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PROCEDURAL DUE PROCESS IN CANADIAN CONSTITUTIONAL LAW: NATURAL JUSTICE AND FUNDAMENTAL JUSTICE

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*Dean, Faculty of Law, McGill University. This is an abbreviated version of a paper read at the *Conference on Procedural Due Process: Liberty and Justice*, Gainesville, Florida, on February 13, 1987. Many people have helped me sharpen the argument of this article. In particular I should like to thank Professor David Mullan of the Faculty of Law of Queen's University, Kingston, and Professor Brayton Polka of the Department of History of York University, Toronto, as well as my own colleagues Professors Daniel Jutras and Stephen Toope, each of whom reviewed the entire manuscript. I am also indebted to the participants at a Faculty of Law Workshop at the University of Southern California, to whom an early version of sections two and five was read in October, 1986. Finally, I benefitted from the insights of Professors Jennifer Sharpe and Jerome Bickenbach, who publicly commented on the paper as delivered and privately offered several suggestions for its improvement. Research for this essay was supported in part by a grant from the Meredith Research Fund of the Faculty of Law, McGill University.

I. INTRODUCTION

The adoption in 1982 of the Canadian Charter of Rights and Freedoms[1] (the "Charter") was a singular legal event. For the first time, a constitutional democracy in the common law tradition enacted a written due process guarantee without at the same time undergoing a political revolution. In this article my objective is to describe and assess that event in a manner that is meaningful to an American audience.[2] In doing so I also hope to suggest how the Canadian pro-

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1. Constitution Act, 1982, pt. I, §§ 1-34, Canada Act, 1982, ch. 11, sched. B (U.K.).

2. The doctrinal literature on the CANADIAN CHARTER OF RIGHTS AND FREEDOMS in general is voluminous. The narrow theme of this paper alone (the relationship between the common law natural justice standard and the fundamental justice standard elaborated in section 7 of the Charter) involves dozens of sources. The more helpful are HOGG, CONSTITUTIONAL LAW OF CANADA 34 (2d ed. 1985); Bender, *Commentary*, 13 MAN. L.J. 489 (1983); Christian, *Section 7 of the Charter of Rights and Freedoms: Constraints on State Action*, 22 ALTA. L. REV. 222 (1984); Cumming, *Fundamental Justice in the Charter*, 11 QUEEN'S L.J. 134 (1986); Duplé, *L'article 7 de la Charte Canadienne des droits et libertés et les principes de justice fondamentale*, 25 LES CAHIERS DE DROIT [C. DE D.] 99 (1984); Garant, *Fundamental Freedoms and Natural Justice*, in CANADIAN CHARTER OF RIGHTS AND FREEDOMS: COMMENTARY 257 (W. Tarnopolsky & G. Beaudoin eds. 1982) [hereinafter *Freedoms*]; Garant, *L'article 7 de la Charte — toujours énigmatique après 18 mois de jurisprudence*, 13 MAN. L.J. 477 (1983); Mackay, *Fairness After the Charter*, 10 QUEEN'S L.J. 263 (1985); Mullan, *Judicial Deference to Administrative Decision-Making in the Age of the Charter*, 50 SASK. L. REV. 203 (1985-86) [hereinafter *Judicial Deference*]; Mullan, *Unfairness in Administrative Processes: The Impact of* Nicholson *and the Charter*, in PITBLADO LECTURES 78 (1983); Tremblay, *Section 7 of the Charter: Substantive Due Process*, 18 U.B.C.L. REV. 201 (1984); Whyte, *Fundamental Justice: The Scope and Application of Section 7 of the Charter*, 13 MAN. L.J. 455 (1983).

cedural due process experience can contribute to a deeper understanding of both the concept of due process and the theory of judicial review of legislation in contemporary liberal democracies.

This article is divided into four sections. The first section reviews salient features of the Canadian constitutional tradition, for I believe that differences between Canadian and American political cultures account in large measure for differences in their respective legal cultures. The second section examines the origins and growth of "natural justice" as an Anglo-Canadian common law standard of procedural due process. The third section explores the meaning of the "fundamental justice" standard set out in section 7 of the Charter. The fourth section considers the interaction of the natural justice and fundamental justice standards in order to evaluate, first, whether the Charter can be understood simply as an analogue of the first ten amendments to the United States Constitution; and, second, whether it has actually modified Canadian conceptions of procedural due process. The conclusion sketches the rudiments of a unique model of constitutional procedural due process review that is emergent in Canada today.

In any article such as this there is a considerable risk of misunderstanding. Cross-cultural translation is a particular concern. In law, not only specific terms, but also more general concepts and even entire epistemological units are system contingent.[3] Moreover, because this article is both descriptive and normative many nuances in the argument must be left either unstated or underdeveloped. Finally, because due process is often a surrogate deployed for lack of adequate legal architecture elsewhere, it is obvious that many Canadian uses (and non-uses) of due process norms are comprehensible only against the background of institutions, practices, and understandings peculiar to Canada. Nevertheless, I trust that the story I am about to relate may serve in some small way to illumine the tacit presumptions of contemporary American procedural due process theory.

I have counted, in addition, some eighteen other monograph or periodical sources dealing in some detail with one or another aspect of § 7. In my view the best overall treatment of the history, scope and interpretation of the Charter is that by D. GIBSON, THE LAW OF THE CHARTER: GENERAL PRINCIPLES (1986).

3. I am especially sensitive to the methodological issues of legal transplantation and comparative law raised in the recent debates between the late Otto Kahn-Freund and Alan Watson. For the last round, see Kahn-Freund, *Common Law and Civil Law — Imaginary and Real Obstacles to Assimilation* in NEW PERSPECTIVES FOR A COMMON LAW OF EUROPE 63 (M. Cappelletti ed. 1978) and A. WATSON, THE MAKING OF THE CIVIL LAW chs. 3, 5 & 12 (1981). Of course, the coexistence of both civil law and common law traditions in Canada keeps the perils of comparative law constantly in view.

II. Canadian Political and Legal Culture

Social historians and legal theorists are fond of noting that Canadian political culture is not cast in the classical liberal-democratic mould. As a result, it has not generated a national legal order that meets — or even aspires to — the minimum requirements of legal liberalism as defined in documents such as the United States Constitution. Rather, Canadian political culture comprises elements derived from divergent intellectual traditions, and Canadian legal culture has been British rather than American in overall orientation. Therefore, to set the stage properly for an assessment of various standards of procedural due process in Canada, it is helpful to recall salient features of this political and legal order.[4]

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4. I put aside, as beyond the scope of this article, those features of the Canadian political and legal order that result from the juxtaposition of French and English traditions in a federal state. For a brief theoretical exploration, see P. TRUDEAU, FEDERALISM AND THE FRENCH CANADIANS (1968), a book that remains the *locus classicus.*

Many of the issues canvassed in the following paragraphs were first given a coherent theoretical exposition in G. HOROWITZ, CANADIAN LABOUR IN POLITICS ch. 1 (1968); *see generally* G. GRANT, ENGLISH SPEAKING JUSTICE (1974); G. GRANT, TECHNOLOGY AND EMPIRE (1969); Macdonald, *Understanding Regulation by Regulations,* in REGULATIONS, CROWN CORPORATIONS AND ADMINISTRATIVE TRIBUNALS 111 (I. Bernier & A. Lajoie eds. 1985); Monahan, *At Doctrine's Twilight: The Structure of Canadian Federalism,* 34 U. TORONTO L.J. 47 (1985).

Horowitz's explicit appropriation of Louis Hartz's fragment theory as an explanation of differences between United States and Canadian political culture has not gone unchallenged. *See, e.g.,* Armstrong & Nelles, *Contrasting Development of the Hydro-Electric Industry in the Montreal and Toronto Regions 1900-1930,* 18 J. CAN. STUD. 5 (1983); Dewar, *The Origins of Public Broadcasting in Canada in Comparative Perspective,* 8 CAN. J. COMM. 26 (1982); Dewar, *Private Utilities and Municipal Ownership in Ontario 1891-1900,* 12 URB. HIST. REV. 29 (1983); Dewar, *Toryism and Public Ownership in Canada: A Comment,* 63 CAN. HIST. REV. 404 (1983); Kettler, *The Question of Legal Conservatism in Canada: A Review of Essays in the History of Canadian Law,* 18 J. CAN. STUD. 136 (1983); Nelles, *Public Ownership of Electrical Utilities in Manitoba and Ontario 1906-1930,* 57 CAN. HIST. REV. 461 (1976).

Nevertheless, recent work in Canadian legal and social history confirms, regardless of the explanation, the essential features of Horowitz's description of Canadian political culture. *See* Baker, *Legal Education in Upper Canada 1785-1889: The Law Society as Educator,* in 2 ESSAYS IN THE HISTORY OF CANADIAN LAW ch. 2 (D. Flaherty ed. 1983); Baker, *The Reconstitution of Upper Canadian Legal Thought in the Late-Victorian Empire,* in 3 LAW AND HIST. REV. 219 (1985); Gidney & Lawr, *Bureaucracy vs. Community?: The Origins of Bureaucratic Procedure in the Upper Canadian School System,* in J. SOC. HIST. 438 (1980); Vipond, *Constitutional Politics and the Legacy of the Provincial Rights Movement in Canada,* 18 CAN. J. ECON. & POL. SCI. 267 (1985).

A. *Political Ideology*

A first noteworthy characteristic of Canadian political culture is the diversity of ideological tendencies that are accepted as legitimate. By contrast with the situation prevailing in the United States, strong non-liberal and non-egalitarian threads remain woven into Canada's political fabric.[5] Over the past two hundred years, toryism, whiggism, liberalism, and socialism have been Canada's most influential political traditions.[6]

In their archetypal form, Canada's four political traditons may be differentiated on two intersecting axes. On an axis reflecting conceptions of state and individual they may be divided into non-democratic ideologies — toryism and whiggism, and democratic ideologies — liberalism and socialism. In this usage, the expression "democratic" entails a commitment to the political equality of citizens as citizens. Persons espousing the democratic ideal believe that basic political rights can be neither expanded nor abridged for reasons of wealth, religion, class, sex, race, and so forth. On a second axis reflecting conceptions of the internal dynamics of society and the role of the state, one may contrast the atomistic and individualistic views of whigs

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5. Seymour Martin Lipset has written a series of detailed analyses of differences between Canadian and United States political culture. *See* S. LIPSET, *North American Labor Movements: A Comparative Perspective,* in UNIONS IN TRANSITION 421 (1986); Lipset, *Canada and the United States: The Cultural Dimension,* in CANADA AND THE UNITED STATES 109, 134-44 (C. Doran & J. Sigler eds. 1985); Lipset, *Why No Socialism in the United States?,* in 1 SOURCES OF CONTEMPORARY RADICALISM 31-149, 346-63 (S. Bialer & S. Sluzar eds. 1977). A slightly more impressionistic picture is painted in E. FRIEDENBERG, DEFERENCE TO AUTHORITY (1980).

The recent rediscovery of republican virtue by United States constitutional scholars, *see, e.g.,* Michelman, *Traces of Self-Government,* 100 HARV. L. REV. 4 (1986), is viewed with some amusement in Canada. Many of the concerns raised for reconsideration have never been absent from Canadian political discourse. *See also Symposium: Law and Community,* 84 MICH. L. REV. 1373 (1986) (a further contribution to the resurrection of this issue in American law). Nevertheless, it is important to signal that the term "community" in today's republican political discourse is not the communitarianism of organic political ideologies such as toryism or socialism. *See* HOROWITZ, *supra* note 4.

6. Although traces of other ideologies, such as libertarianism, anarchism, Marxism, social corporatism, and fascism may be found, as yet these credos have managed neither to attract widespread adherence nor to have made much contribution to ongoing political and legal discourse. For an analysis of the impact of Marxism on the Canadian labour movement, see I. ABELLA, NATIONALISM, COMMUNISM AND CANADIAN LABOUR: THE CIO, THE COMMUNIST PARTY AND THE CANADIAN CONGRESS OF LABOUR 1935-1956 (1973), and for a parallel treatment of corporatist, right-wing movements, see M. STEIN, THE DYNAMICS OF RIGHT-WING PROTEST: A POLITICAL ANALYSIS OF SOCIAL CREDIT IN QUEBEC (1973).

and liberals with organic and communitarian views of tories and socialists.

In eighteenth century liberal theory, equality of opportunity was the fundamental assumption. Even in its late nineteenth century United States version — democratic liberalism — the state was conceded no function other than to establish a legal guarantee of equal opportunity to individuals, recognizing that equal opportunity might not always be "naturally" present. Conversely, tory and socialist views are founded on the recognition of class or inequality. While tories see active government as a means of reconciling citizens to their proper station in life, socialists argue the contrary. Legislative programmes aimed at equality of condition are one of the primary goals of active government.

Until recently, toryism (in Quebec, ultramontainism) has had an impact on Canadian political culture second only to traditional democratic liberalism. For tories, values such as ascriptivism and elitism predominate over values like achievement and egalitarianism.[7] The tory commitment to order as a pre-condition of freedom has meant the expression "Law and Order" has few of the repressive connotations so familiar to liberals. The conception of the state as a fundamental social institution, similar to the church, the family, the local community, the trade union, and profession, supports a belief in its capacities and its duty to assure the basic needs of citizens. Hence, in Canada there are many fewer of what de Tocqueville characterizes as mediating and voluntary private institutions, and many more state sponsored or para-public mediating and non-voluntary institutions, including established religions.

The tory perspective is also reflected in the Canadian commitment to state education and semi-public philanthropy through the establishment of religion and the early creation of public workhouses, hospitals, and orphanages. Tories believe not only that enterprise should not be free, but to use the language of welfare economics, the cost of both economic and social development should be externalized to the state. Thus, Canadian conservatives advocate the use of public power to achieve national purposes and to order market forces in the name of the common good. In fact, they show great willingness to employ

7. The vocabulary and analysis here and in the next few paragraphs is adapted from T. PARSONS, R. BALES, & E. SHILS, WORKING PAPERS IN THE THEORY OF ACTION (1953). For its application to Canada, see W. CLEMENT, THE CANADIAN CORPORATE ELITE: AN ANALYSIS OF ECONOMIC POWER (1975); J. PORTER, THE VERTICAL MOSAIC: AN ANALYSIS OF SOCIAL CLASS AND POWER IN CANADA (1965).

public enterprise in the development and exploitation of transportation, utilities, energy, communications, and financial institutions.

Despite the dominance of democratic liberal and tory ideologies, an unmistakable strain of eighteenth-century whig liberalism persists in Canadian political culture. Some theorists argue that both toryism and whiggism are simply justifications for elite domination and exploitation, but at the rhetorical level whiggism is distinct in at least two ways.

A first notable attribute of whiggism is that it links material achievement to superiority in directing political and economic affairs. For example, whigs think that a government, once elected, should be free to pursue its policies relatively unhampered until the next election.[8] The same perspective is reflected in the concession of monopolies and protected market shares to economic entrepreneurs, be these land development corporations, transportation conglomerates, private immigration companies in the nineteenth century, or energy, telecommunications, mining, and forestry franchises in the twentieth century. Canada's selective high tariff policy, its Delawaresque corporate law, the creation of a Bank of Canada and restrictions on entry into banking further evidence the influence of whig liberalism.

A second notable attribute of whiggism is that it sustains an economically-based deferential posture towards public institutions and legal constraints. Governmental and para-governmental institutions are accepted as social structures that regulate human intercourse so as to compensate for the perceived anarchy of unregulated markets. Market-inefficient regulatory devices were consciously adopted either to encourage the development of indigenous enterprise, or to sustain uncompetitive existing businesses. Whigs typically want to play in the market, sounding the clarion call of free enterprise, but only when the market is already regulated in their favor.

Socialism is yet another major ideological tradition in Canada. As a non-liberal ideology, the socialist perspective is distinguished from toryism in the former's commitment to egalitarian distributive measures such as old-age pensions, unemployment insurance, and medicare. The socialist understands these schemes as establishing entitlements that the state should provide without imposing a means test. Unlike European socialists, who in effect argue for nationalization of capital, Canadian socialists argue only for redistribution of rents.

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8. This, of course, is an oft-neglected virtue of the Parliamentary as opposed to the congressional political system.

