

Not-So-White, the ten dwarfs, and the nine wise ones: a constitutional fairy-tale

Dale Gibson*

I. PROLOGUE: 1867, 1931, 1982, AND ALL THAT

FAR TO THE NORTH of the great North-American Fantasyland lies a frozen fairy-tale Kingdom (a Queendom, to be more accurate), where the arctic sun glances coldly off snow castles and simple igloos (even fairy-tale societies being divided by class), and the aurora borealis present nightly spectacles that neither Disney nor Baryshnikov can rival.

The Queendom was created once upon a time (in 1867 to be precise) by the great-grandmother of the current monarch. She had been induced by her councillors¹ to amalgamate several northern dwarfdoms into one larger and more or less independent domain called Canada (an ancient word meaning "unprofitable colony").²

Fearful, perhaps, that the citizens of this new land might run amok and join the Fantasyland to the south (with which the mother country was still annoyed from a previous fairy-tale), or possibly conscious that the country might become profitable in time, the Queen and her councillors declined to give Canadians the magic wand of legal sovereignty. This meant that although they were left to fend for themselves in most respects (certainly in every respect that involved the expenditure of money), any changes they desired to the constitution of their amalgamated dwarfdom required the consent of the mother country.

As the years went by, this situation became increasingly unsatisfactory. For Canadians, it was inconvenient and demeaning; for the Queen and her councillors, to whom it was becoming increasingly clear

* Professor, Faculty of Law, University of Manitoba (on leave); currently Belzberg Professor of Constitutional Studies at the University of Alberta.

1 The monarchs of the mother country have long been subjected to a hypnotic trance called "constitutional monarchy," which causes them to do everything their councillors "advise." See F. MacKinnon, *The Crown in Canada*, (Calgary: Glenbow Alberta Institute, 1976).

2 *The Constitution Act, 1867* (U.K.), 30 & 31 Vict., c.3, s.3. For a readable account of the process by which the new country came into being, see P.B. Waite, *The Life and Times of Confederation, 1864-1867: Politics, Newspapers, and the Union of British North America* (Toronto: University of Toronto Press, 1962).

that the semi-colony would never repay their investment, it was a bootless administrative burden. Finally, in 1931, officials in the mother country agreed to make a clean break, and to hand over the magic wand of constitutional sovereignty to the citizens of several former colonies, including Canada. Astoundingly, however, the Canadians refused to accept the wand! The dwarfs in charge of the various regions of Canada had not been able to agree among themselves about a suitable procedure for employing the wand to effect future constitutional changes. They therefore requested that the wand be retained in the mother country until such a procedure could be decided upon.³

For the next 50 years the dwarfs continued to quarrel about appropriate procedures for employing the wand, should they ever agree to accept it. Unsuccessful efforts were made to resolve the dispute at conferences in 1927, 1931, 1935-36, 1950, 1960-61, 1964, 1967-71, 1975-76, 1978-79, 1980, and 1981. The reason that agreement eluded the dwarfs was that some of them believed the wand of constitutional change should only be employed with the unanimous consent of all the dwarfs, while others feared that so rigid a formula would make it impossible for the constitution to grow with the country and change with the times. Dozens of compromise solutions were proposed, but none was approved.⁴

Until the centennial of the frozen Queendom in 1967, these periodic attempts to "patriate" the magic wand had a somewhat desultory character. Thereafter, however, the realization that Canada was 100 years old, but had not yet attained constitutional adulthood, fed a spreading sense of shame, and the mood of the conferences grew urgent.

The urgency was intensified by restlessness in one of the dwarfdoms. Many inhabitants of the French-speaking realm of Quebec had become disenchanted with current constitutional arrangements, and were demanding reforms that ranged from increased local autonomy to outright independence from Canada. These forces of disquiet were eventually focused by a sly but folksy dwarf called René.⁵

Before long, René was running the Government of Quebec, and was demanding "Sovereignty Association" with Canada (an arrange-

3 *Statute of Westminster (U.K.), 1931, s.7(1)*. See Government of Canada, *The Role of the United Kingdom in the Amendment of the Canadian Constitution*, 1981, at 8-9 and P. Gerin-Lajoie, *Constitutional Amendment in Canada*, (Toronto: University of Toronto Press, 1950) at 93ff.

4 See, generally, the works cited in note 3, *supra*.

5 Rene Levesque, Premier of Quebec, 1976-1985. See R. Levesque, *Memoirs*, trans. P. Stratford (Toronto: McClelland & Stewart, 1986).

ment roughly akin to a married couple divorcing, and then reinstating certain components of the marriage on an "as needed" basis).

Enter Prince Pierre. Blessed with the secret of eternal youth, and a manner that men found intimidating and women seductive, Prince Pierre seized both the public imagination and the reins of central power at about the time of Canada's 1967 centenary.⁶

The dwarfs feared him. Some thought he was an enchanted frog, though no dwarf was brave enough to attempt breaking the spell by kissing the Prince. René despised him because, although he came from Quebec, the Prince opposed sovereignty association; furthermore, he had dedicated his considerable prowess in the black arts of politics to aggrandizing the powers of the central government at the expense of Quebec and the other dwarfdoms.

