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Justice Wilson and the Charter: An Engagement to Keep

Tanya Lee[*]

I. THE CHARTER AS A STATEMENT OF FAITH

Justice Wilson is an important figure for one reason: she served on the Supreme Court of Canada at the moment of judicial freedom that existed in the first years of the *Canadian Charter of Rights and Freedoms*[1] and she seized that moment.[2] Very few legal figures have made such a significant contribution to their country. She, and the other members of the Court, interpreted an untouched constitutional document, the subject of no previous judicial decision. And the Charter was not just any constitutional document. Its words rang: freedom of expression and religion, freedom from discrimination, the right to life, liberty and security of the person, the right to vote. It invited the courts to wrestle with the question of being human in a democracy.

It was a heady time. The excitement in the air for Canadians generally and for the legal community in particular was palpable. The

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[*] Tanya Lee, Counsel, Constitutional Law Branch, Attorney General of Ontario. The views expressed are my own and not those of the Ministry of the Attorney General. I was honoured to work for Justice Wilson as a law clerk at the Supreme Court of Canada in the early years of the Charter. During my time at the Court there were hearings or judgments drafted in the following cases (among others): *R. v. Jones*, *infra* (freedom of religion); *R. v. Edwards Books and Art Ltd.*, *infra* (Sunday closing); *Reference re Public Service Employee Relations Act (Alta.)*, *infra*; *Public Service Alliance of Canada v. Canada*, *infra*; *Retail*, *Wholesale and Department Store Union v. Saskatchewan*, [1987] 1 S.C.R. 460 (S.C.C.) (*Labour Trilogy*); *Pelech v. Pelech*, [1987] S.C.J. No. 31, [1987] 1 S.C.R. 801 (S.C.C.); *Richardson v. Richardson*, [1987] S.C.J. No. 30, [1987] 1 S.C.R. 857 (S.C.C.); *Caron v. Caron*, [1987] S.C.J. No. 32, [1987] 1 S.C.R. 892 (S.C.C.) (spousal support trilogy); *R. v. Wigglesworth*, *infra* (legal rights); and *R. v. Morgentaler*, *infra* (abortion).

[1] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

[2] Justice Wilson served on the Supreme Court of Canada between 1982 and 1990. She was sworn in on March 30, 1982: Ellen Anderson, *Judging Bertha Wilson: Law as Large as Life* (Toronto: University of Toronto Press, 2001) [hereinafter "*Judging Bertha Wilson*"], at xiv, xvi, 128. The Charter came into force on April 17, 1982 (with the exception of the s. 15 equality rights provision, which came into force on April 17, 1985). It took about two years for the first Charter cases to work their way up to the Supreme Court of Canada: Robert J. Sharpe & Kent Roach, *Brian Dickson: A Judge's Journey* (Toronto: University of Toronto Press, 2003), at 309 [hereinafter "*A Judge's Journey*"].

process leading to the adoption of the Charter was characterized by debate, divisiveness and decision. Its adoption signalled the start of something new. Justice Wilson appreciated that Canadians had hopes for the Charter and stated "Canadians view the Charter as a statement of faith . . . and they expect it to usher in a new era in the quest for equality".[3] She wondered if their expectations would be fulfilled and undertook to meet those expectations.[4]

Justice Wilson was keenly aware that the first few years of the Charter constituted a window of opportunity. There could be no "broader mandate for judicial creativity"[5] than the Charter. The early decisions under the Charter were of "crucial importance"[6] and "our eye must be on the future rather than on the past".[7]

Remember in those days, everything was unknown and anything was possible. The Charter might protect corporate economic rights, commercial speech, hate speech, collective bargaining and the right to strike, a minimum standard of living, reproductive freedom, freedom from discrimination on the basis of sexual orientation, or it might not. There was no book to pull off the shelf. So for a brief while, lawyers pulled books off other people's shelves in a quest for helpful legal materials. They became instant "experts" on American constitutional law, nodding knowingly as they discussed the Lochner era and discrete and insular minorities and plain view search and seizures. They discovered there was a plethora of international human rights instruments. Legal theory was no longer an abstract pursuit but could be cited as authority for a proposition because no other authority could be found.

The sense of excitement was tempered by an equal sense of seriousness and obligation. Justice Wilson described the judicial role in interpreting the Charter as a "tremendous responsibility"[8] and noted that

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[3] Bertha Wilson, "Law in Society: The Principle of Sexual Equality" (1983) 13 Man. L.J. 221, at 224.

[4] *Id.*, at 224.

[5] Bertha Wilson, "The Charter of Rights and Freedoms" (1985) 50 Sask. L. Rev. 169, at 171.

[6] *Id.*, at 173.

[7] *Id.*

[8] *Id.*

it would take energy, skill, sensitivity and courage "to meet the expectations of those who have laid this burden on us".[9]

II. Forging a Consensus

Justice Wilson is a figure who commentators lionize as an equality icon or trivialize as maverick dissenter and extreme judicial activist. However, in fact, she, along with other key members of the early Court, forged a consensus on an interpretive approach to the Charter which constitutes a lasting legacy.

No single judge determined the shape of the Charter. In the Supreme Court there is more than one vote in every case. However, Justice Wilson, along with Chief Justice Dickson and then Justice Lamer (later Chief Justice), created a climate of Charter interpretation which carried the Court.[10] While they did not always agree on the result in any given case or indeed the meaning of any given right, they did agree on certain approaches to the Charter which still are accepted today.

1. Commitment to the Charter Project

Their first and most important move was to lay to rest the ghost of the *Bill of Rights*[11] and to actively commit to the task that the Charter assigns — judicial review of legislative action in light of Charter rights. This active commitment was not a given at the time but, once made, gave force and vitality to the Charter project.

The Supreme Court stated, and Justice Wilson agreed, that it was "empowered, indeed required, to measure the content of legislation against the guarantees of the Constitution".[12] If legislation violated those guarantees, it must be struck down. Because elected representatives

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[9] *Id.* The Supreme Court of Canada described the Charter as a "new and onerous responsibility": *Reference re s. 94(2) of the Motor Vehicle Act (B.C.)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486, at 497 (S.C.C.) [hereinafter "*Motor Vehicle Reference*"].

[10] W.H. McConnell, *William R. McIntyre: Paladin of the Common Law* [hereinafter "*William R. McIntyre*"] (Montreal and Kingston: McGill-Queen's University Press for Carleton University, 2000), at 192; *A Judge's Journey*, *supra*, note 2, at 296.

[11] S.C. 1960, c. 44.

[12] *Motor Vehicle Reference*, *supra*, note 9, at 496. Justice Wilson also underlined the duty of the Court to measure the contents of legislation against Charter requirements: Bertha Wilson, "Decision-Making in the Supreme Court" (1986) 36 U.T.L.J. 227, at 238 [hereinafter "'Decision-Making'"]; *Operation Dismantle Inc. v. Canada*, [1985] S.C.J. No. 22, [1985] 1 S.C.R. 441, at 472 (S.C.C.), *per* Wilson J. [hereinafter "*Operation Dismantle*"].

enacted the Charter and entrusted its interpretation to the courts "[a]djudication under the *Charter* must be approached free of any lingering doubts as to its legitimacy."[13]

2. Legal Materials: Casting Off Constraint

What legal materials would assist the Court in Charter interpretation? Justice Wilson observed that there is a temporal aspect to the judge's policy-making role. At any point in time, a complete range of policy options is not available because the judge is faced with the constraints of existing legal materials.[14] In the case of the Charter, however, there were no binding legal precedents and the Court itself would determine the relevance of other existing legal materials.

(a) Bill of Rights

The Supreme Court quickly decided that the jurisprudence under the *Bill of Rights* was of little assistance in Charter interpretation. In the 1960s, the federal government enacted the *Bill of Rights*, an ordinary statute which applied only to federal laws. Perhaps because it was not entrenched, the courts took a timid approach to its enforcement and the case law was widely regarded as formalistic and a bit of an embarrassment.[15]

The Supreme Court noted that the Charter, unlike the *Bill of Rights*, was a constitutional document, and rejected the frozen rights theory advanced under the *Bill of Rights* which held that the rights were protected only as they existed at the time of enactment.[16] Nevertheless, in a case which came before it concerning the rights of refugee claimants,

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[13] *Motor Vehicle Reference*, *supra*, note 9, at 497.

[14] Bertha Wilson, "Law and Policy in a Court of Last Resort" [hereinafter "'Court of Last Resort'"], F. McArdle, ed., *The Cambridge Lectures 1989* (Montreal: Yvon Blais, 1990), at 227-28.

[15] *A Judge's Journey*, *supra*, note 2, at 309, 380; *Andrews v. Law Society of British Columbia*, [1989] S.C.J. No. 6, [1989] 1 S.C.R. 143, at 166-68, 170 (S.C.C.) [hereinafter "*Andrews*"]; "Decision-Making", *supra*, note 12, at 245.

[16] *Law Society of Upper Canada v. Skapinker*, [1984] S.C.J. No. 18, [1984] 1 S.C.R. 357, at 365-66 (S.C.C.); *Singh v. Canada (Minister of Employment and Immigration)*, [1985] S.C.J. No. 11, [1985] 1 S.C.R. 177, at 209 (S.C.C.) [hereinafter "*Singh*"], *per* Wilson J., Dickson C.J.C., Lamer J.; *R. v. Big M Drug Mart Ltd.*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295, at 342-44 (S.C.C.) [hereinafter "*Big M Drug Mart*"]; *R. v. Turpin*, [1989] S.C.J. No. 47, [1989] 1 S.C.R. 1296, at 1326-27 (S.C.C) [hereinafter "*Turpin*"].

half of the judges decided the issue based on the *Bill of Rights*.[17] It was Wilson J. (also writing for Dickson C.J.C. and Lamer J.) who did not hesitate to decide the case under the Charter. The *Bill of Rights* has seen little action since.[18]

(b) Common Law

Another possible source of legal materials was the common law itself. Prior to the Charter, Canadians lived in a liberal democracy where they enjoyed many rights conferred by statute or common law. No judge on the Supreme Court thought that Charter rights were limited to existing common law rights or that the common law was of no relevance whatsoever. However, between these extremes different conceptions emerged.