Several twentieth century legislative initiatives have a distinctly socialist tenor. These include government-administered automobile insurance, no-fault workers' compensation, a conciliation model of labour relations, mediational landlord-tenant schemes, and equity-dispensing small claims courts. Each is grounded in non-market economic beliefs and was designed to oust classical market notions, such as property as sovereignty, freedom of contract, and fault-based liability, along with their corresponding legal enforcement institutions, from a wide range of social interactions. In extending egalitarianism to the socio-economic as well as to the political domain, and in arguing for equality of condition in addition to mere equality of opportunity, Canadian socialists have come to accept that a just society cannot be achieved solely through the formal institutions and processes of corrective justice. Both the common law courts and their adversarial adjudicative procedures are viewed with scarcely concealed scepticism.

Many features of the Canadian constitutional tradition can be derived by a process of reverse mapping recalcitrant legal phenomena onto the nation's heterodox political ideology. Even the particular features of the Charter reflect these contrasting themes. But a second, more important point emerges from the process: a corollary of diversity is the absence of ideological hegemony. Canadians typically do not employ the expression "un-Canadian" to de-legitimize the political views or programmes of their opponents. Theorists in orthodox political cultures often fail to realize that in order for an idea or a perspective to be un-something, there must be an explicit or tacit dominant ideological position.[9] This absence of hegemony, reflected even in the absence of a "sacred" text such as a comprehensive written Constitution, means that a society's most fundamental questions tend to be perceived primarily as political (changing, substantive, infinite), not

9. Even sophisticated observers of Canadian and United States political culture can understate the extent of ideological heterodoxy in Canada. For example, Seymour Martin Lipset has written: "The dominant traditions in Canada are statist and communitarian, Tory and socialist, and hierarchically ecclesiastical, Catholic, and Anglican; the American Creed is anti-statist and individualistic, classically liberal or libertarian, and voluntary, egalitarian and congregational, Protestant sectarian." S. Lipset, Comments on Freedoms of Association and Industrial and Labor Policy under the Canadian Charter of Rights and Freedoms 25 (unpublished manuscript from Liberty Fund/Fraser Inst. Symposium, Toronto, Ont., Apr. 10-13, 1986). Lipset also observes: "[t]he United States . . . is the purist example of a non-European non-aristocratic society. It is distinguished from other western countries, including Canada, as a pure bourgeois, pure liberal, born-modern culture." *Id.* at 21. While I am prepared to take on faith Lipset's analysis of United States political culture, it seems to me that his evidence for claiming dominance of one ideological tradition in Canada is not persuasive.

legal (static, procedural, finite). Today, these fundamental questions prompt debate about the universality of social welfare programmes, the abolition of capital punishment, limits upon free enterprise and private property, the availability of abortions, and even the need for an entrenched constitutional bill of rights.[10] The urge to legalize basic policy choices characteristically flows from impoverished political debate and its accompanying false consensus. Because ideological diversity in Canada generates substantive political debate, one sees less recourse to the surrogate legal cram-down of substantive due process.

B. *Constitutional Traditions*

It is, of course, relatively easy to report distinctive features of Canadian political culture in the abstract, and to offer anecdotal evidence of how this culture may have influenced contemporary Canadian legal culture and institutions. But to do so without also examining Canada's constitutional antecedents betrays a naive determinism as between ideology and cultural artifact: legal culture is itself a semi-independent variable. For this reason it is also necessary to note those elements of the Canadian constitutional tradition that do not neatly fit the United States model of legal liberalism. Many of the surviving non-liberal elements of Canadian constitutional law may be traced directly to its English origins. Three britannic attivisms persist: first, the common law character of the Constitution; second, the survival of the concept of Parliamentary sovereignty; and third, the attenuated nature of the separation of powers theory, especially in relation to the role of the courts.[11]

To note that the Constitution arises at common law implies a congeries of ideas. Most important, it means that the fundamental ideological elements of the Canadian Constitution are unwritten. This remains no less true notwithstanding that these unwritten rules flesh out a legislative skeleton enacted by the Imperial Parliament of the United

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10. For a summary of the arguments on both sides of this last issue, see D. SCHMEISER, CIVIL LIBERTIES IN CANADA (1964); Macdonald, *Postscript and Prelude: The Jurisprudence of the Charter — Eight Theses* (1982), 4 SUP. CT. L. REV. 321.

11. For the two best sources on general principles of Canadian constitutional law, see P. HOGG, *supra* note 2, at ch. 1-14; Scott, *The Constitution, Government and Legal System of Canada*, in DOING BUSINESS IN CANADA ch. 2 (H. Stikeman ed. 1985). The former, comprising the introductory chapters in a textbook for first year law students, presents legal orthodoxy primarily from a liberal perspective. The latter, a brief chapter in a compendium directed to American business lawyers, betrays a distinctly non-liberal point of view in both vocabulary and style.

Kingdom. For example, the distribution of legislative powers between federal and provincial governments issues from the Imperial Parliament's Constitution Act, 1867. The Canada Act 1982, also an Imperial statute, incorporates a written bill of rights into the Constitution, along with a non-inclusive definition of that constitution that refers only to legislative instruments.

Written rules and statutes do not preempt other sources of Canadian constitutional law. The Royal Prerogative, constitutional conventions, and especially the unwritten common law, as common law courts identify and interpret it, remain crucial sources. Many topics canvassed by articles I through III of the United States Constitution, and almost all the provisions set out in the first ten amendments thereto, have an equivalent in common law rules of the Canadian Constitution.[12] Also traceable to the notion of an unwritten constitution is the continuing public law significance of common law methodology. The absence of a single constitutive text encourages, if not compels, lawyers and judges constantly to rearticulate these fundamental common law rules. To read a written constitution is an exercise in interpretation; to reconstitute an unwritten constitution is an exercise in hermeneutics.[13]

A second feature of Canadian constitutionalism is its fidelity to the concept of Parliamentary sovereignty. Even though both the very notion of federalism and the civil liberties prescriptions of the Charter restrict the absolute scope of Parliamentary sovereignty as announced by A.V. Dicey, and even though section 52 of the Constitution Act, 1982 now codifies the principle of judicial review of legislation, much of the formal doctrine of Parliamentary sovereignty survives. For example, federal inter-delegation to administrative agencies can trump distribution of powers curial supervision. Furthermore, by permitting legislatures to preclude the operation of much of the Charter by simple majority vote, and by explicitly conditioning judicial review to cases where limitations on Charter rights are not "demonstrably justified

12. This is not to claim that similar unwritten rules and conventions do not permeate the United States Constitution. Rather, the point is that in Canada these have legitimacy as common law rules of the constitution, whereas in the United States it is typically necessary to piggyback these on the written text of the 1783 document. *See, e.g.*, Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1974-75) (setting forth ideologies underlying American view of constitutionalism and interpretive debates Constitution has spawned). A particularly illuminating discussion of recent interpretive trends may be found in Golding, *Sacred Texts and Authority in Constitutional Interpretation*, in AUTHORITY REVISITED, NOMOS XXIX 267 (J. Pennock & J. Chapman eds. 1987).

13. For a particularly apt characterization of this property of unwritten constitutions, see Fuller, *American Legal Philosophy at Mid-Century*, 6 J. LEGAL. EDUC. 457, 464 (1954).

in a free and democratic society," the constitution assumes no prepolitical zone of natural rights that is immune from legislative initiative. Parliamentary sovereignty also implies that the wisdom or policy of legislation is not *per se* reviewable by the judiciary.

In counterpoint, however, Parliamentary sovereignty itself is a common law constitutional doctrine. Non-federalist and non-Charter review on common law principles survives intact. Finally, as in the United States, the actual scope of Parliamentary sovereignty is contingent upon prevailing conceptions of judicial activism and deference. Not surprisingly, therefore, the relationship between the principle of Parliamentary sovereignty and other common law principles of the constitution implies a complex and continual process of political choice.[14]

A third element of Canada's constitutional tradition is the attenuated separation of powers theory that underlies it. Although Montesquieu's initial derivation was from English practice, the theory never held in the United Kingdom exactly as he reported. Today commentators focus on the conjunction of executive and legislative branches inherent in a Parliamentary system as evidence that Montesquieu's thesis is overstated, but in fact the ambivalent position of the senior judiciary is most revealing.

The Judicature provisions of the Constitution Act, 1867 take up the principles of the Act of Settlement of 1701, and provide for tenure during good behaviour, removal only upon joint address of the Senate and House of Commons, and Parliamentary control over salaries, all thought to constitute the essence of judicial independence.[15] In practice, however, judges are often neither conceived of nor treated as

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14. In Canada the nature of this relationship has most frequently been revealed in litigation over constitutional conventions. *See Re* Upper House, [1980] 1 S.C.R. 54 (federal Parliament not empowered unilaterally to modify composition of Senate); *Re* Resolution to Amend the Constitution, [1981] 1 S.C.R. 753 (federal Parliament not competent to repatriate Constitution Act, 1867 without substantial provincial consent); *Re* Quebec Veto, [1982] 2 S.C.R. 793 (concurrence of legislature of Quebec not needed to repatriate Constitution Act, 1867). The extent of judicial deference to the will of Parliament has also been argued in litigation touching the meaning of the Rule of Law and the related notion of an implied Bill of Rights. *See, e.g., Re* Alberta Statutes, 1938 S.C.R. 100; Saumur v. City of Quebec, [1953] 2 S.C.R. 299; Roncarelli v. Duplessis, 1959 S.C.R. 121; *Re* Anti-Inflation Act, [1976] 2 S.C.R. 373; Manitoba Language Rights Reference, 59 N.R. 321 (S.C.C. 1985).

15. The best examination of this issue in Canada remains Lederman, *The Independence of the Judiciary*, 34 CAN. BAR REV. 769, 1139 (1956). For a more recent discussion, see Eliot, *Reference Re Establishment of Unified Criminal Court of New Brunswick*, 16 U.B.C.L. REV. 313 (1982).

constitutionally independent actors. For certain purposes they may even be seen as an arm of government. They are called on to decide reference cases submitted by the Cabinet; frequently they are conscripted to undertake Royal Commissions of Inquiry not unlike the investigation into the Kennedy assassination chaired by Chief Justice Warren.

The Chief Justice of Canada is the Deputy Governor-General, and upon nomination, any Justice of the Supreme Court may act in his stead. The judicial appointing power is vested exclusively in the executive, and mobility between cabinet and judiciary has not been infrequent. Constitutionally permissible encroachments on the substance of Superior Court authority continue, despite a rash of cases seemingly guaranteeing to Superior Courts a core of substantive jurisdiction that cannot be assigned to administrative tribunals or executive delegates. One might conclude that the Judicature provisions of the Constitution Act, 1867 were not intended to, and do not, guarantee the independence of judges and the inviolability of their substantive jurisdiction as this notion is commonly conceived in liberal political rhetoric. Rather, they guarantee the independence of the Judiciary by preserving the jurisdiction of common law courts to elaborate the fundamental principles of the constitution.[16]

C. *Legal Ideology*

Despite the survival of these basic constitutional doctrines, it remains difficult to determine how much of Canada's legal culture is directly derivable from English experience, and how much either results from the transplantation of American practice into British constitutional soil, or is truly indigenous. This is especially evident in areas where commentators puzzle over the extent to which Dicey's conception of the Rule of Law actually permeates constitutional law and practice.

To recall, Dicey claimed that the Rule of Law comprised a trilogy of related principles.[17] First, Dicey assumed that law is essentially a static common law, and legal change could occur only by means of

16. I have developed this theme in greater detail in Macdonald, *The Proposed Section 96B: An Ill-Conceived Reform Destined to Failure*, 26 C. DE D. 251 (1985). It should be noted, however, that few commentators share this perspective on the meaning of the expression "independence of the judiciary."

17. *See* A. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 39-86, 183-205, 406-16 (10th ed. 1959). These principles have been recast slightly so as to emphasize their impact on the discussion at hand.

formally individuated legislative rules woven into the common law by ordinary courts. Non-Parliamentary subordinate legislation and delegations of discretionary powers to public officials were to be avoided or strictly circumscribed. Second, Dicey held an absolutist and instrumentalist view of legislation. Provided that Parliament used sufficiently explicit terms, the statutory form could be deployed to accomplish any goal, notwithstanding pre-existing common law rules to the contrary. Third, Dicey advocated a sharp distinction between law and politics. The objectivity of law could be maintained only if all questions of social policy were compressed into Parliamentary legislation applied by independent common law courts.

Modern commentators recognize the defects of the Diceyan vision and the late nineteenth century excesses it reflected. Yet the theoretical upshot of Dicey's three assumptions for the courts — an aspiration to a Weberian[18] "formally rational" conception of adjudication — remains firmly entrenched in Canadian legal culture. This aspiration is quite different from that revealed in the "substantively irrational" role overtly played by the United States Supreme Court. Canadian constitutional politics in the courts are predominantly consequentialist; United States constitutional politics in the courts are predominantly constitutive. The Canadian judiciary has always understood its role to be to preserve "peace, order, and good government"[19] rather than to guarantee "life, liberty, and the pursuit of happiness."

Although this synopsis of Canadian political and legal culture is insufficiently nuanced, it offers an overall perspective from which to view both the Canadian constitutional tradition and the artifacts it has generated. To evaluate properly the scope and impact of due process standards such as natural justice and fundamental justice, one must know the context within which such concepts are wielded. In particular, one must put aside assumptions that flow from United States political culture — notably, liberal views about the respective roles of government and the courts, the need to elaborate written due process guarantees to protect minorities from majorities, and the function of markets and private property in enhancing individual freedom. One must also distance oneself from assumptions that are grounded

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18. For an analysis of Max Weber's theory of legal rational authority, see *Max Weber on Law in Economy and Society* (M. Rheinstein & E. Shils trans. 1954), especially the introduction by Max Rheinstein at pages xlii-lii. *See generally* A. KRONMAN, MAX WEBER 72-95 (1983).

19. The phrase "peace, order and good government" appears in the Preamble to section 91 of the British North America Act, 1867, 30 & 31 Victoria, c.3. Section 91 sets out the legislative powers of the Parliament of Canada.

in United States legal culture — notably, the obliteration of the distinction between law and politics, with a concomitant politicizing of the judiciary and judicializing of political, processes; and the promotion of adversarial adjudication as an optimal model of social decision-making.

III. Natural Justice and Procedural Fairness at Common Law

Many commentators believe Canada went through a constitutional revolution on April 17, 1982, when Queen Elizabeth II proclaimed in force the Canada Act 1982, an enactment of the United Kingdom Parliament. This revolution was thought to consist of the following three elements. For the first time, the formal power to amend all aspects of the Canadian constitution was vested solely in Canadian institutions, and not, as previously, partially in the Parliament of the United Kingdom. Second, the right of judicial review of legislation and the supremacy of the Constitution, long a feature of Canadian constitutional practice, achieved explicit formulation. Third, civil liberties guarantees such as those reflected in the first ten amendments to the United States Constitution were enacted into a constitutional document, the Canadian Charter of Rights and Freedoms.

All three developments are important to determining the current content of standards of procedural due process in Canada, although for present purposes the third is clearly most significant. The key due process provision of the Charter is section 7, which provides that: "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*."[20]

Section 7 might strike the casual observer as indeed revolutionary, but when seen more broadly in the Canadian constitutional tradition, this parroting of the fifth amendment cannot aspire to such pretension. Even before the adoption of the Charter, Canadian constitutional law had been visited, under the 1960 Canadian Bill of Rights, with both a due process and a fundamental justice standard.[21] Moreover, Cana-

20. Constitution Act, 1982, pt. I, §§ 1-34, Canada Act, 1982, ch. 11, sched. B (U.K.) (emphasis added).

21. Section 1(a) of the 1960 Canadian Bill of Rights provided for the right to "life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law." Section 2(e) of the same Act guaranteed to litigants and accused "a fair hearing in accordance with the principles of fundamental justice." Nevertheless, the guarantees of the Canadian Bill of Rights did not generate any significant level of judicial activity on procedural due process questions. For a thorough discussion of §§ 1(a) & 2(e), see

dian public law already incorporated a highly sophisticated theory of procedural due process. This theory rested on a longstanding common law concept: natural justice.[22] Quite apart from these explicit statutory and common law due process norms, the Canadian Constitution has always contained a variety of implicit norms that find expression in diverse techniques of judicial implication.[23] Since the Charter neither repealed the Bill of Rights, nor abolished the natural justice and procedural fairness standards, nor otherwise restructured the fundamental principles of constitutional jurisprudence, any assessment of the overall framework of due process guarantees in Canadian public law must commence with a review of the pre-Charter position.

