THE IMPLIED BILL OF RIGHTS, THE CHARTER AND THE ROLE OF THE JUDICIARY

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For a Quebecker old enough to remember Trudeau as a leftist and Parizeau as a very thin young man, for an adult to whom the mention of Roncarelli still brings back vivid childhood memories of countless refined anti-pasti lined up under a glass dome atop a rolling cart at the entrance of an elegant dining room, Ivan Rand remains to this day *the* defender not only of rights, but of right, *right* as in "right versus wrong", versus evil, versus the devil I have named Duplessis. It does not matter that Westerners know better and hold: for a fact that the Implied Bill of Rights started with Sir Lyman Duff's *dictum* in the *Alberta Press* reference,[1] for politically aware college students of my generation and persuasion in Québec, Rand remains the father of the Implied Bill of Rights. It matters not that his thoughts on the role of the judiciary were sometimes muddled and his writings about it contradictory, even "abstruse", as others have fortunately noted before me.[2] He was our role-model for judges and, for many of us, *Saumur*[3] and *Switzman*,[4] not to mention the "Rand Formula",[5] were good enough reasons to believe in law and study it.

It is nostalgia for these fond memories, then, and gratitude for the occasion to pay homage to this special hero of my youth, that made me foolishly accept the invitation of Dean MacLauchlan to be the third Rand Lecturer, for which I must nevertheless thank him profusely. I say "foolishly" not because I have changed my mind about Rand, although I would admit my enthusiasm is somewhat more nuanced after reading or re-reading some of his work, but because it is never possible to measure up to such a task. Nor have I had the time or the means to do a full analysis of Rand's corpus along the lines of those I did for the judges of the Dickson Court,[6] an analysis which might have shown whether his judicial behaviour was moulded by the same factors. Failing that, I will use the pretext of

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[1]*Reference Re Alberta Statutes*, [1938] S.C.R. 100 [hereinafter *Alberta Press*].

[2]R. Yachetti, "Ivan Cleveland Rand, The Teacher : A Student Viewpoint" in the Rand Symposium, (1979-80) 18 U.W.O. L. Rev. 1, and R.P.H. Balcome, E.J. McBride & D.A. Russell, *Supreme Court of Canada Decision-Making* (Toronto: Carswell, 1990) at 113.

[3]*Saumur* v. *City of Québec*, [1953] 2 S.C.R. 299 [hereinafter *Saumur*].

[4]*Switzman* v. *Elbling*, [1957] S.C.R. 285 [hereinafter *Switzman*].

[5]46 C.L.L.C., para 18001.

[6]Andrée Lajoie *et al.*, "Les représentations de 'société libre et démocratique' à la Cour Dickson" (1994) 32 Osgoode Hall L.J. 295.

this heartfelt homage to Rand to look at the complex relationship between the Implied Bill of Rights and the apparently more explicit *Charter* and their respective implicit conceptions of the judiciary.

I. The Duff-Rand Bill of Rights and the Charter

A. The Duff-Rand Bill of Rights

It is freedoms, rather than rights, and more specifically freedom of expression, which are at the core of the Implied Bill of Rights, both in the Duff initial version,[7] where freedom of the press was in question, and in the later Rand developments, in which freedoms of religion[8] and of political expression[9] were at stake. It has sometimes been understood,[10] particularly from the *Winner* case,[11] to include economic rights also, as indeed Rand himself claimed. Writing in the *University of Toronto Law Journal*, he said that the principles of which the judiciary was the guardian in society included "the exercise of political and economic rights",[12] but it is mostly the economic rights of small business to act without hindrance from the State that he had in mind, or at best a regulated equilibrium between big business and labour, an equilibrium which he could conceive of as neutral and to be established by an undescribed "rational process".[13]

In the judges' discourse, these rights were grounded explicitly in the requirements of democracy, by the creation, in s. 19 of the *British North America Act 1867*, of a Canadian Parliament, under what the Preamble describes as a "Constitution similar in principle to that of the United Kingdom." But even if Rand, like other judges in the majority deciding these cases, referred to the Preamble and even, in *Saumur*, to Duff's decision in the *Alberta Press* reference, he never wrote explicitly of an Implied Bill of Rights, much less of one which would bind not only the provinces but the federation as well. And for good reasons: to state clearly that a "Constitution similar in principle to that of the United Kingdom", a constitution embodying a democracy precisely specified by parliamentary supremacy, might imply individual rights that would override the

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[7] *Alberta Press*, *supra* note 1.

[8] *Saumur*, *supra* note 3; see also *Boucher* v. *R.*, [1951] S.C.R. 265.

[9] *Switzman*, *supra* note 4.

[10] R.P.H. Balcome, E.J. McBride and D.A. Russell, *supra*, note 2 at 48.

[11] *Winner* v. *S.M.T.*, [1951] S.C.R. 887.

[12] I.C. Rand, "The role of an Independent Judiciary in Preserving Freedom" (1951) 9 U.T.L.J. 1.

[13] *Ibid.*

very laws enacted by that supreme Parliament,[14] could not but expose the oxymoron underlying the argument. There are several ways in which the People can exercise political power, and different structures for democratic States: some of them are incompatible, and Parliament cannot both be supreme in the way it is in the United Kingdom and, at the same time, co-exist with an overriding *Charter* or *Bill of Rights*, whether explicit or implied.

But then, to admit the truth —that he was invoking another concept of democracy, bi-polar in character[15] and American in inspiration— would have been to claim in the reasons for decision a role for the judiciary that he was perhaps ready to play, and even to defend in his scholarly writings, but not in his reasons from the Bench, unless it was the price he was willing to pay to get his colleagues to concur.

Rand was attempting to find reasons for adapting the *Constitution* to the concrete task at hand —to stop Duplessis from persecuting innocent worshippers— not to create a *Bill of Rights* for its own sake. Nor was he trying his hand at "natural lawyering", although his writings flirt with the idea in passages where he would contradict himself from one paragraph to the next.[16] Neither, I think, should he be pigeon-holed into analytical categories that Dworkin would construct only later in the United States, from a paradigm which could not have existed here when Rand was writing these texts in the 1950s and early 1960s.

