

judicial policymaking by substantially redesigning itself – changing its rules of evidence, relevance, standing, mootness, and intervener status – from a constitutional adjudicator to a constitutional oracle. This institutional retooling, combined with the new sophistication of Canadian interest groups in using litigation, means that few major government policy initiatives are likely to escape a Charter challenge. Judicial intervention in the policymaking process is no longer *ad hoc* and sporadic, dependent upon the fortuitous collision of individual interests and government policy; it has become systematic and continuous. The Supreme Court now functions more like a *de facto* third chamber of the legislature than a court. The nine Supreme Court justices are now positioned to have more influence on how Canada is governed than are all of the parliamentarians who sit outside of cabinet.

THREE

THE COURT PARTY

The fate of a bill of rights . . . depends on forces outside of it.

Charles R. Epp.¹

If judges are a more important cause of the Charter revolution than the Charter itself, an even more significant cause is the Court Party. The social movements composing the Court Party would have grown in prominence even without the Charter; they would not have gone so far so fast, however. The Charter gave them a new venue, the courtroom, to pursue their agendas and conferred on them the status needed to participate in the arena of constitutional politics. The result has been enhanced legitimacy (and generous state funding) for Court Party efforts in the legal arena.

While many of the Court Party constituencies would have gained prominence in the absence of the Charter, the opposite is not true. Without a Court Party, the Charter and the courts would not have attained their current political significance. It was the underdevelopment of such a constituency that helped stunt the 1960 Diefenbaker Bill of Rights. The Court Party has provided the political buoyancy that gave life and energy to the Charter, lifting it out of the statute books and making it a new force in Canadian politics.

Like the more familiar electoral parties, or political movements generally, the Court Party is a coalition of several overlapping constituencies. We have identified five main strands or dimensions of the Court Party coalition: (1) national unity advocates, (2) civil libertarians, (3) equality seekers, (4) social engineers, and (5) postmaterialists.² A variety of overlapping interests and ideological orientations (as well as membership) lead these constituencies to join in promoting judicial power.

Unifiers

Unifiers see the Charter, and the judicial power it fosters, as helping to solve Canada's national unity crisis. Former Prime Minister Pierre Trudeau, the "father" of the Charter, most prominently represents this wing of the Court

Party. From the beginning, Trudeau saw the Charter as much more than a rights-protecting document. Indeed, he saw it mainly as a counterweight to the forces of decentralizing regionalism and provincialism.³ The Charter, he hoped, would lead Canadians to define themselves more in terms of rights they held in common and less in terms of geographical communities that divided them.⁴ As early as 1967, Trudeau described his Charter project as "essentially testing, and hopefully establishing, the unity of Canada." Fifteen years later, in debating the Charter in parliament, Trudeau described it as defining "the common thread that binds us together," overcoming "the forces of self-interest [that threaten to] tear us apart."⁵ Peter Russell has described this position as "Charter patriotism."⁶

For Trudeau and the unifiers, the centerpiece of the Charter is language rights. Entrenching language rights in the constitution culminated Trudeau's long-standing strategy to use bilingualism to undercut the appeal of Quebec nationalism and preserve Canadian unity.⁷ In 1969, the newly elected Trudeau government enacted the Official Languages Act (OLA), which, however, was restricted to areas of federal jurisdiction. Section 23 of the Charter, which grants minority language education rights, represented an extension of bilingualism into the field of primary and secondary education, hitherto an exclusive provincial jurisdiction.

The importance Trudeau attached to language rights is reflected in its privileged position *vis-à-vis* the rest of the Charter. During the two-year period in which the wording and structure of the Charter was negotiated, Trudeau refused to compromise on the entrenchment of language rights. When the western premiers finally succeeded in their demand for the section 33 override, the language rights provisions (ss.16-23) were exempted. Trudeau was not about to subject compliance with his new policy breakthrough to the consent of traditionally hostile provincial governments.⁸

With the adoption of section 23 of the Charter, Ottawa encouraged francophone and anglophone rights groups to pressure provincial governments to comply with their new obligation to provide minority language education services. If a province refused or dragged its heels, Ottawa made sure the language rights groups could afford to go to court. These official language minority groups (OLMGs) were already receiving annual operating grants from Ottawa, which also established a "Court Challenges Program" to fund the costs of language rights litigation.⁹ Predictably, section 23 lawsuits were soon launched in almost every province. As Trudeau had anticipated, this flurry of litigation made the Supreme Court of Canada the *de facto* national school board for bilingual education.¹⁰