A. *Judicial Strategies to Sustain Due Process Values*

One may usefully begin discussion of common law judicial review for due process by recalling the theory of Parliamentary sovereignty. The interaction of the principle of Parliamentary sovereignty with other common law principles of the constitution is difficult to state precisely. Courts have often reiterated that the common law is logically prior to and formally constitutive of the doctrine of Parliamentary sovereignty.[24] However, most substantive common law constitutional doctrines, such as the subservience of the Royal Prerogative to the common law, the principle that executive action must be justified by law, and the abrogration of the Crown's dispensing power, constitute limits on the executive and not on Parliament.[25] Only rarely and in

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P. HOGG, *supra* note 2, at 645-46, 743-49; W. TARNOPOLSKY, THE CANADIAN BILL OF RIGHTS 259-74 (1975).

22. In the late 1970s, a "new natural justice" known as procedural fairness was recognized by the courts. For a detailed study of the emergence of procedural fairness, see Loughlin, *Procedural Fairness: A Study of the Crisis in Administrative Law Theory*, 18 U. TORONTO L.J. 215 (1978); Macdonald, *Judicial Review and Procedural Fairness in Administrative Law* (pts. 1 & 2), 25 MCGILL L.J. 520 (1979-1980), 26 MCGILL L.J. 1 (1980-1981); Mullan, *Fairness: The New Natural Justice*, 25 U. TORONTO L.J. 281 (1975). While natural justice is the epithet most often applied to the common law of procedural due process, one also finds judicial reference to the following: substantial justice, universal justice, rational justice, British justice, English speaking justice, the essence of justice, and even justice without any epithet. *See* S. DESMITH, JUDICIAL REVIEW OF ADMINISTRATIVE ACTION 156-58 (J. Evans 4th ed. 1980).

23. For analysis of these techniques, see P. HOGG, *supra* note 2, at 313-51; B. STRAYER, THE CANADIAN CONSTITUTION AND THE COURTS (2d ed. 1983).

24. *See, e.g., Re* Initiative and Referendum Act, 1919 A.C. 935 (P.C.) (parliamentary process cannot be limited by plebiscite); Alliance des professeurs de Montreal v. Attorney-Gen. of Que., 21 D.L.R.4th 354 (Que. C.A. 1985) (omnibus statutory override not sufficient on manner and form grounds to oust Charter).

25. *See* Case of Proclamations, 12 Co. Rep. 74, 77 Eng. Rep. 1352 (K.B. 1610) (common

oblique ways have Canadian courts asserted the supremacy of the common law over validly enacted Parliamentary legislation.[26] Yet it is obvious that courts will not necessarily enforce (or enforce as Parliament may have intended) all statutes that have been validly enacted. At least four techniques have been adopted to confess and avoid on the issue of Parliamentary sovereignty while at the same time reviewing state action on due process or other civil liberties grounds.[27]

First, courts may find refuge in the doctrine of constitutional ultra vires. Ever since Canada became a federal state in 1867, courts have been charged with allocating legislative authority as between national

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law determines scope of Royal prerogative); Entick v. Carrington, 19 St. Tr. 1030, 95 Eng. Rep. 807 (K.B. 1765) (all government acts must be justified by law); Regina v. Catagas, 81 D.L.R.3d 396 (Man. C.A. 1977) (Crown does not have power to suspend operation of statute).

26. In the 1950s and early 1960s, there were several suggestions that the preamble to the Constitution Act, 1867, which gives Canada a "Constitution similar in principle to that of the United Kingdom," and the very notion of parliamentary government itself were evidence of an "implied Bill of Rights," which courts could invoke to control parliamentary sovereignty. These dicta, reminiscent of Bonham's Case, 8 Co. Rep. 114a, 77 Eng. Rep. 646 (K.B. 1610), first appeared in *Re* Alberta Statutes, 1938 S.C.R. 100. They were repeated in Saumur v. City of Quebec, [1953] 2 S.C.R. 299; Switzman v. Elbling, 1957 S.C.R. 285; Oil, Chem. & Atomic Workers v. Imperial Oil, 1963 S.C.R. 584. In no case, however, was the notion of an implied Bill of Rights held out as a ground for decision. Between 1963 and 1978, the Supreme Court did not advert to the notion, and in Attorney Gen. for Can. v. City of Montreal, [1978] 2 S.C.R. 770, it seems to have been abandoned. Nevertheless, in the post-Charter era there is evidence of its resurrection. *See Re* Fraser & Pub. Serv. Staff Relation Bd., 23 D.L.R.4th 122, 128 (S.C.C. 1985), in which, without expressly using the phrase "implied Bill of Rights," Chief Justice Dickson suggests that "freedom of speech is a deep-rooted value in our democratic system of government. It is a principle of our common law Constitution, inherited from the United Kingdom by virtue of the preamble to the *Constitution Act, 1867.*" Although *Fraser* was a non-Charter case, similar statements may be found in Charter cases. *See* Retail, Wholesale & Dep't Store Union, Local 580 v. Dolphin Delivery Ltd., 33 D.L.R.4th 174 (S.C.C. 1987), in which McIntyre, J., again without expressly using the phrase "implied Bill of Rights," stated: "Prior to the adoption of the *Charter*, freedom of speech and expression had been recognized as an essential feature of Canadian parliamentary democracy. Indeed, this Court may be said to have given it constitutional status." For an overview of the failings of the implied Bill of Rights technique, see D. GIBSON, *supra* note 2, at 1-12; *see also* T. BERGER, FRAGILE FREEDOMS: HUMAN RIGHTS AND DISSENT IN CANADA (1981) (a chronicle of human rights abuses in Canada and the reluctance of courts to check offensive legislation). The implied Bill of Rights thesis has also appeared in New Zealand. For a chronicle and assessment, see Joseph & Walker, *A Theory of Constitutional Change*, 7 OXFORD J. LEGAL STUD. 155, 156-57 (1987).

27. These techniques, while no doubt also deployed in the United States, probably are less developed because of explicit due process constitutional rhetoric, and because of the entrenchment of judicial review under Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). In other words, the reality of procedural due process review is revealed not only in constitutional texts; the current state of civil liberties in a given polity is a question of fact, not a question of legal doctrine.

and provincial governments on the basis of constitutional texts. While some commentators claim to find a coherent textual rationale for at least most such distributive decisions, the majority acknowledge that the allocative function has never been a purely formal exegetical exercise. In other words, the sometimes acrobatic jurisprudence of the Supreme Court prior to 1982 is much more than a demonstration of arcane and overrefined techniques of judicial implication. Where statutes provide for egregious transgressions upon civil liberties, courts may, even in the absence of a Bill of Rights, and without the need to invoke fundamental common law principles, simply strike them down as falling outside "federal" or "provincial" legislative jurisdiction, as the case may be.[28]

Second, Canadian courts have occasionally deployed, in parallel fashion to American courts, a series of doctrines through which access to judicial enforcement mechanisms may be denied. Even though principles such as standing, ripeness, exhaustion, mootness, and the political question doctrine often are used to deny judicial review to those asserting civil liberties claims, they also may be deployed to the opposite effect. Thus one finds courts refusing to enforce contempt citations for breach of an injunction, dismissing prosecutions under colorable legislation, and declining to homologate doubtful administrative orders, not on the basis of any substantive defect but rather on grounds perceived to be tied to the institutional integrity of the judicial function.[29]

Third, at the point of application of validly enacted statutes that delegate executive authority, the judiciary has been able to assert due process review under the guise of its ordinary, common law supervis-

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28. This strategy is discussed in detail in P. WEILER, IN THE LAST RESORT 186-95 (1974). Weiler objects, however, to this dissimulation on the grounds that (1) it disrupts the distributive scheme of the Constitution, and (2) it undervalues and understates civil liberties questions. *See* Weiler, *The Supreme Court of Canada and the Law of Canadian Federalism*, 23 U. TORONTO L.J. 307, 344-52 (1973). My own position on this issue is to the contrary: we often protect our most cherished values by refusing to let them become the subject of debate, especially in the courts. *See* Macdonald, *Pour la reconnaissance d'une normativité juridique implicite et inférentielle*, 18 SOCIOLOGIE ET SOCIETES 47 (1986).

29. To date no Canadian commentator has elaborated a complete theory of passive virtues that parallels the theory of A. BICKEL, THE LEAST DANGEROUS BRANCH (1962) and A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS (1970). Once again, this probably results because Canadian courts typically have not been required to adjudicate due process claims of right grounded in constitutional texts. For an attempt to apply Bickel's thesis in a limited context, see Macdonald, *The Commission of Inquiry in the Perspective of Administrative Law*, 18 ALTA. L. REV. 366, 386-95 (1980).

ory jurisdiction. Just as Canadian courts have adeptly wielded the constitutional ultra vires doctrine in aid of due process values, they have also generated complex theories of agency jurisdiction (or legislative ultra vires) to circumscribe administrative and executive behaviour. Both substantive and procedural review of civil liberties questions often is exercised through such delitescent doctrines as "jurisdictional fact," "fettering discretion," "asking the wrong question," "taking into account an irrelevant consideration," and "acting for an improper purpose."[30] Here again the doctrine of Parliamentary sovereignty is explicitly acknowledged and implicitly restrained.

Fourth, courts have been especially resourceful in invoking a wide variety of common law presumptions that they have characterized as constitutional canons of judicial implication. These presumptions, supplied by courts ostensibly to supply the omission of Parliament, are routinely deployed, along with the ordinary rules of statutory construction legislatively prescribed in Interpretation Acts, as due process vehicles. Seven merit enumeration. These are (i) the presumption that access to the common law courts for the ultimate determination of rights and obligations is guaranteed and that no privative clause can insulate administrative action from judicial review on jurisdictional grounds; (ii) the presumption that criminal responsibility cannot attach without mens rea; (iii) the presumption that delegated legislation is subject, inter alia, to an implied condition of reasonableness; (iv) the presumption against the sub-delegation of regulatory or enforcement powers; (v) the presumption, reflected in the maxim "no expropriation without compensation," that Parliament does not intend to interfere with the right of private property; (vi) the presumption that official acts or omissions causing *damna* also are *iniuria* unless lawfully justified; and (vii) the presumption that official decisions affecting rights must be taken in conformity with the rules of natural justice.[31]

30. The values at stake in such jurisdictional review are explored in detail by Dussault & Patenaude, *Le contrôle de l'Administration: vers une meilleure synthèse des valeurs de liberté individuelle et de justice sociale?*, 43 REVUE DU BARREAU [R. DU B.] 163 (1983). *But cf.* Arthurs, *Protection Against Judicial Review*, 43 R. DU B. 277 (1983) (arguing that it is precisely this deployment of jurisdictional rhetoric that makes judicial review so offensive). For a similarly skeptical assessment of the transparency of grounds for judicial review, see Macdonald, *Absence of Jurisdiction: A Perspective*, 43 R. DU B. 307 (1983) [hereinafter *Perspective*]; Macdonald & Paskell-Mede, *Annual Survey of Administrative Law*, 13 OTTAWA L. REV. 677, 685-754 (1981).

31. For a skillful analysis of the implication of several of these presumptions, see Scott, *The Supreme Court and Civil Liberties*, 14 ALTA. L. REV. 97, 100-12 (1976). For an explanation of an additional presumption in favour of strict construction of "statutes which encroach on the rights of subjects," see Attorney Gen. of Can. v. Hallet & Carey, 1952 A.C. 427 (P.C.). It

B. *The Development of Natural Justice*

The presumption of natural justice is the most visible procedural due process standard in Anglo-Canadian law and seems to be the closest analogue to both the fifth amendment and section 7 of the Charter.[32] Amidst seventeenth century impeachments, treason, royal intrigue, and civil war, the Court of King's Bench first came to state the idea of natural justice as two rules: *audi alteram partem* (let the other party be heard), and *nemo iudex in causa sua debet esse* (let no man be a judge in his own cause). More colloquially, these rules were understood to ensure parties the right to adequate notice precedent to an opportunity to be heard, and the right to an impartial and disinterested decision-maker.[33]

Some interpret the early cases as suggesting that natural justice had only a procedural content and applied only to adjudications. It is true that the standard typically was invoked as a procedural control over the exercise of statutory powers granted to the lower-level judiciary, such as magistrates and sewers commissioners, or over the process of disenfranchising office-holders. But several natural justice cases did not fit this monolithic, purely procedural model of due process. Many seventeeth century decisions, and scattered cases as recently as the late nineteenth century, implied both a procedural and a substantive content to natural justice. While few judges accepted Lord Coke's invitation in *Dr. Bonham's Case* to assert common law's supremacy over Parliamentary legislation,[34] most cared little about

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would now seem, however, that this presumption applies mainly in respect to delegated legislation. Debate continues on whether these presumptions are merely a reflection of Parliament's implied intent (that is, whether they are maxims of statutory interpretation) or whether they are truly principles of the common law constitution (that is, whether they in some measure are antecedent to parliamentary legislation in the sense that they do not require statutory "ambiguity" as a precondition to their invocation).

32. Of course, the informed legal theorist cannot ignore the panoply of other presumptions, interpretive strategies, legal techniques, and constitutional mechanisms that reinforce and sustain the natural justice presumption. The most comprehensive pre-Charter discussion may be found in Willis, *Administrative Law and the* B.N.A. Act, 53 HARV. L. REV. 251 (1939).

33. The leading treatment of the content of the rules of natural justice is that of S. DESMITH, *supra* note 22, at chs. 4 & 5. For detailed development, with slight variations, of the historical account set out in the next seven paragraphs, see *id.*; Loughlin, *supra* note 22; R. Macdonald, *supra* note 22.

34. Coke proclaimed

> [i]n many cases, the common law will control Acts of Parliament, and sometimes adjudge them to be utterly void: for when an act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law

whether they were in fact making substantive determinations in reviewing for breaches of natural justice. Over the same period courts were also less concerned with strictly delimiting the types of decisionmaking activity subject to natural justice review, probably because the very concept of adjudication in King's Bench was not settled. On *certiorari*, courts questioned licensing procedures and local government ordinances as routinely as magistrates' decisions.[35]

By the early twentieth century, however, the meaning of natural justice had narrowed considerably. Common law courts had not only repudiated *Dr. Bonham's Case* but had also adopted a surprisingly restrictive definition of procedural error. These developments, coupled with an elaborate and conservative threshold test for identifying reviewable adjudications, meant that judges were declining to question decisionmaking procedures over a wide range of statutory delegations. In fact, the 1950s saw most commentators lamenting the demise of natural justice. The standard at that time possessed four attributes: it was a common law principle; it had only a procedural content; it was a formal and adjudication-modelled concept; and it was a narrowly rule-defined doctrine.

Because the natural justice standard was a common law concept, express legislative language could override it. Moreover, both the content of legislation and the procedures for passing it were beyond the control of the courts. Were Parliament to have provided that an administrative agency could decide cases in which it had a clear pecuniary interest, or that a party could be deprived of license or permit without a hearing, then a reviewing court would have been unable to invoke a breach of the rules of natural justice as grounds for quashing agency action taken pursuant to such legislation.

Again, because natural justice was gradually restricted to matters of procedure, reviewing courts could not use it as a basis for inquiring directly into the merits of an administrative determination. In principle, even a grossly unfair or capricious decision was unassailable on natural justice grounds if the decisionmaker were unbiased and had afforded a hearing. Any challenge required the use of other judicial review doctrines, which were in fact deployed to raise substantive due process issues.

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will controul it, and adjudge such act to be void.

Bonham's Case, 8 Co. Rep. 114a, 77 E.R. 646 (K.B. 1610)

35. An oft-cited case is Cooper v. Wandsworth Bd. of Works, 14 Co. B. 180 (N.S. 1863). The Court held that natural justice was applicable "to many exercises of power which in common understanding would not be at all more a judicial proceeding than would be the act of the district board in ordering the house to be pulled down." *Id.* at 188.

As a formal and adjudication-modelled concept, natural justice was rarely applied when decisionmakers undertook legislative, policymaking, or executive acts. The standard could be invoked only if a "judicial or quasi-judicial" function were in issue. Such functions occurred when decisions "affected strict legal rights" and when the governing statute actually imposed upon the decisionmaker a "duty to act judicially." In other words, courts habitually restricted the application of the standard to *adjudications* upon questions of a *legal right* to life, liberty, and property. Invariably, courts held that cases such as parole revocations and welfare claims processing did not involve the adjudication of a legal right.

