

## THE WORKING OF THE CHARTER\*

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### I. Introduction

I want to do what, to those of you who know me, may seem unusual. I want to defend the status quo. To me, the *Canadian Charter of Rights and Freedoms*<sup>1</sup> has been working well, and I want to tell you why. Usually, the status quo defends itself. Its ally, inertia, is all it needs. However, there have been criticisms of the way the *Charter* is working that may, I fear, veer *Charter* interpretation off the proper course I believe it has followed. I feel it is necessary to address those criticisms to attempt to prevent that from happening.

Entrenching the *Charter* in the constitution in its present form was not an easy task. The *Charter*, in its first draft, was an Attorneys General Charter. It said more about the rights of the state than the rights of the individual. A number of changes were made to the *Charter* to make it the declaration of rights and freedoms it is today. The Canadian Bar Association, through its report "Towards a New Canada" and through its representations to the Joint Committee of Parliament on the Constitution, was instrumental in making the *Charter* a strongly worded document.

There were those who did not want a *Charter*, who felt that Parliament and the legislatures should be free to do what they want. They feared an entrenched *Charter* would give legislative powers to the courts. They argued that judges should not have that power. They asserted that a democratically elected assembly was the best protection for rights and freedoms. Now that we have a strongly worded *Charter*, these assertions continue.

My own concern, when the *Charter* was first enacted, was that it would suffer the fate of the *Canadian Bill of Rights*.<sup>2</sup> The *Bill of Rights*<sup>3</sup> was a ringing document, legislated by Parliament, in relation to law within federal jurisdiction. The courts emasculated the *Bill*, and then ignored it. It became the last resort of desperate counsel, and little else. Yet, much of the wording of the *Bill of Rights* has been repeated in the *Charter*. I feared that the courts would interpret the same words in the same way, that the *Bill of Rights* would hang as an albatross around the neck of the *Charter*.

That has not happened. The *Charter* has been as vigorous as the *Bill of Rights* was weak. For instance, the *Lord's Day Act* survived the freedom of religion guarantee in the *Bill of Rights*.<sup>4</sup> But it was invalidated by the freedom of religion guarantee in the *Charter*.<sup>5</sup> Rather than the *Bill* weakening the *Charter*, the opposite has occurred. The *Charter* has invigorated

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

2. See David Matas, "The Impact of the Canadian Charter of Rights and Freedoms," A speech to Winnipeg Rotary Club, August 18, 1982.

3. *Canadian Bill of Rights*, R.S.C. 1970, Schedule III [hereinafter referred to as the *Bill of Rights*].

4. *Robertson and Rosetanni v. The Queen* (1963), [1963] S.C.R. 651, 41 D.L.R. (3d) 485.

5. *R. v. Big M Drug Mart Ltd.* (1985), [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321 (S.C.C.).

the *Bill*. The entrenchment of the *Charter* has led the courts to give a quasi-constitutional status to the *Bill*, something it did not have before.

For instance, in the case of *Singh v. Minister of Employment and Immigration*,<sup>6</sup> decided after the *Charter* came into effect, the Supreme Court of Canada held that refugee claimants were entitled to oral hearings, and according to one of the judgments, this under the *Bill of Rights*. Yet, in the case of *Saraos v. Minister of Employment & Immigration*,<sup>7</sup> decided before the *Charter* came into effect, the Supreme Court of Canada denied leave to appeal in a case where the Federal Court of Appeal held the *Bill of Rights* did not require an oral hearing for refugee claimants.

So, *Charter* interpretation is on course. But there are those who would take it off course. I put Roy Romanow in that category. I want to address the criticisms he has made of the courts' interpretation of the *Charter*.

## II. The Positions

Mr. Romanow, in a speech he gave in Winnipeg on January 21, 1987, claimed that judges, in using the *Charter*, had gone further afield than ever anticipated.<sup>8</sup> He said that he and others did not foresee the extent to which the basic rules of society for resolution of a broad range of social, economic and political issues were going to be fundamentally affected by the *Charter*. Second, he said that judges, in *Charter* cases, are involved in policy or political decisions. He claimed that the *Charter* can be an instrument for social progress or conservative retrenchment. Third, he argued that, to date it has been the privileged who have benefitted from the *Charter*, more than the common man. He said that we would be shutting our eyes to reality not to recognize that, in its brief history in Canada, the *Charter of Rights* may have done much less for the position of ordinary Canadians than it has done for those groups which have always enjoyed economic and political power in Canada. Finally, Mr. Romanow argued that judges come from the wrong background, that the system of appointment of judges should be changed. He said that the experience of most judges naturally enables them better to understand the interests of privileged groups. He asserted that because judges are making political decisions their general philosophical approach should be scrutinized before appointment to ensure that their opinions reflect the attitudes of all Canadians.

