THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS. Edited by Walter S. Tarnopolsky[1] and Gerald-A. Beaudoin.[2] Toronto: Carswell Co. Ltd. 1982. Pp. liii, 590. $57.50.

Stephen Allan Scott[3]

This symposium has as its purpose the exposition of what, at the time of its appearance, was a freshly enacted series of Canadian constitutional guarantees of fundamental freedoms. On April 17, 1982, Canada became under its own internal law a sovereign state independent of the United Kingdom. Through the Canada Act 1982,[4] the United Kingdom Parliament (acting on a request made by both Houses of the Canadian Parliament, with the concurrence of the executive governments of nine of the ten provinces) brought the law into accord with the long-standing political reality. This final Imperial constituent act, with its associated Constitution Act, 1982,[5] transfers constitution-making power from the United Kingdom Parliament to Canadian institutions acting through a series of intricate constitutional-amendment formulae. It also effects certain reforms in the distribution of the legislative authority between the Parliament of Canada and the provincial legislatures. Finally, it enacts a series of guarantees of rights and freedoms that appear in part I of the Constitution Act, entitled the Canadian Charter of Rights and Freedoms, and in part III, entitled Rights of the Aboriginal Peoples of Canada. The fifteen contributors to the symposium (which, though now overtaken by two years of case law, retains much of its usefulness) deal with these constitutional guarantees.

As the preface notes, the work (like the constitutional reform itself) appeared simultaneously in English and French. Six of the contributions (those of Professors Beaudoin, Blache, Chevrette, Garant, Morel, and Tremblay) were originally written in French. These, by and large, read very well in the English translations,

1. Now the Hon. Mr. Justice Tarnopolsky, of the Court of Appeal of Ontario.
2. Professor of Law, University of Ottawa.
3. Faculty of Law, McGill University.
4. 1982, ch. 11 (U.K.), proclaimed in force on that date; *see* Can. Gaz. Extra No. 20 (Apr. 17, 1982) *appearing also in* 116 Can. Gaz. Pt. II, 2927-28.
5. Canada Act 1982, sched. B.

and the reviewer has neither read the French version[6] nor compared it with the English. But the reader of these chapters should bear in mind the existence of the French originals, particularly when a given passage seems puzzling in English.[7]

Five chapters (chaps. 1-4, and chap. 16) discuss aspects of the Charter as a whole. The others deal with particular guarantees.

I

The general discussion of the Charter begins with Professor Peter W. Hogg's comparison (chap. 1) of the Canadian Charter of Rights and Freedoms with the Canadian Bill of Rights. Professor Hogg develops themes that reappear repeatedly in later analyses of particular guarantees. Particularly is this true of comparisons between the Bill and the Charter. For most of the authors the former casts a long shadow over the latter. Enacted by the Parliament of Canada in 1960 and applicable only to federal law, the Canadian Bill of Rights set forth a broad series of guarantees and provided:

> Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared . . . .[8]

The Supreme Court of Canada indeed held in 1969 that the effect of this provision was to render inoperative federal laws that could not be reconciled with the guarantees of the Bill. In fact the Court struck down as offensive to the guarantee of "the right of the individual to equality before the law and the protection of the law and the law" (section 1(b)), a federal statutory provision making it an offence for an Indian to be intoxicated off a reserve.[9] (By

---

6. CHARTE CANDIENNE DES DROITS ET LIBERTES (G.-A. Beaudoin & W. Tarnopolsky eds. 1982).

7. For instance, in the course of Professor Morel's discussion of double jeopardy in chapter 12, the author speaks of res judicata in criminal matters, and notably the pleas of *autrefois acquit* and *autrefois convict*. "Commentators have long asked whether the provisions of the Criminal Code do not restrict availability of the plea to criminal acts." The phrase "criminal acts" appears in the French version as "actes criminels," which is the technical equivalent of "indictable offence."