Encouraged by federal funding, OLMGs have become some of the most active and successful litigators under the Charter. OLMGs have won 16 of the 21 language rights cases decided by appeal courts since the Court Challenges Program was established. Thirteen of these decisions resulted in positive policy changes from the OLMG perspective.¹¹ Outside Quebec, francophone groups have won major section 23 education cases in British Columbia, Alberta, Manitoba, Ontario, Nova Scotia, and PEI. In non-education cases, they have also won major language rights victories in Manitoba and Saskatchewan.¹² Without exception, these cases have been strategic test cases brought by OLMGs such as La Société franco-manitobaine, Société des Acadiens, L'association francophones des conseils scolaires de l'Ontario, and l'Association culturelle franco-canadienne de la Saskatchewan. A frequent interverner is the Fédération des francophones hors Québec (FFHQ), the national umbrella organization for all the provincial groups.

In Quebec, anglophone rights groups — Alliance Quebec or its precursors¹³ — have helped bring successful court challenges to three different policy provisions of Bill 101. First, in a pre-Charter case, the Supreme Court prevented the Parti Québécois from making French the only official language of Quebec. Second, it used section 23 of the Charter to strike down the restriction of access to English-language education. Third, it invalidated provisions banning English-language signs in outdoor advertising.¹⁴

Like other wings of the Court Party, the unifiers straddle the state-society, public sector-private sector divide. While these OLMGs are typically presented as private-sector non-governmental organizations (NGOs) or citizens' groups, their dependence on federal funding has made them a *de facto* instrument of Ottawa's national unity policy. Not only do they litigate the expansion of language rights in their own provinces, but they intervene in one another's cases to encourage the courts to expand the scope of section 23.¹⁵

In addition, the governments of Ontario and New Brunswick, Trudeau's two original constitutional allies from the 1980-81 Chartermaking process, have frequently intervened in language rights cases against other provinces. The federal Commissioner for Official Languages also frequently intervenes on behalf of OLMGs against the provinces.¹⁶ These government allies give OLMG Charter claims added legitimacy before the courts and contribute to their high success rates.

With respect to most of francophone Quebec, Charter patriotism has been a dismal failure.¹⁷ The OLMGs' success has actually intensified, rather than ameliorated, nationalist projects for Quebec's disengagement from

Canada. Because the Charter was constitutionally entrenched without Quebec's consent, it is held up in that province as evidence of English Canada's betrayal of its founding partner and has symbolically fuelled, rather than doused, nationalist fires. In addition, Quebec nationalists see the 1990 defeat of the Meech Lake accord as a second Charter-related betrayal. The accord brought into sharp focus the tension between the Charter patriots' vision of a common pan-Canadian citizenship and the Quebec nationalists' desire for constitutional recognition of Quebec as a distinct society.¹⁸ Once again, the Charter patriots won.

While the Charter has aggravated Canada's deepest national-unity wound, unifiers retain high hopes for the Charter's unifying potential, if not with respect to the forces of Quebec separatism (at least in the short term), then certainly with respect to the forces of regional alienation in the rest of Canada. If one leaves Quebec out of the picture, it turns out that Canadians are as much divided by Charter issues as they are by regionalism, but these Charter-related disagreements cut across regions, thus acting as counterweights to regionalism.¹⁹

As we have seen, the boundaries of Charter rights are difficult to define with precision, and thus occasion battles over their proper interpretation. For example, the pro-life and pro-choice factions in the abortion controversy have engaged in prolonged and highly charged battles about whether section 7 of the Charter protects the life of the fetus or the liberty of the mother to abort that fetus, a question to which there is no obvious textual answer. Unifiers, however, prefer such cross-cutting cleavages to the regional cleavages at the root of Canada's national unity crisis, and they like the Charter for its tendency to emphasize them. How people view abortion or employment equity, for example, has little to do with what provinces they live in. Surveys of attitudes toward civil liberties issues conducted in 1987 and again in 1999 found no significant variations between regions.²⁰

The Charter does not just engender battles about crosscutting issues; it also makes the courtroom the most publicly prominent arena for conducting these battles. The courts now make more policy than they used to in areas that were previously dominated by legislatures. But the legislative branch of government in Canada is federally divided, while the judicial branch is not. The Canadian judiciary constitutes a single hierarchy, culminating in the Supreme Court, whose Charter interpretations are applicable across the country, regardless of federal jurisdiction. Thus a national court can now make major decisions in controversial policy areas, such as minority language education, which otherwise fall under provincial jurisdiction.²¹