Now, I do not agree with any of that. I do not believe the judges have gone further than the *Charter* intended. They have given the *Charter* full scope, which is what they were mandated to do. I do not believe that judges, in interpreting the *Charter*, are making policy or political decisions for or against social progress or conservative retrenchment. They are making decisions of principle, applying the principles set out in the *Charter*. I reject the notion that the judges have favoured the privileged in their *Charter* decisions. The judges have been neutral here, as elsewhere, blind to privileged

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6. (1985), 1 S.C.R. 177, 58 N.R. 1.

7. (1981), [1981] 36 N.R. 305 (F.C.A.); [sub nom. *Saraos v. Immigration Appeal Board*] (1981), 38 N.R. 170 (S.C.C.).

8. Roy Romanow, "And Justice for Whom?" Remarks to the Social Planning Council of Winnipeg, June 11, 1986, found in (1986) 16/2 *Man L.J.* 102.

and underprivileged alike, as the blindfolded statue of justice symbolizes. Finally, I believe that judges come from exactly the right background, a legal background. I would urge us not to get into the business of examining the political philosophies of judges before we appoint them to the bench. These political opinions should not have, and, I believe, do not have any relevance to their decisions. They should be equally irrelevant to their appointments.

### III. Privilege

Perhaps the best way to begin this debate is by setting out some examples. I will use the examples Mr. Romanow himself used in his speech of January 21, 1987. Mr. Romanow gave three examples of his thesis. One is the disclosure of the names of rape victims. Mr. Romanow asserts that the conflict between the victims and the press was resolved in favour of the press. The second illustration is the combines investigation case. The conflict, in *Hunter v. Southam*,<sup>9</sup> between the interests of the owners of a large newspaper chain and the interests of the public in maintaining a competitive environment was resolved in favour of the owners. The third example concerns Sunday closing. The conflict, in *Big M Drug Mart*,<sup>10</sup> between a large retailer and workers whose personal priorities and agendas might not be respected by large employers who will conduct business in as many hours of the week as they can was resolved in favour of the retailer. These cases are three examples where the courts have made policy decisions. The privileged won and the underprivileged lost.

In response to those examples, I point out first of all that in two of them, the courts did not say what Mr. Romanow said they said. In *Canadian Newspapers v. Attorney General of Canada*,<sup>11</sup> the Ontario Court of Appeal did not say that the names of rape victims should be disclosed. What it did say was that the power of the Court to withhold disclosure simply on the request of the prosecutor or the victim was invalid as a violation of the *Charter*. The power of the judge to forbid disclosure, in the exercise of his discretion, remained. The Court of Appeal said, contrary to the position of the newspapers, that the social value to be protected, namely, the bringing to justice of those who commit rape, is of superordinate importance and can merit a prohibition against publication of the victim's identity. It is a reasonable limitation on freedom of the press. The order that the judge can make to prohibit disclosure will "no doubt be made as a matter of course." It is only in an exceptional case that the judge should have an opportunity to refuse to make a prohibiting order. So, the winner in this conflict was the underprivileged victim, not the privileged press.

Mr. Romanow's comments on the Sunday closing example are equally mistaken. It is true that, in *Big M Drug Mart*, the Supreme Court of Canada held the *Lord's Day Act* inoperative as a violation of the *Charter*. However, the provincial Sunday closing acts remain. In *R. v. Videoflicks*,<sup>12</sup> the Ontario

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9. (1985), 11 D.L.R. (4th) 641, 14 C.C.C. (3d) 97 (S.C.C.).

10. (1985), [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321.

11. (1985), 49 O.R. (2d) 557, 16 D.L.R. (4th) 642.

12. (1984), 5 O.A.C. 1, 14 D.L.R. (4th) 10 [hereinafter referred to as *Videoflicks*].

