', or more simply, a constitution.

Returning to the Canadian Constitution, and in particular, the *Charter*, where do the clues lie which assist in discovering whether the relationship between the constitutional framework, or 'basic norm', and the Canadian polity has changed? Part of the answer is discovered in the preamble and more is exposed in Section 1. Consider the following from the preamble: "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law".[9] The use of the present tense in the first sentence seems deliberate; it reflects a *continuing* state of affairs.

The second portion of the statement has two elements: "The supremacy of God . . ." is probably a statement of conscience and reflects the fact that legal principles have moral underpinnings which in turn have to do with innate obeisance to a higher order of goodness and rightness. The latter statement, "the rule of law", is a secular version of the same idea. That acquiescence, as Hart pointed out, is not solely obtained by coercion, but largely by the internalization of the obligation to obey the rules of law, which in turn is rooted in the experience that the good of all is thereby better served.[10] This has to do with deference to an order which compels regulation of the affairs of the polity and demands continuing acquiescence in the results of official action. We shall return to a discussion of the "rule of law" shortly for it reveals a profound image of a society subtly changed by the articulation of its basic norm.

Section 1 of the *Charter* contains three components. There is a guarantee of all rights and freedoms enumerated in subsequent sections. There is the reservation that such freedoms are limited by strictures both reasonable and lawful. And finally, the limitations must reflect conformity to the ideals of a free and democratic society; that is, they must be "demonstrably justifiable".

Section 1 is worthy of separate and intensive discussion alone, but a "free and democratic" society must surely reflect *Canadian* society and its historical development.[11] This is supported by the remarks of Lamer J., in *Reference Re Section 94(2) of The Motor Vehicles Act, R.S.B.C. 1979, c.*

---

8. H. Kelsen, *General Theory of Law and State* (1961) at 113.

9. *Constitution Act, 1982*, preamble to Part I, being Schedule B to *Canada Act 1982*, c. 11 (U.K.).

10. See H.L.A. Hart, *The Concept of Law* (1961) at 20, and 86-88.

11. For example, in *Operation Dismantle Inc.* v. *The Queen*, Wilson J. in a separate judgement, made the following expositional statement: "The concept of 'right' as used in the *Charter* must also, I believe, recognize and take account of the political reality of the modern state". [1985] 1 S.C.R. 441 at 488, 18 D.L.R. (4th) 481, 59 N.R. 1. It follows that a judge is not at liberty to pursue his own notions of truth and justice; there must be an evidentiary foundation. Expressions such as "the political reality of the modern state", without forensic elaboration, could justify reactionary executive measures, or, on the other hand, licence. It seems implicit, therefore, that in these remarks Madame Justice Wilson was reflecting upon the right of the Court to consider such evidence. This is reinforced when one considers the sentence in the context of the entire judgement. See also: *Alliance des Professeurs de Montréal* v. *Attorney-General of Quebec* (1985), 21 D.L.R. (4th) 354 (Que. C.A.) at 362: "As well as the guarantee of rights and freedoms set forth in the Charter, and the power to restrict them within certain limitations, *this section includes a description of the character of our society.* Therefore, s. 33 must be considered in the context of the rules of that society, some of which are determined by the courts, *since the character of our society is set forth in a Constitution* which is subject to judicial interpretation and application [emphasis added]". See also *Black* v. *Law Society of Alberta* (March 4, 1986) as yet unreported (Alta. C.A.); leave to appeal (S.C.C.) reserved May 26, 1986; at 21 of the judgment.

288. He said: "We would . . . do our own Constitution a disservice to simply allow [sic] the American debate to define the issue for us, all the while ignoring the truly fundamental structural differences between the two Constitutions."[12] The history of the expressions "free" and "democratic" in the Canadian context will undoubtedly figure largely in the resolution of *Charter*-based litigation. Section 1 will in this way force a re-examination of institutions and values which may come under challenge; through the disciplines of history, sociology or political science, for example, we may come to better understand the nature of our laws, and perforce, ourselves.[13] Though this is a digression, it reveals a dimension of the expression the "rule of law".