One view was that the Charter was rooted in common law and statutory rights.[19] Another view, and one that prevailed, was that the Charter invited a fresh look at those rights, in light of Charter guarantees. As the Court explained, existing common law rules were not conclusive because it would be wrong to assume that the fundamental rights guaranteed by the Charter "are cast forever in the straight-jacket [*sic*] of the law as it stood in 1982".[20] The "*Charter* has fundamentally changed our legal landscape"[21] and a common law rule relevant to a fundamental right "may be too narrow to be reconciled with the philosophy and approach of the Charter and the purpose of the Charter guarantee".[22]

Instead of the Charter conforming to the common law, it was the common law that had to conform to the Charter. The Charter binds government and does not apply to a dispute between private litigants governed by the common law. Nevertheless, even in such a dispute, the Court held that the common law should be modified in light of Charter

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17 *Singh*, *id.*

18 In *Authorson v. Canada (Attorney General)*, [2003] S.C.J. No. 40, [2003] 2 S.C.R. 40 (S.C.C.), a claimant challenged legislative expropriation of interest on pensions relying on the *Bill of Rights* instead of the Charter because it provided more explicit protection of property rights. The claim, nonetheless, failed.

19 *William R. McIntyre*, *supra*, note 10, at 186-88; *Reference re Public Service Employee Relations Act*, [1987] S.C.J. No. 10, [1987] 1 S.C.R. 313, at 394, 403-404 (S.C.C.), *per* McIntyre J.; *Retail, Wholesale and Department Store Union Local 580 v. Dolphin Delivery Ltd.*, [1986] S.C.J. No. 75, [1986] 2 S.C.R. 573, at 583-86 (S.C.C.) [hereinafter "*Dolphin Delivery*"].

20 *R. v. Hebert*, [1990] S.C.J. No. 64, [1990] 2 S.C.R. 151, at 163 (S.C.C.).

21 *Id.*, at 164.

22 *Id.*

values.[23] The common law "does not grow in isolation from the Charter, but rather with it".[24]

(c) American Constitutional Law

The rights jurisprudence of other jurisdictions was another possible source of legal materials. American constitutional law, in particular, was expected to be a particularly rich vein to mine. It is a long, sophisticated tradition which has wrestled with defining human rights in many fact situations. In the words of Justice Wilson, "[r]eading through an American constitutional law text is like walking through modern human existence in an afternoon."[25] Like any such tradition, the American tradition has its glories and its ignominies. It has its mistakes.

Justice Wilson said that "Canadian judges are very fortunate to be able to approach their new responsibilities [under the Charter] armed with a wealth of American case law and learned writing on the nature of fundamental rights."[26] Nevertheless, she indicated that judges should avoid a mechanical application of concepts that come from constitutional documents with a fundamentally different structure from the Charter[27] and from societal conditions that differ from those in Canada.[28] The Supreme Court itself stated that care must be taken in placing reliance on the interpretation of constitutions different in structure and purpose from our own.[29]

Justice Wilson, writing concurring reasons in *Operation Dismantle*,[30] a case about the federal government's decision to allow the United States

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[23] *Dolphin Delivery*, *supra*, note 19, at 603; *Hill v. Church of Scientology*, [1995] S.C.J. No. 64, [1995] 2 S.C.R. 1130, at 1164-72 (S.C.C); *Retail, Wholesale and Department Store Union, Local 558 v. Pepsi-Cola Beverages (West) Ltd.*, [2002] S.C.J. No. 7, [2002] 1 S.C.R. 156, at 167-68 (S.C.C.) [hereinafter "*Pepsi-Cola*"]. A question that can arise is, when is it the duty of the Court and when is it the duty of the legislature to modify the common law? See *R. v. Kang-Brown*, [2008] S.C.J. No. 18, 2008 SCC 18 (S.C.C.).

[24] *Pepsi-Cola*, *id.*, at 167.

[25] Bertha Wilson, "The Making of a Constitution" (1988) 71 Judic. 334 [hereinafter "'The Making of a Constitution'"], at 334.

[26] *Id.*, at 335.

[27] *Id.*, at 335-36.

[28] *Id.*, at 335; see also Bertha Wilson, "Constitutional Advocacy" (1992) 24 Ottawa L. Rev. 265, at 272 [hereinafter "'Constitutional Advocacy'". Justice Wilson was kind enough to prepare and deliver this paper for a retreat held by the Ontario Attorney General's Constitutional Law Branch.

[29] *Motor Vehicle Reference*, *supra*, note 9, at 498; *Turpin*, *supra*, note 16, at 1316-17 (*per* Wilson J. writing for the Court); *A Judge's Journey*, *supra*, note 2, at 317-18.

[30] *Operation Dismantle*, *supra*, note 12.

to test cruise missiles in Canada, rejected an American constitutional law argument that the courts should not become involved because this was a "political question". She reviewed the American jurisprudence and academic debate on the political questions doctrine and rejected it. In her view, there was no doubt that, where the question was whether government action violated the Constitution, it was proper for the courts to decide it.[31] Justice Dickson, writing majority reasons, specifically agreed with Wilson J. that Cabinet decisions and disputes of a political or foreign policy nature are reviewable by the courts to ensure compatibility with the Constitution.[32]

It is remarkable, looking at the Supreme Court's work in those early years, how quickly it unleashed itself from American case law. To be sure, where apposite, it looked at American cases. However, it quickly came to rely more on its own emerging jurisprudence under the Charter. Its insights were the benchmark and, in many instances, its approach and results differed from that of the Americans. The Supreme Court, with the help of Justice Wilson and others, created a rich, nuanced and distinctively Canadian approach to rights. Thanks to it we have had our own triumphs. We have made our own mistakes.

(d) Framers' Intent

Finally, the Supreme Court considered the framers' intent theory. Under this theory, the intent of those who negotiated, drafted and adopted the Charter is critical in determining its meaning. Justice Wilson had little patience for this idea. Speaking of the theory in the American context, she stated that it was impossible to know what the framers of the American *Bill of Rights* meant 200 years ago — they could not have had any opinion about issues which did not exist at the time. Further, their intent should not hinder modern constitutional interpretation because they came from a period that was less tolerant, democratic and open-minded than our own.[33]

The Supreme Court decided that framers' intent would be given little weight in Charter interpretation. Framers' intent was difficult to prove because many individuals played major roles in the adoption of the Charter and their intent could not be gleaned from the statements of a

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[31] *Id.*, at 472, *per* Wilson J.

[32] *Id.*, at 455, 459.

[33] "The Making of a Constitution", *supra*, note 25, at 336-37.

few. To treat framers' intent as binding would freeze Charter rights at the moment of adoption with little possibility of development or response to changing societal needs. Finally, the Court stated that issues had arisen that were unforeseen by the framers.[34]

The Supreme Court rejected the theory although "[i]n Canada, only two years, not two centuries, had passed since the adoption of the Charter."[35] Therefore, the framers' mindset was accessible and social conditions had not changed dramatically. While courts undoubtedly must proceed as best they can if issues arise that the framers did not consider, that is different from rejecting framers' intent when known.

The Supreme Court's disregard for framers' intent likely sprang from a prosaic cause. When the Americans speak of framers' intent, they speak of those who drafted the American *Bill of Rights*, of revolutionary heroes, of Madison and Jefferson. In contrast, the Charter was the product of its age, of its champions, such as Prime Minister Trudeau, but also of public participation and submissions, lobbying, federal-provincial negotiation, judicial intervention[36] and political brinkmanship. Unlike the American founding fathers, the framers of the Charter were alive and kicking and available for comment. However, if they had been called as witnesses, the Supreme Court likely would have seen these individuals, despite their outstanding contributions, as contemporary practitioners of the rough art of politics, not as golden historical figures. Perfection is more easily perceived from afar.

3. Choosing Their Own Course

The Supreme Court strengthened the moment of judicial freedom created by the Charter by regarding the common law, the rights jurisprudence of other countries and framers' intent as informative but not determinative of Charter rights. In so doing, it ensured that the meaning of the Charter came from its decisions on a going forward basis. What considerations would inform these decisions? In brief, it decided that these decisions would be driven by a purposive approach to rights grounded in social reality as demonstrated by the effect of the law and evidence.

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[34] *Motor Vehicle Reference*, *supra*, note 9, at 508-509; see also *United States of America v. Cotroni*, [1989] S.C.J. No. 56, [1989] 1 S.C.R. 1469, at 1480 (S.C.C.).

[35] *A Judge's Journey*, *supra*, note 2, at 318.

[36] *Re: Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753 (S.C.C.); *Re: Objection to a Resolution to Amend the Constitution*, [1982] S.C.J. No. 101, [1982] 2 S.C.R. 793 (S.C.C.).