Court of Appeal was asked to hold inoperative the *Retail Business Holidays Act* of Ontario. The Court refused. The Court, in *Videoflicks*, divided the litigants before it into two groups, those who close on a day other than Sunday, because it is their sabbath, and those who do not. For those who do not, the Court held that the *Act* does not infringe the freedom of religion guarantee in the *Charter*. For those who do close, the *Charter* guarantee is infringed. For them, and them alone, the *Charter* renders the *Act* inoperative.

Since the overwhelming majority of businessmen in Canada today are businessmen who do not close on a day other than Sunday because it is their sabbath, the effect of the decision is to uphold the Sunday closing laws. There are similar decisions that have been made by the courts in Quebec and New Brunswick. Again, in this conflict, it is the underprivileged employee who might otherwise have to work on Sunday, and not the privileged employer, who won.

The third example, the case of *Hunter v. Southam*, is a true example. There is no doubt that the newspaper owners won that case. Nor do I put too much stock in the fact that the other examples are wrong. If those examples were not true examples of cases where privileged litigants won, I am sure other examples could be found.

The point I would make about *Hunter v. Southam* is a point I will make in a more general way later. Although newspaper owners won, they did not win because they were newspaper owners. They did not win because the courts made a policy decision in favour of newspaper owners. They won because the state had violated a principle set out in the *Charter*. The owners had been subjected to unreasonable search and seizure. The principle, in that case, favoured a privileged litigant. The very principle, in another case, could equally favour an underprivileged litigant, or the state itself.

Indeed, in a subsequent case, the Ontario Court of Appeal followed the decision of the Supreme Court of Canada in *Hunter v. Southam* to uphold a search and seizure that a litigant challenged. In *Re Print Three and the n*,<sup>13</sup> the Department of National Revenue of the Government of Canada, under the authority of the *Criminal Code*, searched the premises of a taxpayer and seized some of his documents because of an alleged *Income Tax Act* offence. The taxpayer argued that the search and seizure should have been under the *Income Tax Act* and not the *Criminal Code*. The position of counsel for the taxpayer was that the *Criminal Code* was not available for a taxpayer search and seizure because the *Income Tax Act* contained a complete code for a taxpayer search and seizure. The counsel for the Government argued that the *Income Tax Act* provisions on search and seizure were inoperative as a violation of the *Charter*.

The Court, following *Hunter v. Southam*, accepted the Government's argument and upheld the *Criminal Code* search and seizure that had taken place. Thus, because of the *Charter*, because of *Hunter v. Southam*, it was the interests of the state that prevailed over the interests of the taxpayer.

13. (1985), 51 O.R. (2d) 321, 20 D.L.R. (4th) 586.

These two cases together show the very arbitrariness of looking at the wealth of the litigant, his social standing, his power and influence. If courts were to favour the underprivileged or privileged consistently, there would be no law at all, but simply a welter of conflicting decisions. All principles would disappear. The pocketbooks of the litigants would be decisive. That would be the end, not only of the *Charter*, but of the rule of law itself.

*Charter* decisions do not now favour the privileged. If, out of a mistaken perception that they do, or out of political conviction, we set about trying to have *Charter* decisions favour the underprivileged, then the law itself will be corrupted and destroyed. Though Mr. Romanow accuses the courts of sympathizing with the privileged, the opposite charge is often levied. It is sometimes said that hard cases make bad law. What that means is that the courts, acting from sympathy for an unfortunate litigant, distort the law to help him or her out. While there are, no doubt, judicial aberrations where the judge identifies with the rich or sympathizes with the poor, judges, when they perform their functions in the normal course, do neither.

To me, the *Charter* has had an overwhelmingly positive effect on the underprivileged. There are no more wretched people on this earth than refugee claimants. They flee in fear from their homes, threatened, beaten, jailed, or tortured. They come to a place they do not know, where they do not speak the language, where they did not want to come. Till the advent of the *Charter*, refugee claimants could be sent back to the countries they had fled without an oral hearing of their claims. It was only after the *Charter* and because of the *Charter* that the Supreme Court of Canada held, in the *Singh* case, that refugee claimants were entitled to oral hearings. Even the judgment in the *Singh* case that was based on the *Bill of Rights* was, as I mentioned, influenced by the existence of the *Charter*.

There are, of course, more examples besides. Just as Mr. Romanow can produce examples where the *Charter* has helped the privileged, I can produce examples of cases where the *Charter* has helped the powerless and the poor. Examples, from this perspective, prove nothing.