If I had to peg him, I would say that —as often happens to Canadian scholars[17]— Rand was, more than anything, upholding in the 1950s theoretical

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[14]It would seem that before the United Kingdom joined the European Community, British constitutional history shows but one instance of judicial control of Parliament on grounds of incompatibility of the invalidated statute with "fundamental principles of law" : *Bonham's* Case (1610), 8 Rep. 118. But the medieval precedents on which Lord Coke had decided this case were later shown not to back his affirmations, and the doctrine was abandoned. See T.F. Plunkett, *A Concise History of the Common Law*, 5th ed. (London: Butterworth, 1956) at 51 and 336-339. See also A.V. Dicey, *Introduction to the Law of the Constitution*, (London: Macmillan, 1960) at 60-64. Whether one could, in turn, dismiss the dismissal of the Coke doctrine as "positivist revisionism" is another question. But Rod Macdonald thinks that whether or not it has survived in Britain, "its echoes have been heard in the jurisprudence of the Supreme Court of Canada", and he sees it as a possible source of the *Implied Bill of Rights*. See R.A. MacDonald, "The New Zealand Bill of Rights Act : How Far Does it Stretch?" (1993 New Zealand Law Conference) 94 at 121-122.

[15]K. Benyekhlef, "Démocratie et libertés: quelques propos sur le contrôle de constitutionnalité et l'hétéronomie du droit" (1993) 38 McGill L.J. 91.

[16]Which explains why M. Schneiderman may not be wrong in "The Positivism of Hugo Black v. the Natural Law of Ivan Rand: A Study in Contrasting Judicial Philosophies" (1968) 33 Sask. L.R. 267, although I am inclined to side with R.P.H. Balcome, E.J. McBride & D.A. Russell, *supra* note 2 at 119 et seq.

[17]See J. Gosselin, *La légitimité du contrôle judiciaire sous le régime de la Charte* (Cowanswille: Yvon Blais, 1991).

principles developed earlier in the United States, this time by sociological jurisprudents, a school antecedent to legal realism and to which Pound,[18] Frankfurter[19] and his mentor Brandeis belonged. Within an evolutionist and utilitarist paradigm, they saw law as a social product shaped by conflictual social interests that the judiciary had to arbitrate according to morals.[20] In their view, the purpose of arbitration was to adapt law to social requirements and, in that task, it had to take into account, above all, context, facts and their evolution. This is Brandeis' position,[21] and Rand also spells it out in so many words in a lecture delivered to the students of this law school in the early 1960s.[22] It is a functionalist conception of law, seen here as an instrument for "social engineering", an expression quoted explicitly by Rand[23] and defined by Pound as the satisfaction of a synthesis of individual, public and social interests.[24] In such a perspective it is of course the judge's responsibility to identify social requirements and to define the "synthesis" between conflicting ones, a task that Rand felt could be achieved by an undescribed rational process. To discover where this "rationality" led him, we consequently have to ask ourselves what social interests the Implied Bill of Rights has served.

It is easy to see that they are federal ones —as with all cases of human rights originating in Québec between the end of the war and the *Charter,* where the values of the Québec majority have been ignored in favour of those of the minority, which happen to coincide with those of the Canadian majority.[25] In those circumstances, it might be tempting, from a Québec perspective, to conclude that there is nothing more at work here than the irrepressible tendency of the Canadian federation to centralisation, especially given the fact that most decisions referring implicitly to the Implied Bill of Rights were decided on jurisdictional grounds linked to peace, order, and good government, or on the "national

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[18]R. Pound, "Law in Books and Law in Action" (1910) 44 American Law Review 35.

[19]Felix Frankfurter, "The Early Writings of O.W. Holmes" in F.B. Kurland, ed., *Felix Frankfurter on the Supreme Court, Extrajudicial Essays on the Constitution* (Cambridge: Harvard U. P., 1970).

[20]Hence the link with some form of "natural law", which would not be so contradictory after all.

[21]L.D. Brandeis, "The Living Law", [1916] 10 Illinois L.R. 467.

[22]I.C. Rand, "The Role of the Supreme Court in Society" [1991] 40 U.N.B.L.J. 175, pp. 178-181 (W. Kaplan's transcription of I.C. Rand's Lecture).

[23]I.C. Rand, "Louis D. Brandeis" (1947) 25 Can. Bar Rev. 241 at 243

[24]R. Pound, "The Theory of Judicial Decision" (1923) 36 Harvard L.R. 954.

[25]A. Lajoie, P. Mulazzi & Michèle Gamache, "Political Ideas in Quebec and the Evolution of Canadian Constitutional Law, 1945 to 1985", in I. Bernier & A. Lajoie, (Research Coordinators), *The Supreme Court of Canada as an Instrument of Political Change* (Studies, Royal Commission on the Economic Union and Development Prospects for Canada, vol. 47) (Toronto, University of Toronto Press: 1986) 1 at 1-103.

dimensions" of the rights concerned, and the further fact that the rights implied were never invoked against the federal Parliament.[26]

But it is far from clear, at least in the case of Rand, whether centralisation was pursued for itself. It seems more likely to have been at the service of, and instrumental to, the implementation of moral convictions about the nature of public and social interest. These were convictions that the division of powers and the supremacy of legislatures, as embodied in the *British North American Act, 1867*, could not possibly accommodate —thereby frustrating all attempts at "social engineering".

Having thus explored the underpinnings of the Implied Bill of Rights, it is no less important to the comparison with the *Charter* which we are trying to achieve to note that the implicit character of the rights the former embodies makes them quite open ended and vulnerable to judicial discretion. Paradoxically however, these rights were not as open ended as they would be when they stood on their own in the text of the *Charter*. For, whatever the contradictions of that construction, the freedoms affirmed were said to be grounded in democracy, a concept here positively founding freedoms of religious and political expression as one of its *sine qua non* conditions. Yet, at the same time that it serves as their foundation, this link limits their scope, for freedom of expression is only protected by the Implied Bill of Rights insofar as it is related to the democratic debate. I doubt, for instance, that the *Ford*[27] and *Devine*[28] decisions could have fitted freedom to advertise in English, coined as "freedom of commercial expression", within the concept of freedom of expression under the Implied Bill of Rights as its scope was then defined. But then, of course, there are those who claim that it was precisely the aim of the *Charter* to open this possibility.[29]

B. The Charter

The *Canadian Charter of Rights and Freedoms*, as reads its full title, is of course more familiar to contemporary lawyers and the public alike. Every one knows that its text was quite explicitly adopted by the British Parliament, guided by the hand

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[26]R.P.H. Balcome, E.J. McBride & D.A. Russell, *supra* note 2 at 56 and seq.