(a) A Purposive Approach

The Court adopted a purposive approach to the interpretation of rights. The purpose of a right is to be generously interpreted "in light of the interests it was meant to protect".[37] Regard is to be had to the objects of the Charter, the language of the text, the historical origins of the right and, at times, the purpose of other rights.[38]

This approach was enthusiastically echoed by Justice Wilson in many decisions.[39] For her, the purposive approach meant that "the rights guaranteed in the Charter should be interpreted in accordance with the general purpose of having rights, which is to secure for individuals and minority groups protection against the exercise of excessive power by the majority."[40] In addition, "judges should strive to capture within their decisions the purpose of each individual right, meaning the best modern theory that can be devised to justify the existence of the right in question."[41]

(b) Law and Social Reality

Justice Wilson strongly believed that constitutional interpretation was a progressive, evolving enterprise, "while the constitutional document is static, the Constitution is dynamic and progressively shaped, … always unfinished and ... always evolving".[42] Law should not be based on an obsolete image of society, but should change to reflect new social values.[43] Writing for the Court, she held that when determining a Charter violation, regard must be had to the larger political, social and economic reality.[44]

When interpreting equality rights, Wilson J. observed that the discrete and insular minorities protected under section 15 would change

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37 *Big M Drug Mart Ltd.*, *supra*, note 16, at 344.

38 *Id.*

39 For example, *R. v. Morgentaler*, [1988] S.C.J. No. 1, [1988] 1 S.C.R. 30, at 163-64 (S.C.C.), *per* Wilson J.

40 Bertha Wilson, "We Didn't Volunteer" (April 1999) Policy Options 8 [hereinafter "'We Didn't Volunteer'"], at 9.

41 "The Making of a Constitution", *supra*, note 25, at 338.

42 *Id.*, at 334, 338; see also, "Court of Last Resort", *supra*, note 14, at 227-28, 236; "We Didn't Volunteer", *supra*, note 40, at 8-9.

43 "Court of Last Resort", *supra*, note 14, at 227-28.

44 *Turpin*, *supra*, note 16, at 1331-32; *Andrews*, *supra*, note 15, at 152 (*per* Wilson J. writing for herself, Dickson C.J.C. and L'Heureux-Dubé J.).

with changing political and social circumstances. It can be anticipated that the "discrete and insular minorities of tomorrow will include groups not recognized as such today".[45]

(c) A Law's Effect

The Court determined that a law could be invalidated on the basis of its purpose or effect. The purpose is the object the legislature intended to achieve through the legislation. The effect is the impact produced by the operation and application of the legislation.[46] Justice Wilson characterized the Charter as "first and foremost an effects-oriented document".[47] This focus on the effect of the law removed the discussion from the realm of the lawmaker and placed it in the world of the citizen. It emphasized not how the law was meant to work, but how it does work.

(d) Evidence

The Court championed the use of a wide range of evidence in Charter cases holding that extrinsic evidence concerning the operation and effect of legislation was admissible.[48] It was willing to consider legislative facts that established the purpose and background of legislation, including its social, economic and cultural context.[49] Not only was such evidence admissible but the Court *insisted* upon the presentation of a factual basis in most Charter cases including a wide spectrum of scientific, social, economic, policy and expert evidence.[50] A party's failure to introduce such evidence could lead to defeat.

The Court tied the admission of evidence to a burden of proof model. Individuals bear the burden of proving that an enumerated right, such as the right to freedom of expression, freedom of religion or freedom from discrimination, has been violated. Once that burden had been discharged, the government has the onus of proving that its law meets the requirements of section 1 of the Charter which provides that

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[45] *Andrews*, *id.*, at 153.

[46] *Big M Drug Mart*, *supra*, note 16, at 331.

[47] *Id.*, at 360, *per* Wilson J.

[48] *Motor Vehicle Reference*, *supra*, note 9, at 505-507.

[49] *Danson v. Ontario (Attorney General)*, [1990] S.C.J. No. 92, [1990] 2 S.C.R. 1086, at 1099 (S.C.C.) [hereinafter "*Danson*"]; *R. v. Mills*, [1999] S.C.J. No. 68, [1999] 3 S.C.R. 668, at 703-704 (S.C.C.).

[50] *MacKay v. Manitoba*, [1989] S.C.J. No. 88, [1989] 2 S.C.R. 357, at 366 (S.C.C.).

rights are "subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". The burden of proof throughout is a civil standard of proof based on a preponderance of probability.[51]

Justice Wilson supported the use of an expanded evidentiary record to provide solid factual underpinnings in Charter cases. Without such evidence, "judges will be unable . . . 'to transcend the limitations of their egos' and will rely upon their own personal values systems in interpreting and applying the Charter".[52] When making decisions, judges bring to bear their own experiences which, like the experiences of any individual, are necessarily limited. Evidence can broaden a judge's understanding by introducing the perspectives and lived histories of others. However, Justice Wilson warned against allowing expert evidence "to dictate the scope and meaning of the Constitution".[53] Historical, economic and social data gives the background for constitutional interpretation. However, it is judges who must decide what values are protected by the Constitution.[54]

Because the Supreme Court linked the admission of legislative facts to a burden of proof model, Justice Wilson's warning has not always been heeded. The Court, on occasion, has acted as though the resolution of fundamental human rights issues is best understood as an evidentiary ruling. Value preferences are described as factual findings.

For example, in *Chaoulli*[55] the Supreme Court found that legislation which prohibited the purchase of insurance for private sector health care services, if such services were provided under the public health care plan, was unlawful. The government argued that the prohibition was necessary to preserve the public health care system. Based on its characterization of the evidence, the Court disagreed. It rejected experts and reports supporting the government's position, saying they were based on "common sense" and "theory", not on the evidence.[56] Instead the Court, in holding the prohibition unlawful, relied on the fact that

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51 *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103, at 136-37 (S.C.C.) [hereinafter "*Oakes*"].

52 "Constitutional Advocacy", *supra*, note 28, at 267, quoting Cardozo J.

53 *Id.*, at 270.

54 *Id.*

55 *Chaoulli v. Quebec (Attorney General)*, [2005] S.C.J. No. 33, [2005] 1 S.C.R. 791 [hereinafter "*Chaoulli*"]. Four judges found the legislation unlawful. One judge based his ruling on the Quebec Charter, three on the Canadian Charter, and three judges dissented.

56 *Id.*, at 853-54, 858.

other countries did not have such a prohibition and instead used both private and public health care delivery.

However, this fact does not demonstrate that allowing private health care has no impact on other countries' public health care systems or results in better health care than that enjoyed by Canadians. We can assume that within those countries, as in Canada, there are critiques of the health care provided. Given the numerous trade-offs involved in the delivery of health care to large populations and the different social conditions present in each country, a fair comparison of the results achieved would require a far more detailed assessment of the evidence than is present in the decision.[57]

Further, the assessment of the evidence in this, as in many other Charter cases, is difficult because the issue is what social policies will achieve desired objectives, not who went through a red light or even who murdered a victim. A society is not a controlled laboratory experiment. It is large, complex and multi-faceted, the product of the decisions and actions of millions of individuals. In such an environment, deciding which levers will produce a desired result is no more than a best guess.

In *Harper*,[58] the Supreme Court, confronted with a challenge to third party advertising limits during elections, acknowledged this home truth. The government argued that the purpose of the limit was to ensure election fairness. The Court noted that the harm caused by third party advertising was difficult, if not impossible, to measure scientifically because of the subtle way advertising influences behaviour, the impact of other factors, such as media and polls, and the multitude of issues, candidates and individual parties involved. It held that, when faced with inconclusive or competing social science evidence, it can rely on logic and reason in assessing constitutionality.[59]

In summary, Justice Wilson was correct in her view that while legislative facts are important in providing the Court with information about the factual underpinning of a case, the effect of a law and social realities, constitutional analysis should not be understood as an evidentiary ruling. It should be understood as the resolution of

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[57] The dissent in *Chaoulli*, *supra*, note 55, made similar points concerning the conclusiveness of the evidence offered on the experience in other countries: *per* Binnie, LeBel and Fish JJ., at 892-94.

[58] *Harper v. Canada (Attorney General)*, [2004] S.C.J. No. 28, [2004] 1 S.C.R. 827 (S.C.C.) [hereinafter "*Harper*"].

[59] *Id.*, at 873-75.

conflicting values rooted in evidence but resolved, not by evidence alone, but by principle.

(e) Precedent

The final link which joins constitutional analysis to evolving social realities is judicial attitudes towards precedent. When a court decides an issue, that decision creates a precedent. If the issue arises again, the court's view of precedent will determine whether it will follow its previous decision, even if it does not agree with it, or whether it feels free to revisit, revise or reject the decision.

Justice Wilson identified the tension between achieving certainty in the law and ensuring its adaptability to changing social conditions.[60] She noted that "[p]recedent can obviously be viewed as an ultimate formulation of pure principle independent of context, or it can be seen as merely a useful mechanic for marshalling past experience for present choice."[61] Because of her belief that the law should be grounded in social realities, Justice Wilson preferred the latter view. She warned that judges "should not, in their anxiety, 'not to introduce today's politics into today's law' fall into the trap of 'introducing yesterday's politics into today's law'".[62] Following established doctrine may result in applying the prejudices of a previous age.

As noted, in the early period, there was great judicial freedom in interpreting the Charter because there was no precedent. However, going forward, the debate about precedent will become a key one, as it is in the United States, where nominees for the United States Supreme Court are grilled on whether they will honour precedents, notably, but not exclusively, in the area of reproductive freedom.

The Supreme Court's most dramatic treatment of Charter precedent is its recent decision[63] reversing its earlier decision[64] that freedom of

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60 "Decision-Making" (1986) 36 U.T.L.J. 227, at 228.

61 *Id.*, at 233.

62 Bertha Wilson, "Court of Last Resort", in F. McArdle, ed., *The Cambridge Lectures 1989* (Montreal: Yvon Blais, 1990) at 236, quoting Hon. E. Hall, "Law Reform and the Judiciary's Role" (1972) 10 Osgoode Hall L.J. 399, at 405.