Prince Pierre brought a new determination to the search for a way to bring the magic wand home. It was he who was chiefly responsible for the flurry of constitutional conferences after 1967. At those conferences the wily dwarfs let it be known that before they would agree to patriating the wand, they must receive a promise that the wand would first be used to bring about certain substantive constitutional changes that each dwarf considered immediately desirable. The changes demanded were multitudinous, multifarious, and often mutually inconsistent.

Prince Pierre, not to be outdone, also proposed a substantive amendment to accompany patriation of the wand. "Let us," he suggested, "create a new, constitutionally entrenched, talisman, to be known as the *Canadian Charter of Rights and Freedoms*." Now most of the dwarfs were strongly opposed to a *Charter of Rights*. They feared that such a talisman would reduce their power to rule their subjects as they saw fit. It would subject their actions to the scrutiny of the Nine Wise Ones, who dwell in a splendid Art Deco temple in Ottawa, within shouting distance of the castle occupied by the officials of the central government. "The Wise Ones lack a democratic mandate," the dwarfs protested, "they are anointed for life by Prince Pierre and his ilk, without so much as consulting us."

But Prince Pierre knew a thing or two. He knew, for example, that Canadian voters don't understand abstractions like "legislative supremacy." And he knew that they would like the idea of increasing their "rights and liberties". He was also aware that the mother country had always regarded the central government of Canada, which the Prince led, as the only one from which a request to patriate the magic

6 Pierre Elliott Trudeau, Prime Minister of Canada, 1968-1979, 1980-1984. See: R. Gwyn, *The Northern Magus: Pierre Trudeau and Canadians*, ed. by S. Gwyn (Toronto: McClelland & Stewart, 1980).

wand would be entertained. He decided, therefore, on a bold step. He would bypass the fractious dwarfs altogether, and would go alone to the rulers of the mother country, requesting that they first grant the constitutionally-entrenched talisman of rights and freedoms, and then turn over the wand of sovereignty to the Canadians. The dwarfs' pet constitutional reforms would be ignored.

The dwarfs danced with anger. If Prince Pierre succeeded, both their fears about the talisman and their various personal proposals for constitutional change would be trodden under foot. One of their number (an uncommonly testy gnome called Sterling, whom Disney would undoubtedly have cast as Grumpy)⁷ convened a hurried council of war, and a rare consensus emerged. Eight of the ten dwarfs agreed to a two-pronged attack on the Prince's plan. First, every effort would be made to discredit the Prince in the eyes of Canadians, and to persuade the Queen and her councillors in the mother country that they should not comply with his request. The dwarfs began to refer to Prince Pierre publicly as Prince "Not-So-White." Secondly, legal proceedings would be commenced with a view to obtaining a pronouncement on the matter from the Nine Wise Ones.

In furtherance of the first tactic, the dwarfs and their minions invaded the mother country in great numbers, and began taking councillors and other influential persons to dinner with unprecedented frequency. Prince Not-So-White and his underlings were forced to follow suit. A period of gastronomic abandon ensued; the British had not been so well fed since the days of the Marshall Plan.⁸

The Prince found himself involved, with monotonous regularity, in conversations like the following:

"Now tell me (burp!), old boy, why should we do what you ask, and ignore the requests we are receiving from those delightful little (belch!) dwarfs?"

"Well, because Canada is an independent nation and ..."

"You can hardly be said to be (urp) independent, can you, when you've left your wand of sovereignty in our custody?"

"That's true in a formal sense, of course, but we've long been independent in practice, and you have always used the wand for us in the manner we of the central government have requested."

"Well, yes (munch), but don't you see, old boy, that in the past you've never made such a request without first obtaining the approval of the dwarfs?"

"But it was never a legal requirement that we get their approval!"

7 Sterling R. Lyon, *Premier of Manitoba, 1977-1982*.

8 R. Romanow, J. Whyte and H. Leeson, *Canada Notwithstanding: The Making of the Constitution 1976-1982* (Toronto: Methuen, 1984).

"Nor was it a legal requirement that we grant the requests of your central government! Would you pass the (belch) pheasant again please? There's a good chap."

The rulers of the mother country appeared to have an insatiable appetite for such food for thought, and would probably not have digested the issue fully even yet, had the decision not been taken out of their hands by the Nine Wise Ones. The Wise Ones decreed, with Solomonesque even-handedness, that although the Prince was within his legal rights to request the return of the wand on his own terms, he had violated "constitutional convention" (customary political expectations of how governments should properly behave) in doing so.⁹

This created a serious problem for Prince Not-So-White. He knew that he would risk alienating the voters if he persisted in exercising his legal rights and violating convention. Moreover, he feared, the officials of the mother country might consider his disregard of convention as justification for their disregard of the convention that the mother country always did what the central government requested. The only thing to do was to swallow his pride (no doubt the most difficult meal of all) and convoke yet another conference with the dwarfs.