FORUM SHIFT

In short, the Charter has effected a forum shift. It has transferred authority over language education (and other policy areas) out of provincial legislatures and into the nationally unified court system. By transforming minority interests into minority rights, the Charter transferred ultimate responsibility to the Supreme Court of Canada, a much more sympathetic forum. While OLMGs were the initial beneficiaries of Trudeau's strategy, other similarly situated groups – politically weak at the provincial level but with support in Ottawa – soon took advantage of the Charter (and federal funding) to use the courts to do an end run around unsympathetic provincial governments. In this sense, the Charter represents an empowerment of social interests (Charter Canadians) favoured by the federal government. These groups in turn mobilize support for the Charter, the courts, the Court Challenges Program and the federal government generally.

That the transfer of policymaking power from legislatures to courts amounts to a centralization of policymaking power is something the promoters of judicial review have always understood. In the US, from the founding onwards, the partisans of judicial review have often favoured the national government over the states.²² In Canada, many of the proponents and opponents of the first Supreme Court Act saw judicial review as a form of "disallowance in disguise"; that is, a way for the political centre to control the periphery regions. The critique of the Court as a covert agency of centralization is still very much alive, especially in Quebec.²³ This is one of the reasons that the western premiers demanded that Trudeau add the section 33 override if he wanted their support for the Charter. For unifiers, however, the centralizing tendency of judicial review is a virtue not a vice.

Civil Libertarians

Those who want to protect individual freedom from the potentially oppressive power of the state have also promoted the Charter and judicial power. As Russell has observed, "The Charter's political sponsors were aided and abetted by a phalanx of academics and lawyers who believed a Charter was needed to enhance our freedom and secure our liberty."²⁴ From this civil libertarian perspective, when the enormous state leviathan turns its baleful gaze on the puny individual, the latter needs all the help he can get.

Sometimes libertarians speak as though government was the only threat to individual liberty, but the original formulation of their perspective recognized that equally serious threats could come from other individuals. Indeed, it is the danger individuals pose to each other that justifies the estab-

lishment of a government strong enough to enforce the peace and security on which liberty depends.²⁵ The problem is that the governmental strength required to secure individuals against each other is itself a danger to those individuals. John Stuart Mill, the patron saint of libertarianism, expressed the dilemma in colourful terms:

To prevent the weaker members of the community from being preyed upon by innumerable vultures, it was needful that there should be an animal of prey stronger than the rest, commissioned to keep them down. But as the king of the vultures would be no less bent upon preying on the flock than any of the minor harpies, it was indispensable to be in a perpetual attitude of defense against his beak and claws.

Mill denied that transforming the chief vulture from a king into a representative and responsible parliament made its beak and claws any less dangerous. The advent of democracy, he argued, protected the majority against oppression by minorities but did nothing to protect individuals and minorities against the "tyranny of the majority." Indeed, tyrannical majorities were in some respects more dangerous than individual tyrants. It thus remained necessary to "set limits to the power which the ruler should be suffered to exercise over the community."²⁶ For modern libertarians, the necessary limits are best set by a constitutionally entrenched bill or charter of rights, enforced by the governmental institution most independent of the dangerous majority; i.e., the judiciary.²⁷

In the 1920s and 1930s, libertarians looked to the judiciary mainly to protect economic liberty and property rights against the emerging welfare state. In both Canada and the United States, this economic libertarianism succeeded in having the courts strike down such welfare-state regulation as minimum wage and maximum hour legislation.²⁸ As Mallory pointed out over a generation ago, in Canada "the force that start[ed] our interpretive machinery in motion" in many constitutional cases was "the reaction of a free economy against regulation."²⁹ The same was true in the US. The court parties of that era, in other words, were the libertarian partisans of private property and laissez faire, while their opponents, who controlled the legislatures, favoured public regulation and the redistribution of private wealth.

The generation of intellectuals who developed the welfare state – what Doug Owram called the "government generation"³⁰ – went to war against judicial power and eventually influenced the courts to abandon their oppo-

sition to the welfare state. As noted in chapter 1, the conflict between the US Supreme Court and Franklin Roosevelt's New Deal culminated in the Court's capitulation in 1937. Corwin described this capitulation as nothing less than a "constitutional revolution," because it marked the end in practice (if not in popular myth) of the American Founders' ideal of guaranteeing limited government through a written constitution. After the 1937 Court Crisis, the American Court publicly abdicated its traditional constitutional responsibilities (federalism, economic liberty, and property rights) and virtually disappeared from American politics for almost two decades, until its *School Desegregation Decision* in 1954.