[27]*Ford* v. *Quebec (A.G.)*, [1988] 2 S.C.R. 712.

[28]*Devine* v. *Quebec (A.G.)*, [1988] 2 S.C.R. 790.

[29]M. Mendel, *The Charter of Rights and the Legalization of Politics* (Toronto: Wall & Thompson, 1989); H. Quillinan, *La Cour suprême et les variations du test de l'article premier de la Charte canadienne des droits et libertés*, mémoire présenté à la F.E.S. en vue de l'obtention du grade de Maître en droit (LL.M.), Université de Montréal, Faculté des Études supérieures, 1992.

of God from Ottawa,[30] to be then repatriated unilaterally into Canada despite lack of consent from Québec, on which it has nevertheless been declared to be binding.[31] It differs from the Implied Bill of Rights not only by its origin and its explicitly written character but because of its much greater scope. Far from being limited to freedom of expression, it covers fundamental freedoms, democratic rights, mobility rights, legal rights, equality rights, and it constitutionalizes official languages in Canada. Furthermore, it applies not only to provincial legislatures, but to the federal Parliament (although less often...). It also allows "notwithstanding" clauses in provincial and federal legislation alike.

As important as they are, all those characteristics of the *Charter* are well known and pretty obvious now, and I will not dwell on them. Rather, I will concentrate my attention on the relationship of the *Charter* to the concept of democracy. In order to fully grasp this complex relationship, it is necessary to first come back to certain features of the Implied Bill of Rights.

To begin with, it is important to remind ourselves that it was explicitly, if perhaps unsoundly, founded on British democracy, a monopolar democracy involving parliamentary supremacy. But it was also implicitly and more soundly inspired by American democracy, a bi-polar democracy where the legislator is not supreme. The contradictions inherent to the first argument, and the impossibility to openly admit using the second, were to have two distinct consequences on the relationship of the Canadian polity to democracy: the Implied Bill of Rights would *appear* to be short lived, and the *Charter* would *seem* to switch the Canadian constitution from monopolar to bi-polar democracy. My choice of the words "seem" and "appear" is not entirely innocent.

If the Implied Bill of Rights "appeared" to be short lived, it is because it was "momentarily" killed by Beetz, who knew an oxymoron when he saw one. In Dupond,[32] he wrote flatly: "Modern parlance has fostered loose language upon lawyers. As was said by Sir Ivor Jennings, the English at least have no written constitution and so they may divide[33] their law logically. None of those freedoms is so enshrined in the *Constitution* as to be above the reach of competent

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

[31]*Re: Objection to a Resolution to Amend the Constitution*, [1982] 2 S.C.R. 793. See also *Re: Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753.

[32]*A.G. Canada and Dupond* v. *City of Montréal*, [1978] 2 S.C.R. 770, a decision where he wrote some of his most conservative prose. He would later confide to this author that, writing it, he would see himself becoming a conservative but could not help it. To take the measure of his hesitations and contradictions in time on this subject, see *infra* note 41.

[33]The Supreme Court translator should have used a better word for the french expression "organiser leur droit logiquement" : "*construct* their law" might have come nearer to what Beetz meant.

legislation". But, if you will allow my own oxymoron, the killing itself would be short lived, as we shall see in a moment.

Yet, when the *Charter* came into being in 1982, it "seemed" to change the concept of democracy for the Canadian polity. After all, an explicit *Charter of Rights and Freedoms* to be enforced by "such remedy as the court considers appropriate and just in the circumstances" was now entrenched in a Constitution declared to be "the supreme law of Canada ... [where] ... any law that is inconsistent with the provisions of the *Constitution* is, to the extent of the inconsistency, of no force or effect."[34] The lesson to be read from the *lacunae* in the foundations of the Implied Bill of Rights had been learned: in order that the *Charter* could be properly implemented, the supremacy of Parliament was set aside.

Or was it? I mean: was it set aside *then*, or had it already been? Since something can only be set aside if it still exists, the answer depends on wether you see the killing of the Implied Bill of Rights as definitive, or whether you think the *Bill* had survived, or been resurrected: wild cats have nine lives too. Because, if the Implied Bill of Rights had survived or had been resurrected before, or coincidentally with the *Charter*, the supremacy of Parliament had already disappeared at its inception —at least insofar as freedom of expression is concerned— and could not be set aside anew. That brings us back to my saying that the Implied Bill of Rights *appeared* to be short lived: what I hinted at is that I have several good reasons to think that it is its death that was short lived.

The first reason lies in the *Charter* itself, which provides that: "The guarantee in this *Charter* of certain rights and freedoms shall not be construed as denying the existence of any other rights and freedoms that exist in Canada".[35] Of course, it is not clear whether the provision thereby recognizes —or confers paramountcy to— such rights, but it seems to me it can only refer to rights and freedoms as they existed previously. Further support for this view can also be read in decisions both before and after the *Charter*.

In fact, after the so-called killing of the Implied Bill of Rights and before the inception of the *Charter*, or at least before the Court would start to interpret it, the constitutionalization of fundamental freedoms had been affirmed by Dickson J., who held freedom of expression to be entrenched through its intrinsic link with

[34] *Supra* note 30, s. 24(1) and s. 52(1).

[35] *Ibid.* S. 26.

democracy,[36] a link also noticed by L'Heureux-Dubé,[37] Lamer[38] and Estey.[39] Beetz was more ambivalent: after first taking a position similar to that of his future Court colleagues in his early academic writings,[40] he nuanced it, to say the least, through important reservations in *Dupond*, and he changed his mind again about the *Bill*, but only after the *Charter* had been inserted in the Constitution.[41] Freedom of movement had also been recognized by almost all judges: La Forest J. invokes it to protect the individual against the State,[42] as indeed do McIntyre[43] and L'Heureux-Dubé,[44] as well as Dickson[45] and Lamer,[46] who attribute it even to criminals and had stressed it even before the *Charter* as the foundation of

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[36]*Gay Alliance Toward Equality* v. *Vancouver Sun*, [1979] 2 S.C.R. 435; *Cherneskey* v. *Armadale Publishers Ltd.*, [1979] 1 S.C.R. 1067; *Jabour* v. *Law Society of British Columbia et al.*, [1982] 2 S.C.R. 307 [hereinafter *Jabour*]; *Solosky* v. *The Queen*, [1980] 1 S.C.R. 821.