#### IV. Policy

An even more fundamental objection I have to Mr. Romanow's position is his assertion that the courts, in applying the *Charter*, are making policy or political decisions. They are not; they are making decisions of principle.

A policy decision is a decision about what is in the best interests of the community as a whole. It is majoritarian in focus. It involves accommodation between different segments of the community. A political decision as made by politicians reflects either what politicians want, or what the electorate wants, or some combination of the two. Typically, in a political decision, the politician orders his own priorities to respond to the inclinations of the electorate.

A decision made on principle, on the other hand, is a decision based on rights. It is an elaboration of a concept on which a principle is based. In a court, a decision on principle focusses on the individual litigant rather than society as a whole. The decision may be totally uncompromising in nature.

As made by judges, it imposes neither their own inclinations nor the attitudes of society. Rather, a decision on principle applies the relevant principle to the facts before the court. Decisions based on principle are consistent in a way that policy decisions are not. While politicians like to be consistent with what they have said before, and with what their party colleagues say, politicians make no attempt to be consistent with political decisions in other jurisdictions, or with decisions made by past governments. Judges, on the other hand, in applying principle, do more than just try to be consistent with themselves and with their colleagues. They try to be consistent with courts in other jurisdictions, and with courts that have come before them.

Judges are motivated by fairness to treat like cases alike. Politicians are motivated by exigencies to treat every political situation differently, according to the circumstances at the time. There is an internal logic to the law that allows judges to come to decisions of principle. Politicians do not operate from the internal logic of their own political philosophies to anywhere near the same degree. Political philosophy may give a politician direction. More often than not, it does not dictate a particular decision.

Judges, of course, may reject precedent. They may reject the decisions of their colleagues in other jurisdictions. Even these rejections are motivated by consistency. When these rejections occur, the reason is that the court considers the decisions, in retrospect, to be inconsistent with the relevant principle at work in the area of law the court is applying.

Ronald Dworkin, who himself makes this distinction between policy and principle in his book *Taking Rights Seriously*<sup>14</sup>, says policy goals involve a trade-off of benefits and burdens in the community as a whole. Rights do not involve this trade-off.

Judges may disagree amongst themselves about how to apply a principle to a particular fact situation. We often see dissenting judgments, or conflicting judgments in different jurisdictions. That does not mean judges have made different policy decisions, stemming from different political philosophies. What it means is that their understanding of the meaning of the relevant principles differ. The meaning of legal principles is unavoidably contentious. That is why the courts are there in the first place, to resolve these differences over the meaning of principles. What the courts do in resolving these differences is to make their best efforts to determine what these principles truly mean. The courts do not abandon this effort and wander off into a policy exercise.

Judges, of course, make mistakes. I do not mean to defend every judicial decision, or even every decision under the *Charter*. Given the number of conflicting decisions, that would be impossible. When a court does make a mistake, however, it is a legal mistake, not a policy mistake. Judges have elaborated the concepts inherent in the law wrongly. One cannot say they got the public interest wrong, since they have not sought to get it right. When the judges apply the *Charter*, they apply a policy. However, it is not

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14. (London: Duckworth, 1977). See chapter 4 entitled "Hard Cases."

their own policy. It is the policy set out in the *Charter*. Our law-makers have said that the policies in the *Charter* are to prevail over other policies that are not in the *Charter* and the judges are trying to make sure that happens.

When politicians make decisions in which they do not believe, they are considered hypocrites. When judges apply laws in which they do not believe, they are just doing their job. A judge may share *Charter* values. He or she may personally believe in them. I, for one, hope he or she does. However, he or she can be a perfectly good judge, a perfectly good *Charter* judge, without believing in them. It may be a little more difficult for judges who do not believe in a *Charter* value to understand the ramifications of the value and how it applies to the case before them. Yet, if they are good at what they do, they will be capable of understanding the concepts of the *Charter*, and applying them, whether they believe in them or not.

Policy and principle may conflict. What is in the best interests of the community as a whole may conflict with what the *Charter* dictates. However, unless the *Charter* itself is changed, one cannot blame the judges for making a decision against the public interest. In a sense, that decision was made for them by those who entrenched the *Charter*. Judges in *Charter* cases are not deputy legislators, deciding in a way that Parliament or the legislatures would otherwise decide. It is not just that the people are different. The arguments, the considerations that are brought to bear, are different as well.