Let us consider the recent *Reference* by the Governor-in-Council concerning language rights under section 23 of the *Manitoba Act, 1870*,[14] and section 133 of the *Constitution Act, 1867*.[15] The way in which constitutional deliberations have indeed changed is illustrated by the manner in which the Supreme Court of Canada approached the dissimulations of the Manitoba Legislature for the past ninety years with respect to section 23 of the *Manitoba Act*. A consideration of the case will demonstrate that the day of black-letter strictures in constitutional matters is well behind us. There is an observable process by which the reasoning behind a law is examined in light of principles enshrined in the Constitution. Constitutional analysis has taken on a new dimension; one which looks to rationality found in a society which exists beyond the mere document itself. To understand the approach, the essential facts and issues in the *Reference* require outlining.

The Manitoba Language Reference: The Case

In 1980, Roger Bilodeau challenged the right of the Province of Manitoba to issue him a unilingual traffic offence notice, pursuant to the authority of *The Highway Traffic Act*[16] and *The Summary Convictions Act*.[17] He argued that since these *Acts* were enacted solely in the English language they were by the operation of section 23 of the *Manitoba Act* invalid. This provision calls for printing and publishing in both English and French, as well as a requirement that the enactment process be recorded in both official languages. In 1981, the Manitoba Court of Appeal held that the statutes under challenge were valid.[18] The decision was appealed to the Supreme Court of Canada.

---

12. S.C.C. unreported, Dec. 17, 1985, Suit No. 17590 at 10.

13. In *Reference Re Language Rights under Section 23 of the Manitoba Act, 1870, and Section 133 of the Constitution Act, 1867*, the Supreme Court of Canada made this important observation: "This Court cannot take a narrow and literal approach to constitutional interpretation. The jurisprudence of the Court evidences a willingness to supplement textual analysis with historical, contextual and purposive interpretation in order to ascertain the intent of the makers of our Constitution". [1985] 1 S.C.R. 721 at 751, 19 D.L.R. (4th) 1, [1985] 4 W.W.R. 385, 35 Man. R. (2d) 83 (hereinafter referred to as the *Reference*). The Court undoubtedly was referring to an increased receptiveness to the admission of social science briefs in recent years. See for example *Morgentaler* v. *The Queen*, [1976] 1 S.C.R. 616, 53 D.L.R. (3d) 161, 4 N.R. 277, and *Reference Re Anti-Inflation Act*, [1976] 2 S.C.R. 373, 68 D.L.R. (3d) 452, 9 N.R. 541.

14. *Manitoba Act, 1870*, S.C. 1870, c. 3, as confirmed by the *Constitution Act, 1871*, enacted as *British North America Act, 1871*, 34-35 Vict., c. 28 (U.K.) (hereinafter referred to as the *Manitoba Act*).

15. *Constitution Act, 1867* enacted as *British North America Act*, 1867, 30-31. Vict. c. 3 (U.K.) (hereinafter referred to as the *Constitution Act*).

16. *The Highway Traffic Act*, R.S.M. 1970, c. A60.

17. *The Summary Convictions Act*, R.S.M. 1970, c. S230.

18. See *Bilodeau* v. *Attorney-General of Manitoba*, [1981] 5 W.W.R. 393, 10 Man. R. (2d) 298 (C.A.).

To resolve the issue expeditiously, proceedings were initiated by Order-in-Council in 1984, whereby the Federal Government referred four questions to the Supreme Court of Canada.[19] These were:

> Question #1. Are the requirements of section 133 of the Constitution Act, 1867 and of section 23 of the Manitoba Act, 1870 respecting the use of both the English and French languages in
> (a) the Records and Journals of the Houses of the Parliament of Canada and of the Legislatures of Quebec and Manitoba, and
> (b) the Acts of the Parliament of Canada and of the Legislatures of Quebec and Manitoba mandatory?
>
> Question #2. Are those statutes and regulations of the Province of Manitoba that were not printed and published in both the English and French languages invalid by reason of section 23 of the Manitoba Act, 1870?
>
> Question #3. If the answer to question 2 is affirmative, do those enactments that were not printed and published in English and French have any legal force and effect, and if so, to what extent and under what conditions?
>
> Question #4. Are any of the provisions of An Act Respecting the Operation of section 23 of the Manitoba Act in Regard to Statutes, enacted by S.M. 1980, Ch. 3, inconsistent with the provisions of section 23 of the Manitoba Act, 1870, and if so are such provisions, to the extent of such inconsistency, invalid and of no legal force and effect?[20]