Most observers expected the conference to fail once more. Many, indeed, thought that Prince Pierre intended it to be a final demonstration of dwarfly intransigence, which would provide renewed political justification for proceeding with his scheme to patriate the wand unilaterally in defiance of convention. If all the dwarfs had been as stubborn as René, this tactic might well have succeeded. Seven of the eight recalcitrant dwarfs recognized the trap, however, and refused to be outmaneuvered. To the considerable surprise of the Prince and his advisors, they made it known that they might be willing to agree to both patriation and the creation of a constitutional *Charter of Rights* if the Prince would agree to significant concessions of detail.

Since René was opposed to any such weakening of the dwarfs' position, and it was felt that his presence could frustrate the negotiations, the Prince and the other dwarfs agreed that their representatives would attempt to forge an agreement at a secret all-night cabal in the kitchen of the temple (a former railway station) where the conference was being held. Thus, although Disney would never have cast him in the role of Sleepy, René and his staff slept through the most crucial part

9 Reference re the Amendment of the Constitution of Canada (Nos. 1, 2, and 3) [Patriation case] (1981), [1981] 1 S.C.R. 753 (sub nom. A.G. Man. v. A.G. Can.; A.G. Can. v. A.G. Nfld; A.G. Que. v. A.G. Can.; A.G. Can. v. A.G. Que.), 125 D.L.R. (3d) 1, [1981] 6 W.W.R. 1. See also P. Hogg, *Constitutional Law of Canada*, 2nd ed. (Agincourt, Ontario: Carswell, 1985) at 14ff; G. Marshall, *Constitutional Conventions: the Rules and Forms of Political Accountability* (Oxford: Clarendon Press, 1984) at 180ff.

of Canada's most important constitutional conference in a century. When they arrived at the conference temple the following morning rested and breakfasted, they learned from their sheepish and bleary-eyed fellow dwarfs that a deal had been made without them.¹⁰

Some of the more metaphorically-minded of René's followers described the deal as having been either "cooked" or "railroaded," but most used less artistic expressions, uttered in French, a language which, fortunately, most of the other dwarfs could not comprehend.

René tried to persuade both the authorities in the mother country and the Nine Wise Ones that it would be unconstitutional to proceed with the Prince's proposals in the absence of agreement from the dwarfdom of Quebec. He was unsuccessful. The government of the mother country was satisfied that a request supported by the central government of Canada and nine of the ten dwarfdoms could not be refused, and the Wise Ones ultimately ruled that it did not violate constitutional convention to proceed without the agreement of Quebec.¹¹

And so it was that, on the 17th day of April, 1982, the magic wand of constitutional sovereignty was finally delivered to Ottawa by the Queen herself. To mark the event, 500 pigeons (legally deemed to be doves for the occasion) were released, and a Member of Parliament, back in the mother country, was quoted as saying: "I guess it's back to Spam and buying our own lunches now."¹²

Will everyone live happily ever after? Certainly not. Even if we disregard the undernourished politicians of the mother country, Canada's new constitutional arrangements seem to have been cunningly designed so as not to satiate anyone's constitutional appetite. Well then, will the new arrangement at least provide sufficient constitutional nourishment to ensure the survival of the frozen fairyland in a reasonably healthy state? That is a more difficult question to answer, and one which requires a closer look at both the magic wand and the talisman. It also calls for some discussion of the manner in which the Nine Wise Ones have responded to the new situation.

10 See Romanow et al, *supra*, note 8, and R. Sheppard and M. Valpy, *The National Deal: The Fight For a Canadian Constitution* (Toronto: Fleet Books, 1982).

11 *Re A.G. Que. and A.G. Can.* (1982), [1982] 2 S.C.R. 793, 134 D.L.R. (3d) 719. See Hogg, *supra*, note 9 at 15-16.

12 The bogus dove expose and the Spam lament both came from Sheppard and Valpy, *supra*, note 10 at 303-4.

II. THE QUEEN'S GIFT

THE INSTANT the Queen placed the magic wand and the talisman in the hands of the Prince, they vanished in a poof of rhetoric. In their place the Prince held two dreary looking legal documents. One was entitled "The Canada Act," and the other was headed "The Constitution Act, 1982." Readers with a high boredom threshold will find endless edification in the full text of these documents. Those who prefer a "Classics Comics" approach to heavy literature may prefer the following synopsis.

A. The Canada Act

This is a very simple enactment of the Parliament of the mother country which states, in effect, that the Canadian Constitution shall be altered in accordance with the other document, the *Constitution Act, 1982*. It then proceeds to stipulate that, thereafter, no enactment of the mother country's Parliament shall have legal effect in Canada.