[37]*Dubois* v. *The Queen*, [1985] 1 S.C.R. 350.

[38]*Jabour*, *supra*, note 36.

[39]*Ibid.*

[40]J. Beetz, "Les attitudes changeantes du Québec à l'endroit de la constitution de 1867", in P.-A. Crépeau & C.B. MacPherson, eds., *The Future of Canadian Federalism* (Montréal, Presses de l'Université de Montréal et University of Toronto Press, 1965) 113.

[41]*A.G. Canada and Dupond* v. *City of Montréal*, *supra*, note 32. He would indeed come back to square one after the Charter, by concurring with Dickson C.J's reasons in *Re Fraser and Public Service Staff Relations Board*, [1985] 2 S.C.R. 455, as R. Macdonald has noted in "The New Zealand Bill of Rights Act: How Far Does It Stretch?", *supra* note 14.

[42]*R.* v. *Stewart* (1982), 39 N.B.R. (2d) 444 (C.A.); "Towards a New Canada: The Canadian Bar Association's Report on the Constitution" (1979) 57 Can. Bar Rev. 493.

[43]*Robinson* v. *Countrywide Factors*, [1978] 1 S.C.R. 753.

[44]*Renard* v. *Directeur du Centre de développement correctionnel de Laval*, [1980] (C.A.) 125; *Travailleurs unis du pétrole (local 2)* v. *Shell Canada Ltée*, [1983] (C.A.) 162.

[45]*A.G. Canada* v. *Canard*, [1976] 1 S.C.R. 170; *Leary* v. *The Queen*, [1978] 1 S.C.R. 29; *Marcotte* v. *Dep. A.G. (Can.) et al.*, [1976] 1 S.C.R. 108; *The Queen* v. *Biron*, [1976] 2 S.C.R. 56; *The Queen* v. *Gardiner*, [1982] 2 S.C.R. 368.

[46]Law Reform Commission of Canada, *Our Criminal Law: Report* (Ottawa: Information Canada, 1976); Law Reform Commission of Canada, *Limits of Criminal Law: Obscenity, A Test Case* (Ottawa: Information Canada, 1975).

procedural rights, which they and LeDain[47] moreover consider intrinsic to democracy.[48]

It is not surprising then, that this link with democracy would be reaffirmed as grounding freedom of expression independently of the *Charter* even after its inception, in particular in the discourse[49] of Dickson,[50] Lamer[51] and even McIntyre JJ.[52] These ambiguities reflect themselves in the role of the judges as conceived both in the Implied Bill of Rights and in Rand's writings on the one hand, and in the Court practice of its role, on the other.

II. Their Respective Implicit Conceptions of the Judiciary

As with the concept of democracy and for the same reasons, it has been generally understood that, with the *Charter,* a new era was opening, in which the judges, especially those of the Supreme Court, would be transformed overnight— Cinderella-like— from the "oracles of the law" that they were reputed to have been until then, into full-fledged legislators. As if they had never interpreted open ended concepts before, as if they were not already the very political arbitrators of the division of powers in the federation, as if they had never before invalidated any law, at least never otherwise than by applying black-letter crystal-clear constitutional provisions to no less unequivocal laws. As if, moreover, there was no "notwithstanding" clause in the *Constitution Act 1982,* whereby the real legislator could now override them back to "reason".

Reality is more subtle, and if there is any clear-cut difference, it would probably be that they would, from then on, be able to do with written constitutional authority most of what the Implied Bill of Rights, and no doubt countless better hidden devices, had allowed them to do already. For one thing, most judges' conception of judicial powers has changed very little with the advent

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[47]G. LeDain, "The Quest for Justice: The Role of the Profession" (1969) 19 U.N.B.L.J. 18; G. LeDain, "The Twilight of Judicial Control in the Province of Quebec?" (1952) 1 McGill L.J. 1; *P.G. Canada* v. C.R.T.F.P., [1977] 2 F.C. 663; G. LeDain, "The Supervisory Jurisdiction in Quebec" (1957) 35 *Can. Bar Rev.* 788; *Shell Canada* v. *Min. of Energy, Mines & Resources,* [1979] 2 F.C. 367; *Croy* v. *Atomic Energy Control Board,* [1981] 1 F.C. 515; *Louhisdon* v. *Employment and Immigration Canada,* [1978] 2 F.C. 589; *Oloko* v. *Employment and Immigration Canada,* [1978] 2 F.C. 593; *Jiminez Perez* v. *Minister of Employment and Immigration,* [1983] 1 F.C. 163; *Faiva* v. *Minister of Employment and Immigration,* [1983] 2 F.C. 3; *Minister of Manpower and Immigration* v. *Tsiafakis,* [1977] 2 F.C. 216; *McCarthy* v. *Minister of Employment and Immigration,* [1979] 1 F.C. 121.

[48]G. LeDain & E. Ryan, "The Path of Law Reform" (1977) 23 McGill L.J. 519.

[49]R.A. MacDonald, *supra* note 14.

[50]*Re: Fraser and Public Service Staff Relations Board, supra* note 41.

[51]*OPSEU* v. *A.G. Ontario,* [1987] 1 S.C.R. 2.

[52]*RWDSU* v. *Dolphin Delivery Ltd.* [1986] 2 S.C.R. 573.

of the *Charter*, as a close look not only at Rand's writing, but at that of other Supreme Court judges, will show. But, perhaps more revealing, the practice of the Supreme Court at first brought no change to the role of the judiciary as the Implied Bill of Rights had defined it and, when the Court finally would depart from this course, it would not do so in the expected direction.