8. Part I of An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms, 8-9 Eliz. II, S.C. 1960, c. 44.

9. R. v. Drybones, 9 D.L.R.3d 473 (1970), which struck down section 94(b) of the Indian Act, R.S.C. 1952, ch. 149, at least as to the Northwest Territories, where the facts of the *Drybones* case arose, and where—*all* law being federal—all liquor laws, whether they be applicable to Indians or to non-Indians, are alike enacted under the authority of the Parliament of Canada. Thus any differentiation of treatment results *directly from federal legislative action* and not (as in the provinces) from a contrast between federal and provin-

contrast, the territorial liquor ordinance, of general application to the population of the Northwest Territories, where the case arose, punished only intoxication "in a public place" and also carried less severe penalties.) After this initial judicial intervention, however, the Court consistently refused to find conflicts between federal legislation and the Bill's provisions. Majorities repeatedly found, after examination that usually was at best superficial, that challenged legislation was properly enacted in pursuance of a "valid federal objective," in effect applying what in the United States would be minimum-level scrutiny or less.[10]

Moreover, section 1 of the Bill opened with the statement that: "It is hereby recognized and declared that in Canada there have existed and shall continue to exist . . . the following human rights and fundamental freedoms . . . ." On several occasions the Court said that the Bill created "no new rights"; therefore pre-existing federal legislation could not be inconsistent with its terms. Pre-Bill legislation, when challenged, would thus itself become the very standard against which it was to be tested. In other words, the response to the challenge would be circular. Of this Professor Hogg writes:

> This theory, which would have robbed the Bill of much of its force, was never consistently applied, and is contradicted by the decision in *R. v. Drybones* (1969) because the discriminatory provision struck out of the Indian Act in that case had been in the Indian Act long before 1960. Still, the frozen concepts theory kept

---

cial laws. This qualification does not appear explicitly in the *Drybones* judgment, but may be implicit in later decisions of the Court, where it was said that violations of the equality guarantee did not arise simply because the federal Parliament dealt with matters under *its* jurisdiction differently from the way in which some or all provinces dealt with matters under *their* jurisdiction.

Both the ordinance and the Indian Act imposed maximum fines of $50, but only the latter provided for a minimum fine (of $10). Both pieces of legislation also carried liability to imprisonment, but whereas the maximum under the ordinance was thirty days, the maximum under the Indian Act was three months. In fact, Drybones' conviction under the Indian Act arose because of his intoxication in the Old Stope Hotel (*quaere*, a "public place" within the meaning of the ordinance?) and his sentence was a fine of $10 and costs, or, in default, three days in custody. On the facts, it seems probable that a conviction could have been entered under either piece of legislation, and clear that, on conviction, the same sentence could have been imposed under either, and this, whether the offender was or was not an Indian.

10. For a notable exception, see the concurring opinion of Beetz, J., in A.G. Canada v. Canard, 1976 S.C.R. 170, 194, 204-08. A majority of the Court concurred in the order proposed by Beetz, J., which disposed of the appeal on essentially jurisdictional grounds, on the basis that the particular relief claimed by Canard in reliance on the Canadian Bill of Rights could not be granted against the relevant parties unless upon fresh proceedings brought in the Federal Court of Canada. This made it, strictly speaking, unnecessary to deal with the Bill; but all the opinions delivered did nevertheless deal with the effect of the Bill. That of Beetz, J., reviews the earlier decisions, and analyzes the issues involved in a special Indian status with great care and balance.

> appearing from time to time as a ground of decision in other cases, and has never been squarely laid to rest.

Professor Hogg's prognostication seems to be one of cautious optimism:

> The Charter scrupulously avoids references to existing or continuing rights which could form the basis of a frozen concepts theory. That theory therefore should not bedevil the interpretation of the Charter, although no doubt under the limitation clause of the Charter the prior state of the law in Canada will be a relevant factor in considering whether a particular law can be "demonstrably justified in a free and democratic society".

This last-quoted phrase refers to section 1 of the Charter, which provides: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Section 1 in effect responds to the history of the Bill with an attempt to ensure that, whenever prima facie the rights guaranteed by the Bill are infringed, the legislation or other governmental action affecting those rights will be closely scrutinized by the courts. The trend of the case law appears so far to point to the success of the provision.[11]

A number of contributors rely on the differences in formal status between the Bill and the Charter as a basis for more active judicial enforcement of the latter. As Professor Herbert Marx[12] very reasonably notes, however, "[l]ogically, similar or identical sections in the Charter and the Bill should receive a similar interpretation."

The Bill, at least in appearance, was an "ordinary" act of the Parliament of Canada, while the Constitution Act declares the Charter to be a formal part of the Constitution of Canada. Furthermore the Bill was (and is generally assumed still to be) repealable by an ordinary federal statute, while the Charter is amendable only by the "bilateral" and "multilateral" constitutional amendment procedures.[13] Even the late Chief Justice Las-

---

11. *See, e.g., Re* Ontario Film and Video Appreciation Society and Ontario Board of Censors, 5 D.L.R.3d 766 (Ont. C.A. 1983) and *Re* Southam Inc. and the Queen, 146 D.L.R.3d 408, 419-20 (Ont. C.A. 1983).