63 *Health Services and Support-Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] S.C.J. No. 27, [2007] 2 S.C.R. 391 (S.C.C.) [hereinafter "*Health Services*"].

64 *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*, [1990] S.C.J. No. 75, [1990] 2 S.C.R. 367 (S.C.C.) [hereinafter "*Northwest Territories*"]; *Reference re Public Service Employee Relations Act (Alta.)*, [1987] S.C.J. No. 10, [1987] 1 S.C.R. 313 (S.C.C.); *Public Service Alliance of Canada v. Canada*, [1987] S.C.J. No. 9,

association does not include the right to collective bargain (or the right to strike). It now has found that freedom of association does include a procedural right to collective bargain. This explicit, acknow-ledged reversal is dramatic because the Court's earlier decision had been hard-fought, extensively reasoned and among its most significant.

Importantly, the Supreme Court did not argue that its reversal was necessary to adapt the law to changing social realities. The position of the labour movement in Canada is not significantly different than before. Nor did it rely on the strength of the earlier dissenting judgments, written by Chief Justice Dickson and Justice Wilson, which had found a right to collective bargain and to strike.[65] Instead it went through the reasoning of the earlier majority decision, found that it did not agree, and changed the law. The implications of this both for labour relations and other keystone Charter decisions will be interesting to observe.

4. A Frame for the Picture

In summary, the Supreme Court, in the early years of the Charter, constructed an interpretive frame. Justice Wilson was an active and important participant in achieving a consensus on the proper approach to Charter interpretation, a consensus which has held to the present day. While we now take for granted the Charter's force and vitality, it was not a foregone conclusion. The Charter, like its predecessor, the *Bill of Rights*, could have degenerated into an arid formalism. The Supreme Court's decision to recognize a sea change, to commit to the protection of rights, and to place that protection within an understanding of the modern society inhabited by Canadians, was a profound one. Having constructed a frame, the Court now had to place within it a picture of rights and democracy, a picture of itself and its role.

[1987] 1 S.C.R. 424 (S.C.C.); *Retail, Wholesale and Department Store Union v. Saskatchewan*, [1987] S.C.J. No. 8, [1987] 1 S.C.R. 460 (S.C.C.).

[65] Justice Wilson and Dickson C.J.C. dissented in the *Labour Trilogy*. However, in *Northwest Territories*, *id.*, Dickson C.J.C., because he felt himself bound by the precedent of the Labour Trilogy, found that there was no right to collective bargaining.

III. BROAD AND CONTESTABLE TERMS

1. Definition of Individual Rights

The early Court began to decide the meaning of each protected right. As discussed, Justice Wilson advocated a purposive and generous approach to the definition of rights. She felt that, given the presence of section 1 in the Charter, there was less need to find internal limits within the definition of the rights.[66] Any justification for the violation of rights should be considered under section 1 rather than in the definition of the right.[67] This did not mean that she found a violation of rights in every instance: "[t]he rights under the *Charter* not being absolute, their content or scope must be discerned quite apart from any limitation sought to be imposed upon them by the government under section 1."[68]

2. Section 7

While there are a number of examples of Justice Wilson limiting the scope of the right through definition of the right including legal rights,[69] freedom of religion,[70] freedom of association and expression,[71] and

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66 "The Making of a Constitution" (1988) 71 Judic. 334, at 336.

67 *Turpin*, [1989] S.C.J. No. 47, [1989] 1 S.C.R. 1296, at 1325-26 (S.C.C.).

68 *Operation Dismantle*, [1985] S.C.J. No. 22, [1985] 1 S.C.R. 441, at 489 (S.C.C.), *per* Wilson J.; see also *R. v. Jones*, [1986] S.C.J. No. 56, [1986] 2 S.C.R. 284, at 314 (S.C.C.), *per* Wilson J.

69 She wrote an important majority judgment for the Court concerning s. 11 of the Charter which confers a number of critical rights to persons charged with an offence, including the right to be tried within a reasonable time, to be presumed innocent until proven guilty and not to testify against oneself. She refused to apply it to all legal proceedings and instead restricted it to prosecutions for public offences involving punitive sanctions, *i.e.*, criminal, quasi-criminal and regulatory offences. A matter fell within s. 11 either because, by its very nature, it was a criminal proceeding or because a conviction in respect of the offence led to a true penal consequence. In reaching this conclusion, Wilson J. did a careful analysis of the text of s. 11, including its marginal notes, and compared the text to the language of a similar provision in the *Bill of Rights*. She considered the need to give a consistent interpretation to the section in all the proceedings to which it applied and to provide certainty for authorities who prosecute offences: *R. v. Wigglesworth*, [1987] S.C.J. No. 71, [1987] 2 S.C.R. 541 (S.C.C.).

70 Justice Wilson was clear that a trivial or insubstantial effect on freedom of religion would not constitute a violation of that right, for to hold otherwise "would radically restrict the operating latitude of the legislature": *Jones*, *supra*, note 68, at 314, *per* Wilson J. quoting, *Braunfeld v. Brown*, 366 U.S. 599, at 606 (1961). The Supreme Court accepted this proposition and it has persisted, to date, as one of the few constraints in the definition of freedom of religion: *Syndicat Northcrest v. Amselem*, [2004] S.C.J. No. 46, [2004] 2 S.C.R. 551, at 584 (S.C.C.); *Bruker v. Markovitz*, [2007] S.C.J. No. 54, [2007] 3 S.C.R. 607, at para. 67 (S.C.C.).

71 In a case challenging the requirement to pay union dues on the basis that it violated freedom of association and freedom of expression, she wrote reasons, attracting substantial support

equality rights,[72] Justice Wilson has a reputation for broadly defining Charter rights largely based on her approach to section 7 of the Charter.

From the beginning, it was obvious that section 7 (along perhaps with the equality rights section) had the potential to be the broadest of the Charter provisions. It provides: "Everyone has 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." As Justice Wilson noted, these are "broad and contestable terms".[73] The early Court was concerned to ensure that its interpretation of this section would not haunt it in the future.[74] While most judges approached section 7 gingerly, Justice Wilson seemed to prefer grounding her decisions in that section.[75]

(a) Life, Liberty and Security

Justice Wilson led, and the rest of the Court followed, in deciding two threshold issues concerning section 7. First, she decided that section 7 rights could be asserted by every human being physically present in Canada, regardless of whether they were citizens.[76] Second, she decided that under section 7 a claimant must demonstrate only that his or her life, liberty or security had been violated; not that all three had been violated.[77] However, she went further than this in interpreting section 7 and when she did, failed to carry the early Court. Most judges in the

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on this point, which found that freedom of association did not embrace the freedom not to associate and that forced payments did not violate freedom of expression because such payments did not convey support for the union or its activities, particularly where the individual remained free not to join the union and to express his own views: *Lavigne v. Ontario Public Service Employees Union*, [1991] S.C.J. No. 52, [1991] 2 S.C.R. 211 (S.C.C.), *per* Wilson and L'Heureux-Dubé JJ., concurred with on this point by Cory J. The Supreme Court dismissed the claim.

[72] Interestingly, in equality rights, she was an early proponent of the idea that the purpose of s. 15 is to protect against demonstrated discrimination, stereotype, prejudice and affronts to human dignity: *McKinney v. University of Guelph*, [1990] S.C.J. No. 122, [1990] 3 S.C.R. 229, at 387, 391-92 (S.C.C.), *per* Wilson J. [hereinafter "*McKinney*"]; *Law v. Canada (Minister of Employment and Immigration)*, [1999] S.C.J. No. 12, [1999] 1 S.C.R. 497, at 527, 529 (S.C.C.).

[73] "The Making of a Constitution", *supra*, note 66, at 334; see also *Jones*, *supra* note 68, at 317-18, *per* Wilson J.

[74] "Constitutional Advocacy" (1992) 24 Ottawa L. Rev. 265, at 272; James MacPherson, "Canadian Constitutional Law and Madame Justice Bertha Wilson — Patriot, Visionary and Heretic" (1992) 15 Dalhousie L.J. 217, at 237 [hereinafter "'Patriot, Visionary and Heretic'"].

[75] "Patriot, Visionary and Heretic", *id.*

[76] *Singh*, [1985] S.C.J. No. 11, [1985] 1 S.C.R. 177, at 202.

[77] *Id.*, at 204-205. This conclusion for half the court in *Singh* was later accepted by the whole court in *Motor Vehicle Reference*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486, at 500-501 (S.C.C.).

early cases, without foreclosing other possibilities, defined the words "liberty" and "security" as narrowly as possible given the desired outcome. Their focus was on physical restraint, interference with bodily integrity and the criminal context.[78]

In contrast, Wilson J. argued that liberty guaranteed the individual's freedom "to plan his own life to suit his own character, to make his own choices for good or for ill".[79] When discussing the protection afforded by section 7 she said "the basic theory underlying the Charter [is] that the state will respect choices made by individuals and, to the greatest extent possible, will avoid subordinating these choices to any one conception of the good life."[80] Elsewhere Wilson J.'s description of section 7 was narrower. Most importantly, she said that the right to liberty did not extend to all individual choice but was limited to a degree of personal autonomy over important decisions intimately affecting private lives.[81]

Thus, in *Jones* she held that liberty protects parents' right to raise their children in accordance with their conscientious beliefs. The relations of affection between an individual and his family are central to an individual's sense of self and of his place in the world.[82] In *Morgentaler*, she found that liberty protects the profoundly personal decision of a woman to terminate her pregnancy.[83]

(b) Principles of Fundamental Justice

Justice Wilson acknowledged that individuals' rights under section 7 were not absolute and must accommodate the corresponding rights of others.[84] However, she maintained that Charter rights "erect around each individual, metaphorically speaking, an invisible fence over which the state will not be allowed to trespass. The role of the courts is to map out, piece by piece, the parameters of the fence".[85]

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[78] *Morgentaler*, [1988] S.C.J. No. 1, [1988] 1 S.C.R. 30 (S.C.C.), *per* Dickson C.J.C., Lamer , Beetz and Estey JJ.