B. The Constitution Act, 1982

This document is the final text of the deal that the Prince and the nine dwarfs agreed to in rough substance at the "Kitchen Cabinet" Conference. Its contents are highly miscellaneous. Among the more important features are:

1. Constitutional definition. The various documents that comprise the Constitution of Canada, from 1867 to 1982, are identified,¹³ renamed¹⁴ in many cases, and stated to constitute "the Supreme Law of Canada."¹⁵

2. Constitutional amendment. A formula is set out for effecting future constitutional amendments.¹⁶

It may well be the most complicated, and in some respects the most rigid, amendment formula in the world. Whereas some amendments may be made with the approval of the central Parliament and two-thirds of the legislatures of the dwarfdoms, representing 50% of the total population,¹⁷ other amendments require the unanimous consent of

13 Section 52(2), Part VII of the *The Constitution Act, 1982*, being Schedule B of the *Canada Act 1982 (U.K.)*, 1982, c.11.

14 *Ibid.*, s.53.

15 *Ibid.*, s.52(1).

16 Procedure for Amending Constitution of Canada, ss.38-49, Part V of the *Constitution Act, 1982*, *supra*, note 13.

17 *Ibid.*, s.38(1).

the dwarfdoms,¹⁸ and certain amendments may be made by only the jurisdictions affected.¹⁹ In the case of amendments by two-thirds majority, any dwarfdom has the extraordinary power to "opt out" of the amendment if it chooses to do so.²⁰

3. Jurisdiction over resources. Certain powers of the dwarfdoms with respect to the exploitation of non-Renewable and forestry resources within their jurisdictions are somewhat expanded.²¹

4. Constitutional conferences. There are requirements to hold constitutional conference between the central government and the dwarfs, one within a year of the passage of the act,²² and another within 15 years.²³

5. Equalization and regional disparities. A rather vague "commitment to promote equal opportunities" among the different regions of Canada is articulated.²⁴

6. Aboriginal rights. The "existing aboriginal and treaty rights of the aboriginal peoples of Canada" are "recognized and affirmed."²⁵

7. *Canadian Charter of Rights and Freedoms*. A major constitutional guarantee of fundamental rights and freedoms is established. This aspect of the document will be examined more fully in the next section.²⁶

C. The Canadian Charter of Rights and Freedoms

The *Charter* incorporates most of the constitutional guarantees of individual rights found in the constitutions of other democratic countries: freedom of religion, thought, expression, assembly, and association²⁷; the right to vote and run for legislative office²⁸; and the right to equality before and under the law and to equal protection and equal benefit of the law²⁹. Most of the familiar legal rights are included: life, liberty, and security of the person³⁰; the right to counsel³¹; security from

18 *Ibid.* s.41.

19 See, e.g., *ibid.*, ss.43, 44, and 45.

20 *Ibid.*, ss.38(3) and 38(4).

21 *Ibid.*, s.51, Part VI, set out in the Consolidation of the *Constitution Act, 1982*, *supra*, note 13.

22 *Ibid.*, s.37(1), Part IV.

23 *Ibid.*, s.49, Part V.

24 *Ibid.*, s.36, Part III.

25 *Ibid.*, s.35, Part II.

26 *Ibid.*, ss.1-34, Part I.

27 *Ibid.*, s.2.

28 *Ibid.*, ss.3 and 4.

29 *Ibid.*, s. 15(1).

30 *Ibid.*, s.7.

31 *Ibid.*, s.10.

unreasonable search and seizure³² and from arbitrary detention³³; the right to be informed of and tried on criminal charges within a reasonable time³⁴; the presumption of innocence³⁵; protection from double jeopardy,³⁶ cruel and unusual punishment or treatment,³⁷ self incrimination³⁸; and so on.

There are also some rights in the *Charter* that are not commonly encountered in other constitutions. There are "mobility rights," for example: the right to enter, remain in, and leave the country; as well as to move freely from one dwarfdom to another and to take up residence or employment anywhere in the country.³⁹ (It was rumoured that this provision was included to ensure that Prince Not-So-White would always be able to date movie stars in New York and go skiing in the mountainous dwarfdoms in the west). Even more noteworthy are a group of rights guaranteeing the use of the French and English languages in certain circumstances. Both languages are required to be used in the laws of the central government, of the dwarfdom of Quebec, where French-speaking citizens are in the majority, and of the dwarfdoms of Manitoba and New Brunswick, where significant French-speaking minorities reside.⁴⁰ Either language may be used in the legislatures and courts of those same jurisdictions.⁴¹ In New Brunswick, any member of the public may communicate with and receive services from any governmental institution of the dwarfdom in either language.⁴² A similar right exists with respect to the head office of any institution of the central government, or any other office of that government where there is "a significant demand" for services in both languages, or where it is otherwise "reasonable" that such services be provided.⁴³ Members of the French or English language minority in any dwarfdom have, moreover, the right to have their children educated in the minority language in the public schools whenever the

32 *Ibid.*, s.8.