Natural justice also became a rule-focused review doctrine. Some courts continued to insist that natural justice was a flexible standard whose precise content could be tailored to fit any type of adjudication or quasi-adjudication, but in practice the two "rules of natural justice" had acquired a precise and defined content. With rare exceptions courts and commentators agreed on the specific requirements of natural justice, requirements that would be applied indiscriminately to all administrative activity.

Together these four attributes evidenced a law of due process that had all the characteristics of a suppletive procedural Code whose content closely resembled the common law court's Rules of Practice. The *audi alteram partem* principle became little more than an orthodox inventory of trial-type procedures.[36] Similarly, the *nemo iudex* principle meant only that the decisionmaker should display a judicial temperament.[37] Thus, by mid-century natural justice was reduced to a series of discrete due process rules relating to the right to a hearing before an impartial tribunal, and the rules themselves were thought to reflect the procedural essence of adversarial adjudication.

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36. Typically, this inventory was held to comprise the following rights: (1) the right to adequate notice of a hearing; (2) the right to pre-hearing discovery; (3) the right to an adjournment; (4) the right to counsel; (5) the right to call witnesses and submit documents; (6) the right to cross-examine adverse witnesses and to refute prejudicial material; (7) the right to a transcript; and, if requested, (8) the right to reasons for decision.

37. One way to state the presumption relating to bias or interest is that the decisionmaker (1) would be free from any pecuniary, moral, or professional interest in the outcome of the decision; (2) would not demonstrate any prejudicial conduct in the hearing; (3) would not be sitting in appeal of its own prior decisions; (4) would not be exercising a hybrid role of prosecutor and judge; and (5) would not have made any prior declaration or engaged in any prior activity suggestive of attitudinal bias.

C. *The Emergence of Procedural Fairness*

Paradoxically, just as this orthodoxy was achieving explicit doctrinal and legislative recognition, courts in the United Kingdom began to loosen their own self-imposed fetters. Judges appeared simply to be broadening the range of reviewable agency decision, without otherwise changing either the grounds for, or the content of, due process review. They seemed only to be revising the criteria for characterizing an agency decision as judicial. They significantly relaxed the requirement that a plaintiff demonstrate an impact on his "legal rights." Decisions affecting mere "privileges," "economic interests," or even "legitimate expectations" were considered sufficiently important to give rise to due process protection. In addition, judges restated the requirement that the statute under review actually impose a "duty to act judicially," and instead permitted such a duty merely to be inferred from the extent of the power exercised.[38]

While courts were broadening the scope of procedural review they were also reworking the other aspects of natural justice. Gradually, due process review acquired a firmer constitutional footing. There developed widespread use of negative privative clauses purportedly ousting the power of judicial review, and positive privative clauses granting decisionmaking power in subjective terms, or explicitly excluding natural justice. In reaction, courts deduced new categories of reviewable jurisdictional error.[39] Courts also began to accept scholarly blandishment urging substantive review,[40] and arguing for flexible procedural norms.[41] Only the rule-defined character of natural justice seemed to survive developments of the 1960s and 1970s.[42]

In Canada this jurisprudential evolution peaked in two Supreme Court cases. A 1977 case, *Re Nicholson & Halimand-Norfolk Regional*

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38. The first House of Lords case reflecting these developments was Ridge v. Baldwin, 1964 A.C. 40.

39. *See* Anisminic Ltd. v. Foreign Compensation Comm'n, [1969] 2 A.C. 147.

40. The overlap between notions of substantive due process and these newer doctrines is nicely demonstrated by the House of Lords in Padfield v. Minister of Agric., Fisheries & Food, 1968 A.C. 997.

41. A thorough review of how fairness permits courts to relax the procedural requirements of a trial-type hearing (for example, oral submissions, cross-examinations, strict rules of evidence, right to counsel, open proceedings, and the right to reasons) is set out in D. MULLAN, ADMINISTRATIVE LAW §§ 27-45 (2d ed. 1979); *see also* D. JONES & A. DE VILLARS, PRINCIPLES OF ADMINISTRATIVE LAW 197-239 (1985) (arguing that fairness is natural justice "writ small").

42. *See* Macdonald, *supra* note 22, at 543-63, for an exhaustive critique of this attribute of both traditional and revisionist natural justice.

Board of Commissions of Police, added a new phrase to the vocabulary of procedural due process, "procedural fairness."[43] In adopting the "fairness" standard the Supreme Court invited due process review of low-level non-adjudicative statutory discretion granted to administrative officials, and also of high-level executive and Cabinet decisions grounded in the Royal prerogative. Even rule-making hearings have been imposed under the fairness doctrine. A 1981 case, *Crevier v. Attorney-General for Quebec*, asserted that judicial review could not be precluded by any provincial enactment purporting to oust the supervisory power of the Superior Courts.[44] *Crevier* only claimed a right of judicial review notwithstanding a privative clause in the face of a substantive jurisdictional error by a provincially constituted tribunal. But it also opens the door to constitutionalizing the right of judicial review for breaches of natural justice and procedural fairness.

Most commentators hailed these Supreme Court decisions, and several even advocated that judges consciously readopt the more activist and informalist theory of due process review reflected in the leading decisions of the early seventeenth century. But some anticipated a crisis in Canadian administrative law theory, on the grounds that the doctrine could be deployed substantively to resurrect two discredited aspects of the Diceyan Rule of Law ideology: conservative politics, and the exhultation of the adversarial adjudication of common law rights.[45] Others expressed process concerns, fearing that courts, as adjudicative bodies, might not be able to develop a more nuanced view of the requirements of due process. Instead, they would neither be institutionally competent to develop non-adjudicative due process norms, nor able to overcome the legalistic urge to state finite due process rules.[46]

Both these concerns have proved grounded in part. Some lower courts have toyed with substantive due process review in a haphazard fashion;[47] and courts generally have not been able to develop alterna-

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43. [1979] 1 S.C.R. 311 (1981).

44. [1981] 2 S.C.R. 220.

45. The most trenchant criticisms are those of H.W. Arthurs. *See* Arthurs, *Rethinking Administrative Law: A Slightly Dicey Business*, 17 OSGOODE HALL L.J. 1 (1979); Arthurs, *Jonah and the Whale: The Appearance, Disappearance and Reappearance of Administrative Law*, 30 U. TORONTO L.J. 225 (1980); *see also* Loughlin, *supra* note 22 (judicial license implied by fairness doctrine is dangerous).

46. *See* Macdonald, *supra* note 22.

47. See the discussion in Mullan, *Natural Justice and Fairness: Substantive as well as Procedural Standards for the Review of Administrative Decision-Making*, 27 MCGILL L.J. 250 (1982); and the polemic by Grey, *Can Fairness Be Effective?*, 27 MCGILL L.J. 360 (1982).

tive, non-adjudicative procedural models to guide review decisions.[48] As a "new natural justice," the procedural fairness standard in Canada is somewhat different from "old natural justice." For example, it may encompass both substance and procedure, and its invocation is much less dependent upon formalistic threshold tests. Like procedural fairness in the United Kingdom, however, the standard has not fully escaped its dual origins in an adjudicative model of decisionmaking and a concept of due process as a series of finite rules.[49]

D. *Other Common Law Due Process Vehicles*

The current picture of common law procedural review in Canada would be incomplete without reference to other legislative and judicial developments by which due process norms have achieved enhanced recognition. Over the past two decades, a number of statutes have been enacted to simplify judicial remedies, to establish other agencies that enhance due process review, to codify procedural norms, and to engraft detailed trial-type procedures onto existing administrative discretions.[50] While most of the statutes did not bear directly on either the concept or the content of natural justice, their overall effect has been to enhance the institutional and remedial context of procedural

48. *See* Attorney-Gen. of Can. v. Inuit Tapirisat, [1980] 2 S.C.R. 735; D. JONES & A. DE VILLARS, *supra* note 41, at 162-96.

49. This is especially evident in early debate on whether natural justice and procedural fairness constituted distinct procedural standards. *See* Taylor, *Fairness and Natural Justice — Distinct Concepts or Mere Semantics*, 3 MONASH L. REV. 191 (1977). For an excellent review of the development of the fairness doctrine in Canada from 1977-1986, see Garant, *La nouvelle justice naturelle . . . quelques problems de mise en oeuvre*, 43 R. DU B. 409 (1983); Garant & Dussault, *L'équité procédurale et la révolution tranquille du droit administratif*, 16 REVUE DE DROIT (Université de Sherbrooke) [R.D.U.S.] 495, 537-40 (1986).

50. *See, e.g.*, in Ontario, The Judicial Review Procedure Act, ONT. REV. STAT. ch. 224 (1980) (consolidating writs of certiorari, prohibition and mandamus, and actions for injunction and declaration into simplified "Application for Judicial Review"); The Ombudsman Act, ONT. REV. STAT. ch. 325 (1980) (legislative appointee with broad investigatory and recommendatory powers); The Statutory Powers Procedure Act, ONT. REV. STAT. ch. 484 (1980) (establishing mandatory trial-type code of administrative procedures wherever "statutory power of decision" in issue). The most remarkable statute was Ontario's Civil Rights Statute Law Amendment Act, ONT. STAT. vol. 2, ch. 49 (1971), which systematically inserted a right to a trial-type hearing into the decision-making structure of hundreds of existing statutes.

Other initiatives include the creation of a federal judicial review jurisdiction under The Federal Court Act, CAN. REV. STAT. ch. 10 (2d Supp.), §§ 18, 28 (1970); the regulation of federal delegated legislation under The Statutory Instruments Act, ch. 38, 1970-1972 Can. Stat. 791; and the opening up of federal records under the Access to Information Act, ch. 111, sched. 1, 1980-1983 Can. Stat. 3321 and the Privacy Act, ch. 111, sched. 2, 1980-1983 Can. Stat. 3378.

review at common law.[51] Even prior to the formal constitutional step reflected in the Charter, Parliament and the provincial legislatures were acting to promote due process values in public administration.

The courts kept pace with the legislatures in recognizing the importance of due process in statutory decisionmaking procedures. Constitutional ultra vires retained its traditional place as a due process surrogate, notwithstanding the development of the more flexible procedural fairness standard.[52] In addition, novel substantive jurisdictional doctrines continued to buttress explicit due process control.[53] More importantly, the Supreme Court asserted various common law presumptions with renewed vigour. It significantly reduced the scope of no-mens rea regulatory offences by developing a third category of criminal liability;[54] it restated forcefully the principle of unreasonableness as a grounds for quashing municipal bylaws;[55] it broadened the conditions under which the *delagatus non potest delagare* doctrine could be invoked to void agency decisions;[56] it extended the no-expropriation-without-compensation rule to implied expropriations;[57] and it reaffirmed the common law liability of public officials by holding a provincial premier liable for slander in the exercise of a purported power to dismiss a civil servant.[58]

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51. For a brief overview of several of these initiatives, see Macdonald, *Big Government and Its Control: Legislative Initiatives of the Past Decade*, in DECADE OF ADJUSTMENT ch. 4 (J. Menezes ed. 1980).

52. Two representative cases are Labatt Breweries of Can. Ltd. v. Attorney Gen. of Can., [1980] 1 S.C.R. 914 (federal statute prescribing alcohol content of "lite beer" ultra vires of Parliament); Westendorp v. The Queen, [1983] 1 S.C.R. 43 (by-law concerning prostitution ultra vires of municipality/provincial legislature).

53. *See* Bell v. Ontario Human Rights Comm'n, 1971 S.C.R. 756 (court may review notwithstanding privative clause if agency errs as to jurisdictional, that is, legislative, facts); Metropolitan Life Ins. Co. v. International Union of Operating Eng'rs, 1970 S.C.R. 425, 426 (court may review notwithstanding privative clause if agency "asking itself the wrong question").

54. Regina v. Sault Ste. Marie, 40 C.C.C.2d 353 (S.C.C. 1978) (distinguishing strict from absolute liability offences and holding the defence of due diligence open to persons accused of strict liability offences).

55. Atkinson v. Municipality of Metro. Toronto, 16 N.R. 153 (S.C.R. 1977); Regina v. Bell, 16 N.R. 457 (S.C.C. 1976).

56. Canadian Inst. of Pub. Real Estate Cos. v. Toronto, [1979] 2 S.C.R. 2; Ramawad v. Minister of Manpower & Immigration, [1978] 2 S.C.R. 375.

57. Manitoba Fisheries v. The Queen, 86 D.L.R.3d 462 (S.C.C. 1978); *see also* Regina v. Tener, [1985] 1 S.C.R. 533 (impairment of mining rights in National Park constitutes implied expropriation).

58. Jones v. Bennett, 1969 S.C.R. 277. For a particularly forceful statement of this principle by a provincial court of appeal, see Gershman v. Manitoba Vegetable Producers Mktg. Bd., 69 D.L.R.3d 114 (Man. C.A. 1976) (agency liable in damages for *mala fides* revocation of marketing permit).

Throughout the 1970s, paralleling the development of procedural fairness as an extension of natural justice, the courts maintained their traditional inventory of techniques for achieving due process review. The only due process casualty of the period seems to have been the long dormant implied Bill of Rights doctrine. Twice the Supreme Court effectively held that no common law civil liberties guarantee "is so enshrined in the Constitution as to be beyond the reach of competent legislation."[59] Yet apart from the temporary enterrement of this one aspect of the common law constitution, the 1970s' record suggests a renaissance of the informalist and activist approach to due process review that had been abandoned at the turn of the century.[60]

IV. FUNDAMENTAL JUSTICE IN THE CHARTER OF RIGHTS AND FREEDOMS

Following *Nicholson*, procedural due process evolved largely as sceptical commentators had predicted, but the anticipated crisis in administrative law theory never materialized. Shortly after *Crevier*, the Charter was proclaimed in force. Almost immediately, scholarly and judicial attention was deflected away from the common law concepts of procedural fairness and natural justice, and away from all other mechanisms for asserting standards of procedural due process, and towards the section 7 guarantee of fundamental justice.

But the Charter has done more than simply add a new epithet to Canadian due process discourse: in changing the rhetoric, it has also changed the participants. Perhaps more importantly, it has also changed the way commentators view the political and legal underpinnings of procedural review. Before 1982, United Kingdom-oriented administrative lawyers, versed in the presumptions of the common

59. *See* Attorney Gen. for Can. v. City of Montreal, [1978] 2 S.C.R. 770, 796; *see also* Attorney Gen. of Can. v. Law Soc'y of B.C., [1982] 2 S.C.R. 307, 364. But recently the court seems to be more open to "implied Bill of Rights" reasoning. *See supra* note 26.

60. A subsidiary question, which will be discussed fully in the context of a comparison of natural justice and fundamental justice, concerns the judiciary's overall attitude on the question of deference to legislative will. For an insightful discussion, see *Judicial Deference, supra* note 2. In the mid-1970s, in S.E.I.U. v. Nipawin Dist. Staff Nurses Ass'n, [1975] 1 S.C.R. 382 and C.U.P.E., Local 963 v. N.B. Liquor Corp., [1979] 2 S.C.R. 227, the Supreme Court seemed to be taking a deferential approach to substantive jurisdictional error. But almost immediately the trend was reversed. The Court's attitude on common law procedural error seemed to track its view of substantive error, although it would be hazardous to periodize the Court's due process jurisprudence on such a criterion. *See* Morissette, *Le contrôle de la compétence d'attribution: thèse, antithèse et synthèse*, 16 R.D.U.S. 591 (1986) (demonstrating the inherent flux of judicial approaches to the deference question).

law and the theory of implied due process review of administrative action, dominated public law scholarship on due process issues. Since 1982, United States-oriented constitutional lawyers, preoccupied with statutory norms and entrenched guarantees, have been ascendant. Before 1982, some scholars viewed procedural due process as primarily a problem of public administration involving the search for an optimal match between power and process. Since 1982, most scholars see procedural due process as no more than a vehicle for subjecting all state action to adjudicative norms. While nothing in the Charter requires such a result, or precludes traditional administrative law analysis, today most due process commentators in Canada tend to work outwards from section 7. To understand how these constitutionalists interpret the fundamental justice standard, a brief review of its genesis is required.[61]

In the period of political negotiation leading up to the drafting of the Charter, the federal government proposed a "due process" guarantee for deprivations of "life, liberty, security of the person and the enjoyment of property."[62] Yet the provincial governments, whose constitutional authority over "property and civil rights" would be most affected by any such guarantee, were apprehensive of the potential Lochnerization of the Charter. To allay concern that courts would suddenly reverse their interpretation of identical language in section 1(a) of the Canadian Bill of Rights and develop a theory of substantive due process, the federal government abandoned the due process terminology.[63] Moreover, Canada's socialist political party strongly opposed the inclusion of "the enjoyment of property" in the category of guaranteed rights. That phrase was deleted as a result of fear that a property guarantee could dismantle provincial and federal social welfare programmes, undermine trade unions, sterilize agricultural products marketing boards, and void land use regulation statutes. Much of the current interest in section 7 flows directly from these two political accommodations.