[79] *Jones*, *supra*, note 68, at 318, *per* Wilson J.

[80] *Morgentaler*, *supra*, note 78, at 166, *per* Wilson J.

[81] *Id.*, at 171, *per* Wilson J.

[82] *Jones*, *supra*, note 68, at 319, *per* Wilson J.

[83] *Morgentaler*, *supra*, note 78, at 171, *per* Wilson J.

[84] *Operation Dismantle*, *supra*, note 68, at 488-89, *per* Wilson J.; *Jones*, *supra*, note 68, at 319, *per* Wilson J.

[85] *Morgentaler*, *supra*, note 78, at 164, *per* Wilson J.

However, her interpretation of the relationship between liberty and security, the principles of fundamental justice and section 1 allowed little room for state incursion on individuals' liberty and security. Early on, she floated the idea that even where the government action infringing life, liberty or security of the person is in accordance with the principles of fundamental justice, it would nevertheless have to be justified under section 1.[86] The Court never entertained this position and she did not pursue it. Instead, under section 7, the government can infringe liberty and security as long as it does so in accordance with the principles of fundamental justice.

In the *Motor Vehicle Reference*,[87] the Supreme Court consi-dered whether the principles of fundamental justice were procedural or substantive — whether section 7 allowed the government to limit liberty and security as long it was done pursuant to a fair procedure, or whether its reasons for limiting rights were subject to judicial review as well. In a watershed determination, the Supreme Court rejected arguments, based on framers' intent, textual analysis, the right's purpose and appropriate institutional roles, all of which supported a procedural definition. It was convinced that section 7 could go beyond procedural protections but still allow the Court to avoid, through the articulation of objective and manageable standards, the adjudication of the merits of public policy.[88] It stressed that a law would violate the principles of fundamental justice only if it contravened the "basic tenets of our legal system".[89]

Justice Wilson's view of the "basic tenets of our legal system" test is unclear. She cautioned against a comprehensive or restrictive definition of the phrase "principles of fundamental justice" early in the jurisprudence.[90] In her writing, there is an implicit criticism of the "basic tenets of our legal system" test as failing to "meet social, economic and political values head on".[91]

In her major judgments on section 7, instead of relying on this test, she propounds the idea that the principles of fundamental justice are violated where the government infringes not only an individual's life,

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86 *Motor Vehicle Reference*, *supra*, note 77, at 523, *per* Wilson J.

87 *Id.*

88 *Id.*, at 499.

89 *Id.*, at 503.

90 *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] S.C.J. No. 52, [1990] 1 S.C.R. 1123, at 1218-19, *per* Wilson J. [hereinafter "*Prostitution Reference*"].

91 "Court of Last Resort", *supra*, note 62, at 223-24; Robert E. Hawkins & Robert Martin, "Democracy, Judging and Bertha Wilson" (1995) 41 McGill L.J. 1, at 40.

liberty and security interest but also another Charter right. Thus in *Morgentaler*, she found that the government's restriction on access to abortion violated women's liberty and security and was not in accordance with the principles of fundamental justice because it also violated women's freedom of conscience. She found this latter violation by defining freedom of conscience in essentially the same manner as she had defined the liberty interest — as the individuals' freedom to make choices consistent with their beliefs.[92] Under this construction, it is difficult to imagine a legislative provision which implicated liberty which also would not violate freedom of conscience. Similarly, in the *Prostitution Reference*, a case concerning the *Criminal Code* prohibition on communication in public for the purpose of prostitution, she found that the prohibition, which impinged on liberty by virtue of its potential for imprisonment, violated the principles of fundamental justice because it also violated freedom of expression.[93] Justice Wilson also felt that violations of section 7 were nearly impossible to justify as a reasonable limit under section 1.[94]

Accordingly, Justice Wilson's approach to section 7 leads to the illogical result that when a law violates a liberty or security interest and another right, no further examination of the principles of fundamental justice is required and any justification under section 1 becomes virtually impossible. Simultaneously, if the law violates another right which violation normally could be justified under section 1, it suddenly becomes unjustifiable because there is also a violation of section 7. Thus when there is an infringement of liberty and security and another right, the government has no avenue for advancing a justification, no matter how worthy its objectives.

(c) Summary

Justice Wilson, in some passages, described the scope of section 7 in very broad language. If this broad language were accepted, her approach would amount to judicial colonization of a country's decision-making. The judiciary, in the final analysis, would decide whether any legislative

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92 *Morgentaler*, *supra*, note 78, at 175-80.

93 *Prostitution Reference*, *supra*, note 90, at 1220-22.

94 *Id.*, at 1223; see also *Motor Vehicle Reference*, *supra*, note 77, at 523, *per* Wilson J.; *Jones*, *supra*, note 68, at 322, *per* Wilson J.; *R. v. Swain*, [1991] S.C.J. No. 32, [1991] 1 S.C.R 933, at 1034 (S.C.C.), *per* Wilson J. The Court as a whole has found little scope for the application of s. 1 when there is a breach of s. 7: *Motor Vehicle Reference*, *supra*, note 77, at 518.

decision struck the appropriate balance between the individual and the state. It would patrol the lines of the fence. On this view of section 7, the rest of the Charter is superfluous as the whole world is contained in the words of section 7. However, in other passages, Justice Wilson sounds a quieter note and restricts liberty to important decisions intimately affecting private lives.

3. Justice Wilson Finds an Audience

While initially Justice Wilson was isolated in her views of section 7, the Court has since accepted some of them. The limiting of liberty and security to physical restraint, interference with bodily integrity and the criminal context, as present in the early majority judgments, has disappeared. Justice Wilson's view of section 7 as a protector of important decisions intimately affecting private lives is no longer the view of an outlier renegade but rather has found an audience in and acceptance by the Court.

The Supreme Court, citing Wilson J.'s decision in *Morgentaler*, has held that the liberty interest protected by section 7 is not restricted to freedom from physical restraint but is engaged where state compulsions or prohibitions affect important and fundamental life choices.[95] It also has held that security of the person includes state-imposed serious psychological stress concerning a matter of fundamental importance where the state interferes with profoundly intimate and personal choices.[96]

Interestingly, the areas where liberty and security have received a warm reception by the Court are those that provided the springboard for Justice Wilson's broad conception of liberty: familial relations, particularly parent-child relations, and health and medical decisions. Thus it has held that both child protection proceedings[97] and excessive waiting times for public health care when combined with a ban on private health care insurance[98] affect security of the person.

The Supreme Court has not pursued Justice Wilson's unique idea that the violation of other rights leads to breach of the principles of

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[95] *Blencoe v. British Columbia (Human Rights Commission)*, [2000] S.C.J. No. 43, [2000] 2 S.C.R. 307, at 340-42 (S.C.C.). *Morgentaler*, *supra*, note 78.

[96] *Id.*, at 355-56.

[97] *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] S.C.J. No. 47, [1999] 3 S.C.R. 46 (S.C.C.).

[98] *Chaoulli*, [2005] S.C.J. No. 33, [2005] 1 S.C.R. 791 (S.C.C.).

fundamental justice under section 7. However, it has concluded that a law can violate the "basic tenets of our legal system" and hence the principles of fundamental justice where it is grossly disproportionate to the state interest[99] or is arbitrary in the sense that it bears no relation to or is inconsistent with the objectives behind it.[100] When applied aggressively, these tests may lead to substantive review of legislation which is akin to patrolling the lines of the fence between the state and the individual.

In summary, under section 7, the Supreme Court has held that when legislation interferes with issues of fundamental importance to individuals, the Court may engage in a substantive review of the government's decision. It, like Justice Wilson, may have adopted this approach because it is aware that the Canadian state, on occasion, has been guilty of discriminatory and oppressive behaviour towards its citizens.[101] Should the Court be confronted by such behaviour, it wants a weapon to fight it. The challenge, of course, is to recognize the difference between a historical moment where the democratic state, through its actions, begins to devour itself and the Court, as guardian of the Constitution, must intervene, and the more quotidian clash of legitimate viewpoints in the democratic arena. The Court, having armed itself for battling the former, should not be tempted to enter the arena to smite the latter.

IV. VALUING DEMOCRACY — SECTION 1

1. Setting the Standard

Once a court has found a violation of a right, the question becomes whether the violation can be justified under section 1 of the Charter. Justice Wilson was aware that the standard established for section 1 was pivotal: "If too low a threshold is set, the courts run the risk of emasculating the *Charter*. If too high a threshold is set, the courts run the risk of unjustifiably restricting government action."[102]

The early court in a unanimous judgment in *Oakes* outlined the test for section 1: to justify a violation of a right a government must show that the legislative objective is pressing and substantial, rationally

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[99] *R. v. Malmo-Levine*; *R. v. Caine*, [2003] S.C.J. No. 79, [2003] 3 S.C.R. 571, at 650-51 (S.C.C.); *R. v. Clay*, [2003] S.C.J. No. 80, [2003] 3 S.C.R. 735, at 752-53 (S.C.C.).

[100] *Chaoulli*, *supra*, note 98, at 852.

[101] *McKinney*, *supra*, note 72, at 354, *per* Wilson J.