What the courts are doing in *Charter* cases is not different in nature, even constitutionally, from what the courts were doing before the *Charter*. Before the *Charter*, the courts measured legislation by constitutional standards to determine whether the legislation fell within federal or provincial jurisdiction. With the *Charter*, the scope for measurement of litigation by constitutional standards has broadened. As Mr. Justice Lamer of the Supreme Court of Canada pointed out in *The Reference re s.94(2) of the Motor Vehicle Act of British Columbia*,<sup>15</sup> the actual nature of the task before the courts remains the same.

The *Charter* contains within it general statements of principle. This does not mean that the *Charter* is so vague that the judges can do anything they want. Although the concepts are general, they are not, I suggest, vague at all. "Freedom of the press," for instance, is not half a thought. It is a fully stated principle.

The *Charter* could have been more verbose than it is. The *International Covenant on Civil and Political Rights*, from which much of the *Charter* is drawn, states many of the principles of the *Charter* in a lot more words. Yet it is not a better drafted document. On the contrary, it is the *Charter* that is the better drafted document. An entrenched *Charter* is meant to have an educational value. It is addressed to everyone. It should be comprehensible to everyone. From a drafting point of view, the worst part of

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15. (1985), [1985] 2 S.C.R. 486, 63 N.R. 266 at 272.

the *Charter* is the part that is most technical and intricate, the minority language educational rights section. The best part of the *Charter*, and this is the bulk of it, is the part that is in the clear and simple language accessible to all.

The reason the courts have difficulties applying the principles in the *Charter* is not because of any vagueness. It is that, in each difficult *Charter* case, one principle conflicts with another principle of nearly equal weight. These conflicts have to be resolved. Take, for instance, *Hunter v. Southam*. Mr. Romanow portrayed this case as a conflict between the interests of newspaper owners and the interests of the public in maintaining a competitive environment. The Supreme Court of Canada, on the other hand, saw the case as a conflict between the state's interest in detecting and preventing crime, and the interest of the individual in being left alone. In other words, there was a conflict between the rights of the victim represented by the state, and the rights of a suspect. That conflict was resolved, by reference to a *Charter* value, the right to be free from unreasonable search and seizure. Unreasonable search and seizure was explained on the basis of the Anglo-Canadian common law and legislative tradition. According to that tradition, the interests of the state prevail over the interests of the individual where credibly based probability replaces suspicion.

The Court used a *Charter* principle to decide the case, rather than the public interest in the abstract. The focus of the Court was at a much higher level of generality than the focus of Mr. Romanow. The Court did not look specifically at the issue of impeding monopolistic trends in media ownership. Instead, the attempt was to make the decision consistent with the whole Anglo-Canadian legal tradition of search and seizure.

A decision that is made by the Courts under the *Charter* may well have been made without the *Charter*, by politicians in Parliament or the legislatures. Giving the decision to the courts does not, however, mean giving policy-making powers to the courts. An issue can be approached from the point of view of principle or from the point of view of policy. Though the subject matter is the same, the approach differs.

The *Charter*, in section 1, gives the courts power to determine whether a law is a reasonable limit to a *Charter* right or freedom. This power to determine whether a law is a reasonable limit is no more a policy-making power than any other power under the *Charter*. As the Honorable David McDonald said in his book, *Legal Rights in the Canadian Charter of Rights and Freedoms*,<sup>16</sup> a reasonable limit is one that has a rational basis. It does not mean that the judge personally agrees with it.

The concept of reasonableness is pervasive in the law. For instance, in the law of tort, there is the doctrine of reasonable care. Giving judges a power to decide reasonable limits does not give them a new type of power they never had before. It means asking them to apply, in a new arena, concepts and techniques they have applied elsewhere.

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16. (Calgary: Carswell, 1982) at 14.



So a policy approach to *Charter* decisions is not happening; and it would be wrong if it did happen. For one thing, it would contradict the purpose of the *Charter* itself. The whole purpose of the *Charter* was to assert certain minority and individual rights, if need be, against the interests of the majority. If the courts start deciding *Charter* cases only on the basis of the interests of the community as a whole, the value of the *Charter* will be lost. It would truly then become inappropriate for the courts to make *Charter* decisions. Giving the judges power to make *Charter* decisions is acceptable only if the judges are making decisions of principle. Once they start making policy decisions, then it is unacceptable. Judges have neither the electoral mandate, nor the access to polls, studies, interest groups, lobbies and media — constituents that all form part of the policy process.