12. Professor Marx, on leave from the University of Montreal, is a member of the National Assembly of Quebec; that is, the single House of the Quebec Legislature.

13. Parliament's new power of unilateral constitutional amendment (section 44 of the Constitution Act, 1982) is framed in much narrower terms than that of section 91.1 of the amended 1867 Act 31, in force when the Bill was enacted. This could, at least arguably, affect Parliament's power, since April 17, 1982, to repeal or amend the Bill.

The "unanimous consent" procedure (Constitution Act, 1982, section 41), is not generally *required* for an amendment to the *Charter* (*but compare* § 14(c) *with e.g.*, §§ 16(1),

kin, who as a rule insisted that the Bill was a "quasi-constitutional enactment"[14] demanding more stringent scrutiny of federal law than a majority of his colleagues were willing to exercise, retreated on one occasion to the position that "compelling reasons ought to be advanced to justify the Court in this case to employ a statutory (as contrasted with a constitutional) jurisdiction to deny operative effect to a substantive measure duly enacted by a Parliament constitutionally competent to do so."[15] In other words, a more modest judicial role was appropriate than if the Bill had been truly "constitutional."

With these precedents, it is all too easy for courts and judges to distinguish the Charter from the Bill in the way envisaged (if not necessarily approved) by several contributors to this volume, and to conclude that what was not, under the Bill, a denial (say) of freedom of speech or of equality before the law, has become so under the Charter. But it would be quite wrong to countenance such a justification. The Bill was validly enacted by the Parliament of Canada, and (just as the Charter does now) prevailed over other inconsistent federal laws whether previously or even (semble) subsequently enacted. Moreover, it is idle to disparage the Bill as lacking "constitutional" status. In its legal character the Bill was no different from a very large part of the Constitution of Canada. Many rules of the common law, and many statutory enactments, were at the time when the Bill was enacted[16] fully

---

17(1), 18(1), 19(1), 20(1)). It would nevertheless clearly be *available* for this purpose—both by reason of section 41(e) and because compliance with section 41 would (at least normally) constitute compliance a fortiori with the other amending procedures. Professor Hogg argues that the "general" amending procedure (section 38) would be available. As a rule that seems true, though in some instances section 43 would be available and perhaps obligatory. *See* § 43 and *compare* § 43(b) *with, e.g.*, §§ 16(2), 17(2), 18(2), and 19(2). And in some instances section 41 would be obligatory. *See* § 41(c).

14. The Canadian Bill of Rights is a half-way house between a purely common law regime and a constitutional one; it may aptly be described as a quasi-constitutional instrument. It does not embody any sanctions for the enforcement of its terms, but it must be the function of the Courts to provide them in the light of the judicial view of the impact of that enactment. The *Drybones* case has established what the impact is, and I have no reason to depart from the position there taken.

Hogan v. R., 1975 S.C.R. 574, 597-98 (Laskin, J., dissenting). *See also* Miller v. The Queen, 1977 S.C.R. 680, 690 (Laskin, J., concurring); A.G. Canada v. Canard, *supra* note 10, at 205 (Beetz, J., concurring).

15. Curr v. R., 1972 S.C.R. 889, 899. Here a unanimous Court held, for various reasons, that drivers' compulsory breath test for alcohol was not a denial of "the right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law" (section 1(a) of the Bill), nor of protection from self-crimination (section 2(d)), nor of any other guarantee. The reasons of Justice Laskin, as he then was, were those of a majority of the Court.

16. The British North America Act, 1867, 30 & 31 Vict., ch. 3, § 91.1 (U.K.), as added by the British North America (No. 2) Act, 1949, 13 Geo. 6, ch. 81 (U.K.), and repealed by the Constitution Act, 1982, § 53(1).

part of the Constitution of Canada, and many still are,[17] and not the less so because of being subject to amendment or repeal by simple federal statute. The Bill, in truth, was no less "entrenched" than these many provisions formally described as "constitutional," but unilaterally amendable by federal act.[18] In certain respects the Bill was in fact *more* entrenched than these portions of the Constitution, in that it required express words to enact operative laws inconsistent with its guarantees. In the reviewer's opinion, Parliament in enacting the Bill acted well within its then-existing power to amend unilaterally the Constitution of Canada in respect of federal parliamentary institutions.[19] It did so by prescribing a particular manner and form requisite for certain legislation: federal statutes offensive to the guarantees of the Bill were required to declare expressly that they were to operate "notwithstanding the *Canadian Bill of Rights*."[20] It is surely little short of frivolous to suppose that anything turns on the fact that the Bill was not styled "constitutional"; and pointless, too, to debate whether it is appropriately described as "constitutional," "quasi-constitutional," or "nonconstitutional."