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61. For a thorough discussion of the process, see Davenport, *Reshaping Confederation: The 1982 Reform of the Canadian Constitution*, 45 LAW & CONTEMP. PROBS., Autumn 1982, at 1.

62. Canadian Bill of Rights, CAN. REV. STAT. app. III, § 1(a) (1970).

63. This political concern was surprising to commentators since the Supreme Court had consistently taken a narrow view of the "due process" guarantee rendering it a purely procedural standard meaning essentially no more than "in accordance with existing law." *See* Curr v. The Queen, 1972 S.C.R. 889; Miller v. The Queen, [1977] 2 S.C.R. 680.

A. *Rediscovering Non-Procedural Due Process*

In the September 1980 draft of the Charter, the term "due process of law" was replaced with the phrase "the principles of fundamental justice." Several justifications were offered. First, Canadian lawyers already knew the term "fundamental justice," because it had been used in section 2(e) of the 1960 Canadian Bill of Rights.[64] Second, the phrase was not politically charged. Officials in the federal Ministry of Justice maintained that, unlike the expression "due process," the new term clearly referred only to procedural standards.[65] Third, the term would discourage courts from relying too heavily on United States jurisprudence, since all realized that the concept of due process had often been deployed in curious ways simply to invoke federal jurisdiction.[66] Finally, the term was preferred over the then predominant procedural standard, natural justice. It would preempt the developing imbroglio about whether natural justice and procedural fairness were distinct standards, and whether only adjudications were reviewable on due process grounds.

This borrowing of existing terminology did not, however, quiet debate over the scope of section 7. Notwithstanding the obvious Parliamentary intent, counsel and commentators have tried to give the section a substantive content. The arguments advanced track those previously profferred in the United States and are well known.[67] Already more than twenty Superior Court decisions have dealt with

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64. Canadian Bill of Rights, CAN. REV. STAT. app. III, § 2(e) (1970) provided that no law of Canada was to be construed or applied so as to "deprive a person of his right to a fair hearing in accordance with the principles of fundamental justice."

65. In evidence before the Parliamentary Commission, Barry Strayer (then Assistant Deputy Minister of Public Law in the Federal Department of Justice and now Mr. Justice Strayer of the Federal Court of Appeal) stated:

> [it] was our belief that the words "fundamental justice" would cover the same thing as what is called procedural due process, that is the meaning of due process in relation to requiring fair procedure. However, it in our view does not cover the concept of what is called substantive due process, which would impose substantive requirements as to the policy of the law in question . . . .

Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada, No. 40 (Jan. 27, 1981) at 46:32, *quoted in* Whyte, *supra* note 2, at 458.

66. Of course the need to assert a due process interest for the purpose of invoking federal jurisdiction is unnecessary in Canada, which is possessed of a unitary federal court system. *See* P. HOGG, *supra* note 2, at ch. 7.

67. For a brief review, see Mackay, *supra* note 2, at 295-300.

claims to substantive due process under section 7.[68] Three cases have reached the Supreme Court docket, and in one, *Reference Re Section 94(2) of Motor Vehicle Act* [*Section 94(2) Reference*], a seven member panel of the Court unanimously held that "the principles of fundamental justice" have more than a purely procedural content.[69]

At issue in *Section 94(2) Reference* was whether the legislature of British Columbia could make it an absolute liability regulatory offence, punishable by a fine and minimum term of seven days imprisonment, to drive with a suspended license. The Supreme Court concluded that notwithstanding extrinsic evidence of Parliament's contrary intention, "the principles of fundamental justice" are not limited solely to procedural guarantees, but "are to be found in the basic tenets and principles, not only of our judicial process, but also of the other components of our legal system."[70] The Court then held that the mens rea require-

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68. At least six cases expressly hold § 7 to be procedural only: *Re* Latham & Solicitor-Gen. of Can., 12 C.C.C.3d 9 (Ont. C.A. 1983); Regina v. Hayden, 8 C.C.C.3d 33 (Man. C.A. 1983); *Re* M.H. & the Queen (No. 2), 17 C.C.C.3d 443 (Alta. Q.B. 1985); Public Serv. Alliance v. The Queen, 11 D.L.R.4th 337 (F.C.T.D. 1984); *Re* Balderstone & the Queen, 2 C.C.C.3d 37 (M.Q.B. 1982); *Re* Jamieson & the Queen, 70 C.C.C.2d 430 (Que. Sup. Ct. 1982). Another three suggest, although do not hold, that § 7 is procedural. *See Re* United States & Smith, 10 C.C.C.3d 540 (Ont. C.A. 1984); *Re* Potma & the Queen, 2 C.C.C.3d 383 (Ont. C.A. 1983); *Re* Cadeddu & the Queen, 4 C.C.C.3d 97 (Ont. H.C. 1982). By contrast, at least twelve cases can be read as giving § 7 a substantive interpretation. *See* Regina v. Swain, 53 O.R.2d 609 (C.A. 1986); Regina v. Morgentaler, Smoling & Scott, 22 C.C.C.3d 353 (Ont. C.A. 1985); *Re* Howard & Sony Mountain Inst., 19 C.C.C.3d 195 (Fed. C.A. 1985); Regina v. Robson, 19 C.C.C.3d 137 (B.C.C.A. 1985); Regina v. Young, 13 C.C.C.3d 1 (Ont. C.A. 1984); Reference Re Section 94(2) of the Motor Vehicle Act, 4 C.C.C.3d 243 (B.C.C.A. 1983); Regina v. Stevens, 3 C.C.C.3d 198 (Ont. C.A. 1983); The Queen v. Operation Dismantle, Inc., 3 D.L.R.4th 193 (F.C.A. 1983); *Re* Miller & the Queen, 55 O.R.2d 417 (H.C.J. 1986); *Re* Rowland & the Queen, 13 C.C.C.3d 367 (Alta. Q.B. 1984); R.L. Crain, Inc. v. Couture & Restrictive Trade Practices Comm'n, 6 D.L.R.4th 478 (Sask. Q.B. 1983); Regina v. G., 4 C.C.C.3d 466 (Ont. Co. Ct. 1982). Finally, in one case § 7 was held to be substantive only. *Re* Rolbin, [1982] 1 C.R.R. 186.

69. 24 D.L.R.4th 536 (S.C.C. 1985) (Lamer, J.) (McIntyre & Wilson, J.J., concurring separately); *see* Regina v. Stevens (leave to appeal to the Supreme Court granted June 6, 1983, but judgment not yet rendered). In Westendorp v. The Queen, [1983] 1 S.C.R. 43, 46, the Court indirectly raised this issue, implying that § 7 was procedural only. *Section 94(2) Reference* presumably can be taken as overruling *Westendorp* on this point.

70. *Section 94(2) Reference*, 24 D.L.R.4th at 557. The gravamen of Justice Lamer's argument is that §§ 8-14, roughly a constitutional code of criminal procedure relating to search and seizure, arrest and detention, criminal proceedings, punishment, and self-incrimination, deal with substantive matters. It would be incongruous to read § 7, the general clause, more narrowly than §§ 8-14, the specific guarantees. The Court also noted that the expression "fundamental justice" in § 2(e) of the Bill of Rights was placed in the context of a right to a fair hearing, while no such obvious procedural context is present in § 7. *See id.* at 547-50, 555-56.

ment in criminal law was one such tenet. To the extent that conviction for any absolute liability offence would lead to a deprivation of life, liberty, or security of the person (that is, to the extent that imprisonment or even probation were a possible sanction), section 7 would be violated and the legislative provision in question would be constitutionally impermissible.[71]

Significantly, the Supreme Court has scrupulously avoided substantive due process rhetoric and consistently refused to entertain arguments or offer reasons to suggest that substantive review of the wisdom or policy of legislation is possible. In several previous cases involving such diverse issues as the right to a hearing, the right to counsel, reverse onus clauses, suppression of the defence of mistake of fact, excessive delay in laying criminal charges, and the right not to self-incriminate, judges have been able to find either a purely procedural basis under section 7 or a separate substantive Charter guarantee upon which to review either police or administrative action.[72] In *Section 94(2) Reference*, the Court declined to hold that the principles of fundamental justice encompass a substantive due process guarantee.[73] One may deduce, therefore, two interconnected issues troubling the Court. First, how to avoid incorporating the substantive due process/procedural due process dichotomy into section 7; and second, how to avoid conflating the concept of a purely procedural natural justice with the concept of fundamental justice, or conversely, simply announcing vague and indeterminate standards for deciding which principles of law are principles of fundamental justice.[74]

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71. *Id.* at 559-63. The Court also found that the Attorney-General for British Columbia had not established the general § 1 exception to Charter rights. *Id.* at 563. The effect of § 1 is discussed *infra* notes 126-34 and accompanying text. In a concurring judgment, Justice Wilson denied that § 1 could save a breach of the principles of fundamental justice and found the combination of absolute liability and mandatory imprisonment impermissible. *Id.* at 564-73.

72. *See, e.g.*, Singh v. Minister of Employment & Immigration, [1984] 1 S.C.R. 7 (right to hearing prior to deportation); Regina v. Therens, [1985] 1 S.C.R. 613 (right to counsel prior to giving breath sample); Trask v. The Queen, [1985] 1 S.C.R. 655 (same); Rahn v. The Queen, [1985] 1 S.C.R. 659 (same); Regina v. Dubois, [1985] 2 S.C.R. 350 (scope of right against self-incrimination).

73. *See Section 94(2) Reference*, 24 D.L.R.4th at 557. Justice Lamer wrote: "this is not to say, however, that the principles of fundamental justice are limited solely to procedural guarantees." *Id.* at 577. Justice Wilson stated: "I have grave doubts that the dichotomy between substance and procedure . . . should be imported into § 7 of the Charter." *Id.* at 571. Only Justice McIntyre offered an affirmative statement: "I agree that fundamental justice, as the term is used in the Charter, involves more than natural justice [which is largely procedural] and includes as well as [sic] substantive element." *Id.* at 541.

74. *See id.* at 558. The best the Court could do is found in Justice Lamer's statement:

B. *Finding Property in Life, Liberty, and Security of the Person*

Fewer scholarly debates and judicial disagreements surround the second modification to section 7 resulting from pre-enactment political negotiation. The meaning of the phrase "life, liberty, and security of the person" has not been extensively litigated outside the criminal law field; nor have there been as many attempts indirectly to resurrect the deleted term "property" as a protected interest. In fact, courts have often observed that, unlike natural justice, which applies to determinations affecting all manner of personal and property rights, the fundamental justice guarantee attaches only to a limited class of personal rights.

Legislative provisions affecting the right to life in relation to euthanasia, suicide, refusal of medical treatment, and capital punishment (the latter to all intents and purposes abolished in Canada since 1976)[75] have not been the subject of a Charter challenge. On the other hand, parties on both sides of the abortion question have unsuccessfully raised a section 7 argument. Courts have held that section 7 neither prohibits abortions[76] nor guarantees the right to procure an abortion.[77]

Most litigation over the scope of the liberty guarantee has related to criminal law, the paramount concern being the meaning of the specific guarantees of sections 8 through 14.[78] Nevertheless, section 7 retains an important role absent application of section 11(d), which provides that "any person charged with an offence has the right . . .

"whether any given principle may be said to be a principle of fundamental justice within the meaning of section 7 will rest upon an analysis of the nature, sources, *rationale* and essential role of that principle within the judicial process and in our legal system, as it evolves." *Id.*; *see also id.* at 571-73 (Justice Wilson seems to suggest that the implicit fundamental principle is "punishment should not be disproportionate to the crime").

75. *See* Regina v. Miller & Cockriell, [1977] 2 S.C.R. 680 (holding capital punishment not cruel and unusual punishment under Canadian Bill of Rights).

76. *See* Borowski v. Attorney Gen. of Can., 4 D.L.R.4th 112 (Sask. Q.B. 1983) (fetus not a "person" capable of bearing § 7 rights). This decision was confirmed by the Saskatchewan Court of Appeal on a Judgment not yet reported. Leave to appeal to the Supreme Court of Canada was granted in June, 1987.

77. *See* The Queen v. Morgentaler, 47 O.R.2d 353 (Ont. H.C.), *aff'd* 48 O.R.2d 519 (Ont. C.A. 1984) (right to control reproduction not a protected liberty of a pregnant woman).

78. The fact that Criminal Law and Procedure is a federal head of power under the Constitution Act, 1867 contributes to a more rational structure of due process rights for accused persons. Nevertheless, one may anticipate a series of analogous challenges to provincial statutes creating regulatory offences. Already, as the annual index to the Canadian Rights Reporter testifies, §§ 8-14 have been widely argued in quasi-criminal fields such as deportations, extradition, corrections, and parole.

[to] . . . a fair and public hearing by an independent and impartial tribunal." Section 7 should address statutes authorizing involuntary civil commitments, quarantines for carriers of communicable diseases, obligatory treatment for drug addiction and alcoholism, as well as the entire corpus of immigration law.[79] A broader, socio-economic concept of liberty has not yet been directly raised, probably because the most innovative Charter claims have been argued under the affirmative guarantee of security of the person.[80]

Security of the person no doubt applies to any legislatively mandated interference with physical integrity, such as surgical intervention, organ transplants, blood transfusions, electroshock treatment, lobotomies, compulsory extraction of bodily fluids, and sterilization.[81] In addition, litigants have argued that a degree of mental and social well-being is a component of security of the person. In *Operation Dismantle v. The Queen*, appellants argued that to permit the testing of the cruise missile in Canada would increase the risk of nuclear war. But the Supreme Court held that a Cabinet decision permitting the testing did not infringe on the security of the person guarantee.[82] Nevertheless, the Court left open the possibility that other non-physical infringements might be subject to Charter review.[83] These could

79. *See* Singh v. Minister of Employment & Immigration, 17 D.L.R.4th 422 (S.C.C. 1985) (right of immigrant to determination of refugee status is right touching liberty and security of the person, and requiring trial-type hearing); *see also* Mashaw, *Dignitary Process: A Political Psychology of Liberal Democratic Citizenship*, 39 U. FLA. L. REV. 433 (1987) ("State power to punish, ostracize, or disable is always a serious threat to individual liberty.").

80. In other words, decisions on the scope of the liberty guarantee such as Meyer v. Nebraska, 262 U.S. 390, 399 (1923) would probably be argued in Canada under the security of person guarantee. *But see, e.g.*, P.S.A.C. v. The Queen, 11 D.L.R.4th 399 (F.C.T.D. 1984) (right to liberty does not encompass freedom to contract).

81. An indication of the Supreme Court's likely approach to these issues can be seen in the recent non-Charter case *Re* Eve, 31 D.L.R.4th 1 (1987). Upon an application by a mother to have the court exercise its parens patriae jurisdiction, the court declined to authorize substituted consent to non-therapeutic sterlization of a mentally retarded adult female. The Court held, subsidiarily, that the right to procure a sterilization was not a protected § 7 right.

82. 18 D.L.R.4th 481 (S.C.C. 1984).