In Canada an analogous if less dramatic conflict between the judiciary and the new welfare-state interventionism of the federal government also appeared to spell the end of a significant political role for the courts. In particular, the Judicial Committee of the Privy Council, which had mounted the judicial opposition to the welfare state, was replaced by the Supreme Court as Canada's highest court of appeal, and political negotiation replaced judicial review as the preferred means of managing federal-provincial jurisdictional disputes. The triumphant government generation in both countries, in short, was to a considerable extent an anti-court party. Its perspective lingered on in Canada into the 1960s, helping to swamp Diefenbaker's 1960 Bill of Rights and render it without effect.³¹ To liberals on both sides of the border, "whose political truths were formed during the era of the New Deal, judicial activism was simply incompatible with progressive politics."³²

If the libertarians in the older court party focused on economic liberty, the libertarians in today's Court Party emphasize other liberties. Concerned especially with protecting individual rights of freedom of religion and expression against state restriction, they typically oppose censorship and state-support for religion. They are also concerned with ensuring that individual freedom is not unnecessarily or unjustly infringed by either the state's criminal justice system or its administrative procedures. Criminals should certainly be caught, punished, and deterred, but state enthusiasm to do so effectively and efficiently must not lead to the unnecessary harassment or, much worse, the punishment of innocent individuals. Far better from the libertarian perspective to have the occasional guilty party go free than to interfere with the liberties of the innocent. The power imbalance between the state leviathan and the individual must be similarly redressed in administrative contexts, such as hearings to determine whether an otherwise illegal immigrant should get the benefit of refugee status.³³

The Canadian Civil Liberties Association (CCLA) is the oldest and most influential representative of the civil libertarian perspective. It has independent affiliates in most provinces, such as the BC and Alberta Civil Liberties Associations. The CCLA pre-dates the Charter. In the 1970s, it was bitterly disappointed with the Supreme Court's failure to adopt libertarian interpretations of the 1960 Bill of Rights in cases involving issues such as abortion, right to counsel, and exclusion of evidence. The CCLA opposed the original version of the Trudeau Charter because it was worded so similarly to the Bill of Rights that they feared it would simply mean more of the same. As noted in chapter 1, however, CCLA criticisms of the early drafts of the Charter produced important changes in that document.

The CCLA has been active in using and developing the Charter. Up to 1997 it intervened in 32 cases and was the primary litigant in two others. It is second only to LEAF in interventions before the Supreme Court of Canada.³⁴ Most of the CCLA's interventions — 15 — have been to defend freedom of speech. The CCLA has also been involved in six criminal law/legal rights cases and five freedom of religion cases, and has participated in cases involving abortion, privacy, labour law, and equality issues. Overall the CCLA has been successful in 63 per cent of its interventions and changed the policy status quo in the direction it wanted in 16 cases. It successfully challenged the practice of voluntary school prayer in Ontario and directly influenced the Supreme Court's nullification of the rape shield law. On the other hand, it failed in its challenges to censorship of pornography and hate-speech.³⁵

Equality Seekers

Peter Russell has described the civil libertarian supporters of the Charter as the "believers" and juxtaposes them to yet another "cluster of interest groups and ideologues ... 'the hoppers': the egalitarians on the left who hoped the Charter would be an instrument for reforming society. Whereas the civil libertarians believed the Charter was essential for preserving liberty, the egalitarians hoped it would bring about social equality."³⁶

The Charter equality seekers are drawn primarily from the social left, not the older economic left and organized labour. From the start, spokesmen for the economic left have been sceptical, even scornful, of using courts and litigation as an instrument for economic leveling.³⁷ They associated judges with lawyers and lawyers with the interests of the business class, not an unreasonable deduction given the well-documented antipathy of courts to the creation of the welfare state in Canada, the US and the UK earlier in this century. Former NDP Premier of Saskatchewan, Allan Blakeney, strongly

opposed the adoption of the Charter for these very reasons.