The symposium's "general" chapters deal with a number of other major issues involving the Bill or comparisons with the Bill. For instance, Professor Hogg argues that the Bill is in effect partially repealed by the Charter; that is to say impliedly repealed by supersession insofar as the operation of the Charter is identical with that of the Bill. The reviewer, with respect, is unpersuaded. First, there is a presumption against implied repeal. Next, the Charter is an Imperial, and the Bill a federal, enactment: the intention to supersede should be especially clear. Third, on Professor Hogg's argument, it would appear that no *single* provision of the Bill is, for *all* purposes,[21] superseded. We are then, surely,

---

17. Constitution Act, 1982, § 44.

18. Indeed, these portions of the Constitution of Canada were, and are, vulnerable in principle even to repeal by implication. *See* McCawley v. The King, 1920 A.C. 691 (P.C.); *Re* Agricultural Products Marketing Act, 1978 S.C.R. 1198, 1291 (Pigeon, J., for a majority of the Court, indeed contrasts sections 53 and 54 of the British North America Act, 1867 [now, the Constitution Act, 1867] with the Canadian Bill of Rights).

19. This is true, in the reviewer's view, on a grammatical construction of the then section 91.1 of the Constitution Act, 1867 (as the act is now known). The results achieved by the Supreme Court of Canada in Reference *re* Legislative Authority of Parliament of Canada to Alter or Replace the Senate, 102 D.L.R.3d 1 (1979) were achieved despite the terms of section 91.1.

20. See section 2 of the Bill.

21. For instance, sections 1 and 2 of the Bill must on Professor Hogg's reasoning survive for purposes of scrutiny by the Minister of Justice of draft legislation (section 3). Indeed, Professor Hogg goes so far as to argue that the common law, and pre-Confederation statute law, are not subject to the Charter. The reviewer does not agree with this proposition; but, assuming it to be true, it affords another important sphere for the contin-

well short of the conditions sufficient for implied repeal in their classic summary by Rt. Hon. Dr. Lushington in *India (No. 2)*:

> What words will constitute a repeal by implication it is impossible to say from authority or decided cases. If, on the one hand, the general presumption must be against such a repeal, on the ground that the intention to repeal, if any had existed, would have been declared in express terms; so on the other, it is not necessary that any express reference be made to the statute which is to be repealed. The prior statute would I conceive be repealed by implication, if its provisions were wholly incompatible with a subsequent one, or if the two statutes together would lead to wholly absurd consequences, or if the entire subject-matter were taken away by the subsequent statute. Perhaps the most difficult case for consideration is where the subject-matter has been so dealt with in subsequent statutes, that, according to all ordinary reasoning, the particular provision in the prior statute would not have been intended to subsist, and yet if it were left subsisting no palpable absurdity would be occasioned.[22]

Much *éclat* (this volume included) has accompanied the introduction of the Canadian Charter: so much so as to leave the impression that the Canadian Constitution has been virtually revolutionized by the enactment of comprehensive guarantees fully binding the Parliament of Canada and the legislatures of the provinces. Such an impression is, unfortunately, very far from the truth. Section 33 of the Charter, which has become known as the "override" clause, enables Parliament or a provincial legislature to exclude at will the operation of sections 2 and 7 to 15 of the Charter, which contain most of the guarantees of fundamental freedoms, such as freedom of conscience and expression, the right to be secure against unreasonable search and seizure, the right not to be arbitrarily detained or imprisoned, and so forth. All that is required to exclude these guarantees is that Parliament, or the provincial legislature as the case may be, declare in an act "that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter." In that event, the statute "shall have such operation as it would have but for the provision of this Charter referred to the declaration." Such a declaration is subject to a five-year sunset rule and expires on any earlier date specified, but may thereafter be reenacted, whereupon the reenactment becomes itself subject to the sunset rule.