[102] *Singh*, *supra*, note 76, at 217.

connected to the objective, impairs the right no more than is necessary to accomplish the objective and is proportionate between the effects of the law and the objective.[103]

2. Impermissible Objectives

In early decisions, Justice Wilson evinced discomfort with section 1 and the idea that the "welfare of the many"[104] could justify the breach of individual rights. In her view, utilitarian considerations[105] and pragmatic compromises[106]could not justify overriding rights under section 1. For this reason, she was the judge who first identified cost and administrative convenience as impermissible objectives under the *Oakes* test and that continues to have some currency.[107] However, as catchphrases, cost and administrative convenience can obscure as much as they illuminate.

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[103] *Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 (S.C.C.).

[104] "The Making of a Constitution" (1988) 71 Judic. 334, at 338.

[105] *Id*.

[106] In *R. v. Edwards Books and Art Ltd.*, [1986] S.C.J. No. 70, [1986] 2 S.C.R. 713 (S.C.C.) [hereinafter "*Edwards Books*"], the Supreme Court considered a Sunday closing law which required businesses to close on Sunday with an exception for small retailers if the business had been closed the previous Saturday. Of the six judges who upheld the law, three concurred in reasons which upheld the law because it was a satisfactory balancing of the religious freedom of retail store owners against the interest of their employees in enjoying a common pause day with their families. Justice Wilson held the law unconstitutional, finding that it was unacceptable to recognize the religious freedom of some members of a religious group and not others. The legislature cannot adopt a compromised scheme of justice but must affirm a principle which is applicable to all: *Edwards Books*, at 808-810, *per* Wilson J. In a similar vein, Wilson J. alone found that for the federal government to fight inflation generally by imposing wage control legislation only on the public service was unconstitutional. Justice Wilson thought that if both the public and private sectors were free to engage in collective bargaining, then the public sector employees alone should not be deprived of this freedom in order to send a message to the private sector: *Public Service Alliance of Canada v. Canada*, [1987] S.C.J. No. 9, [1987] 1 S.C.R. 424, at 455-58 (S.C.C.), *per* Wilson J.

[107] In *Singh*, *supra*, note 76, at 218-19, Wilson J., writing for three members of the Court who found a Charter violation, rejected a government argument that to give refugee claimants an oral hearing would impose an unreasonable administrative burden, both in terms of time and money, on the Immigration and Refugee Appeal Board. In *United States of America v. Cotroni*, [1989] S.C.J. No. 56, [1989] 1 S.C.R. 1469, at 1514-15 (S.C.C.), Wilson J., dissenting, found that it was a violation of s. 6 mobility rights to extradite an accused to the United States, when the actions of the accused took place in Canada, notwithstanding that there were many factors, including the location of evidence and witnesses, that would have made it more administratively convenient to prosecute in the United States. In *Stoffman v. Vancouver General Hospital*, [1990] S.C.J. No. 125, [1990] 3 S.C.R. 483, at 554-55 (S.C.C.), Wilson J. found that a policy that required doctors to retire at age 65 subject to exceptions could not be justified on the basis that it was more administratively convenient to remove incompetent doctors this way rather than through individual performance reviews.

(a) Costs

The vindication of Charter rights results in costs because there is an embedded cost within some rights (for example, the right to legal aid in child protection proceedings or to trial within a reasonable time). Individuals also have claimed that the Charter guarantees them direct monetary payments from government. For example, there was an unsuccessful claim that the Charter required government to provide social assistance recipients with a certain level of income.[108]

In addition, costs arise when individuals make equality claims for benefits based on section 15. The government is not constitutionally required to provide the benefits. However, once it has provided them to some, it may be discriminatory not to extend them to others. There are a number of hurdles to such a claim, including the question of whether the group receiving the benefits is the proper comparator group,[109] the definition of the benefit,[110] the ameliorative nature of a targeted program[111] and the impact of the distinction on human dignity.[112] Nevertheless, there have been successful claims for benefits on the basis of a comparative claim.[113]

Governments have advanced prohibitive costs as a constitutional justification for denying a program or benefit to claimants. The Supreme Court is very skeptical of this argument[114] but has accepted it where it felt the government was facing a financial crisis.[115]

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[108] *Masse v. Ontario (Ministry of Community and Social Services)*, [1996] O.J. No. 363, 134 D.L.R. (4th) 20 (Ont. C.J.), leave to appeal refused [1996] O.J. No. 1526 (Ont. C.A.), [1996] S.C.C.A. No. 373 (S.C.C.).

[109] *Hodge v. Canada (Minister of Human Resources Development)*, [2004] S.C.J. No. 60, [2004] 3 S.C.R. 357 (S.C.C.).

[110] *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] S.C.J. No. 71, [2004] 3 S.C.R. 657 (S.C.C.).

[111] *Lovelace v. Ontario*, [2000] S.C.J. No. 36, [2000] 1 S.C.R. 950 (S.C.C.).

[112] *Law v. Canada (Minister of Employment and Immigration)*, [1999] S.C.J. No. 12, [1999] 1 S.C.R. 497 (S.C.C.). For a recent revisiting to the *Law* test and a questioning of the human dignity factor in s. 15 analysis, see *R. v. Kapp*, [2008] S.C.J. No. 42, 2008 SCC 41 (S.C.C.).

[113] *Miron v. Trudel*, [1995] S.C.J. No. 44, [1995] 2 S.C.R. 418 (S.C.C.); *Nova Scotia (Workers' Compensaton Board) v. Martin*, [2003] S.C.J. No. 54, [2003] 2 S.C.R. 504 (S.C.C.) [hereinafter "*Martin*"]; *Canada (Attorney General) v. Hislop*, [2007] S.C.J. No. 10, [2007] 1 S.C.R. 429, at 457 (S.C.C.) [hereinafter "*Hislop*"].

[114] *Health Services*, [2007] S.C.J. No. 27, [2007] 2 S.C.R. 391, at para. 147 (S.C.C.).

[115] *Newfoundland (Treasury Board) v. N.A.P.E.*, [2004] S.C.J. No. 61, [2004] 3 S.C.R. 381 (S.C.C.) [hereinafter "*NAPE*"]; in *Hislop, supra*, note 113, at 457, a case concerning a claim for retroactive remedy where a s. 15 violation had occurred, the Court acknowledged that cost could be a factor under s. 1, although not an available justification on the record before it. However, as a remedial matter, its award of prospective but not retroactive benefits was undoubtedly influenced by cost concerns.

Generally the cost of vindicating Charter rights is borne by government, which must analyze the cost within its revenue envelope.[116] Every order to increase benefits to rights-holders means the loss or diminution of benefits to others. Justice Wilson believed that constitutional rights should have the first claim on the distribution of available government funds. She allowed the government leeway in the allocation of resources only in cases where there were competing constitutional claims for fixed resources and the vindication of one constitutional right would come at the expense of another constitutional right.[117]

However, the Supreme Court, recognizing that most government expenditures go to health, education and social assistance, has said that cost is not just a case of "rights versus dollars"; it is also a case of "rights versus hospital beds, rights versus layoffs, rights versus jobs, rights versus education and rights versus social welfare".[118] It concluded it is "not convincing simply to declare that an expenditure to achieve a s. 15 objective must necessarily rank ahead of hospital beds or school rooms".[119] Accordingly, constitutional rights do not invariably trump other claims for government resources.

The issue of costs should be addressed not only within the scope of section 1 but perhaps more importantly within the definition of the right itself.[120] When a right is defined, the costs associated with that definition should be measured to ensure that this is an appropriate draw on the resources of society. Further, the Court's equality analysis applies to a social policy landscape which assists many groups to varying degrees and which inevitably is a product of history and accretion. Care must be taken to ensure that the jurisprudence establishes incentives for government to be innovative and progressive in establishing new programs and improving old ones. Where the government is not constitutionally required to provide a benefit, it is better for the government to assist vulnerable groups than to retreat from the fray

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[116] Occasionally the costs of providing a Charter right to an individual may be borne directly by other individuals. Justice Wilson would have struck down mandatory retirement notwithstanding that it made fewer jobs available to the young: *McKinney*, [1990] S.C.J. No. 122, [1990] 3 S.C.R. 229, at 403 (S.C.C.), *per* Wilson J.

[117] *Id.*, at 404, *per* Wilson J.

[118] *NAPE*, *supra*, note 115, at 414.

[119] *Id*., at 421.

[120] Peter Hogg, *Constitutional Law of Canada*, 5th ed. (Toronto: Thomson Carswell, 2007) [hereinafter "*Constitutional Law*"], at 38-31.

because of a potentially costly judicial extension of a program beyond its intended beneficiaries.

(b) Administrative Convenience

Large service delivery structures, whether in the public or private sector, require sophisticated operational models to succeed. While funding for these structures is certainly a major factor in their successful operation, it is not the only one. The nature of the service, its deliverers and recipients will often impact on administration, including access to the service and the timeliness in which it is provided.

The Supreme Court decisions affording a Charter right to an oral hearing for refugee claimants[121] and establishing maximum times between committal and trial of an accused criminal[122] had profound consequences for the operation of the immigration and criminal justice systems respectively, leading in the latter case to the staying or withdrawal of thousands of criminal charges.[123]

The Supreme Court has come to acknowledge the validity of operational arguments in constitutional cases. It agreed that in workers' compensation schemes the benefits available cannot be customized to individual needs but must be classified by types of injury or illness for reasons of administrative efficiency. Individuals benefit from the reduced transaction costs and speed with which the claims are addressed. Without such techniques "large-scale compensation might well be impossible".[124]

While administrative *convenience* should never justify the violation of rights, there are operational realities that exist. To use an extreme example, General Motors could not build all its cars for a year in one day, even if it was ordered to do so by a court. If the government can

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[121] *Singh*, [1985] S.C.J. No. 11, [1985] 1 S.C.R. 177 (S.C.C.).