While the old left has always sought to reduce or abolish class inequalities, the social left is more concerned with life-style issues and the politics of identity. The former is associated with politically organized labour; the latter with the new social movements: feminism, environmentalism, the anti-nuclear/peace movement, ethnic nationalism, and gay rights. To the extent that the hoppers address economic equality, their stated goal is usually not the abolition of class inequality, but rather the proportional representation of their group within each of the different rungs of the economic ladder. As Michael Mandel, a prominent advocate of the economic left perspective, puts it, Charter litigation "take[s] for granted basic power relations." He maintains, for example, that equality-rights cases "are all about equal access to existing institutions while leaving these institutions and especially the employment relationship itself ... untouched. In other words, they lack all class character.... They challenge nothing but the place of [minorities] within an otherwise intact status quo."³⁸

Russell, failing to distinguish between the economic and the social left, wrongly concludes that the egalitarian dreams of the hoppers have not been fulfilled under the Charter. While this is true for the old left, it is not as true for the social left. Feminists and gay rights advocates have achieved significant victories and policy changes through Charter litigation.³⁹ The kind of equality they seek is not the same as Mandel's economic leveling.

The social left's idea of equality is also different from the traditional liberal understanding of equality as equal (i.e., the same) treatment. The hoppers emphasize group rather than individual equality, equality of results rather than equality of opportunity. Indeed, they insist that the liberal principle of non-discrimination against individuals must be temporarily suspended until the goal of equality of results for specified groups is achieved. They support preferential governmental treatment that either "compensates" group members for past injustices or promotes group equality in the future.⁴⁰

For example, Judge Rosalie Abella, a leading light within the equality-seeking movement, argues that traditional civil liberties are overly individualistic and anchored in a formal account of equality — "treating every one the same." Abella distinguishes between such "civil liberties" and a newer breed of "human rights," which require governments "to treat us differently to redress the abuses our differences have attracted." Abella describes the discovery of such human rights as an epochal moment in human history.

It was as if we had awakened from a 300 year sleep, looked around us and realized how limited our rights vision had become and with stunning energy and enthusiasm, acknowledged more rights and remedies in one generation than we had in all the centuries since the Glorious Revolution in England in 1688.⁴¹

This kind of evangelical enthusiasm for the new human rights vision has led feminist legal scholars to reject a policy of non-discrimination as inadequate. Instead they have proposed sophisticated jurisprudential theories of disparate impact and systemic discrimination that invite judicial revision of legislative decision-making.⁴² Other members of the section 15 club have endorsed this theory of systemic discrimination. At a minimum this interpretation of section 15 challenges otherwise neutral government policies that disproportionately burden women and other "disadvantaged" minorities. At a maximum it sanctions judicially ordered positive remedies to achieve equal results. In the latter instance, Charter experts advocate the use of the structural injunction, a legal instrument pioneered by American activists whereby the courts manage the reconstruction of a social institution such as schools or prisons until they comply with constitutional standards. Failure to use such aggressive, state-extending remedies, says Helena Orton, former litigation director for LEAF, will render "the guarantee of equality ... deceitful and meaningless."⁴³ In its 1989 *Andrews* decision, and in such subsequent cases as *Vriend*, the Supreme Court embraced much of this revolutionary human rights understanding of the Charter's equality provisions.⁴⁴

The list of equality-seeking groups includes the "charter" members of the section 15 club: women, visible and religious minorities, the mentally and physically disabled, and the elderly. Also included are the so-called "analogous" section 15 groups added by the courts via interpretation: homosexuals and non-citizens.⁴⁵ Official language minorities (sections 16-23), the multicultural communities (section 27), and aboriginals (sections 25 and 35) round out the equality-seekers. When Deborah Coyne observed that a "new emerging power structure" has formed around the Charter, these groups were mostly what she had in mind.⁴⁶ Since the egalitarian hoppers seek to fulfill their hopes through judicial enforcement of their Charter rights, they have a vested interest in judicial power.

Encouraged by funding from the Secretary of State and the Court Challenges Program, each of these groups has formed a litigation organization to press their causes in court. The first, the most influential, and the model for

the rest has been the feminist organization, LEAF. As noted in chapter 1, LEAF was formed after the adoption of the Charter for the express purpose of carrying out strategic litigation of test cases. The lead national advocacy group for homosexuals is EGALE (Equality for Gays and Lesbians Everywhere), supported by numerous provincial counterparts such as the Coalition for Lesbian and Gay Rights in Ontario. The disabled are represented by COPOH (Coalition of Provincial Organizations of the Handicapped) and the Disabled Women's Network; non-citizens by the Canadian Council for Refugees; and visible minorities by the Canadian Ethnocultural Council (Equality Committee) and the Minority Advocacy Rights Council. There are also "wannabe" members of the section 15 club who have not yet received the blessing of the Court but do have litigation organizations, thanks to grants from the Court Challenges Program. Prisoners are now represented by the Canadian Prisoners' Rights Network (CPRN) and the poor by the Charter Committee on Poverty Issues and End Legislated Poverty. While the Assembly of First Nations (AFN) has a broader mandate, it has also become a frequent intervener in aboriginal rights cases.⁴⁷