This legislative override is in part the topic of Professor Marx's useful essay, and references to it recur in the other contri-

---

ued operation of sections 1 and 2 of the Bill, which, undoubtedly, do apply to the common law and pre-Confederation enactments still in force in Canada and subject to repeal by Parliament. See section 5(2) of the Act for the Recognition and Protection of Human Rights and Fundamental Freedoms.

22. [1864] 33 L.J. (P.M. & A.) 193, 193-94 (Adm.).

butions, notably that of Professor Hogg. The reviewer's feeling is that Canadian legal scholars, not excluding the contributors to this volume, generally underestimate the significance of the override. Thus Professor Hogg writes of the sunset feature that it "reinforces the already powerful political safeguards against an ill-considered use of the power."

In truth, on May 5, 1982—barely weeks after the coming into force of the Charter and about the time this volume appeared—the government of Quebec introduced into the legislature a bill entitled An Act Respecting the Constitution Act, 1982. As amended, it was passed by the National Assembly, and received royal assent on June 23, 1982, becoming chapter 21 of the Statutes of Quebec, 1982. This act in substance reenacted all previous Quebec statutes with the addition of an override clause:

> This Act shall operate notwithstanding the provisions of sections 2 and 7 to 15 of the Constitution Act 1982 (Schedule B of the Canada Act, chapter 11 of the 1982 volume of the Acts of the Parliament of the United Kingdom).

Although this act has itself been challenged, its validity was sustained at trial, and it is indeed difficult to see upon what ground it could be struck down.[23] Moreover, since June 23, 1982, every public general act of the legislature of Quebec, however innocuous, has contained a similar override clause. The result is of course that most of the Charter is, for all practical purposes, waste paper at the provincial level in Quebec. Quebec's use of the override proves that the guarantees of the Canadian Charter will be unavailable precisely when they are most needed. Nowhere in this volume has this truth been recognized.

Use of the override is thus far more than a mere speculative possibility. A legislature desiring to override fundamental freedoms may well be fortified, rather than deterred, by the very public opinion that led to Alberta's legislative attempts to control newspaper discussion of Social Credit doctrine[24] or Saskatchewan's statute barring white females from residing in, working in, or (with limited exceptions) frequenting places of business or

---

23. Alliance des Professeurs de Montréal v. Dubé et le Procureur du Québec, Superior Court, Montreal, No. 500-05-004093-835, *coram* Deschênes C.J.; judgment of April 27, 1983; reported in an English translation *sub nom* Alliance des Professeurs de Montréal v. A.G. Quebec, 5 D.L.R.4th 157 (Que. S.C. 1983). An appeal is pending. On this issue, see the reviewer's discussion in *Entrenchment by Executive Action: A Partial Solution to "Legislative Override,"* 4 S. C. L. REV. 303 (1982), *reprinted in* THE NEW CONSTITUTION AND THE CHARTER OF RIGHTS 303 (Belobaba & Gertner eds. 1982).

24. *See* Reference *re* Alberta Legislation, 1938 S.C.R. 100. The Alberta Accurate News and Information Act was struck down by the Court as part of a legislative scheme intruding upon exclusive federal jurisdiction with respect to banking.

amusement owned, kept, or managed by Chinese.[25]

The want of realism in what the symposium says (or more accurately does not say) about the legislative override—even the blithe assumption that Quebec laws would be left subject to challenge under the Charter—struck the reviewer as, quite frankly,[26] Polyannish.

Yet the Quebec's response to the Charter was an entirely predictable reflex reaction of its Parti Québécois government. When the federal executive government and the nine provincial governments (excluding Quebec) reached their 1982 accord on the compromise package that would go forward for enactment by the Parliament at Westminster, a principal new element was the override power. On that evening, the reviewer, reluctant to comment on an unseen text, visited the Canadian Press news services offices in Montreal as details of the accord came through on the telex, and immediately ventured the prediction that the Parti Québécois would insert an override clause into every statute. Why? First, on principle, to express rejection of the Canadian federation in general and, in particular, of a constitutional reform to which it had not agreed (though it gave the "eight provinces" including Quebec most of what they had sought). Second, by making exercise of the override commonplace, to render the public insensitive to its use and ensure that no special attention was called to any particular legislation in which it might be employed.

And why was the override part of the compromise package?