83. *See* Regina v. Therens, [1985] 1 S.C.R. 613, 644 (Le Dain, J., dissenting). Justice Le Dain intimated that security of the person should be understood as having both a physical and psychological component. *Id.* The most interesting § 7 case yet reported is Litwack v. National Parole Bd., [1986] 1 F.T.R. 282. *Litwack* involved a refusal to modify parole conditions prohibiting petitioner from holding a position of trust. Justice Walsh held that the refusal constituted an infringement of the right to security of the person (the right to earn a livelihood). Thus the infringement was not in accordance with the principles of fundamental justice. *Id.* at 288-90.

conceivably include administrative permissions to pollute, to destroy forests, or to dam rivers and streams; the granting of licenses to transport hazardous materials; and decisions to redesign transportation and energy corridors, or to site nuclear plants and prisons.[84]

Many commentators remain preoccupied with strategies for surreptitiously reinserting property rights into section 7. Section 8's guarantee against unreasonable search and seizure has been unsuccessfully used in attempts to overturn an expropriation,[85] and to resist an administrative *duces tecum* order.[86] Both attempts represent classical deployments of the "property" guarantee. Other litigants have argued for a completely contrary view of property that would impose on government a positive economic obligation. The expression "security of the person" arguably includes an economic capacity to satisfy basic human needs. On such a view, state action removing a person from a welfare scheme, the confiscation of tools essential to one's work, the refusal of a permit to practice a profession, the cancellation of a trade license, or the refusal of public housing could constitute an infringement of section 7.[87] But no court has yet clearly reached such a conclusion, and on several occasions judges have explicitly denied that section 7 can sustain a general protection of economic rights.[88] On the

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84. For an unsuccessful early attempt to raise such a question, see *Re* Town of Milton & Ontario Waste Management Corp., 18 D.L.R.4th 688 (Ont. Div. Ct. 1984) (hazardous waste dump siting).

85. *See Re* Becker, 148 D.L.R.3d 539 (Alta. C.A. 1983).

86. *See Re* Gershman Produce Co. & Motor Transp. Bd., 22 D.L.R.4th 520 (Man. C.A. 1985).

87. The argument has been put most forcefully by Whyte, *supra* note 2, at 474-75; *see also Re* Mia & Medical Servs. Comm'n of B.C., 17 D.L.R.4th 385 (B.C.S.C. 1984) (denial of medicare billing number); *Re* Workers' Compensation Bd. & Coastal Rental, 12 D.L.R.4th 564 (N.S.S.C. 1983) (government tax lien on third party property). In *Re* Fisherman's Wharf, 135 D.L.R.3d 307 (N.B.Q.B. 1982), the trial court held that § 7 reached property rights, but the court of appeal affirmed this decision on other grounds *sub nom.* The Queen v. Estabrooks Pontiac Buick, 144 D.L.R.3d 21 (N.B.C.A. 1982). *See* most recently Piercey v. General Bakeries Ltd., 31 D.L.R.4th 373 (Nfld. S.C.T.D. 1986) (holding provincial labour legislation unconstitutional as infringement of Charter).

88. The leading cases are: Elliott v. Director of Social Servs., 17 Man. R.2d 350 (C.A. 1982) (§ 7 inapplicable to withdrawal of welfare benefits); Manitoba Soc'y of Seniors, Inc. v. Greater Winnipeg Gas Co., 18 Man. R.2d 440 (C.A. 1982) (§ 7 not available to require funding expert witnesses); *Re* Gershman Produce Co. & Motor Transp. Bd., 22 D.L.R.4th 520 (Man. C.A. 1985) (§ 7 does not apply to show cause hearing prior to license revocation); *Re Groupe d'eleveurs de volialles de l'est de l'Ontario,* 14 D.L.R.4th 153 (F.C.T.D. 1984) (§ 7 not applicable to product quotas). The contrast with the situation prevailing in the United States is striking. In the United States, lawyers argue for novel forms of property (for example, Reich's "new property") in order to get due process review. In Canada, lawyers argue that traditional forms of property (for example, land and goods) are not property in order to get due process review.

other hand, at least where federal legislation is in issue, litigants may invoke the due process guarantee of the unrepealed and unconsolidated 1960 Canadian Bill of Rights to protect property rights.[89] A property guarantee may well find expression in the Charter, but it will do so only to the extent that "security of the person" is implicated. In such a context, progressive income tax legislation, workers' compensation laws, and environmental protection statutes will almost certainly survive non-procedural due process challenges.

C. *The Scope and Procedural Content of Fundamental Justice*

In addition to questions of whether fundamental justice incorporates a theory of substantive due process, and whether it extends to the protection of property, section 7 raises three general issues as to its scope and content.[90] One of these, the constitutional impact of the fundamental justice guarantee, is particularly complex. Section 1 of the Charter gives explicit criteria to be applied in the balancing of policy and principle, which the United States Supreme Court has always avoided through formulae such as "political question," "executive privilege," and "no case or controversy." Moreover, section 33 permits a legislature to exclude the operation of parts of the Charter, including section 7, by simple statute. The extent to which sections 1 and 33 de-constitutionalize the fundamental justice guarantee remains for many the Charter's unresolved paradox. For others, however, it is simply a continuing reflexion of Canadian constitutional heterodoxy.[91]

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89. *Compare* Singh v. Minister of Employment & Immigration, 17 D.L.R.4th 422 (S.C.C. 1985) (suggesting that the Bill of Rights has constitutional status analogous to Charter) *with* Regina v. Big M Drug Mart Ltd., 18 D.L.R.4th 321 (S.C.C. 1985) (implying that the Bill of Rights may be only a quasi-constitutional document not capable of grounding a judicial power to declare legislation unconstitutional). It is also possible to deploy the equality guarantee of § 15 of the Charter to protect property rights. *See Re* Fisherman's Wharf, 135 D.L.R.3d 307 (N.B.Q.B. 1982); Piercey v. General Bakeries Ltd., 31 D.L.R.4th 373 (Nfld. S.C.T.D. 1986).

90. The two most illuminating sources in respect of the issues canvassed here and in Part V of this essay are D. GIBSON, *supra* note 2; CHARTER LITIGATION (R. Sharpe ed. 1986) (a collection of essays reviewing litigation strategy and outcomes in connection with several Charter guarantees).

91. Most scholarly commentary about the impact of the Charter has been focussed on § 33. Some, however, perceive (in my view correctly) that the real issue is the relationship between § 33 and § 1. *See, e.g.*, Slattery, *Canadian Charter of Rights and Freedoms — Override Claims Under Section 33 — Whether Subject to Judicial Review Under Section 1*, 61 CAN. BAR REV. 391 (1983). After all, in both cases, courts are confronted with the perennial problem of deference to legislative will, a problem they confront equally in natural justice litigation.

A second foundational issue is whether the Charter applies only to "state action." Despite some early commentary to the contrary, most analysts today accept that section 7 should be confined to governmental and para-governmental activity.[92] Section 32 provides that the Charter applies to both Parliament and provincial legislatures, and to bodies and individuals whose authority derives from them. Courts have held that decisions of administrative agencies, municipalities, and the Cabinet, whether authorized by statute or by virtue of the Royal prerogative, will be subject to review.[93] But it is uncertain whether section 7 reaches Crown corporations that are not Crown agents, such as the C.B.C.; quasi-public authorities, such as labour arbitrators and discipline committees; and domestic tribunals.[94]

Some cases suggest that the Charter applies not only to judicial proceedings, but also to judicial orders enforcing statutes and common law rules,[95] and even to purely private action.[96] But recently the Su-

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92. The most eloquent spokesmen for a non-statist position are M. MANNING, RIGHTS, FREEDOMS AND THE COURTS 255-56 (1983); Gibson, *Distinguishing the Governors from the Governed: The Meaning of "Government" Under Section 32(1) of the Charter*, 13 MAN. L.J. 505 (1983). The narrower position is argued in P. HOGG, *supra* note 2, at 674-78; Swinton, *Application of the Canadian Charter of Rights and Freedoms*, in CANADIAN CHARTER OF RIGHTS AND FREEDOMS: COMMENTARY, *supra* note 2; *see generally* Christian, *supra* note 2; McLellan & Elman, *To Whom Does the Charter Apply? Some Recent Cases on Section 32*, 24 ALTA. L. REV. 361 (1986); Slattery, *Charter of Rights and Freedoms — Does It Bind Private Persons?*, 63 CAN. BAR REV. 148 (1985).

93. *See Re* Schmidt & the Queen, 4 C.C.C.3d 409 (Ont. H.C. 1983); McCutcheon v. City of Toronto, 41 O.R.2d 652 (H.C. 1983); Hunter v. Southam, 11 D.L.R.4th 641 (S.C.C. 1984); The Queen v. Operation Dismantle, Inc., 3 D.L.R.4th 193 (F.C.A. 1983); Van Mulligen v. Saskatchewan Housing Corp., 23 Sask. R. 66 (Q.B. 1982).

94. Professor Hogg has suggested that the Charter would apply to a commercial corporation that was an agent of the Crown. No court has yet adopted this view. On the other hand, there is some weak authority that when a private decisionmaker has a legislative mandate, for example, a labour arbitrator, the Charter will apply. By analogy, *see* Cat Prods. v. Macedo, [1985] 1 F.C. 269 (T.D.).

95. *Compare* Regina v. Begley, 38 O.R.2d 549 (H.C. 1982) (Charter not applicable to judicial order banning publication of criminal proceedings prior to verdict) *with* Regina v. Germain, 53 A.R. 264 (Alta. Q.B. 1984) (Charter applicable to judicial contempt of court order).

96. Regina v. G.B., 3 W.W.R. 141 (Alta. Q.B. 1983); Regina v. Lerke, 13 C.C.C.3d 515 (Alta. Q.B. 1984). Of course, when private action is legislatively authorized, as in citizens arrests or by-laws made by railways under the Railway Act, the Charter clearly will apply. Similarly, when one private party invokes or relies upon governmental action in private litigation, a Charter issue is raised. *See Re* Blainey & Ontario Minor Hockey Ass'n, 16 D.L.R.4th 728 (Ont. C.A. 1986) (private action to compel registration of female hockey player in men's league successful on basis that league's defense of statutory authority unavailable when statute infringes Charter).

preme Court has taken a much narrower view of the Charter's reach.[97] In *Retail Wholesale & Department Store Union, Local 580 v. Dolphin Delivery* the Court was asked to decide whether a common law injunction to restrain secondary picketing offended the freedom of expression guarantee of section 2(e). While the Court was prepared to find that the Charter applied to rules of the common law, just as it would apply to the Royal prerogative or to statutory rules, the Court would not apply the Charter in the context of civil litigation between private parties. Justice McIntyre concluded that, even though as decisionmakers, the courts were bound by the Charter, a judicial order per se could not constitute "government action" within the meaning of section 32.[98]

A third issue courts must not confront is that of defining the scope and the specific procedural guarantees of section 7. There has been no indication that courts will have difficulty in extending the Charter to all types of governmental functions. Like procedural fairness, and unlike natural justice, the fundamental justice standard does not depend on a prior exercise of classification of functions. It may be invoked in respect to adjudications, rule-making, investigations, recommendatory processes, contracting, and other types of informal administrative action.[99] Moreover, without exception commentators argue that courts

97. 33 D.L.R.4th 174 (S.C.C. 1987).

98. *Id.* at 196. Justice McIntyre stated:

> While in political science terms it is probably acceptable to treat the courts as one of the three fundamental branches of Government, that is, legislative, executive, and judicial, I cannot equate for the purposes of Charter application the order of a court with an element of governmental action. This is not to say that the courts are not bound by the Charter. The courts are, of course, bound by the Charter as they are bound by all law. It is their duty to apply the law, but in doing so they act as neutral arbiters, not as contending parties involved in a dispute. To regard a court order as an element of governmental intervention necessary to invoke the Charter would, it seems to me, widen the scope of Charter application to virtually all private litigation. All cases must end, if carried to completion, with an enforcement order and if the Charter precludes the making of the order, where a Charter right would be infringed, it would seem that all private litigation would be subject to the Charter. In my view, this approach will not provide the answer to the question. A more direct and a more precisely-defined connection between the element of government action and the claim advanced must be present before the Charter applies.

99. For representative cases not already mentioned, see Cadieux v. Director of Stony Mountain Inst., 10 C.R.R. 248 (F.C.T.C. 1984); *Re* Cadeddu & The Queen, 4 C.C.C.3d 97 (Ont. H.C. 1982); *Re* United States & Smith, 42 O.R.2d 668 (H.C. 1983); Willette v. Commissioner of R.C.M.P., 10 Admin. L.R. 149 (F.C.A. 1984).

should adopt a reasonably flexible approach as to what procedures the principles of fundamental justice require in any given process.[100] One may anticipate that courts will borrow both the rhetoric and substance of procedural fairness decisions,[101] although to date there are no examples of decisions where a non-adjudicative claim for due process has been upheld or even raised. In any event, it is not yet clear whether the fundamental justice standard, any more than the procedural fairness standard, will liberate due process from its adversarial adjudicative mould and lead to the invocation of alternative procedural models.[102]

No court has explicitly addressed a final aspect of the content of fundamental justice: whether "the principles of fundamental justice" can be invoked to impose specific procedures even in cases where Parliament or a legislature has enacted detailed codes governing administrative procedures. At common law, courts often were reticent to imply a requirement of natural justice in the face of express statutory procedures.[103] However, since section 7 is an explicit rather than an implied due process standard, such procedural codes will probably no longer inhibit courts from requiring additional due process guarantees in individual cases.

After only five years of litigation, it is difficult to predict exactly where the courts will take the section 7 guarantee. The fundamental justice standard in the Charter is a product of the Anglo-Canadian due process tradition. Yet in style and vocabulary it seems to reflect United States preoccupations. For this reason, it has challenged both Canadian procedural due process theorists versed in the presumptions of the common law, and latter-day constitutional scholars. A direct comparison of these two due process guarantees is therefore appropriate.

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100. *See Freedoms*, *supra* note 2, at 278-85; Mackay, *supra* note 2, *passim*.

101. The leading cases on the new rhetoric of procedural fairness are M.N.R. v. Coopers & Lybrand, [1979] 1 S.C.R. 495; Martineau v. Matsqui Inst. Disciplinary Bd. (No. 2), [1980] 1 S.C.R. 602; Attorney Gen. of Can. v. Inuit Tapirisat, [1980] 2 S.C.R. 735.

102. For an attempt to illustrate how courts might respond to such an opportunity, see Macdonald, *A Theory of Procedural Fairness*, 1 WINDSOR. Y.B. ACCESS. JUST. 3 (1981).

103. *See* Macdonald, *supra* note 22, at 550-63 (assessment of position at common law). The argument for deference usually is as follows. Natural justice, on one view at least, is implied only to supply the omission of the legislature. Therefore, if the legislature has provided a detailed statutory code, it cannot be said to have inadvertently omitted to consider procedural matters. Hence, the presumption of natural justice ought not to apply.

V. THE INTERACTION OF THE NATURAL JUSTICE AND THE FUNDAMENTAL JUSTICE STANDARDS

Almost all section 7 commentators have speculated, at least in general terms, upon the interaction between the common law natural justice standard and the Charter fundamental justice standard.[104] Surprisingly few, however, have attempted to situate the two standards in their broader constitutional context, and to develop the connexion between their content and their means of enforcement. As noted already, the natural justice standard has been applied to domestic tribunals and to private action to a far greater extent than apparently the courts will assert the fundamental justice standard. By contrast, there is some evidence that within the framework of traditional government action, section 7 may have a broader reach. The Charter standard might apply not only to administrative agencies, inferior courts, the Cabinet, and other statutory, prerogative, or contractual power-holders, but possibly also to proceedings of the Superior Courts and the processes of Parliament itself.[105] Common law courts have been somewhat reluctant to extend the fairness doctrine to certain types of legislative, rule-making, contracting, and negotiating activity, and to develop procedural models against which due process claims in each of these domains can be evaluated, but they appear to feel less reticence about section 7. Whereas the natural justice and procedural fairness standards applied equally to personal and economic rights, the omission of a property guarantee from section 7 will compel an as yet undisclosed judicial inventiveness to achieve the same substantive reach. Finally, it seems that the concept of fundamental justice has not added a new procedural due process standard to Canadian law. That is, while section 7 may indeed have a substantive or quasi-

104. *See* sources cited *supra* note 2.

105. At common law, the hallmark of a Superior Court was that it exercised the supervisory power and itself could err as to jurisdiction free from collateral attack upon its decisions by any other tribunal. Hence, natural justice could not be invoked as against judicial proceedings of a Superior Court. Today, if a judge hearing a case involving the government were to breach a Charter guarantee (for example, if he were to take a bribe or were to decide without hearing), his decision presumably could be collaterally attacked before another Superior Court justice.

As to Parliament, it is difficult although not impossible to conceive of how a Charter challenge might be brought against any parliamentary proceedings. A joint address for removal of a Superior Court judge or an order of expulsion rendered by the Speaker of the House are two examples that come to mind. Procedures before Commons Committees would, as in the United States, attract the Charter. There is as yet, however, no evidence as to what procedural content courts will require in these latter cases.

substantive content not associated with natural justice since the seventeenth century, the purely *procedural* content of fundamental justice is apparently identical to that of modern day natural justice and procedural fairness.[106]

A. *Standing, Judicial Jurisdiction, and Remedies*

Other points of comparison reveal important theoretical differences and the reciprocal influence between these standards. To commence, it is worth contrasting the two standards from the perspective of civil procedure.