The unifiers and OLMGs also qualify as equality-seekers. The crusade for national bilingualism has always invoked the symbols and rhetoric of equality. For Trudeau and his disciples, achieving the symbolic and practical equality of French with English was to be the antidote to Quebec separatism. When the Canadian Coalition on the Constitution formed to protect the Charter against the 1987 Meech Lake Accord, Alliance Quebec, the FFHQ, and its various provincial affiliates were all counted as members.

While these groups all march under the banner of equality, there are important differences among them. The tension between bilingualism and multiculturalism is longstanding. The logic of two founding nations is not particularly flattering to those Canadians, now a majority, whose ancestry is neither French nor English. Not unreasonably, aboriginals take some offense at the concept of two founding nations when it ignores first nations. Aboriginal self-government, an idea that often rejects review of rights claims by outsiders (i.e., white judges), has prompted strong criticism from feminists.⁴⁸

There are also tensions between the libertarian and egalitarian wings of the Court Party. Both economic and social libertarians wish to protect their favoured liberties against overweening government. By contrast, the hoppers' equality-of-results agenda generally means more government, not less. This is clearly true of the section 23 minority language education rights, which often expand educational bureaucracy.⁴⁹ It is also often the object of

feminists and other equality seekers, whose policy agendas reject formal equality of opportunity in the name of equality of results. As Janine Brodie has written, most "key feminist policy demands ... call for more not less government and public spending."⁵⁰ Or, to use Abella's formulation, traditional civil liberties require "the state not to interfere with our liberties" while human rights "cannot be realized without the state's intervention." Abella adds that "unlike civil liberties, which re-arranges no social relationships and only protects our political ones, human rights is a direct assault on the status quo. It is inherently about change."⁵¹

The positive judicial activism required by this "human rights" position – i.e., telling governments what to do, or even doing it for them – is anomalous for libertarians, who think government can infringe constitutional rights only by doing too much, not by failing to act and thus doing too little. For the egalitarian wing of the Court Party, by contrast, a government's failure to act can be just as unconstitutional as its actions, and positive activism thus becomes a logical remedy. A libertarian might well wonder how such an approach to the Charter is possible. How, he might ask, can a document that, on its face, covers only the laws and policies of legislatures and governments apply to the *absence* of law or policy? The answer given by egalitarian theoreticians is that the decision not to impose law or policy is itself a legal or policy decision; i.e., that nonlaw is also law, and thus subject to the Charter.⁵²

An example will help to clarify the point. Section 15 of the Charter explicitly prohibits only discrimination by laws. From the libertarian perspective, this means that section 15 does not directly prohibit a private employer from refusing to hire, say, disabled employees. Moreover, although governments are free to address such private discrimination through statutory human rights codes, section 15 imposes no positive obligation to enact such legislation. Someone with this view might well believe that private discrimination against the disabled is wrong, and that legislation to prohibit it would be desirable, but would nevertheless deny that section 15's prohibition of public discrimination requires the state to legislate against private discrimination. If, by contrast, a government's decision not to enact such legislation is understood as legal permission for, even endorsement of, private discrimination, then we have a government policy that would be subject to section 15. As Dale Gibson has put it, "If the term 'law' in section 52(1) of the Charter were interpreted to include [such] permissive aspects of law as well as those which are prohibitory, the Charter would have a very wide range of operation."⁵³

A very wide range indeed! Among other things, it would subject all government inaction – all public failures to right private wrongs – to judicial scrutiny under the Charter and would require positive action to remedy any unconstitutional inaction. In our example, it would require any government that had not legislated against private discrimination to do so.

The equality seekers' conflating of state action and inaction involves a rejection of the traditional liberal ordering of state and society. In classical liberal theory the realm of societal freedom precedes the state, which is based on consent. People consent to the establishment of the state, and thus to *some* state-imposed limits on their freedom, in order better to secure a remaining (and significant) realm of freedom. Thus, when classical liberals use the old adage that "whatever the law does not prohibit is permitted," they understand it as protecting an important residue of pre-political freedom, which does not owe its existence to the state.