[122] *R. v. Askov*, [1990] S.C.J. No. 106, [1990] 2 S.C.R. 1199 (S.C.C.) [hereinafter "*Askov*"].

[123] In the 12 months following the *Askov* decision, *id.*, over 47,000 charges were stayed or withdrawn in Ontario: *Constitutional Law*, *supra*, note 120, at 52-11.

[124] *Martin*, *supra*, note 113, at 558; similarly, in *Wynberg v. Ontario*, [2006] O.J. No. 2732, 82 O.R. (3d) 561 (Ont. C.A.), leave to appeal refused [2006] S.C.C.A. No. 441 (S.C.C.), where it was claimed that an early intervention program should be provided to all children with autism and not just to those under the age of six, the Ontario Court of Appeal, upholding the government program, found that given the scarcity of professionals who were trained to administer the program, removing the age limit would increase waiting lists and divert available resources away from the younger children for whom the program was most effective.

demonstrate that its delivery of services constitutes a best practice, given operational realities, the section 1 standard should be met.

3. The Quest for a Purposive Approach to Section 1

(a) Deference, Unease and Oversight

Justice Wilson's consideration of the issues of cost and administrative convenience took place pursuant to the *Oakes* test. There can be no dispute that the *Oakes* test for the analysis of section 1 is one of the most significant Charter judicial annotations. It has stood the test of time. Its strengths are many. It has a series of steps, which is always appealing to the legal mind, captures important considerations and allows facts, with relative ease, to be slid into its matrix. Its weakness is that it is an abstract, one-size-fits-all test. It does not articulate contextual factors which make it more or less difficult to justify government legislation in a given case. After the first few years, the Court began to feel this weakness and grapple more closely with issues of deference to the legislature and justification for the breach of protected rights.

Justice Wilson herself had a deep unease with the notion of judicial deference to the decisions of government. She asked "whether a policy of deference to the legislature comports easily with a duty of judicial review designed to protect the entrenched rights of citizens"[125] and expressed her "difficulty reconciling the two".[126]

She had a particular view of government which shaped her attitude towards deference. She accepted and even desired a large government role in society.[127] After reviewing the role played by government in Canada, she concluded that it had not been a "monolith of oppression"[128] but instead had played a beneficent role in solving numerous social, political and economic problems. In her view, freedom was not "co-extensive with the absence of government"[129] but often required "the intervention and protection of government against private action".[130] However, she did not believe that therefore the Court should stand aside and let the government do its good work. In her view, it was precisely

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125 "We Didn't Volunteer" (April 1999) Policy Options 8, at 9.
126 *Id.*
127 *Judging Bertha Wilson* (Toronto: University of Toronto Press, 2001), at 63.
128 *McKinney*, *supra*, note 101, at 354, *per* Wilson J.
129 *Id.*, at 356, *per* Wilson J.
130 *Id.*

because of government's large role that it was vital that oversight functions, such as judicial review under the Charter, be robust and vigilant in protecting individual rights. She did not simply want more government, she wanted just government.[131] Judicial review under the Charter ensured just government by "setting out basic constitutional norms rooted in a concern for individual dignity and autonomy which government [is] compelled to respect when structuring important aspects of citizens' lives."[132]

Despite her concerns about deference, Justice Wilson, along with Justices Dickson and Lamer, in the case of *Irwin Toy*[133] wrote a joint majority judgment which, in many ways, is as important as the *Oakes* test for section 1 because it articulates when the government should be given greater leeway in justifying the infringement of rights. The judgment stated that the government should be given greater leeway where it is acting to protect the vulnerable[134] or mediating between competing groups, particularly where there is an assessment of conflicting scientific evidence and differing justified demands on scarce resources. In such cases, the question under section 1 should be whether the government had a *reasonable basis* for concluding that it impaired the relevant right as little as possible given its objectives.[135] In contrast, the government would be given less leeway where it is the singular antagonist of the state, typically in the case of criminal sanctions and prosecutions.[136]

As evidenced by her participation in this judgment, Justice Wilson was not an *Oakes* absolutist. She acknowledged that imposing an obligation to safeguard Charter rights above all else could impose intractable difficulties and that, on occasion, a more relaxed standard was appropriate.[137] However, her starting point was that the full rigours of the *Oakes* test should be applied. It was only in exceptional circumstances that it should be ameliorated.[138]

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[131] *Judging Bertha Wilson*, *supra*, note 127, at 305; Philip L. Bryden, "The Democratic Intellect: The State in the Work of Madam Justice Wilson" (1992) 15 Dalhousie L.J. 65, at 75-76.

[132] *McKinney*, *supra*, note 101, at 358, *per* Wilson J.

[133] *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927 (S.C.C.) [hereinafter "*Irwin Toy*"].

[134] *Id.*, at 993-94.

[135] *Id.*; *McKinney*, *supra*, note 101, at 304-305, 309.

[136] *Irwin Toy*, *id.*, at 994; *McKinney*, *id.*, at 305.

[137] *Lavigne v. Ontario Public Service Employees Union*, [1991] S.C.J. No. 52, [1991] 2 S.C.R. 211, at 295 (S.C.C.), *per* Wilson J.

[138] *McKinney*, *supra*, note 101, at 404-405, *per* Wilson J.

After *Irwin Toy*, Justice Wilson remained of the view that deference was appropriate where the government sought to promote or protect the interests of the vulnerable, disadvantaged and disempowered.[139] However, she became less convinced that it should apply in cases of competing claims, particularly when they were competing claims for scarce resources. As discussed above, it was only when the competing claims for scarce resources were all made by constitutional rights-holders that she felt that more of an argument for deference could be made.[140]

Justice Wilson's fears concerning a relaxed *Oakes* test came to a head in a criminal case where the majority upheld a *Criminal Code* provision on the basis that, while Parliament may not have chosen the absolutely least restrictive means of meeting the objective, it had chosen from a range of means which impaired rights as little as possible. It was not the role of the Court to second-guess policy choices made by Parliament.[141] Justice Wilson argued that because the state was acting as the singular antagonist of a basic legal right of the accused, the standard of review must be a strict one rather than a relaxed one.[142]

After her retirement, Justice Wilson reflected on what had occurred in respect of deference under section 1. She described the Supreme Court as paying lip service to the *Oakes* standard and replacing it with a standard of reasonableness because of lingering doubts about the legitimacy of judicial review. She maintained that adherence to the *Oakes* standard was necessary to ensure that Charter rights were not emasculated and concluded that "judicial review and deference to the

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[139] *McKinney*, *id.*, at 401, *per* Wilson J.; *Lavigne*, *supra*, note 137, at 295, *per* Wilson J. Her interest in protecting the vulnerable, disadvantaged and disempowered is demonstrated in her judgments concerning the rights of refugees (*Singh*, [1985] S.C.J. No. 11, [1985] 1 S.C.R. 177 (S.C.C.)), women (*Morgentaler*, [1988] S.C.J. No. 1, [1988] 1 S.C.R. 30 (S.C.C.)), children (*Irwin Toy*, [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927 (S.C.C.)), and workers (the *Labour Trilogy — Reference re Public Service Employee Relations Act (Alta.)*, [1987] S.C.J. No. 10, [1987] 1 S.C.R. 313 (S.C.C.); *Public Service Alliance of Canada v. Canada*, [1987] S.C.J. No. 9, [1987] 1 S.C.R. 424 (S.C.C.); *Retail, Wholesale and Department Store Union v. Saskatchewan*, [1987] S.C.J. No. 8, [1987] 1 S.C.R. 460 (S.C.C.)): see "Patriot, Visionary and Heretic" (1992) 15 Dalhousie L.J. 217, at 235. She also provided input into Dickson C.J.C.'s judgment in *R. v. Keegstra*, [1990] S.C.J. No. 131, [1990] 3 S.C.R. 697 (S.C.C.) upholding restrictions on hate speech because of their impact on racial and religious minorities: *A Judge's Journey* (Toronto: University of Toronto Press, 2003), at 408-409.

[140] *McKinney*, *supra*, note 101, at 403-404, *per* Wilson J.; *R. v. Chaulk*, [1990] 3 S.C.R. 1303, at 1388-89 (S.C.C.), *per* Wilson J. [hereinafter "*Chaulk*"].

[141] *Chaulk*, *id.*, at 1343.

[142] *Chaulk*, *id.*, at 1390, *per* Wilson J.; see also *Cotroni*, *supra*, note 107, at 1515-16, *per* Wilson J.

legislature are an incompatible pair and I fear that our attempt to combine them has simply resulted in a muddying of the jurisprudential waters".[143]

However, with respect, the question is not whether the Court should generally defer to the legislature; it should not. Justice Wilson was correct in her rejection of judicial deference as an *answer* to Charter cases as it would simply result in victory for the government in every case. Nevertheless, as a judicial *attitude*, deference has validity as it recognizes the role of the legislature as an articulator of values and sometimes, as the protector, not the antagonist, of minorities and rights.

Section 1 is not inconsistent with the Charter; instead it lies at the heart of the Charter enterprise. It is the first section in the Charter, applies to all rights and provides that government may limit them. It recognizes that, while the identified rights have great weight, there also are other values with heft.

The democratic discussion, while protective of rights, does not allow them to trump in all circumstances. In part, this is because generous interpretations have been given to the rights. Freedom of expression is not just peaceful, political expression but any activity that conveys meaning.[144] Freedom of religion is the freedom of an individual to harbour religious beliefs and undertake practices which he sincerely believes regardless of whether they are required by his religion.[145] Equality rights protect against purposive discrimination as well as neutral laws that have an adverse effect on individuals or groups.[146] Once rights are defined in this manner, it is inevitable that there will be times when these rights must give away to other compelling values.