In its majority decision of September 28, 1981, on the *Patriation Reference*,[27] the Supreme Court of Canada held that, legally, the authority of the United Kingdom Parliament survived intact and unimpaired; that is, it could validly and effectively legislate on the Canadian Constitution on its own motion or in response to any request. But the Court also held that extralegal "conventions" existed, rendering constitutionally improper a federal parliamentary approach to the Imperial Parliament without a sufficient provincial consensus. Whatever the necessary "consensus" might be, the Court held that the two provinces of Ontario and New Brunswick, which alone supported the then federal proposals, including full entrenchment of constitutional guarantees, did not suffice.

Even if it had remained politically possible for federal parlia-

25. *See* Quong Wing v. The King, 49 S.C.R. 440 (1914), an unsuccessful challenge of this statute *quoad* employment.

26. *See, e.g.*, Professor Garant, on the right to representation by counsel.

27. *Re* Resolution to Amend the Constitution, 1981 S.C.R. 753.

mentary majorities to force the federal measure as it then stood through both Houses of the Canadian Parliament, it was at best doubtful that the government of the United Kingdom would (even perhaps that it *could*) carry such a bill through the Parliament at Westminster.

A negotiated settlement became the only solution. The opposition to full entrenchment of constitutional guarantees varied in tenacity amongst "the eight provinces," that is, those other than New Brunswick and Ontario. In the case of Manitoba under the Conservative government of Hon. Sterling Lyon, and Quebec under the Parti Québécois government of Hon. Rene Levesque, it was intransigent.

The result was the November 5, 1981, negotiated "consensus" of the federal government and nine provinces (all save Quebec), which contained the override provision. This compromise between legislative sovereignty and entrenchment of basic rights seemed almost designed to underscore the cliché that in all matters situates Canada halfway between the United Kingdom (which of course has no constitutionally entrenched guarantees) and the United States (whose Constitution guarantees a wide range of fundamental freedoms).

At the same time, the very fact that this semi-entrenchment was the result of several years of heated national constitutional debate gave the compromise the stamp of an exercise of the Canadian national will. The country had clearly and deliberately defined, among other things, the constitutional role of the judiciary. It is surely this fact (coupled with the differences in language discussed above) that will cause the judiciary to take the guarantees of the Charter more seriously than it has taken those of the Bill, if still with a good deal of caution. The facts that, unlike the Charter, the Bill was not nominally part of the Constitution and that it was a federal rather than an Imperial statute, are explanations of the probable difference in judicial approach only in the sense of being convenient rationalizations, but not in the sense of being justifications. Still less are they sound *causal* conjunctions.

Three problems, not unrelated, as to the Charter's scope of application recur in these essays. First, are rules of the common law and pre-Confederation enactments subject to the guarantees of the Charter? Second, are exercises of the royal prerogative — that is to say, common-law powers of the executive — subject to review? Third, what application does the Charter have to *private* action?

On the first point, Professor Hogg, giving as examples the law

of defamation and that of contempt of court, argues that this corpus of law is not subject to review under the Charter's guarantees. Yet, Professor Beckton in her treatment of freedom of expression appears to assume the opposite in her discussion of the same two branches of law.

The issue is difficult and delicate. The former position would tend to produce haphazard and even unjust results, while the latter position is not easily reconciled with the language of section 32(1):

> 32. (1) This Charter applies
> (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
> (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Yet section 32 need not be construed as exhausting the scope of the Charter. Indeed, at least in some Canadian jurisdictions the reception of the common law now rests wholly or partly on statute. Furthermore section 52(1) is completely general in rendering "of no force or effect" *any* law that is inconsistent with the Constitution.[28]

Professor Hogg rightly argues that the references in section 32(1) to the "government" subject the exercise of the royal prerogative to review under the Charter. Professor Katherine Swinton, whose essay on the *Application of the Canadian Charter of Rights and Freedoms* is specifically concerned with section 32, proposes a "governmental function" test that seemingly would cover a good deal of prerogative action. In the recent case of *Operation Dismantle Inc. v. The Government of Canada*, four out of five members of the Federal Court of Appeal considered, and three upheld, application of the Charter to the exercise of the prerogative in matters of defense. The Court nevertheless dismissed the plaintiffs' action to restrain the testing of air-launched cruise missiles in Canada, on the ground that the government of Canada was not thereby affecting the plaintiffs' right to life and security of the person, merely through such impact as these missiles might have on international relations.[29] As *Operation Dismantle* shows, simply because exercises of prerogative powers are in principle reviewable, it does not follow that the courts will automatically find con-

28. See the opinion of LeDain, J.A., as he then was, in Operation Dismantle Inc. v. Government of Canada, 49 N.R. 363, 375 (F.C.A. 1983), relying in particular on the French version of section 52(1).