33 *Ibid.*, s.9.

34 *Ibid.*, ss.11(a) and (b).

35 *Ibid.*, s.11(d).

36 *Ibid.*, s.11(b).

37 *Ibid.*, s.12.

38 *Ibid.*, s.13.

39 *Ibid.*, s.6.

40 *Ibid.*, s.18. The equivalent guarantees for Quebec and Manitoba are contained in the *Constitution Act, 1867*, s.133, and the *Manitoba Act, 1870*, 33 Vict., c.3 (Canada), (confirmed by the *Constitution Act, 1871*), s.23, respectively.

41 *Ibid.*, ss.17 and 19. For Quebec and Manitoba, see the references cited in note 40, *supra*.

42 *Ibid.*, s.20(2).

43 *Ibid.*, s.20(1).

number of children involved is "sufficient to warrant" the provision of minority language education.⁴⁴

The *Charter* is perhaps most distinctive in the limits that it places on the rights and freedoms it guarantees. The entire document begins on a negative note, in fact, by acknowledging in section 1 that the various rights and freedoms guaranteed are subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." This is, of course, no more than an articulation of the obvious fact that no right can ever be absolute, and every right must sometimes yield to the higher priority of competing rights, or of social necessity. Although it was explained to the dwarfs by their advisors that the courts of all countries with guaranteed constitutional rights have found such "reasonable limits" to be implied, even if not expressed in the Constitution, the dwarfs insisted that the restriction be stated openly. This demand may have been founded on distrust for the Nine Wise Ones, and their judicial colleagues, the most important of whom are appointed by the central government.

Apart from this general restriction, the *Charter's* rights and freedoms are also subject to several other limitations. Protection of property rights is conspicuous by its absence, for example. A few of the dwarfs, as well as the Prince himself when in public-spirited moods, looked favourably upon certain kinds of social welfare legislation. Reading in an out-of-date textbook that the property clause in the Fantasyland constitution had once been used to attack such legislation, they insisted that property rights be excluded from the *Charter*.⁴⁵

The most unusual feature of the *Charter*, no doubt, is section 33, which permits both the dwarfs and the central government to opt out of most *Charter* rights at will. This was the key concession extracted by the dwarfs at the midnight cabal. It permits any legislature to escape the application of the *Charter* to particular legislative enactments by simply stating that the enactment "shall operate notwithstanding" the *Charter*. There are some limits to this elective immunity: it does not apply to language rights, mobility rights, or the right to vote or run for office; and declarations of immunity under the provision operate for only five years (though the declarations may be renewed every five years indefinitely). Most of the classic rights and freedoms may be set aside, however, including the freedoms of thought, religion, expression, association and assembly, the guarantee of equality, and all of the historic legal rights.

44 *Ibid.*, s.23.

45 See Sheppard and Valpy, *supra*, note 10 at 127, and G.J. Brandt, "Canadian Charter of Rights and Freedoms Right to Property as an Extension of Personal Security States of Undeclared Rights," (1983), 61 Can. Bar Rev. 398.

In agreeing to this remarkable feature, the cunning Prince Not-So-White thought that it would be rarely invoked, because the dwarfdoms are democracies, and it would be politically dangerous for any democratic government to blatantly declare that any of its laws may contravene the rights and freedoms enshrined in the highly popular *Charter of Rights and Freedoms*.

The Prince reckoned without René. Having been wilfully permitted to slumber through the bargaining that resulted in acceptance of the *Charter*, René felt no compunction about publicly thumbing his nose at the document. Since the voters he represented shared his outrage at the Kitchen Cabinet agreement, he knew there would be no political danger for him in the opting out process. Accordingly, he caused the legislature of Quebec to opt out of the *Charter* in an omnibus fashion, not only with respect to all new laws as they were enacted, but also with respect to all existing laws. Although the propriety of invoking section 33 in a wholesale fashion with respect to existing enactments has been held to be unconstitutional by lower courts, and is currently under consideration by the Nine Wise Ones,⁴⁶ and René's government has subsequently been replaced by one which has ceased to opt out of the *Charter* automatically,⁴⁷ the notion that using the opt-out provision would be politically suicidal has been punctured, and other dwarfdoms are now displaying a readiness to put it to use.⁴⁸

III. THE WISE ONES IN THE SADDLE

THE CHIEF BENEFICIARIES of the Queen's gifts, initially at least, appeared to be the Nine Wise Ones (in addition, of course, to the legal profession, whose members seem to benefit from every social development, fair or foul). The Wise Ones now held more power in their wizened hands than ever before. At first, they seemed to find this fact exhilarating. In fact, while they awaited the early *Charter* cases to work their way up through the lower courts to their exalted precincts, some of the more impatient Wise Ones appeared at public gatherings and performed eager little ballet routines not unlike Indian rain dances.⁴⁹

46 *Alliance des Professeurs de Montreal v. A.G. Quebec* (1985), 21 D.L.R. (4th) 354, 21 C.C.C. (3d) 273, [1985] R.D.J 439 (*sub nom.* Alliance des Professeurs de Montreal c. Quebec) (Que. C.A.).