When addressing an issue, there may be a number of acceptable ways to strike a balance between rights and the government objective. The very nature of democracy is that parties with conflicting views on issues succeed each other and become the government of the day. During one mandate, a party may choose one solution to a problem. During the next, another party may choose differently. Both may be legitimate choices in a democracy.

The object of the Charter is both to protect rights and to provide a scale to weigh them against other values. The *Oakes* test, while helpful,

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143 "Constitutional Advocacy" (1992) 24 Ottawa L. Rev. 265, at 270.

144 *Irwin Toy*, *supra*, note 101.

145 *Syndicat Northcrest v. Amselem*, [2004] S.C.J. No. 46, [2004] 2 S.C.R. 551 (S.C.C.).

146 *Andrews*, [1989] S.C.J. No. 6, [1989] 1 S.C.R. 143 (S.C.C.).

when used exclusively leads to an atomistic evaluation of the law's fine print. A purposive approach to rights asks us what we value in those rights. A purposive approach to section 1 invokes as profound an exploration — what do we value about a democracy; what do we value other than rights? Justice Wilson's strict approach to section 1 justification meant that her jurisprudence, while rich in many ways, applied a purposive approach to rights but failed to fully do so to the other half of the Charter equation.

(b) After Her Departure

After Justice Wilson's departure, the Court continued in its quest to understand section 1. It stated that on complex social issues, the minimal impairment test is met if Parliament has chosen one of several reasonable alternatives.[147] The means chosen need not be the least impairing option.[148] The contextual factors to be considered under section 1 include the nature of the harm addressed (and the ability to measure it scientifically), the vulnerability of the group protected, ameliorative measures considered to address the harm, and the nature and importance of the infringed activity.[149]

The Supreme Court has recently suggested that another relevant factor under section 1 is the record of government consultation with affected parties before a law is made.[150] While it did not articulate why this factor was relevant, it could be argued that Charter rights-holders are constitutionally entitled to greater consultation than others because they are persons who, for insidious reasons, are typically excluded from the political process.

Certainly Justice Wilson was of the view that governments in a democracy will generally further the interests of the majority. Therefore, judges in interpreting and applying the Charter, have to ask themselves which groups in society are typically shut out of the political process — the poor, the powerless, racial minorities, accused criminals. The courts must ensure that the rights of these groups are not sacrificed in the pursuit of majority goals.[151] Justice Wilson held that, when determining

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[147] *Canada (Attorney General) v. JTI-Macdonald Corp.*, [2007] S.C.J. No. 30, [2007] 2 S.C.R. 610, at para. 43 (S.C.C.).

[148] *Harper*, [2004] S.C.J. No. 28, [2004] 1 S.C.R. 827, at 888 (S.C.C.).

[149] *Health Services*, [2007] S.C.J. No. 27, [2007] 2 S.C.R. 391, at para. 139 (S.C.C.).

[150] *Id.*, at para. 157.

[151] "The Making of a Constitution" (1988) 71 Judic. 334, at 338.

which discrete and insular minorities are protected by section 15 equality rights, political powerlessness was a factor to consider.[152] A similar view likely has contributed to the Supreme Court's holding that there is a constitutional duty to consult Aboriginal peoples before authorizing action that could diminish the value of the land or resources that they claim.[153]

However, to shoehorn into section 1 a general duty to consult based on the idea that Charter rights-holders are politically powerless is less than persuasive. Many Charter rights-holders, whether they be media with their free expression rights, corporations with their right to be free from unreasonable search and seizure or parents with their right to make decisions concerning their children, are not politically powerless.[154] Further, before deciding who is politically powerless, it might be of assistance for the courts to have further information about the dynamics of a modern democracy, where power may be related to a number of factors including identity of interest, organizational capacity, ability to fundraise, access to media, *etc*., as well as to numbers alone.

Further, section 1 does not ask the courts to consider whether politicians are conducting an appropriate democratic relationship with the citizenry. Put simply, the record of consultation with affected parties is the election and the debate in the legislature. If the judiciary believes that democracy requires more than representative government, it must in short order come to a sophisticated analysis of what that might be. Vibrant democracies do use mechanisms other than elections and legislative debates to ascertain popular will and to evaluate policy options, and these mechanisms, including consultation, can strengthen their legitimacy and effectiveness. However, the Charter does not mandate their use and it is difficult to imagine what formula could be devised to determine and monitor the appropriate mix of these mechanisms.

Neither the political nor policy process ever follows the same steps in arriving at legislation. There are no *Rules of Civil Procedure* for the development of legislation. Sometimes legislation involves a

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152 *Andrews*, *supra*, note 146, at 152.

153 *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.J. No. 70, [2004] 3 S.C.R. 511 (S.C.C.).

154 For a discussion of the views of Justice Wilson and others on the issue of whether judicial review should focus on disadvantaged groups because of their lack of access to the political process, see Robert E. Hawkins & Robert Martin, "Democracy, Judging and Bertha Wilson" (1995) 41 McGill L.J. 1, at 26-27.

consultation process, expert panels, published policy papers, internal policy work, detailed Cabinet submissions and extensive legislative hearings. Other times it does not. Cabinet and the legislature are not a court of record. Their decisions should not be reviewed as though the relevant question is the evidence before them on which they based their decision. Politicians are in constant contact with the populace generally and interest groups specifically through correspondence, constituency offices, door-to-door visits, community meetings and "rubber chicken" dinners. They are entitled to take what they learn from these contacts into consideration, as well as information gleaned from a tailored policy process, when making decisions about legislation.[155]

The political process in not better or worse than the judicial process; it is simply different. It would damage the strengths of the former to require it to act as if it were the latter. The Court's job is not to supervise the political process but to examine, at the end of the day, how the legislation actually affects the rights of citizens and whether it attains desirable objectives.

V. Taking Advice

As discussed, the Charter produced a revolution in the role of the judiciary. It also produced significant change in the operation of government, which must ensure that it is acting in accordance with constitutional norms when advancing legislation.[156] For this reason, Justice Wilson stated that governments should seek advice from counsel as to whether proposed legislation meets Charter requirements and that to fail to do so would be "thoroughly irresponsible of governments and a dereliction of their obligation of Charter compliance".[157]

Most legislative provisions will never be tested in court and therefore much of the active protection of Charter rights occurs during the development of legislation. The Charter performs a valuable function by ensuring that the government is mindful of rights when making policy

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[155] The Attorney General of Ontario successfully made similar arguments when resisting the production of a Cabinet document in the case of *Masse v. Ontario (Ministry of Community and Social Services)*, [1996] O.J. No. 363, 134 D.L.R. (4th) 20 (Ont. C.J.), leave to appeal refused [1996] O.J. No. 1526 (Ont. C.A.), [1996] S.C.C.A. No. 373 (S.C.C.).

[156] *Hislop*, [2007] S.C.J. No. 10, [2007] 1 S.C.R. 429, at 472 (S.C.C.); Ian Scott, "The Role of the Attorney General and the Charter of Rights", in G.-A. Beaudoin, ed., *Charter Cases 1986-1987: Proceedings of the October 1986 Colloquium of the Canadian Bar Association in Montreal* (Cowansville: Yvon Blais Inc., 1987), at 134.

[157] "We Didn't Volunteer" (April 1999) Policy Options 8, at 10.

and demanding that it more closely analyze its reasons for proceeding. The requirement of minimal impairment, in particular, is a powerful tool for ensuring a careful selection among policy options.

The government, in assessing constitutionality, takes its cue from the Supreme Court, which has the final word on the interpretation of the Constitution.[158] However, moves made by Justice Wilson and other members of the early Court, including an emphasis on constitutional growth and a weakened approach to *stare decisis*, have made judicial pronouncements more provisional, providing the government with less guidance.

The Supreme Court, in the recent case of *Hislop*,[159] returned to a number of themes identified in the early years of Charter interpretation. It confirmed that constitutional law changes because the Constitution is not static but adapts to the times through a process of evolutionary interpretation.[160] If previous interpretations of the Constitution no longer correspond to societal realities, the Supreme Court must change the law.[161]

However, the Supreme Court provided some relief to the government in cases where it had enacted legislation relying on existing jurisprudence, and subsequently the Court made a substantial change to that jurisprudence which rendered the legislation unconstitutional.[162] In such a case, it would award a claimant prospective but not retroactive relief as the latter might prove highly disruptive to a government which, relying on the law as it stood, had framed budgets or designed social programs.[163]

VI. CONCLUSION

Justice Wilson was appointed to the Supreme Court of Canada at the inception of a great historical project: the Charter. She had behind her a Canadian and British legal tradition which, at times, could be black-letter and formalistic, leading to results that were out of touch with

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[158] *Hislop*, *supra*, note 156, at 476.

[159] *Id.*

[160] *Id.*, at 468.

[161] *Id.*, at 477.

[162] *Id.*, at 469-70. Substantial change was defined as the overruling of precedent or giving content to broad but previously undefined principles or norms. The latter occurs often in Charter interpretation.

[163] *Id.*, at 470-71.

current realities. She was anxious to ensure that this did not happen with the Charter and she joined with others on the Court to adopt interpretive approaches that made the Charter an active guarantee of individual rights. As a serious scholar of the Charter she confronted its flashpoints, including social change, the proper relationship between the individual and the state and judicial deference. Justice Wilson had an engagement to keep with history. We should keep her engagement with the Charter as an exemplar for our own.