Modern equality-rights theoreticians understand the same adage very differently. They take it to mean that societal freedom is permitted by the law and thus exists *because of* (as opposed to being better secured by) the state.⁵⁴ Instead of understanding the state as the creation of a pre-existing society, equality seekers see society as the creation of the state. The societal realm of private freedom is no longer understood as the residue of an original, pre-political freedom, the better protection of which constitutes the very *raison d'être* of the state, but as existing only because, and to the extent that, the state permits it. The state thus becomes responsible for the use and misuse of societal freedom, and can be forced to regulate the latter by courts applying constitutional standards.

The equality-seeking wing of the Court Party has only partially succeeded in persuading the courts to accept its conflation of state and society. The courts have insisted on maintaining the distinction, with the Charter applying only to the state.⁵⁵ Since this distinction is undermined by the doctrine that state inaction is essentially the same as state action, the courts have not fully accepted that doctrine. They have not, to be more precise, fully endorsed the view that public failures to redress private wrongs are necessarily subject to Charter scrutiny. The courts have gone part way in this direction, however, holding that *partial* action may be successfully challenged even if complete inaction is permissible. Thus, although a government doesn't have to legislate against private discrimination, if it chooses to do so, the legislation must extend to all the group traits protected against public discrimination by the Charter. Having found that homosexuality was a prohibited ground of discrimination under section 15, for example, the Ontario Court of Appeal, concluded in *Haig and Birch* that the failure of the

Canadian Human Rights Act to include sexual preference as a prohibited ground of discrimination was unconstitutional. In *Vriend* (1998), the Supreme Court came to the same conclusion about the Alberta Human Rights Act.⁵⁶

Logically, of course, finding a partial action to be unconstitutional for not going far enough does not require positive judicial activism if complete inaction is also permissible. Indeed, a perfectly logical response would be to invalidate the entire law, leaving it to the legislature to choose between the two constitutional alternatives: re-enacting the law in a constitutionally comprehensive manner, or enacting no law at all. This is not what equality seekers have in mind, however. Understanding the "staying power of a legal status quo,"⁵⁷ such Court Party actors as LEAF argue that the courts should not dismantle desirable remedial legislation, thus establishing ground zero as the legal status quo, a status quo the government might well be tempted to leave in place. Judges "should hesitate," LEAF advised the Supreme Court, "to select a remedy that would leave the disadvantaged dependent on the actions of a majoritarian legislature to restore to them benefits" which have been struck down only because they are "underinclusive."⁵⁸ To the contrary, LEAF maintained, judges should not hesitate to read the unconstitutionally missing beneficiaries into the deficient legislation, thus placing the weight of the legal status quo at the interventionist end of the policy continuum. This is the ultimate in positive judicial activism, inasmuch as it allows judges to bypass legislatures altogether and extend policies of state intervention directly, by rewriting legislation themselves.

Here again, the equality seekers' perspective has met with only partial, but nevertheless significant success. The Supreme Court has accepted the legitimacy of reading in, but only when the missing beneficiaries are significantly fewer in number than those already included, thus making it safer to assume that the legislature would rather keep a slightly extended version of the legislation than to abandon it altogether.⁵⁹ Homosexuals, it turns out, are a small enough group to qualify for reading into a list of legislative beneficiaries. Thus, in *Haig and Birch*, the Ontario Court of Appeal read sexual preference into the Canadian Human Rights Act, as the Supreme Court later did to the Alberta Human Rights Act in *Vriend*.

The tension between the libertarian and egalitarian wings of the Court Party occasionally results in public and bitter clashes in the courtroom. In such cases as *Keegstra* (hate literature), *Butler* (pornography) and *Seaboyer* (rape shield), LEAF and the CCLA have intervened to take opposing positions. In each instance, LEAF defended the government's policy as necessary to promote the equality of women. The CCLA countered that the censorship of

hate literature and pornography unduly infringed freedom of speech and expression, while the rape shield law deprived the accused of procedural fairness. When the Supreme Court struck down the rape shield law in 1991, feminists publicly attacked the CCLA for its role and over 50 CCLA members resigned their memberships.⁶⁰

Libertarians and equality seekers have also clashed about the balance between free speech and anti-discrimination law.⁶¹ For example, Kathleen Mahoney, a prominent feminist lawyer, brought *Alberta Report* before the Alberta Human Rights Commission for publishing a story arguing that the much publicized abuse in Indian residential schools was balanced by the positive experiences many Indians had in these schools. The story suggested that the prospect of federal compensation might fuel exaggerated claims of abuse by Indian leaders. Mahoney charged *Alberta Report* with violating the law's prohibition of publications "likely to expose a person or a class of persons to ... contempt because of" their race. The *Saskatoon Star Phoenix* faced similar charges for publishing an anti-gay advertisement, as did the *Toronto Star* for refusing to publish an ethnic leader's letter to the editor. These challenges to free speech flow from the equality seeking impulse and tend to be opposed by civil libertarians.