Standing, of course, is the threshold issue.[107] At common law, a breach of the rules of natural justice usually was challenged by writ of certiorari or by an action for a declaration. The 1970s and 1980s saw the Supreme Court considerably liberalize the law of standing with respect to constitutional claims,[108] but until recently the spill-over effect upon administrative law remedies has been less certain.[109] Conventionally, an ordinary action brought under section 52 of the Constitution Act, 1982 to have a statute declared ultra vires section 7 would attract the liberalized standing criteria applicable to other constitutional claims,[110] as would a section 7 challenge to specific administrative action brought under section 24.[111] But now, perhaps as a direct

106. What is more, even though the specific provisions of §§ 8-14 of the Charter may establish constitutional procedural guarantees not found in the natural justice standard or in existing rules of criminal procedure, in general courts do not seem to have used this explicit legislative invitation to give any additional content to the procedural guarantees mandated by § 7. *See* Mackay, *supra* note 2, at 326. *But see Re* Howard & Stony Mountain Inst., 19 C.C.C.3d 195 (Fed. C.A. 1985) (exceptional case in which court attempted to establish § 7 as an "enhancer" of common law procedural fairness).

107. *See generally* D. GIBSON, *supra* note 2, at 264-78; CHARTER LITIGATION, *supra* note 90, pt. I.

108. *See* Thorson v. Attorney Gen. of Can., 43 D.L.R.3d 1 (S.C.C. 1974); Nova Scotia Bd. of Censors v. McNeil, 55 D.L.R.3d 632 (S.C.C. 1975); Borowski v. Attorney Gen. of Can., [1981] 2 S.C.R. 575.

109. For certiorari, standing to persons not directly aggrieved or forming a part of a specially affected class usually has been refused. *See Re* North Vancouver & Nat'l Harbours Bd., 89 D.L.R.3d 704 (F.C.T.D. 1978). The result is mixed as to declarations. *Compare Re* Clark & Attorney Gen. of Can., 81 D.L.R.3d 33 (Ont. H.C. 1977) (applying *McNeil*, 55 D.L.R.3d at 632, in non-constitutional setting) *with* Rosenberg v. Grand River Conservation Auth., 12 O.R.2d 496 (C.A. 1975) (*McNeil*, 55 D.L.R.3d at 632, has no application to non-constitutional cases).

110. *See Re* Edmonton Journal & Attorney Gen. Alta., 4 C.C.C.3d 59 (Alta. Q.B. 1983) for a recent example.

111. Section 24(1) provides: "Anyone whose rights or freedoms, as guaranteed by this

result of the change in judicial posture stimulated by the Charter, courts have claimed discretion to grant "public interest standing" to private parties who challenge, even on non-constitutional grounds, various exercises of statutory authority.[112] If this trend continues there might soon be no discernible difference in standing requirements to bring Charter or non-Charter procedural due process claims.

Judicial jurisdiction over due process claims constitutes another fruitful point of comparison.[113] Direct review for breach of the rules of natural justice was historically vested exclusively in the Superior Courts, being an aspect of the supervisory jurisdiction. A similar principle ought to apply to declaratory proceedings under section 52. Of course, if a natural justice or Charter issue were properly raised in a proceeding before an inferior court that had jurisdiction over the substance of a given dispute, that due process claim could be pursued.[114] The special remedy of section 24, however, is properly brought before any court of competent jurisdiction. While there is some doubt about whether this requirement permits administrative appeal tribunals to grant in rem orders to quash decisions taken in violation of a section 7 right, courts of inferior jurisdiction might well be allowed to exercise such a power.[115]

At common law, breaches of natural justice typically were sanctioned by the issue of a writ of certiorari or prohibition, while procedural fairness was raised in declaratory or injunctive proceedings. Apart from these traditional recourses, section 24 permits a court hearing a Charter claim to award "such remedy as [it] considers just in the circumstances." To date courts have concluded that section 24 does not vest new remedial powers in inferior courts or administrative

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Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances." Two cases in particular reveal a liberal attitude to standing questions under § 24(1). *See* Singh v. Minister of Employment & Immigration, [1984] 1 S.C.R. 7 (simple fear of reprisal in one's country of origin deemed sufficient to ground standing in a refugee case); Quebec Ass'n of Protestant School Bds. v. Attorney Gen. of Que., 140 D.L.R.3d 33 (Que. S.C. 1982) (court permitted a § 24(1) application to proceed, notwithstanding that the infringement claimed would be a future and uncertain event).

112. *See, notably,* Minister of Fin. v. Finlay, 33 D.L.R.4th 321 (S.C.C. 1987).

113. *See* D. GIBSON, *supra* note 2, at 279-87; Smith, *Applying the Charter*, in CHARTER OF RIGHTS AND ADMINISTRATIVE LAW 1 (G. Smith ed. 1983).

114. On the general principles governing both collateral attack and private law actions (for example, damages, specific performance, restitution) grounded in an alleged procedural defect in a previous proceeding, see D. MULLAN, *supra* note 41, at 217-21.

115. *See* P. HOGG, *supra* note 2, at 695-97 (a general discussion of judicial jurisdiction).

appeal tribunals even if either has jurisdiction over a section 7 claim. Hence, if "the court of competent jurisdiction" is not a Superior Court the power to fashion novel orders and recourses is severely constrained.[116] Moreover, the prophylactic value of section 24, even in proceedings before a Superior Court, is limited because a separate application for a section 24 remedy has been held not to be timely until the court or tribunal initially seized with a matter has decided upon the alleged Charter infringement.[117] Thus, unlike the common law remedy of prohibition, available to enjoin proceedings being taken or even threatened in breach of natural justice, section 24 has a limited preventive dimension.

Nevertheless, the type of remedial orders that may be issued under section 24 are quite diverse, and include not only traditional defensive remedies,[118] but also offensive remedies such as mandatory injunctions, and damages for constitutional torts. Also possible are novel structural remedies such as appointing counsel, ordering a jury trial, or imposing a particular administrative procedure.[119] Surprisingly, courts have not yet taken advantage of the opportunities provided by the last clause of section 24(1).

B. *Constitutional Status and Judicial Deference*

The natural justice and fundamental justice standards may also be compared in relation to their constitutional status. Natural justice is a common law constitutional presumption. As such it may be ousted by express legislative language, by a properly structured discretionary grant of substantive jurisdiction, and possibly even by implication from a detailed legislative procedural code.[120] Moreover, since natural

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116. *See Re* Seaway Trust, 41 O.R.2d 532 (Ont. C.A. 1983); Singh v. Minister of Employment & Immigration, [1984] 1 S.C.R. 7.

117. *See Re* Krakowski & The Queen, 41 O.R.2d 321 (Ont. C.A. 1983).

118. Typical defensive recourses are the declaration of a nullity, the staying of proceedings, injunctions, and the exclusion of evidence, the latter specifically authorized under § 24(2). *See* Regina v. Vermette, 3 C.C.C.3d 38 (Que. C.A. 1982).

119. *See* D. GIBSON, *supra* note 2, at 183-215; MacLellan & Elman, *The Enforcement of the Canadian Charter of Rights and Freedoms: An Analysis of Section 24*, 21 ALTA. L. REV. 205 (1983); Pilkington, *Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms*, 62 CAN. BAR REV. 517 (1984). To date, however, the cases have been disappointing. *See* Regina v. Lyons (No. 2), 141 D.L.R.3d 376 (B.C.C.A. 1982) (refusal to appoint counsel); Regina v. Crate, 1 D.L.R.4th 149 (Alta. C.A. 1983) (refusal to order jury trial).

120. *See* Regina v. Randolph, 1966 S.C.R. 260 (exclusion by express language); Roper v. Royal Victoria Hosp., 50 D.L.R.3d 725 (S.C.C. 1974) (discretion as to holding hearing and as to procedures ousts due process). *But see* Crevier v. Attorney Gen. for Que., [1981] 2 S.C.R.

justice is a presumption, in the past courts have been prepared to refuse relief on the grounds that the requirements of natural justice have been waived, or that no substantial injustice has resulted from its breach. Inevitably, therefore, due process review for breach of the rules of natural justice starkly raises the issue of judicial deference to Parliamentary will. It follows that the key issue in any common law proceeding is the extent to which courts are willing to concede that the legislature has spoken clearly about questions of procedure.[121]

The identical issue of judicial deference arises, albeit in a slightly different form, in proceedings under section 7 of the Charter. Accepting that the Charter is a legislative rather than a common law constitutional standard, its specific section 7 guarantee, nevertheless, may be legislatively overridden. Section 33 permits Parliament or a legislature to preclude the operation of sections 2 and 7 through 15 of the Charter for infinitely renewable periods of up to five years each.[122] The section 33 override, with one exception, has only been invoked in Quebec, but in that province it has been systematically deployed.[123] Recently the Quebec Court of Appeal held that the retroactive insertion of the override into all Quebec statutes by means of a single general amending statute did not meet the manner and form requirements for the invocation of section 33.[124] The impact of this judgment on as yet hypothet-

220 (privative clause not effective to preclude jurisdictional review of orders of a provincial tribunal).

121. The dynamic of this judicial "concession" is explored in *Perspective, supra* note 30, at 205-21.

122. To all intents and purposes, therefore, a legislature may dispose of the fundamental justice standard exactly as it would overcome the natural justice standard. Sections 52 & 33 of the Charter merely require that certain "manner and form" requirements for excluding the fundamental justice standard be followed. Paradoxically, the use of § 33 to override § 7 does not per se preclude recourse to the natural justice standard. In order to also exclude the natural justice standard it would be necessary to adopt one of the legislative techniques noted *supra* note 120 and accompanying text.

123. Immediately after the Charter was proclaimed in force, the National Assembly of Quebec enacted Bill 62, An Act Respecting the Constitution Act, 1982, 1982 Qué. Stat. ch. 21, which retroactively inserted the override into all existing Quebec statutes. Thereafter, each new act also contained the override.

The one exception is SGEU Dispute Settlement Act, 1984-1986 Sask. Stat. ch. 111, § 9(1) 1173. This provision inserted an override into an act ordering public servants to stop rotating strikes.

124. *See* Alliance des professuers de Montreal v. Attorney Gen. for Que., 21 D.L.R.4th 354 (Que. C.A. 1985) (leave to appeal to the Supreme Court granted September 30, 1985). The Québec Court of Appeal seemed to suggest that the override would have to be inserted individually in each statute and would have to explicitly identify which Charter guarantees were being overridden.

ical future section 33 jurisprudence is difficult to foresee. However, given that the Court accepted the authority of the Quebec National Assembly to deploy section 33 and contested only the mechanism it chose, a properly crafted general override might well be unassailable.[125]

When section 33 is not deployed to override section 7, the residual question addressed explicitly in section 1 poses in a legislative rather than a common law formulation the same issue of judicial deference that arises in judicial review proceedings for breach of the rules of natural justice. Again, only the way the question is framed varies. If natural justice is the claim, the issue is whether courts should interpret statutes so as to imply procedural due process standards that "supply the omission of the legislature." If fundamental justice is the claim, the issue is both whether the court should "supply the omission of the legislature" when a statute is silent on procedural questions, and whether the court should defer to the "commission of the legislature" when a statute expressly imposes procedural norms.[126]

Section 1, which provides that the rights guaranteed by the Charter are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society," has been extensively litigated.[127] In fact, given the Supreme Court's view that

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125. In the face of a general override that meets the manner and form requirements of *Alliance des professeurs*, 21 D.L.R.4th at 354, few strategies to contest the use of § 33 are open. Presumably, one would be obliged either to say that the deployment of § 33 is contingent upon meeting the § 1 reasonableness test, an argument apparently rejected, *id.* at 362, or to argue that the statute invoking the override is subject to some implied standard of legality derivable either from § 7 or from the Charter's preamble. On the first argument, see Slattery, *Canadian Charter of Rights and Freedoms Override Claims Under Section 33 — Whether Subject to Judicial Review Under Section 1*, 61 CAN. BAR REV. 391 (1983). For an argument that § 7 limits the manner in which § 33 may be deployed, see Arbess, *Limitations on Legislative Override under the Canadian Charter of Rights and Freedoms: A Matter of Balancing Values*, 21 OSGOODE HALL L.J. 113 (1983). For a case in which the Supreme Court actually relied on a process of reasoning analogous to that offered as a second strategy, see *Re* Manitoba Language Reference, [1985] 1 S.C.R. 721 (notwithstanding invalidity of all statutes passed in Manitoba from 1890-1984, court invokes principle of Rule of Law to preserve civil government until void statutes properly translated and re-enacted).

126. For a thoughtful discussion of these issues, see *Judicial Deference*, *supra* note 2.

127. For a general analysis, see T. Christian, *The Limited Operation of the Limitations Clause*, 25 ALTA. L. REV. 264 (1987) and D. GIBSON, *supra* note 2, at 133-62. The Supreme Court has directly considered § 1 on several occasions. The decisions containing the most extensive discussion of the section are Regina v. Oakes, 26 D.L.R.4th 200 (S.C.C. 1986); Edwards Books & Art Ltd. v. The Queen, 35 D.L.R.4th 1 (S.C.C. 1987); Singh v. Minister of Employment & Immigration, [1984] 1 S.C.R. 7; Regina v. Big M Drug Mart Ltd., 18 D.L.R.4th 321 (S.C.C. 1985); Hunter v. Southam, 11 D.L.R.4th 641 (S.C.C. 1984); Law Soc'y Upper Can. v. Skapinker, 9 D.L.R.4th 161 (S.C.C. 1984); Jones v. The Queen, 31 D.L.R.4th 569 (S.C.C. 1987).

section 1 operates after an infringement of a Charter right has been found, as a contingent limitation on such a right, this issue necessarily arises in every case. The Court has wavered on the evidentiary burden section 1 imposes in respect of general Charter litigation.[128] But the interaction of section 1 and section 7 raises special problems. *Section 94(2) Reference* suggested two different approaches. Adopting the analysis taken in other section 1 cases, Justice Lamer's majority opinion held that section 1 could be invoked to save an enactment or procedure that otherwise offended the principles of fundamental justice.[129] Justice Wilson, by contrast, held that if a section 7 right has been impaired without regard to the principles of fundamental justice, section 1 cannot then be invoked to save the enactment. Rather, section 1 operates to impose a further justificatory burden upon the government if a section 7 right has been infringed *in accordance* with the principles of fundamental justice.[130] It remains an open question whether the section 7 guarantee is like any other Charter right, as Justice Lamer asserts, or whether it also amounts to a positive assertion of a guaranteed right whose permissible limitations are self-defined, as Justice Wilson believes.

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128. In Regina v. Oakes, 26 D.L.R.4th 200 (S.C.C. 1986), a case involving a reverse onus clause in a narcotics control statute, the Court advanced a twofold test that, in effect, has four components: the objective of the legislation under attack must be of sufficient importance to warrant the infringement of a Charter right; the measures must be carefully designed to meet that objective; they must involve as minimal impairment of the Charter right as possible; and actual effects of the measures must be proportional to the objective to be achieved. Such a test puts a heavy evidentiary burden on governments seeking to plead § 1. But in Edwards Books & Art Ltd. v. The Queen, 35 D.L.R.4th 1 (S.C.C. 1987), a case involving a Sunday-closing statute, the court, on the facts, found no disproportionality, in a judgment surprising to many. Finally, in Jones v. The Queen, 31 D.L.R.4th 569 (S.C.C. 1987), the Court seemed to retreat from its earlier jurisprudence on the burden of proof question. Justice Laforest stated that the Crown assumes a burden of proof only

> [w]here evidence is required in order to prove the constituent elements of a § 1 inquiry. I do not think such evidence is required here. A court must be taken to have a general knowledge of our history and values and to know at least the broad design and workings of our society. We are not concerned with particular facts.

Id. at 594.

129. *See Section 94(2) Reference*, 24 D.L.R.4th at 563.