For the answers to these questions, the Court turned to a single elementary point: the word *shall* in section 23 of the *Manitoba Act* and section 133 *Constitution Act* is mandatory, and failure to comply therewith has the result of invalidity. The Court then went on to deal with the nettlesome question which pondered the consequences of such a declaration on Manitoba's legal structure. A Canadian court of an earlier time, having come to the conclusion that a provincial legal complex was invalid by failure to comply with a necessary institutional requirement, may have cast about for, and relied upon traditionally recognized and established principles by which order would be preserved. In *Bilodeau* v. *Attorney-General of Manitoba*, Monnin J. A. (as he then was) made the observation that mandatory language carries with it, particularly with respect to entrenched rights, a positive obligation.[21] He observed that "[t]he effect of such a conclusion [in this case] would be to create chaos and social disorder of great magnitude .... It would not be logical nor realistic."[22] He considered that necessity would operate to prevent that result.

---

19. Order-in-Council, P.C. 1984-1136, April 5, 1984. The preamble to the Order read: "Whereas the Minister of Justice reports ... That it is important to resolve as expeditiously as possible legal issues relating to certain language rights under Section 23 of the *Manitoba Act, 1870*, and Section 133 of the *Constitution Act, 1867*...."

20. *Ibid.*, at 1.

21. He said:

> If constitutionally entrenched rights are to be effectively challenged by the application of the principles of directory versus mandatory legislation, the defenders of parliamentary supremacy in the present constitutional debate have little to fear from the abuse of judicial supremacy if the end results are so weak and ineffective as to amount to no protection at all for entrenched rights.

Supra n. 18, W.W.R. at 407.

22. *Ibid.*, W.W.R. at 406. And whereas Monnin J.A. relied upon a conservative, traditional doctrine (i.e. necessity) for an answer to the problem, a view disposed even more to conservatism is found, oddly enough, after the Supreme Court decision on the *Reference*. In *Yeryk* v. *Yeryk*, O'Sullivan J.A. in a separate concurring judgement expressly disavowed by the Chief Justice, felt that a declaration of invalidity should have been left to the Queen to address by invoking inherent extraordinary powers. These comments appear in his expatiations on the *Reference*:

> In its advisory opinion, the court has proposed some ideas which with respect appear on the surface to be truly revolutionary.... I do not understand how the Supreme Court or any other court has a power to declare judicially valid or enforceable that which is judicially invalid.... I think it is the Queen in right of Manitoba who has the right to proclaim measures necessary to meet the situation, not the Supreme Court.

[1985] 5 W.W.R. 705 at 711-713, 35 Man. R. (2d) 153 at 157-158 (C.A.). O'Sullivan J.A., with respect, goes quite wide of the mark, for the Supreme Court was obliged to take its inspiration constitutionally. Times have changed and no longer will courts be left to rely upon archaic notions of *parens patriae*. They must look for principles consonant with 'the supreme law of Canada'.

In the *Reference*, the Court considered the doctrine of necessity as well as the savings doctrines of *de facto* and *res judicata*. It is apparent from their analysis that these doctrines could have substantially, if not wholly, operated to preserve the *status quo*. The Justices did not address all of the possibilities that human imagination could engineer and which could diminish rights, obligations and other effects not saved by these doctrines; they merely stated that the protection of such effects would be the responsibility of the Manitoba Legislature.[23] In short, the Supreme Court of Canada declared the laws of Manitoba up to June 13, 1985 to be invalid, but remarkably the Court held that there would be a continuing validity until such time as those laws could be re-enacted, printed and published in both the English and French languages.[24]

Constitutional Interpretation: New Directions On An Old Map

The power to declare this extraordinary order granting temporary validity lay not in doctrinaire approaches to the law, but in what the Court perceived as the new jurisdictional mandate awarded to the judiciary in post-*Canada Act* Canadian society.