47 "Crosbie Lands Quebec on Adhering to Charter," *The [Toronto] Globe and Mail* (5 March 1986).

48 "Saskatchewan Government Legislates to End Labor Row," *The Winnipeg Free Press*, (1 February 1986); "Override Caution Promised by Alberta Government," *The Winnipeg Free Press*, (22 April 1985).

49 E.g., B. Dickson, C.J.C., Address (Canadian Bar Association, Alberta Section, 2 February 1985).

When the first few cases did begin to arrive, they were hungrily seized upon by the Wise Ones as opportunities for pronouncements upon diverse *Charter* issues, whether or not the issues were relevant to the cases themselves.⁵⁰

After a while, though, the thrill appeared to fade. The consensus that the Wise Ones initially exhibited on *Charter* questions was soon replaced by the multiple and often dissenting judgments to which the Wise Ones had previously been prone.⁵¹ It wasn't long, indeed, before some of the Wise Ones were seeking ways to dodge altogether the *Charter* implications of cases coming before them.⁵² Some of the steps in this process can be illustrated by reference to three of the Wise Ones' *Charter* rulings.

A. The Terrible Trolls and the Magic Missile

Beyond the frozen kingdom lies a land of fearsome Trolls. At least, they seem frightening to the inhabitants of Fantasyland. Most Canadians don't regard them as all that fearsome (except in the hockey arena, and even there they have occasionally been subdued by Canadian teams). Canadians are nothing if not obliging, however, and if their friends to the south fear the Trolls, then most Canadians are happy to act as if they fear them too.

The Government of Fantasyland seems to believe that the most effective way of preventing the terrible Trolls from obliterating the world is to develop the capability to obliterate the world themselves. (Perhaps this explains why the country is known as Fantasyland.) In line with this policy, a magic missile has been developed which flies so low to the ground (or will, it is hoped, when the bugs have been worked out) that it cannot be detected by the most sensitive of the Trolls' antennae. The bugs are considerable, however, and much testing is yet required before the magic missile will be fully operational. The prospect of unsuccessful tests presents a problem. If a straying rocket were to destroy

50 See, e.g., the rejection by Ledain J., in the course of a dissenting judgment on an unrelated matter, of the author's suggestion that public opinion polls might assist courts to determine whether the admission of certain types of unconstitutionally obtained evidence would "bring the administration of justice into disrepute": *R. v. Therens* (1985), [1985] 1 S.C.R. 613 at 653, 18 D.L.R. (4th) 655 at 687, [1985] 4 W.W.R. 286 at 318.

51 For a relatively concise examination of the first few years experience with the Charter, as well as of events leading to its enactment, see D. Gibson, *The Law of the Charter: General Principles* (Calgary: Carswell, 1986).

52 See, e.g., *Singh v. Minister of Employment and Immigration*, (1985), [1985] 1 S.C.R. 177, (1985) 17 D.L.R. (4th) 422, 14 C.R.R. 13, in which several members of the Court revived the almost defunct *Canadian Bill of Rights*, S.C. 1960 c.44, (reprinted in R.S.C. 1970, App. III) rather than base their ruling on the *Charter*.

an office building in New York, or even a corn silo in Nebraska, Congressional eyebrows would rise. The solution to this problem was to persuade the accommodating Canadians to permit missile testing over their territory instead.

It turned out, however, that some Canadians are less accommodating than others, and a few unneighborly individuals ran to the Nine Wise Ones, seeking an order to prevent the testing. They alleged that it would pose a threat to the "security of the person" of Canadians, contrary to section 7 of the *Charter*.⁵³ The concern was not for the immediate threat of a missile crashing in Edmonton (a much smaller risk than has long been posed by Air Canada), but for the alleged likelihood that development of the magic missile would increase the overall threat of nuclear holocaust.

The Wise Ones (flattered, perhaps, by the idea that someone thought them capable of saving the world from destruction), displayed what seemed at first a surprising eagerness to entertain the case. Counsel for the central Government offered the Wise Ones an easy way out, if they had wanted one. Counsel contended that matters of governmental policy are immune from the *Charter*, because they are formulated in the innermost recesses of the central government's palace, a sacred sanctum to which no judicial officials, not even the Nine Wise Ones, have ever been granted admission. "Ah!" replied the plaintiffs, "but the *Charter of Rights and Freedoms* has changed all that, by subjecting all governmental activities to judicial review." "Not so," responded the government, "Although actions by the legislatures and by administrative boards and agencies may be governed by the *Charter*, decisions of the Cabinet are made in the name of the Crown, and the Crown retains its traditional immunity from judicial review; no mere piece of paper can impliedly rescind that historic immunity of the Crown."