A. The Judges' Conception of the Role of the Judiciary

To take up first the judges' conception of the judiciary, then, let us start with Rand. Although he pays lip service to parliamentary supremacy ("the position in Canada is more restricted than in the United States: there is not here any absolute security against legislation"),[53] his conception of the role of the judiciary, and of the Supreme Court in particular, is difficult to fit into that mould. Faithful to his theory of *social engineering*, he was forever trying to adapt law to facts in a changing society, seeing it as "really pushing forward under the urge of changing social demands",[54] and trying to define modes of judicial reasoning that would bring about this kind of result. In 1951 he was already writing:

> The basic principles and considerations which are to give shape and direction to judgment must be gathered as best they can from the precedents and affirmations of the traditional law, from legislative enactments, from universally accepted attitudes and working assumptions of our polity and their organic tendencies, from the fundamental conception of freedom in society and from tested experience of what, considering all factors and interests, the mass of free and rational men applying the rule of universality will ultimately accept or demand: these are the modes of reasoning built up over the centuries, "the artificial reason" as Coke called it, of the Law, expanded and made flexible by the nature of the new matter of which it partakes.[55]

In the 1960s, he would be even blunter, then writing about common law systems: "we have two law-making institutions".[56] It is difficult to see what one would need to add to such descriptions to make them fit post-*Charter* judging.

Yet, bold and avant-gardiste as he was, Rand was not alone on this path: the affirmation by Lamer[57] and L'Heureux-Dubé [58] of a bi-polar structure of normative power in the pre-*Charter Constitution*, where they had already stressed

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[53]I.C. Rand, *supra* note 12 at 8.

[54]I.C. Rand, *supra* note 22 at 180.

[55]I.C. Rand, *supra* note 12 at 12.

[56]I.C. Rand, *supra* note 22 at 180.

[57]*Supra* note 51.

[58]"Matrimonial Property", in R. Abella & C. L'Heureux-Dubé (dir.), *Family Law: Dimensions of Justice* (Toronto: Butterworths, 1983).

the judiciary's creative powers, is no doubt significant, as they are believed to have rarely agreed on anything else. On the other hand, judges who had put the supremacy of Parliament at the core of their definition of democracy before the *Charter*, such as Beetz[59] and especially LeDain,[60] or even reverence for governmental discretion, like La Forest,[61] did not really change their minds afterwards: even if they admitted in principle that the *Charter* allowed them the power of constitutional control of legislation, most of the time, they could rarely if at all bring themselves to exercise it.[62]

B. The Court's Practice of its Role

It is not entirely surprising, then, that when the Supreme Court started to interpret the *Charter* cases, it did at first little more than what would have resulted from the application of the Implied Bill of Rights, even though the concept of democracy, which was the positive foundation of freedoms of expression in the Implied Bill of Rights, is apparently attributed the opposite function in the *Charter*, where it allows the legislator to restrict entrenched rights in certain circumstances. Section 1 indeed enables the federal and provincial legislatures to impose on guaranteed rights and freedoms "such reasonable limits prescribed by law as can be demonstrably justified in a *free and democratic society*". Hence the importance of determining what role the Court has given itself especially through the meaning it has imposed on this concept of "a free and democratic society".[63]

In its first interpretations of that expression, concentrated mostly from 1984 to 1986, the Court wanted to catch up with its own vision of American liberalism.[64] The main value on which such a classic liberal interpretation rests

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[59]*A.G. of Quebec* v. *Labrecque et al.*, [1980] 2 S.C.R. 1057; *Landreville* v. *Boucherville*, [1978] 2 S.C.R. 801; *Cie Immobilière Viger* v. *L. Giguère Inc.*, [1977] 2 S.C.R. 67; *Cité de Montréal-Nord* c. *Lalonde*, [1974] C.A. 416; *A.G. (Can) and Dupond* v. *Montreal*, [1978] 2 S.C.R. 770; *The Queen.* v. *Moreau*, [1979] 1 S.C.R. 261; *Harelkin* v. *University of Regina*, [1979] 2 S.C.R. 561.

[60]*Yukon Conservation Society* v. *National Energy Board*, [1979] 2 F.C. 14.

[61]*Re Estabrooks Pontiac Buick Ltd.* (1982), 44 N.B.R. (2d) 201 (C.A.); "The Canadian Charter of Rights and Freedoms: An Overview" (1983) 61 Can. Bar Rev. 19.

[62]A. Lajoie *et al.*, "Jean Beetz sur la société libre et démocratique" (1994) 28 Revue juridique Thémis 557; A. Lajoie & L. Rolland, "Gérald LeDain: sur la société libre et démocratique" (1993) 38 McGill L.J. 899; Andrée Lajoie & H. Quillinan, "Emerging Constitutional norms: Continuous Judicial Amendment of the Constitution — The Proportionality Test as a Moving Target (1992) 5 Law and Contemporary Problems 285.

[63]The following four pages contain paragraphs translated and excerpted from my article at *supra* note 6.

[64]As it becomes evident when, after paying lip service to the specificity of Canadian society, it borrows the U.S. Supreme Court reasons and solutions, while formally decrying the practice at the same time. For examples, see *Hunter* v. *Southam*, [1984] 2 S.C.R. 145; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R.

is freedom, particularly freedom of expression and religion, which is discussed at length in philosophical terms in Dickson J's and especially Wilson J's reasons for landmark decisions,[65] stressing freedom from State constraints for the civil society. Thus an important group of decisions, rendered for the majority alternately by justices Dickson, Lamer, Wilson, Estey, McIntyre and Beetz,[66] severely limit State intervention, both normative and decisional, on the basis of the same individual freedoms that were included in the Implied Bill of Rights: freedom of expression[67] (now expanded to include commercial expression)[68] and freedom of religion.[69]

This is not to say no new ground was being broken, but much of the Court activity in the first years of the application of the *Charter* was in direct continuity with the Implicit Bill of Rights cases. New rights and freedoms were being invoked, present in Rand's writings but not covered by the Bill, such as freedom of movement and circulation,[70] integrity of the person[71] and privacy.[72] The limits imposed on State intervention would no more be only of the previously familiar negative kind, where a tribunal would declare unconstitutional some legislative dispositions or government policies: the Court would now order the State to act according to its directives, forcing the authorities to put public property at the disposal of political publicity,[73] or to apply *audi alteram partem* in hearings where the security of the person is at stake.[74] This tendency, especially visible in criminal law when procedural rights are involved, would spread

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486; *Ford* v. *Quebec (A.G.), supra* note, 26; *R.* v. *Oakes*, [1986] 1 S.C.R. 105; *Law Society of Upper Canada* v. *Skapinker*, [1984] 1 S.C.R. 357; *R.* v. *Collins*, [1987] 1 S.R.C. 265; *Irwin Toy* v. *Québec (A.G.)*, [1989] 1 S.R.C. 927; *Committee for the Commonwealth of Canada*, [1991] 1 S.C.R. 139.