> The judiciary is the institution charged with the duty of ensuring that the government complies with the Constitution. . . . The Constitution of a country is a statement of the will of the people to be governed in accordance with certain principles held as fundamental and certain prescriptions restrictive of the powers of the legislature and government. It is, as s. 52 *Constitution Act*, 1982 declares, the 'supreme law' of the nation, unalterable by the normal legislative process, and unsuffering of laws inconsistent with it. The duty of the judiciary is to interpret and apply the laws of Canada and each of the provinces, and it is thus our duty to ensure that the constitutional law prevails.[25]

But this assertion goes beyond the bare realities of the particular operative sections of the Constitution. Clearly, more is intended. The expressions "certain principles" and "certain prescriptions" could have as easily been replaced with more precise, more restrictive words, perhaps following the headings in the *Charter*. The passage cited, in the Court's view, reflected an aspirational statement which is implicitly contained in the Constitution of Canada. Like the passage from Riel, the value system transcends the written word.

The provision in the Constitution from which such bold power is taken unto the Courts is found in section 52; but the expression which shapes and gives effect thereto is the preamble: "Whereas Canada is founded upon principles that recognize the supremacy of God and *the rule of law*" [emphasis added].[26]

---

23. The Court stated:

> . . .[T]o ensure the continuing validity and enforceability of rights, obligations and any other effects not saved by the de facto or other doctrines, the repealed or spent Acts of the Legislature, under which these rights, obligations and other effects have purportedly arisen, may need to be enacted, printed and published, and then repealed, in both official languages.

Supra n. 13, S.C.R. at 768.

24. By an Order of the Court dated November 4, 1985, consented to by all the parties, it was ordered that the period of continuing validity endure for all current laws, regulations, and rules of court and administrative tribunals until December 30, 1988, and for all other laws until December 30, 1990: *Order: Manitoba Language Rights*, [1985] 2 S.C.R. 347.

25. *Supra* n. 13, S.C.R. at 745.

26. *Constitution Act, 1982*, preamble to Part I, being Schedule B to *Canada Act 1982*, c. 11 (U.K.).

It is that statement which enabled the Court to look beyond the four corners of the document to the values and traditions of Canadian society:

> The Court has in the past inferred constitutional principles from the preambles to the Constitution Acts and the general object and purpose of the Constitution . . . in the process of Constitutional adjudication, the Court may have regard to unwritten postulates which form the very foundation of the Constitution of Canada.[27]

In other words, because one may view a statement in the constitutional package, whether express or implied, as aspirational does not mean that it is non-justiciable. In the *Reference,* the preamble animated the Court's power to rule as they did.

The Supreme Court of Canada considered the meaning of "the rule of law". There was not an exhaustive inquiry, but it was felt that the expression meant at least two things: First, that the law holds sway over individuals and government officials, and is "thereby preclusive of the influence of arbitrary power".[28] Second, that the rule demands "the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order".[29] It is the latter which, when examined in the light of the Canadian experience and socio-political heritage, ultimately yields the power to resolve the consequences of ruling Manitoba's laws invalid.[30]

The Court quoted Wade and Phillips, *Constitutional and Administrative Law* with approval: ". . . the rule of law is a philosophical view of society which in the Western tradition is linked with basic democratic notions".[31] Wide imperatives are imported into an otherwise bald expression in the preamble to the *Charter.*

It was considered that the simple declaration of invalidity would produce a state of chaos, uncertainty, and social disorder, as Monnin J. A. (as he then was) observed on the same point. This prospect, the Justices decided, offended a continuing constitutional requirement for "the existence of public order".[32] In the result, the case was decided in the following passages:

> The only appropriate solution for preserving the rights, obligations and other effects which have arisen under invalid Acts of the Legislature of Manitoba and which are not saved by the *de facto* or other doctrines is to declare that, in order to uphold the rule of law, these rights, obligations and other effects have, and will continue to have, the same force and effect they would have had if they had arisen under valid enactments, for that period of time during which it would be impossible for Manitoba to comply with its constitutional duty under s. 23 of the *Manitoba Act,* 1870. The Province of Manitoba would be faced with chaos and anarchy if the legal rights, obligations and other effects which have been relied upon by the people of Manitoba since 1890 were suddenly open to challenge. The constitutional guarantee of rule of law will not tolerate such chaos and anarchy.
>
> Nor will the constitutional guarantee of rule of law tolerate the Province of Manitoba being without a valid and effectual legal system for the present and future. Thus, it will be neces-

27. *Supra* n. 13, S.C.R. at 751-2.
28. *Ibid.*, at 748-9.
29. *Ibid.*
30. See, for example, *ibid.* at 750.
31. E.C.S. Wade and G.G. Phillips, *Constitutional and Administrative Law* (9th ed. 1977) at 89.
32. *Supra* n. 13, S.C.R. at 749.

> sary to deem temporarily valid and effective the unilingual Acts of the Legislature of Manitoba which would be currently in force, were it not for their constitutional defect, for the period of time during which it would be impossible for the Manitoba Legislature to fulfil its constitutional duty.[33]

The *Reference* is a determination by our highest Court that has constitutional implications beyond the rectification of Manitoba's refusal to comply with section 23 of the *Manitoba Act*. What the Court has said with considerable force is that the Constitution of Canada does not speak solely in the chosen expressions of its text, but reflects an image of a robust, established society. The present Constitution, one may say, is drawn upon the palimpsest of the pre-existent Acts of the Imperial Parliament. Their real fabric may be discovered with evidentiary assistance by a court looking to understand how a particular problem may or may not be governed by a constitutional precept.

Such an insight permits the penetration of an idea expressed simply as the "rule of law", to the more fundamental propositions behind it.

> For then are we said to know the law when we apprehend the reason of the law; that is, when we bring the reason of the law so to our owne reason that wee perfectly understand it as our owne; and then, and never before, have we such an excellent and inseparable propertie and ownership therein, as wee can neither lose it, nor any man take it from use. . . .[34]

Coke intuitively understood that law has its underpinnings in apriorisms which are the collected experience of the polity.

The rule of law, then, imparts to the Constitution more than a legal principle; it contemplates the entire legacy of the common law and the British legal tradition. Nenner put it this way:

> The common law provided a constant conceptual framework for political action. Throughout the century virtually every important controversy was formulated, and every position justified, in legal language and common law paradigms. The law was the one constant in an era otherwise marked by constitutional uncertainty and political disarray. It afforded the one structure, both institutional and intellectual, which rendered the issues intelligible and which provided a forum for political debate. Never in question were the existence and utility of a rule of law.[35]

Thus, it is necessary to look behind the Constitution to understand it. The nature of constitutional litigation is unlike traditional forensic inquiry in that the nature of the analysis demands that one look, in Coke's words, to the "reason of the law". In the Canadian context, the reason of the law (in the sense that Coke meant it — the rightness or practicality of it) flows from the Constitution as jurisdictional font of all law in this country.

Conclusion: The Worth of the Exercise

In an engaging treatise, one commentator expressed the 'deficiency' of the *Charter* in "the manner of enunciating . . . fundamental values".[36] The examples he gives are the notions of power, enlightenment, respect, skill, and well being, which among others, have not been sufficiently addressed

33. *Ibid.*, at 758.

34. 2 Sir Edward Cote, *Coke Upon Littleton* (First American Edition from the Nineteenth London Edition, corrected, 1853) at 394 B.