At this point, the Chief Wise One interjected. Taking up the document upon which the *Charter* was inscribed, he uttered a solemn incantation (it sounded something like "Lex sum!"), and the document was transformed to a talisman once more, glowing and throbbing with tumescent authority. There was a flourish of the talisman from the bench, and a muffled "whump" was heard in the distance. The noise had emanated from the governmental palace, a couple of blocks down the street from the temple of the Wise Ones. Eyewitnesses at the palace observed a huge hole, smouldering at its edges, penetrating to the very

53 *Operation Dismantle Inc. v. R.* (1985), [1985] 1 S.C.R. 441, 18 D.L.R. (4th) 481, 13 C.R.R. 287.

heart of the government's inner sanctum. It is doubtful that the magic missile could have done the job more effectively.

"The *Charter* is no mere piece of paper!" the Chief Wise One intoned. "Nor is it simply an entrenchment of the status quo. It is an instrument by which we and our wisdom may (in the absence of an opting-out under section 33) scrutinize all governmental activities, from the most picayune to the most profound! We may enter the most secret recesses of the governmental palace if we see fit!"

Amazingly, however, the Wise Ones then declined to enter the opening they'd made in the palace! To justify such an intrusion, they ruled, it would be necessary for the plaintiffs to prove at least a prima facie causal connection between the action they complained of (permitting the magic missile to be tested in Canada) and the harmful consequence to which they alleged it would lead (an increased risk of nuclear war). No significant causal link having been demonstrated by the plaintiffs, the Wise Ones declined, by a majority, to enter the citadel, or to proceed further with the case.⁵⁴

As workers labored to repair the palace wall (with materials left over from the most recent remodelling of the government leader's home), one of their number asked, "Now what was that all about?" and no lawyer in the land could (or would) provide an answer. It is said, however, that one of the Wise Ones was overheard to remark to another as they left their temple that day: "Wow! I don't recall that sex was as good as that!"

B. Outlawing Sunday

While the Wise Ones' approach to the magic missile case might be characterized as flashy but ultimately diffident, they exhibited little diffidence when called upon to determine the constitutional validity of the central government's venerable Sunday observance statute, the *Lord's Day Act*.⁵⁵ Being unanimously of the view that the legislation in question was intended to promote Christian religious values, rather than to serve fundamentally social or economic purposes, and that this violated the "freedom of conscience and religion" guaranteed by section 2(a) of the *Charter* in a manner that could not be justified as a "reasonable limit in a free and democratic society," the Wise Ones once again waved the talisman, and the *Lord's Day Act* was reduced to a heap of smoking ash.

Lest it be thought that this was one of those instances of heavy-handed judicial intermeddling that the dwarfs had originally dreaded,

⁵⁴ *Ibid.* at 491-4.

⁵⁵ *R. v. Big M Drug Mart Ltd.* (1985), [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321, [1985] 3 W.W.R. 481.

it should be pointed out that the dwarfs were the indirect beneficiaries of the decision. The reason that the Wise Ones had little difficulty characterizing the legislation as religious, rather than as social or economic, was that legislation enacted to control hours of work for social or economic purposes falls primarily within the legislative jurisdiction of the dwarfdoms rather than that of the central government. If, therefore, the lawyers for the central government had advanced socio-economic purposes for the legislation, they would have acknowledged that it was beyond the central government's sphere of enactment.⁵⁶ The practical result of the Wise Ones' ruling was to invite the dwarfdoms each to enact their own Sunday observance laws, carefully drafted to avoid overt religious implications.⁵⁷

"So what has been accomplished?" asked a passer-by who observed ten new green shoots pushing up through the ashes of the *Lord's Day Act*. A companion, after much reflection, pointed out that Newfoundland, a sea-girt dwarfdom lying closer to the dawn than the rest of Canada, could perhaps declare its day of rest to commence a half-day early. Or, exploiting its most bountiful resource, unemployment, it could establish a two-day Sunday. "And, of course, it will keep the dwarfs occupied for a year or two, preventing them from meddling in important matters."

C. Privatizing Rights and Freedoms

It was fun for a while, but as *Charter* cases began to proliferate more rapidly than the Wise Ones could deal with them, the novelty wore off, and they sought ways to turn down the volume of the bubble machine. One way would have been to grant fewer leaves to appeal, but that was difficult to do in view of the fact that many of the appeals had been prompted or encouraged by previous decisions or utterances of the Wise Ones themselves. Another method beckoned, however. Academics were divided as to whether the *Charter* was restricted in its application to governmental activities, or extended as well to private sector enterprises.⁵⁸ By adopting the narrower approach, some observers thought that the Wise Ones could limit the size of the *Charter* avalanche to an extent. So, apparently, did the Wise Ones. They seized

56 *Robertson and Rosetanni v. R.*, (1963), [1963] S.C.R. 651, 41 D.L.R. (2d) 485, 1 C.C.C. 1.