A policy decision made by the courts is unfair to litigants because it is retroactive. A decision on principle may be uncertain before it was made, but the winning litigant gets the decision he was entitled to get. A policy decision is not a decision of past entitlement. The losing litigant is sacrificed to the public good. He does not lose because he has done anything wrong.

### V. Backgrounds

The best background that judges can have to deal with the *Charter* is a legal background. Lawyers are doing what judges do, elaborating legal concepts and applying them to the facts before them. That is exactly the background that judges do have. In order for a person to be a judge, he or she, by statute, must be a lawyer for at least ten years.<sup>17</sup> The skills of judges could, no doubt, be improved. The improvement, however, should be an improvement in their legal skills, not an improvement in their policy-making powers.

It is important to have on the bench judges from different legal backgrounds, with differing legal expertise. The reason is that such a bench will have a better understanding of the wide variety of principles that motivate our laws. The reason is not that they will make better policy decisions.

The process for the selection of judges could be improved. But, if it is to be improved, what we want is a process that is even better in choosing competent lawyers than the present one is. What we do not want is a system that examines the candidates' political philosophies and chooses depending on their philosophies. Choosing a judge on the basis of his or her political philosophy amounts to the interference of politics in the judiciary. It breaches the wall that separates the legislative and judicial powers. It is an attack on the independence of the judiciary. More fundamental than that, it is irrelevant. The political philosophy of a judge simply gives no guide to what sort of judge he or she will be, no guide to what decisions he or she will make.

When political philosophy has been used as a criterion for appointment, it has been a notoriously poor indicator of what a judge will do. For instance,

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17. *Judges Act*, R.S.C. Chapter J-1, s. 3.

Earl Warren, former Chief Justice of the U.S. Supreme Court, was a Republican Governor of California, a candidate for the Republican presidential nomination, and an Eisenhower appointee to the U.S. Supreme Court. Yet, he is generally considered today to have been a liberal judge who headed a liberal court.

The reason that political philosophy is a poor indicator is not that people change when they go from politics to the bench. By and large, they do not. However, when they go to the bench they are doing something different from what they did when they were in politics, or when they were thinking about politics. On the bench, they do not apply their beliefs. Instead, they apply their understanding of what the law requires. That understanding is arrived at in each case, after argument from counsel is heard. The understanding of what the law requires in a particular case is not something a judge brings with him or her to the bench.

## VI. Scope

The last point I want to make relates to the expectations Mr. Romanow had about the *Charter*. For me, there was not one area in which the *Charter* was intended or expected to apply, and another area into which the courts have wandered to everyone's surprise. The *Charter* was meant to be comprehensive, and has been interpreted to be comprehensive. I do not doubt that Mr. Romanow and others did expect the *Charter* to be applied more narrowly than it was. Yet, there is nothing in the *Charter* to justify that expectation. The courts can hardly be faulted for applying the *Charter* as it is, rather than as Mr. Romanow and others expected.

Legislators sometimes mean to say one thing and say another. The duty of the courts, in that situation, is to apply the law as passed, not to apply the law the legislators intended to pass, but did not pass. That may have happened here. The *Charter*, as entrenched, may be broader than its creators intended. However, I do not think that is the case.

The entrenchment of the *Charter* involved a great number of people from all walks of life throughout Canada. I do not want to downplay the importance of the role Roy Romanow and his colleagues played. But it is not their *Charter*. Many of the people involved in the entrenchment of the *Charter* wanted and expected exactly what has happened.

I said earlier I had feared the *Charter* might not be an effective document. However, I — and, I think it is fair to say, my colleagues in the Canadian Bar Association involved at the time — wanted an effective document. We wanted a *Charter* that was comprehensive in scope, that the courts took seriously and applied vigorously. We would be disappointed now if it turned out the *Charter* meant less.