29. *Id.* Messrs. Justices Pratte, Ryan, LeDain, and Marceau considered the issue, with Messrs. Justices Pratte, Ryan, and LeDain upholding application of the Charter.

stitutional rights to have been even prima facie infringed. And even when they *have* been prima facie infringed, the rules of the common law conferring the relevant discretion may nevertheless survive scrutiny under section 1 of the Charter.

The consensus of those participants in this symposium who consider the matter is that the Charter controls legislation and other *governmental* action, but not *private* conduct. Opinions to this effect may be found in the essays of Professor Hogg, Professor Swinton, and Professor Chevrette. The reviewer reads Professor Dale Gibson as *dubitans.* In principle, the reviewer shares the consensus view. The Charter, however, suppresses laws that do or omit to do certain things, such as laws denying the right to security of the person. So the Charter can *indirectly,* where appropriate, accomplish results comparable to those that would obtain it if did impose obligations on private persons. For example, the Charter may not create a civil cause of action for assault, but could still be read as precluding any law that denies such a right of action. Nevertheless, the state is not of course responsible for all that it does not prevent. Otherwise, everything done or omitted by anyone would become arguably state action and as such subject to legal control through the Constitution. The danger — and American experience shows it to be real — is an attempt at indiscriminate extension of the category of state action to embrace private individuals and corporations with consequent governmental control through the judicial branch.

II

Eleven chapters deal with the Charter's substantive guarantees. Exposition of the guarantees calls for grammatical analysis of their language, consideration of the history of the relevant branches of the law in Canada and elsewhere, comparison with constitutional guarantees and constitutional jurisprudence in Canada and other countries, and identification and weighing of the competing policy considerations. Inevitably, different authors strike different balances. Some range far afield indeed: the final chapter contains references to the constitutions, among others, of Tuvalu, Kirbati, and Vanuatu.

For the most part, these contributions on the "substantive" guarantees struck the reviewer as at worst workmanlike and at best imaginative and thought-provoking. The more detailed Charter provisions seemed easiest to come to grips with; and the reviewer, after reading the chapters dealing with them, felt "on top of" their subjects: Professor Pierre Blache on *The Mobility*

Rights, Professor Francois Chevrette on *Protection Upon Arrest or Detention and Against Retroactive Penal Law*, Professor Ed Ratushny on *The Role of the Accused in the Criminal Process*, and Professor Morel on *Certain Guarantees of Criminal Procedure*. There also are useful accounts of rights pertaining to the political process by Professor Gerald Beaudoin in *The Democratic Rights*; dealing with *The Language Rights*, by Professor André Tremblay; and treating of *The Rights and Freedoms of the Aboriginal Peoples of Canada*, by Mr. Justice Kenneth Lyskyk (as he now is).

The general language of some of the basic guarantees presents a special challenge. Professor Clare Beckton's tour d'horizon of the position under the laws of Canada, Britain, the United States, and under the European Convention, alerts one to the problem areas and possible solutions relating to freedom of expression. Her treatment of controls upon election expenditures has proved especially timely, if in the event somewhat cautious. On July 13, 1984, just as a federal election was getting under way, Mr. Justice Medhurst in the Alberta Queen's Bench dramatically struck down federal provisions designed to prevent persons other than candidates, their agents, and registered political parties from expending money during electoral periods to promote or oppose the election of registered political parties or candidates.[30] The legislation reflected Parliament's apprehension about the impact of single-issue organizations on the electoral process.

A central guarantee is that of section 7 of the Charter, which secures to everyone "the right to life, liberty and security of the person *and* the right not to be deprived thereof except in accordance with the principles of fundamental justice" (my emphasis). No scheme to entrench fundamental rights can be meaningful without such a safeguard: the most brutal police state is otherwise entirely compatible with the constitution. It is not too much to say that section 7 is the general and comprehensive guarantee, while all the others in the Charter are particularizations.