[65]*Ford* v. *Quebec (A.G.) supra* note 26; *R.* v. *Oakes, supra* note 63; *R.* v. *Big M Drug Mart*, [1985] 1 S.C.R. 295; *Singh et al.* v. *M.E.I.*, [1985] 1 S.C.R. 177.

[66]They were subscribed to, in turn, by LeDain, La Forest and L'Heureux-Dubé JJ., which is to say that these decisions collectively carried the assent of the whole court.

[67]*Ford* v. *Quebec (A.G.) supra* note 64, *Edmonton Journal* v. *Alta. (A.G.)*, [1989] 2 S.C.R. 1326; *Committee for the Commonwealth of Canada* v. *Canada, supra* note 64; *S.D.G.M.R.* v. *Dolphin Delivery, supra* note 50.

[68]*Ford* v. *Quebec (A.G.), supra* note 27.

[69]*R.* v. *Big M Drug Mart, supra* note 65.

[70]*Andrews* v. *Law Society of British Columbia*, [1989] 1 S.C.R. 143.

[71]*Operation Dismantle* v. *The Queen*, [1985] 1 S.C.R. 441.

[72]*R.* v. *Dyment*, [1988] 2 S.C.R. 417.

[73]*Committee for the Commonwealth of Canada* v. *Canada, supra* note 64.

[74]*Singh et al.* v. *M.E.I., supra* note 65.

to other fields, to culminate in *Schachter*,[75] where the Court would declare itself constitutionally authorized to write new elements in the legislative text.

Thus in the first years of *Charter* interpretation, the Dickson Court fostered a society where judges would actively intervene in the legislative and governmental domain to protect individual rights and, even more so, individual liberties. A society characterized by such judicial power and constitutional control is tending towards bi-polarity,[76] a political structure where normative power is really shared between Parliament and the Courts.[77]

This trend was not to last. From 1985 to 1990, following institutional and social evolution and the coming into force of the right to equality, other values emerge in the discourse of the Court, carried by political trends quite different from the previous liberalism, especially in its emphasis on a certain kind of social solidarity, universal at first, but soon narrowing to the selective protection of groups which have, in the past, been subject to historical discrimination: for want of a better expression, we refer to it under the label of "communitarian pluralism".

It is an ideology favouring the social programs engineered since the war through the federal spending power, and to which elements of multiculturalism had been amalgamated in the 1970s. It acts more or less as a substitute for Canadian identity or, at least, accounts for its distinctive character in comparison with American society.[78] It would be adopted by the Dickson Court, or some of its majorities, at the end of its classical liberal phase. This second interpretation would be more preoccupied with limitations of individual liberties than those of State intervention, in the name of protecting disadvantaged groups.

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[75] *Schachter* v. *Canada*, [1992] 2 S.C.R. 679.

[76] K. Benyekhlef, *supra* note 15.

[77] For a theoretical approach to this phenomenon, see: A. Lajoie, "Schachter, ou la retenue judiciaire comme antithèse de la neutralité", dans *Droits de la personne: l'émergence de droits nouveaux. Aspects canadiens et européens*, Actes des Journées strasbourgeoises de l'Institut canadien d'études juridiques supérieures 1992 (Editions Yvon Blais, 1993) 525.

[78] Guy Rocher sees it taking form in the Trudeau government's reaction to the Laurendeau-Dunton Commission Report: Guy Rocher, "Les ambiguités d'un Canada bilingue et multiculturel", (1972) 1:3 Revue de l'Association canadienne d'éducation de langue française at 21-23. Its contemporary manifestations through the *Charter* culture are central to A. Cairns's recent work. See, *inter alia*, A.C. Cairns, *Charter v. Federalism: the Dilemmas of Constitutional Reform* (Montréal et Kingston: McGill-Queen's U. Press, 1992).

The main values supporting it are tolerance,[79] multiculturalism,[80] equity,[81] and protection of the disadvantaged.[82] Freedom of expression[83] (including freedom of the press[84] and of commercial expression[85]) and of religion,[86] which had been affirmed with strength in the first interpretation, are now to be restrained in the name of tolerance,[87] or in order to protect some disadvantaged groups whose liberties —not to be confused with the collective freedom of the general community— will now prevail: children,[88] unionized workers,[89] employees of small enterprises,[90] minorities,[91] foreigners[92] and victims of sexual aggression.[93]

Such a "free and democratic society" is not so much polarized between the State and the individual as it is preoccupied with groups and their interrelationships, which it tries to organize, through multiculturalism and protection of the underprivileged, into a still bi-polar —although better described as increasingly pluralist— democracy. In it, individual freedoms are more circumscribed and judicial intervention less frequent and not so intrusive. In fact, during this period, which spans from 1986 to 1990, if the Court made more room for the State, it was for the welfare State. But from then on it was a repressive State that the Court would favour, while narrowing its interpretation of a "free and democratic society" still further and, with it, the scope of constitutional control by the judiciary.

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[79] *R.* v. *Keegstra*, [1990] 3 S.C.R. 697.

[80] *Ibid.* See also *Andrews* v. *Law Society of British Columbia*, *supra* note 70; *R.* v. *Edwards Books*, [1986] 2 S.C.R. 713.

[81] *Andrews* v. *Law Society of British Columbia*, *supra* note 70.

[82] *R.* v. *Edwards Books*, *supra* note 80; *Irwin Toy* v. *Quebec (A.G.)*, *supra* note 63; *Slaight Communications Inc.* v. *Davidson*, [1989] 1 S.C.R. 1038; *Canadian Newspapers Co.* v. *Canada (A.G.)*, [1988] 2 S.C.R. 122.

[83] *Irwin Toy* v. *Quebec (A.G.)*, *supra* note 63; *Slaight Communications Inc.* v. *Davidson*, *supra* note 82; *R.* v. *Keegstra*, *supra*, note 79; *Canadian Newspapers Co.* v. *Canada (A.G.)*, *supra* note 82.