35. H. Nenner, *By Colour of Law* (1977) at IX.

36. L.D. Barry, "Law, Policy and Statutory Interpretation Under a Constitutionally Entrenched Canadian Charter of Rights and Freedoms" (1982), 60 Can. B. Rev. 237 at 260.

in the *Charter.* Barry stated that the drafters could have said much about these values and the means by which they ought to be properly balanced. While this is undoubtedly true, there is a limit to the extent a single document can carry forward the critical core of a society's values for legal enshrinement. Judges must look beyond the bare words of the Constitution and recognize that they reflect an aspirational complex which is the Canadian experience. Like poetry, law must convey the essence, and it is for the reader to establish yield. Perhaps the author recognized this when he mused:

> [The Courts] will no longer be able to portray themselves as mere mechanical finders and appliers of the law. Instead, they will be forced to give content to concepts such as 'equality before and under the law' by specific reference to the nature of Canadian society. Artifical, question begging, decision making should be reduced with fewer sterile exercises in logical derivation and more contact with reality. Greater certainty should result as well as the injection of new life into the law by reference to other disciplines.[37]

Dicey referred to the rule of law as the predominance of the legal spirit.[38] To give that expression effect, the Surpeme Court in the *Reference* could not do anything else but declare continuing validity. The officials of the Province of Manitoba were equally bound by the same value system to comply with a direction to appear at a special hearing to set a timetable for Constitutional compliance.[38a] The way in which such concepts alter our hitherto tentative constitutional approaches augurs well for the development of our understanding of the law. In a recent case, the following remarks were repeated by the Supreme Court of Canada: ". . . it is incumbent upon the Court *to give meaning* to each of the elements — life, liberty and the security of the person, which make up the 'right' contained in section 7. [emphasis added]."[39] This encourages the proposition that a quest for the values that are implicit in the Constitution is expected in judicial reasoning. There must be an observable process by which one approach is accepted or rejected. For as Lamer J. said of one of the phrases of the *Charter* (fundamental justice), "a single incontrovertible meaning is not apparent", though clearly the phrase itself is 'charged with meaning'.[40]

Section 26 of the *Charter,* for example, manifestly declares that the document is not an exhaustive list of rights, and implicitly recognizes that other rights do exist in Canada.[41] These would include those established by the common law and by statute, such as human rights codes, the *Canadian Bill of Rights,*[42] as well as, presumably, other statutes which accord rights to groups or members of groups to act in a certain way. The legal explanation of the dynamics between such rights and obligations has become an

---

37. *Ibid.*, at 264.

38. A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed. 1959) at 188.

38a. This was done on November 4, 1985, at which time an order was issued with the consent of all parties, setting the time limit at three years (December 31, 1988) for all current laws, and five years (December 31, 1990) for all others to be re-enacted, printed and published.

39. *Supra* n. 12, *per* Lamer J. approving the words of Wilson J. in *Singh* v. *Minister of Employment and Immigration*, [1985] 1 S.C.R. 177 at 205, 17 D.L.R. (4th) 422, 58 N.R. 1.

40. *Ibid.*, at 15.

41. Note the conspicuous absence of the word 'may'. The expression is "that exist", not "that may exist". This clause is comparable to the Ninth Amendment of the American Constitution which reads: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people". U.S. Const. amend. IX.

42. *Canadian Bill of Rights*, being Part I of *An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms*, 1960, S.C. 1960, c. 44.

exercise which will test the skill and determination of our legal system; for the system must adapt to a document which requires adherence to principles beyond the application of precedent, and moreover, requires the articulation of the exercise by which one principle is selected over the other. Canadian society can only be richer for the adoption of this perspective. The Supreme Court of Canada in the *Reference* showed imagination and introspection in acting as they did. The prospects for a more vigorous assertion of protection of established rights, as well as the more visibly precise definition of the limitation of those rights, seems assured. This is not to say that the new Constitution is physic to the laws of this country; it is simply to observe that those laws must be demonstrably tied to fundamental values in Canadian society. The hesitancy of an earlier time is gone.

> . . . cela était autrefois ainsi, mais nous avons changé tout cela, et nous faisons maintenant la médecine d'une méthod toute nouvelle*
>
> — Moliere
> Le Médecin malgré lui, 1666

* . . . [T]hat was so in the old days, but we have changed all that, and we now practise medicine by a completely new method.