57 *R. v. Videoflicks* (1984), 14 D.L.R. (4th) 10, 48 O.R. (2d) 395, 5 O.A.C. 1 (Ont. C.A.).

58 Contrast, e.g., K. Swinton, "Application of the Canadian Charter of Rights and Freedoms," in W.S. Tarnopolsky and G. Beaudoin, eds., *Canadian Charter of Rights and Freedoms: A Commentary*, (Toronto, Carswell, 1982), at 41, with Gibson, *supra*, note 51 at 110ff.

the opportunity to do so in a case that had to be shoe-horned considerably before it fit the issue.⁵⁹

It was a case in which the plaintiff sought an injunction prohibiting secondary picketing of its premises. There was no applicable statute prohibiting the activity, but the plaintiff contended that secondary picketing constituted a common law tort. The defendant trade union argued that no such liability existed at common law; and that even if it did such liability must now be regarded as abolished by the freedom of expression guarantee in the *Charter*.

The Wise Ones held:

- Secondary picketing is prohibited by common law principles, at least to the extent that it constitutes the tort of interference with contract.
- Picketing is a form of expression that is protected by section 2 of the *Charter*.
- Common law prohibition of secondary picketing is, however, a "reasonable limit" within the meaning of section 1 of the *Charter*.

Since this line of reasoning was sufficient to rule out the plaintiff's claim, the Wise Ones could have stopped there. They did not do so, however, because they had much bigger game than secondary picketing in their sights. They announced an alternative rationale for dismissing the action: that the *Charter* is not applicable to private litigation, except where some "governmental action" is involved, even where the issue relates to the constitutionality of a common law principle. The common law is subject to the *Charter*, they acknowledged, but only in situations where some form of governmental activity is concerned. This would appear to mean, for example, that the freedom of expression guarantee in the *Charter* might provide a more generous defence to a defamation action against a statement in a government publication than in one published privately. While it is true, the Wise Ones admitted, that governmental action of a sort would be involved in the issuance of a court injunction, if one treated courts as part of "government," the judiciary should be treated as immune from the strictures of the *Charter*. "Government" includes only legislators and administrators, and not judges.

By thus removing themselves and their judicial colleagues from *Charter* scrutiny, the Wise Ones might be thought to have exhibited a "not-so-white" streak themselves. Given that they had now created for themselves the horrendous task of defining the boundary line between

⁵⁹ *Retail, Wholesale and Department Store Union v. Dolphin Delivery Ltd.* (1986), [1986] 5 S.C.R. 573, 33 D.L.R. 174, [1987] 1 W.W.R. 577.

what is private and what is governmental, which may well require a much greater expenditure of time and energy than simply applying the *Charter* indiscriminately to all activities that interfere with rights and freedoms, they may also have demonstrated that they are "not-so-wise" either.⁶⁰

IV. EPILOGUE: THE MORALS

AS I'VE ALREADY MENTIONED, it isn't possible to say whether everyone will live happily ever after. "Ever after" is a very long time, after all, and "happily" is a pretty slippery concept. I can't even tell you whether the frozen land will remain constitutionally healthy; that will depend in part on how wise the Wise Ones turn out to be in reality, and on whether the dwarfs grow a little in stature.

The best I can offer in substitution is a moral or two (and then only if it is permissible for fairytales to conclude with interim and tentative morals):

1. Constitutional independence mostly means having fewer folks to blame.
2. The constitutional entrenchment of rights and freedoms is grand, so long as judicial interest and energy hold up.
3. In constitutional matters the line between fact and fantasy is never easy to discern.

* * * * *

Author's Note

The foregoing was written in response to a request for a brief introduction for the uninitiated to Canada's 1982 constitutional amendments, as well as to the events that brought them about, and the initial reception they have received from the Supreme Court of Canada. It also served to vent my feelings about some of the silliness and small-mindedness exhibited by certain participants in the process.

It is, however, a most unfair fairy tale, especially in its treatment of the judicial reaction to the *Charter*. If it were regarded as an assessment of the general response of Canadian judges to this new and massively important constitutional instrument, it would itself be open to charges of silliness and small-mindedness, to say nothing of gross inaccuracy. Read in a vacuum, the piece trivializes a very serious subject, and im-

⁶⁰ See D. Gibson: "Distinguishing the Governors From the Governed The Meaning of 'Government' Under Section 32(1) of the Canadian Charter of Rights and Freedoms," (1983), 13 Man. L.J. 505.

plies unduly negative conclusions about a process that I actually believe has been surprisingly positive to date.

The point is that it is not intended to be read in a vacuum. As I pointed out when it was presented to the Canadian/American Cooperation Section of the American Association of Law Schools in January, 1988, my writings about the *Charter* have tended to laud the document and the legal and social results it has produced so far in the hands of a cautiously activist judiciary. This piece should be regarded as no more than a little seasoning for what might otherwise be an overly bland stew.