[84] *Canadian Newspaper Co.* v. *Canada (A.G.)*, *supra* note 82.

[85] *Irwin Toy* v. *Québec (A.G.)*, *supra* note 64.

[86] *R.* v. *Edwards Books*, *supra* note 80.

[87] *R.* v. *Keegstra*, *supra* note 79.

[88] *R.* v. *Edwards Books*, *supra* note 80.

[89] *Slaight Communications Inc.* v. *Davidson*, *supra* note 82.

[90] *R.* v. *Edwards Books*, *supra* note 80.

[91] *R.* v. *Keegstra*, *supra* note 79.

[92] *Andrews* v. *Law Society of British Columbia*, *supra* note 70.

[93] *Canadian Newspaper Co.* v. *Canada (A.G.)*, *supra* note 82.

The third, neo-liberal interpretation of the Court consequently features a threatened society, diminished liberties and a democracy almost monopolar again. The new "values" invoked to justify it are the scarcity of resources; pure and simple respect for the legislator and the government and, most prominently, the protection of society against dangers of all sorts, especially regarding the integrity, health, and security of the person, but also the security of institutions. Particularly important in view of the comparison we are pursuing here, protection against crimes such as murder,[94] and infractions implying violence,[95] or incurring strong social reprobation, such as drunk driving or prostitution,[96] will inspire the Court with a growing respect for almost any restriction the legislator is ready to impose[97] whether on freedom of expression,[98] or of religion,[99] or on equality[100] or yet on natural justice or procedural rights.[101]

The about-turn, between the first and the third interpretation of "free and democratic society", is so enormous that in reading the criminal cases of this last period, one might think they have not been decided by the same Court. In fact, the Court will no longer interfere with legislative or administrative discretion when

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[94]*R.* v. *Lee*, [1989] 2 S.C.R. 1384; *R.* v. *Chaulk*, [1990] 3 S.C.R. 1303; *R.* v. *Ratti*, [1991] 1 S.C.R. 68.

[95]*R.* v. *Swain*, [1991] 1 S.C.R. 933.

[96]*R.* v. *Whyte*, [1988] 2 S.C.R. 3; *Reference re Criminal Code* (Man.), [1990] 1 S.C.R. 1123.

[97]This tendency is even more apparent if one takes into account decisions where judicial restraint took the easier way of refusing to see rights infringement in the facts of several criminal cases, without even having to resort to apply section 1 and define what kind of "free and democratic society" it has in mind in those instances of crimes implying violence: murder *R.* v. *Turpin*, [1989] 1 S.C.R. 1296; *Argentina* v. *Mellino*, [1987] 1 S.C.R. 536; *United States* v. *Allard*, [1987] 1 S.C.R. 564; *R.* v. *Potvin*, [1989] 1 S.C.R. 525; *R.* v. *Baig*, [1987] 2 S.C.R. 538; *R.* v. *Conway*, [1989] 1 S.C.R.1659; rape *R.* v. *Stevens*, [1988] 1 S.C.R. 1153; kidnapping *Canada* v. *Schmidt*, [1987] 1 S.C.R. 500; robbery *R.* v. *Sheldon (S.)*, [1990] 2 S.C.R. 254; *Krug* v. *The Queen*, [1985] 2 S.C.R. 255; *R.* v. *Smith*, [1989] 2 S.C.R. 368; assault *R.* v. *Beare*, [1988] 2 S.C.R. 387; *R.* v. *Debot*, [1989] 2 S.C.R. 1140; *R.* v. *Bernard*, [1988] 2 S.C.R. 833; *R.* v. *Holmes*, [1988] 1 S.C.R. 914 or incurring strong reprobation from the public because they relate to alcohol *R.* v. *Penno*, [1990] 2 S.C.R. 865; *R.* v. *Tessier*, [1991] 3 S.C.R. 687; *Thompson Newspapers Ltd.* v. *Canada*, [1990] 1 S.C.R. 425; *R.* v. *Kalanj*, [1989] 1 S.C.R. 1594; *R.* v. *Valente*, [1985] 2 S.C.R. 673, or drugs *R.* v. *Simmons*, [1989] 2 S.C.R. 495; *R.* v. *Duarte*, [1990] 1 S.C.R. 30; *R.* v. *Jacoy*, [1988] 2 S.C.R. 548; *Strachan*, v. *R.*, [1988] 2 S.C.R. 980; *Mills* v. *The Queen*, [1986] 1 S.C.R. 863; *R.* v. *Wigglesworth*, [1987] 2 S.C.R. 546; *R.* v. *Pearson*, [1992] 3 S.C.R. 665; *R.* v. *Morales*, [1992] 3 S.C.R. 711 or bring justice in disrepute *Thompson Newspapers Ltd* v. *Canada*, [1990] 1 S.C.R. 425; *Pearlman* v. *Manitoba Law Society*, [1991] 2 S.C.R. 869; *Cloutier* v. *Langlois*, [1990] 1 S.C.R. 158; *R.* v. *Lee*, [1989] 2 S.C.R. 1384.

[98]*Reference re: Criminal Code (Man.)*, *supra* note 96.

[99]*R* v. *Jones* (1974), 2 S.C.R. 284.

[100]*McKinney* v. *University of Guelph*, [1990] 3 S.C.R. 229; *Tetreault-Gadoury* v. *Canada (E.I.C.)*, [1991] 2 S.C.R. 23 and *Schachter*, *supra* note 75.

[101]*R.* v. *Lee*, *supra* note 94; *R.* v. *Chaulk*, *supra* note 94; *R.* v. *Ratti*, *supra* note 94; *R.* v. *Swain*, *supra* note 95.

faced with a serious crime: society feels so threatened that the seriousness of the offence has replaced the degree of liability of the accused as the criterion of judicial intervention.

In this society, where individuals have regained their previous importance at the expense of disadvantaged groups, where resources are diminishing, and dangers increasing, the judiciary will apparently use any pretext not to intervene. This non-intervention comes close to reversing the bi-polar structure of the State —characteristic of the two previous interpretations and no doubt intended by the *Charter*— almost coming back full circle to parliamentary supremacy.