In talking about his expected scope of the *Charter*, Mr. Romanow makes a distinction that is neither tenable nor justifiable. He divided cases into human rights cases, such as a challenge to the *Lord's Day Act*, which were expected, and cases impinging on the political process of accommodation between economic and social groups, such as the administration of the *Combines Investigation Act*, which were not expected. Yet, how is *Hunter*

v. *Southam*, a case on the administration of the *Combines Investigation Act*, not a human rights case? That case was decided on the basis of unreasonable search and seizure. Is the suggestion being made that when a newspaper reader is subject to unreasonable search and seizure there is a violation of human rights, but that when a newspaper owner is subject to unreasonable search and seizure, there is no violation of human rights?

There are two implications that can be drawn from the distinction Mr. Romanow tries to make, both of which should be avoided. One is that, because the courts have given the *Charter* unintended scope, the courts should return to the original intended scope. There is an implied call for judicial restraint. I reject that call. What is at stake here is not just a principle of constitutional interpretation. It is the principle of the *Charter* itself. Restraint means that, in some cases, fundamental rights and freedoms will be ignored. Judges, in applying the *Charter*, may come to a wrong conclusion. However, if judicial restraint involves the refusal to apply the *Charter* where it seems to apply, great harm can result. For instance, if the Supreme Court of Canada, in the *Singh* case, decided out of a sense of restraint not to require oral hearings for refugee claimants, people fleeing persecution could have been returned home without a hearing, to face possible death. Now that we have the *Charter*, we must not lose it through judicial restraint. If that happens, all the effort we went through to get the *Charter* will have been for naught; and Canada will be the worse for it.

The second implication that can be drawn from Mr. Romanow's distinction, one that Mr. Romanow himself draws, is that if the courts are to be involved in these political issues, as opposed to the "human rights" issues, we must try to make sure that the courts act as an instrument of social progress and not of conservative retrenchment. The argument seems to be that if the courts are to be unrestrained in scope, they should be equally unrestrained in technique. The *Charter*, in a sense, is an instrument to help the disadvantaged. However, the assistance the *Charter* gives to the disadvantaged is the protection of their rights. The disadvantaged are viewed as disadvantaged because of the violation of their *Charter* rights.

There is one exception to this perspective: under section 15, the equality rights guarantee does not preclude affirmative action programmes to ameliorate the conditions of the disadvantaged. Here the disadvantaged are viewed from a more general perspective. Here, the underprivileged can defeat someone else's claim to equality rights simply because the law, programme or activity in question helps the underprivileged remove their underprivilege. However, none of the other *Charter* rights is qualified in that way. Obviously, a person can suffer a violation of his or her *Charter* rights, and yet, in every other sense, be very well off indeed. A newspaper owner may be a victim of unreasonable search and seizure, and yet remain a powerful and wealthy individual. A person can have all his or her *Charter* rights respected, and, yet, in every other way, be very poorly off.

The *Charter* is not there to change that situation, nor to keep it the way it is. The *Charter* was not meant to be used as an ideological instrument of either social progress or conservative retrenchment. It should have no political or ideological role at all. Conservatism, socialism, liberalism have no place in the courts.

## VII. Conclusion

Although I have defended the status quo, I cannot finish without saying something critical about *Charter* reality. It has to do with *Charter* funding. The cost of *Charter* litigation disadvantages neither the underprivileged nor the overprivileged, but those in between. The rich can pay the costs of litigation out of their own pockets. The poor can ask for legal aid to pay. Those in between can do neither.

The Government of Canada has now funded a court challenges programme administered by the Canadian Council on Social Development. The funding is both for language issues and equality issues. There are two notable gaps in the programme. One is the issue gap. Equality issues and language issues are covered, but other issues are not. If someone wants to challenge legislation involving the violation of freedom of religion or freedom of assembly, the fund is not available. The second gap is a jurisdictional gap. Language issues funding is available to challenge both federal and provincial legislation. Equality issues funding is available to challenge federal equality rights violations alone. It is not available for provincial challenges.

The language issue funding is a continuation of a programme that existed for some time. Indeed, the funding has been used by Ottawa to finance litigation that led to virtually all Manitoba legislation being declared invalid as a violation of the language provisions of the constitution. Since Ottawa has done that, it is hard to see why it should be so shy about funding equality rights challenges of provincial legislation.

However these funding gaps are filled, they need to be filled. Whether it is the province or the federal government that makes the court challenges programme comprehensive, it should be made comprehensive. The full range of litigants on the full range of issues should be before the courts on the *Charter*. The courts are prepared to give the *Charter* full scope. Litigants should have the opportunity to do the same.