130. *See id.* at 565. For support of Justice Wilson's view, see Bender, *The Canadian Charter of Rights and Freedoms and the United States Bill of Rights: A Comparison*, 28 McGill L.J. 811 (1983) (arguing that all Charter guarantees containing their own limitations, for example, § 7, or § 8, which prohibits *unreasonable* search and seizure, cannot be further limited by a § 1 argument). To date lower courts have twice adopted the Bender thesis. *See Re* Moore & The Queen, 45 O.R.2d 3 (H.C. 1984) (concerning § 12); *Re* Reich & Alberta College of Physicians, 8 D.L.R.4th 696 (Alta. Q.B. 1984).

The Supreme Court is undoubtedly attempting to work out a theory of section 1 that falls between the extremes advanced in doctrinal commentary. For example, some claim that section 1 requires minimal judicial deference to legislative will: Charter rights always trump social policies.[131] Others advocate a more deferential approach out of fear that a judicial due process rampage will stimulate excessive recourse to section 33 with the result that social policy will always trump Charter rights.[132] Still others suggest that section 1 is not the second step of an inquiry into the scope of a Charter right. Rather, they claim that section 1 is an explicit codification of the issue the United States Supreme Court faces in developing doctrines such as "clear and present danger" or "political question." Section 1 simultaneously indicates when Charter rights trump social policy, directs the court to the applicable test, and structures the balancing to be undertaken. In this sense it preserves the ideological heterodoxy of Canadian political and legal culture.[133] The Supreme Court has proceeded cautiously, avoiding any language such as "strict scrutiny" jargon that would colour the debate, and continuing to rely on a general "reasonableness" standard in dealing with both natural justice and section 7 due process claims.[134]

C. *The Political Theory Underlying Fundamental Justice*

A final major issue implied by the co-existence of common law and legislative due process standards is the post-Charter relationship of common law constitutional doctrines and the guarantees of the Char-

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131. *See* Roman, *The Possible Impact of the Canadian Charter of Rights and Freedoms on Administrative Law,* 26 C. DE D. 339, 358 (1985).

132. This is an argument often made by administrative law specialists who are familiar with previous legislative reactions to judicial zeal. Examples in point would be recourse to privative clauses as a response to the rediscovery of error of law on the face of the record, recourse to subjective grants of power in response to novel abuse of discretion doctrines, and recourse to more detailed procedural codes in response to the fairness doctrine. *See Judicial Deference, supra* note 2, for a discussion of the waxing and waning of judicial scrutiny.

133. For a lengthy development of this theme, see Monahan, *Judicial Review and Democracy: A Theory of Judicial Review,* 21 U.B.C.L. REV. 87 (1987). A more comprehensive statement of Monahan's position may be found in his recent book, P. MONAHAN, POLITICS AND THE CONSTITUTION: THE CHARTER, FEDERALISM AND THE SUPREME COURT OF CANADA (1987).

134. *See* Mackay, *supra* note 2, at 331-35; Morissette, *supra* note 60; Tremblay, *supra* note 2; *see also* MacLauchlan, *Judicial Review of Administrative Interpretations of Law: How Much Formalism Can We Reasonably Bear?,* 36 U. TORONTO L.J. 343, 374-85 (1986) (especially recommended analysis).

ter. A useful starting point for assessing this question is the Preamble to the Charter. The preamble states, "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law . . . ." The preamble, together with section 26, which provides, in a fashion similar to the ninth amendment,[135] that common law rights continue to subsist notwithstanding their omission or partial omission from the Charter, means that the Charter is not prior to the common law, but continues to be a reflexion of it.[136] Thus the Charter does not impliedly repeal the Canadian Bill of Rights[137] or common law due process guarantees.[138]

Unquestionably, the natural justice standard was merely one of a series of common law presumptions; as such, it had only a limited generative capacity as a due process norm. The fundamental justice standard does not automatically lend itself to a similar conclusion.[139] For example, section 7 may well embody the common law presumptions canvassed earlier. Of course, the deletion of an affirmative guarantee to the enjoyment of property weakens the case for incorporation of the "no expropriation without compensation" presumption. Nevertheless, presumptions relating, inter alia, to access to the courts, private clauses, mens rea, the scope of delegated legislative, the maxim

135. Note that § 26 does not "reserve these to the provinces"; rather, the Crown continues to claim these on behalf of the people.

136. In other words, the Charter, like the principle of legislative supremacy, is a product of the common law and is circumscribed by the common law constitution.

137. The precise interrelation of the Charter and the Bill of Rights is beyond the scope of this article. But, to the extent the Bill of Rights is now being resurrected as a quasi-constitutional document and not merely as an interpretive instrument, *see* cases cited *supra* note 89, then guarantees in the Bill of Rights relating, inter alia, to the right of property will have constitutional effect. In this sense, at least in federal matters (the Bill of Rights not applying to the provinces), there are two written procedural guarantees: the fundamental justice standard of § 7 of the Charter as it relates to "life, liberty, and security of the person," and the due process of law standard of § 1(a) of the Bill of Rights as it relates to "life, liberty, security of the person, and enjoyment of property."

138. Of course, the question then becomes what are these common law guarantees. To date courts have been uncertain just how much of the private law is constitutionally protected. For example, in The Queen in Right of N.B. v. Fisherman's Wharf Ltd., 135 D.L.R.3d 307 (N.B.Q.B. 1982), the court held that the right to enjoy property free from the threat of confiscation was a § 26 right. By contrast, in *Re Groupe des éleveurs de volailles de l'est de l'Ontario*, 14 D.L.R.4th 151 (F.C.T.D. 1984), the principle of strict construction of statutes interfering with freedom of contract was held not to be a § 26 right. Again, by contrast, in *Re* Piercey v. General Bakeries Ltd., 31 D.L.R.4th 373 (Nfld. S.C.T.D. 1986), the court seemed to suggest that "fault-based liability" was a guaranteed right.

139. Of course, natural justice was broader in scope, in that it also covered the right of property.

delegatus non potest delegare, the theory of agency jurisdiction, and exposure of public officials to tort liability, can readily be seen as "basic tenets and principles" of Canada's constitutional tradition.[140]

A more difficult question concerns the relationship between section 7 and the concept of an implied Bill of Rights. The incorporation of various common law presumptions into section 7 is not inconsistent with their survival under section 26. Depending on how the court interprets their importance in relation to life, liberty, and security of the person, they may or may not achieve section 33 reinforcement. But the same cannot be true of those ideals reflected in the notion of an implied Bill of Rights. Most such ideals cannot be made to fit the section 7 test. Unless the expression "Rule of Law" in the preamble to the Charter can be read as bootstrapping, through section 26, Canada's entire common law constitutional tradition into the Charter,[141] the scope for pleading an implied Bill of Rights in a due process context is next to nil. On the other hand, when constitutional government itself is threatened, courts have shown a willingness to give the "Rule of Law" a substantive content.[142] This may well be the only avenue for protecting due process values against systematic assault through the section 33 override.

These observations about the interaction of the natural justice and fundamental justice standards should conclude with a discussion of "pragmatics" of the two standards. The Charter raises more directly the perennial debate about whether due process has a non-procedural content. At common law, the plethora of other doctrines under which the merits of administrative decisions could be reviewed meant that substantive issues were present only peripherally in natural justice litigation. Since fundamental justice appears to be the only Charter guarantee capable of incorporating these complementary review doctrines, this issue has emerged as central to the meaning of section 7. Of course, the Supreme Court has already opened the door to folding

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140. While other common law doctrines such as the notions of private property per se, freedom of contract, freedom of willing, fault-based liability, and parental authority over their children not having reached the age of majority may well be § 26 rights, they do not fall under the fundamental justice guarantee. Only common law constitutional doctrines touching state action may become Charter rights under § 7.

141. This is a highly unlikely possibility since the preamble contains no affirmative statement and since section 26 does not transform these common law guarantees into Charter rights.

142. *See* cases cited *supra* notes 14 & 26. For a skeptical assessment of this jurisprudence, see D. GIBSON, *supra* note 2, at 1-12, who takes a position diametrically opposed to that argued here.

the entire theory of agency jurisdiction into the fundamental justice standard. But the delicate judicial craftsmanship necessary to assert control over agency vires at the point of legislative enactment without embarking on the road to *Lochner v. New York*[143] has not yet been made explicit. For this reason the deletion of property as a protected right dovetails perfectly with the expansive conception of fundamental justice adopted by the Supreme Court.[144]

The Charter has destabilized both the rhetoric and the political theory of procedural due process. At common law, a heterodox political ideology coupled with acknowledgement of Parliamentary sovereignty helped insulate courts from libertarian pressures to "right all wrongs"; but almost all early commentators have claimed that the legal liberal model of law and state underlies the Charter. To summarize, the dilemma of section 7 lies precisely in its difference from common law due process. As a common law principle, natural justice necessarily required its own justification. Thus, it was invoked more cautiously, but, once invoked, respected more universally by Parliament. Courts and legislatures engaged in a genuine dialectic. As a legislated standard, fundamental justice does not necessarily require its own justification. Courts may well be tempted, in consequence, to treat it as fiat. In the final analysis, reconciling the "donné" and the "construit" is the crucial issue now confronting Canadian constitutional theorists.[145]

VI. CONCLUSION

The preceding sections give a fair account of the Canadian political and legal traditions, the evolution of the procedural due process guarantees of natural justice and fundamental justice, and the interaction of these two standards in contemporary constitutional law. The general patterns traced are not unknown to other liberal democracies. But there are also unique aspects of the Canadian experience that

143. 198 U.S. 45 (1905).

144. It is one thing to declare agency action ultra vires a generic statute on substantive grounds. It is another to find substantive principles that preclude legislatures from crafting statutes to establish a given social programme such as no-fault automobile insurance, no-fault workers' compensation insurance, agricultural marketing schemes, and so on. The challenge of § 7, therefore, is to remain faithful to the common law constitution without reimposing a substantive guarantee of the liberal right to property.

145. These terms are from F. GENY, METHODE D'INTERPRETATION ET SOURCES DE DROIT PRIVE POSITIF (1899). The best English language analyses I have found of these problems are those of Lon Fuller. *See* L. FULLER, ANATOMY OF THE LAW 43-84 (1968); Fuller, *Reason and Fiat in Case Law*, 59 HARV. L. REV. 376 (1946).

merit further attention in this conclusion, if only to bring into sharper focus some of the tacit presumptions of modern American due process theory.

It is appropriate to consider first the exact nature of the Charter of Rights and Freedoms as a constitutional document. Although largely inspired by the American Bill of Rights, the Charter is more than a pale reflection of any existing document. It reveals several very Canadian preoccupations: (i) the preamble juxtaposes the Supremacy of God and the Rule of Law as foundational principles of the Canadian polity; (ii) the Charter explicitly subjects the rights it guarantees to such reasonable limits as can be demonstrably justified in a free and democratic society; (iii) a number of political rights, variously labelled democratic rights and mobility rights, are entrenched, although a right to the enjoyment of property is not; (iv) notwithstanding a formal guarantee of equality, multiculturalism is preserved and affirmative action programmes are specifically permitted; (v) freedom of religion co-exists with a constitutional guarantee of state-subsidized denominational schools; and (vi) legislatures may override by ordinary statute several of the guaranteed rights enumerated in the Charter.

The careful reader will note that each of these features reflects a particular non-liberal democratic aspect of the Canadian political and constitutional heritage. The sectarian preamble, denominational schools, and multiculturalism are consistent with a Tory (and ultramontaine) view of society. The failure to include the enjoyment of property as a protected right in section 7, the promotion of equality of condition through affirmative action, and the legislative override suggest socialist preoccupations. The enumeration of fundamental freedoms, democratic rights, mobility rights, equality rights, and language rights alongside traditional legal rights flows from a continuing commitment to the special version of the separation of law and politics implicit in Canada's common law constitution inherited from the United Kingdom. In other words, the specific terms of the Charter itself imply the same ideological heterodoxy found in other Canadian legal artifacts.

Already the Supreme Court has been required to address several of these features in deciding Charter cases. A number of motifs turn up in its early work. First, the Court has already rejected its own legalistic Canadian Bill of Rights jurisprudence: it has consistently pursued a generous interpretive strategy more in keeping with the methodology of the common law. That is, the Court recognizes that the Charter is not grounded in a commitment to "freedom as the absence of constraint." Second, the Court wisely has not yet addressed the legitimacy issue that has vexed Americans: it has skirted the question by stating simply that section 52 preempts discussion of its legal power to strike down statutes. That is, the Court acknowledges that its moral authority to assert its legal authority as set out in the Charter cannot be proclaimed but must be freely accorded by citizens. Third, the Court has argued that the standards now contained in the Charter may be applied with the same degree of objectivity as earlier common law standards. It has made a concerted effort to weave the Charter into Canada's existing constitutional arrangements. That is, the Court accepts that the ultimate authority of the Charter flows from common law constitutional principles.

Most observers have not fully appreciated the subtlety of the Court's emergent position on these questions. Their pre-Charter adoration of or hostility to the ideology of liberal legalism, and the conception of the minimal state that it implies, has simply been reiterated in much post-Charter commentary.[146] Notwithstanding the Supreme Court's explicit invitation to the contrary, the Charter has been read as a document that exclusively defines the constitutional processes of the Canadian state. In consequence, political choices are now being argued by most commentators only in the rhetoric authorized by the Charter.

Nevertheless, some analyses are responsive to the Supreme Court's position, and reflect the rudiments of a post-Charter theory of Canadian constitutionalism. Three propositions capture this theory's major tenets. First, the juxtaposition of the Supremacy of God and the Rule of Law in the preamble to the Charter arguably invites jurists to remember that a charter is only a small part of a constitution, and to reflect upon the interdependence of individual and community, of self and other.[147] Second, while the scope of pure judicial adjudication, the realm of private law, and the concept of commutative justice are perfectly congruent, most legislative schemes and other non-private law legal processes (including constitutional arrangements) are reflexions of the justice of distributions.[148] Third, the view that a Supreme Court can adjudicate rights by invoking a charter understood as an

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146. For critical commentary, see Mandel, *The Rule of Law and the Legalisation of Politics in Canada*, 13 INT'L J. SOC. L. 273 (1985); Monahan, *A Critics' Guide to the Charter*, in CHARTER LITIGATION, *supra* note 90, at 383-408; Petter, *The Politics of the* Charter, 8 SUP. CT. L. REV. 473 (1986).

147. *See* Polka, *The Supremacy of God and the Rule of Law in the* Canadian Charter of Rights and Freedoms: *A Theologico-Political Analysis*, 32 MCGILL L.J. 853 (1987).

148. For a demonstration of the major premise of this proposition, see Weinrib, *The Intelligibility of the Rule of Law*, in THE RULE OF LAW: IDEAL OR IDEOLOGY 59 (P. Monahan & A. Hutchison eds. 1986); Weinrib, *Toward a Moral Theory of Negligence*, 2 J. L. & PHIL. 37 (1983).

artifact of legal liberalism improperly subordinates the institutions and processes of distributive justice to the institutions and processes of commutative justice.[149]

These three themes tie directly into issues of procedural due process canvassed earlier, for they recall that a legal system comprises a heritage of practices, understandings, and conventions defining its various processes. They also indicate that procedural justice is a dependent variable whose specific content often must be dissociated from the norms of adversarial adjudication. Finally, they bring to mind the limited role of judicial adjudication in elaborating standards of procedural due process. It is to be anticipated that the Canadian procedural due process edifice will continue to be erected upon this foundation.[150]

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149. *See* Macdonald, *Jurisdiction, Illegality and Fault: An Unholy Trinity*, 16 REVUE GÉNÉRALE DE DROIT 69 (1984).

150. I attempted to argue for such a theory as sustaining common law due process review even before enactment of the Charter. *See* Macdonald, *supra* note 102. To restate the argument of that essay, as modified to account for due process under the Charter, I claim that procedural due process theory in Canada presupposes the following:

A. Procedural due process is a concept that is applicable to a broad range of social interactions and that does not require either: (i) a formal state whose processes are to be reviewed, or (ii) a regime of specific due process standards, or (iii) a third party authority to apply these due process standards.

B. Procedural due process, even as a constitutional principle within a state, does not require either (i) written standards, or (ii) a supremacy clause by which these standards override legislative enactments, or (iii) judicial enforcement of these standards.

C. Procedural due process, even as a written, constitutionally supreme, norm enforced by courts, does not require: (i) a liberal view of the relationship of citizen and state, or (ii) a "theory of natural rights" view of freedom, or (iii) a commitment to adversarial adjudication as the paradigm of what process is due.