By a stroke of irony, it appears to have been the first provision of the Charter to be considered by the Supreme Court of Canada, and the only one to be addressed before his recent death by the late Chief Justice Laskin. The Supreme Court, in *Westendorp v. The Queen*,[31] struck down, as an infringement of exclusive federal legislative authority over criminal law,[32] a municipal antiprostitution by-law, enacted under purported provincial

30. National Citizens' Coalition Inc. et al. v. A.G. Canada, No. 8401-01295.
31. 1983 S.C.R. 43.
32. Section 91.27 of the Constitution Act, 1867.

statutory authority. Counsel also relied on section 7 as an alternative ground of appeal, but then abandoned the argument, after what was rumored to have been a very unfriendly reception by the late Chief Justice. What appears in the report is this:

> It appeared in the course of argument that counsel for the appellant not only sought to infuse a substantive content into s. 7, beyond any procedural limitation of its terms, but also to rely on s. 7 to challenge the validity of the by-law provision without accepting as a necessary basis for the s. 7 submission that it could only apply if the by-law was to be taken as valid under the distribution of powers as between the legislating authorities. In the result, counsel for the appellant abandoned the challenge under the *Canadian Charter of Rights and Freedoms.*

Soliciting in the public street for purposes of prostitution is perhaps not the activity with the strongest claim for protection as a constitutionally protected liberty. But it is another matter altogether to deny (as Chief Justice Laskin apparently implied) any substantive protection under section 7 to life or liberty. Aside from its purpose, the very language of section 7 demands a substantive character by speaking separately of the "right to life, liberty and security of the person" *and* the right to procedural fairness. There is, with respect, no "procedural limitation of its terms." Chief Justice Laskin's response to counsel's reliance on section 7 as a substantive guarantee was undoubtedly one of his Lordship's various reflexes of American inspiration. Yet in the United States the aversion to "substantive due process" seems simply to have been a historical reaction to a perceived abuse of that doctrine.

Professor Patrice Garant's interesting essay on *Fundamental Freedoms and Natural Justice*—essentially an analysis of section 7—touches only obliquely on the issue of whether this guarantee is of a substantive character. Although some of his observations appear to presuppose a substantive character to section 7, the review did not discern a clear conclusion on this central question.

The most intractable challenge for a court is surely deciding what is required by a guarantee of equality of legal treatment. It is scarcely surprising that equality issues caused the greatest difficulty for the courts under the Canadian Bill of Rights, and that the equality guarantee of the Charter (section 15) comes into operation only three years after the general effective date of the Charter (section 32(2)). The very choice of any subject of legislation virtually ensures disparate treatment of persons with moral claims to similar treatment. Professor (now Mr. Justice) Walter Tarnopolsky treats sections 15, 27, and 28 of the Charter in *The Equality Rights.* The discussion is largely a careful *compte rendu* of Canadian, British, and American experience—very useful as far as it

goes, but without the special insights that the author could have provided had he chosen a more jurisprudential approach. No one, however, can doubt the author's personal commitment to equality of treatment in practice. His proposition that "anyone who would like to use a particular language meaningfully is not helped by guarantees of free speech: she/he needs others who can understand her/him and communicate with her/him" is followed shortly by the statement: "It may be that the government is required to have civil servants who can comprehend the language of the citizen and reply to him/her in his/her language."

Professor Irwin Cotler, known for his active dedication to the advancement of human rights in many countries, was perhaps too ambitious in attempting to deal in a single chapter with freedom of assembly, association, conscience, and religion. Although these subjects are related, the first two or the second two topics would have afforded ample matter for a single contributor. The resulting seventy-eight pages profoundly disappointed the reviewer, as they seemed, among other things, diffuse and wanting in clarity and coherence.

A closing word on general editorial matters. Typographical errors were not infrequent. More seriously, readers—particularly in the United States—should be warned that the appendices are unreliable reprints of the primary legal documents. Appendix I purports to be the Canada Act 1982, but is actually the text (imperfect even at that) of the motion for the federal parliamentary joint address requesting enactment of the Canada Act. The text appended to this volume contains several mistakes and imperfections (for example, reference to the "Constitution Act, 1981") and is any event incomplete (without disclosing the fact). (The Imperial act as assented to, and as published by authority in London—which is the only reliable text—was perhaps not available when this symposium went to press, but the U.K. Commons bill might probably have been procured, and printed avowedly as such.) Lastly, several authors—particularly those from Quebec—quite properly compare the French and English texts of the Charter in the course of their analyses. Where enacted texts in both languages are authentic, publishers do a disservice to their readers by reproducing them in one language only, as occurred here in the appendices.