Many in the legal world —and in the real one as well— see the *Charter* as the turning point for both democracy and the power of the judiciary in Canada. In order to hold such a reading of constitutional law, one probably has to be the kind of positivist for whom only written laws and constitutions count as valid: then, neither the Implied Bill of Rights nor the affirmation of prevailing rights by the courts will be part of the pre-*Charter* Constitution, and the change brought about in the Constitutional text in 1982 will make all the difference.

But other avenues are available, particularly for phenomenologists —who will construe as law the "tacit presuppositions that shape human interaction"[102]— or even simply legal realists, for whom "the Constitution is what the judges say it is",[103] not to mention constructivists who see law as the historically shaped product of a socio-economic context.[104] Indeed, from any of those theoretical perspectives and probably numerous other ones as well, it is possible to admit that the Implied Bill of Rights was in force when the *Charter* was introduced in the Constitution, not only because Beetz himself, who had momentarily killed it, participated in its resurrection later,[105] but also because it was kept alive in the meantime by several other judges including Dickson, Estey, L'Heureux-Dubé and Lamer,[106] and moreover because it was even extended to freedom of movement by Dickson, L'Heureux-Dubé, Lamer, La Forest, McIntyre, and LeDain JJ.[107]

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[102]R. MacDonald's own translation of "les présupposés tacites qui gouvernent l'agir des communautés", a phrase he uses to define law in: R.A. MacDonald, "Pour la reconnaissance d'une normativité juridique implicite et inférentielle", 18:1 Sociologie et sociétés 47.

[103]G. Kannar, "Representative Egos" (1982) 16 Harv. Civil Rights – Civil Lib. L. Rev. 875. The statement made by Charles Evans Hughes in a Speech at Elmira on 3 May 1907 according to J. Bartlett, *Familiar Quotations* (Boston: Little Brown, 1980) 700.

[104]P. Watzlawick, editor and author of the preface, *L'invention de la réalité ou comment savons-nous ce que nous croyons savoir?* (Paris: Seuil, 1981) at 9-11.

[105]See *supra* note 41.

[106]See *supra* notes 36 to 40.

[107]See *supra* notes 42 to 48.

From this second perspective, there is no real turning point in 1982, but rather a development, an accentuation of a trend that was already present before the *Charter*: other rights and freedoms are invoked and the power of the Courts over the State —both legislator and government— is more penetrating, yet not different in nature from what it was under the regime of the Implied Bill of Rights. The real breaking point comes at the beginning of the 1990s when, after a slow regression of judicial intervention, the Court turns the other way towards unconditional reverence for the legislator.

These two contrasting views of the democratic and judicial features of our Constitution point to different factors bearing on the evolution of law. The first stresses the importance of the change in the constitutional norms and puts the *Constitution Act, 1982* at the top of the list of the causes of the changes it observes. The second, perhaps because it includes other changes in its field of observation, relates them to the political and economic conjuncture. Noticing an uninterrupted progression of the power of the judiciary and an accentuation of the bi-polar character of our democracy between the beginning of WWII and the mid-1980s, and the contrasting abrupt withdrawal from both at the beginning of the 1990s, it links these observations to the alternating cycle of "fat years/lean years" that we are witnessing in the second half of this century, and consequently to the conjuncture at any given time.

For lack of research on the period in which they were evolving, it is not entirely possible to conjecture about the conjuncture in which Duff, Rand and some of their colleagues produced the Implied Bill of Rights. However, the last mentioned perspective would tend to confirm our conclusions from an earlier study[108] modeled on Perelmanian hypothesis,[109] in which we examined the factors affecting the evolution in the Court's pre and post-*Charter* interpretations of the expression "free and democratic society". The ordering that our data would seem to suggest among the factors identified would then be the following: first, in its three post-*Charter* interpretations, the Court has largely borrowed from the pre-*Charter* images of its members; second, its choice among these various and contradictory images has been oriented by the factual and normative context, in that order, the latter sometimes being difficult to distinguish from the expectations of the general public. The Court's perception of this double context has evolved according to the expectations of the legal community but even more according to

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[108]See *supra* note 6.

[109]C. Perelman & P. Foriers, *La motivation des décisions de justice* (Bruxelles: Etablissements Emile Bruylant, 1978). For a Canadian perspective see M. Gold, "The Mask of Objectivity: Politics and Rhetoric in the Supreme Court of Canada" (1985) 7 Supreme Court L.R. 455; "The Rhetoric of Constitutional Argumentation" (1985) 35 U.T.L.J. 154; "The Rhetoric of Rights: the Supreme Court and the Charter", (1987) 25 Osgoode Hall L.J. 375.

the conjuncture, which certainly accounts for the strongest influence, and bears most heavily on the differences between its three successive interpretations.

However tempting it would be to end on this reassuring note, as our most cherished hypotheses are confirmed yet another time, I want to suggest another option. This is based on the finding of a clear case of dialogism[110] throughout the period we have been looking at, and to which Rand himself has more than hinted.[111]

I am referring to the fact that these two perspectives are reflected in two obvious trends in the decisions of the courts, based both on divergencies of values and of interpretative approach. I will try to describe them, even at the risk of caricature. The first values freedoms against the State, and puts individual rights above power structure: it is that of Duff, Rand, the majorities in the Implied Bill of Rights cases, and the majority of the Dickson Court; it proceeds from a common law tradition, where judge-made law is said to spring from community behaviour. The second values collective rights, the protection of which is vested in government, and puts power structures above individual rights: Beetz has articulated it in his writings, both judicial and academic, and it represents the trend of the Québec Court of Appeal and of the Québec minority judges on some of the Supreme Court cases related to the Implied Bill of Rights. It stems from a Romano-germanic legal tradition which rests on written law, enacted by legislatures and applied by judges.

Since this dialogism is observed in the Supreme Court itself, now a Court of last resort, it will not be resolved by further appeal. In my opinion, it is there to stay, reflecting the tensions in our society and it will be influenced differently, at different times, by the evolution of the "rapport de forces" in that society. Neither democracy, nor the judicial power —and not even the polity— have undergone their last transformation, nor —hopefully— will they ever assume a petrified shape.

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[110]A mode of determination of law in which a number of integrating principles of interpretation/application compete. See G. Timsit, "Sur l'engendrement du droit" (1988) R.D.P. 39 and *Les noms de la loi* (Paris: P.U.F., 1991).

[111]I.C. Rand, *supra* note 22.