Alan Borovoy, longtime Executive Director of the CCLA, became so concerned about the deepening split between libertarians and equality seekers that he wrote a book about it — *The New Anti-Liberals*. Not surprisingly, he defends the libertarian position against what he calls the anti-liberal excesses of the current equality-seeking left. The latter, he claims, has abandoned traditional liberal principles.⁶²

The libertarian-egalitarian conflict is not perfectly reflected in the interest group competition between the CCLA and equality seeking groups. The CCLA is decidedly mixed in its commitment to libertarianism. It would hardly agree with the policy positions of the National Citizens' Coalition (NCC), despite the latter's motto: "More freedom through less government." The CCLA has never extended its libertarianism to economic policy. Quite the opposite. The CCLA has early and enduring ties to the labour union movement in Canada and has never challenged the extensive state regime of labour regulation. The NCC, by contrast, frequently challenges labour laws that infringe on individual freedoms of association and speech.⁶³ The NCC financed Merv Lavigne's Charter challenge against OPSEU. Lavigne, a college teacher in Ontario, objected to portions of his mandatory union dues being used by OPSEU to support left-wing causes that he opposed. (These included the Sandinistas in Nicaragua and the Palestinian

Liberation Organization.) The CCLA intervened to defend the power of unions to contribute money to political causes unrelated to collective bargaining. Lavigne claimed that when combined with compulsory union dues for non-members like himself, this was a violation of his rights to freedom of speech and association.

Social Engineers

A fourth perspective that inclines toward judicial power and thus contributes to the Court Party coalition is captured by the term "social engineer." The social engineers are distinct from the other cohorts of the Court Party in that they are not a physically identifiable group. Nor do they have their own litigation organization; there is no organized group of social engineers' equivalent to the OLMGs, LEAF, or the CCLA. Yet the social engineering perspective informs, to varying degrees, each of these groups, and explains why they favour the empowerment of courts.

Social engineers take the view that the social evils of this world are caused not by human nature but rather by defective social institutions and systems. Cure the institutional ills, they believe, and natural human goodness will prevail. Such a cure, of course, implies comprehensive reconstruction of the defective societal structures; i.e., social engineering. For example, social engineers believe that crime has no natural causes, that it can be explained almost completely by such structural factors as class inequality, and that it can be cured through appropriate structural change.

Underlying the perspective of the social engineers is what Thomas Sowell has called the "unconstrained" vision of human nature and society.⁶⁴ This vision is best understood in relation to its opposite, the "constrained" vision, which holds that there are inherent limits or "constraints" on the human capacity to achieve social perfection. Social evil, in the constrained view, has natural causes, which can be checked and ameliorated, but not cured.⁶⁵ Human nature, in other words, while not necessarily devoid of admirable social tendencies, has its ineradicably asocial, even antisocial, side. Institutions can channel asocial and antisocial tendencies in more or less productive ways and can affect the relative balance between the good and bad sides of human nature, but no amount of social engineering can eradicate the latter. Improvement is possible; perfection is not.⁶⁶

The constrained vision underlies the traditional liberal separation of state and society. It sees ineradicable human imperfection as the source of both dissatisfaction with the pre-political state of freedom that underlies consent

to government and the distrustful insistence on limiting and constraining that government. James Madison most memorably captures this perspective in *Federalist Paper 51*:

It may be a reflection on human nature that [checks and balances] should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.⁶⁷

According to the unconstrained vision, by contrast, human beings are good by nature but corruptible by society. As Jean Jacques Rousseau, the father of this perspective, put in 1762, "man is born free, and everywhere he is in chains."⁶⁸ This view makes it possible to think society could be comprehensively re-engineered to end alienation and conflict and, having restored natural human goodness, make it permanently victorious. For Marx and his followers, to take just one example, the source of man's alienation was class inequality. Abolish private property, they preached, and utopia would follow.

Contemporary (or second wave) feminism has aptly been described as "Marxism without economics," since feminists replace class with gender as the key social construct. Of course, what society constructs can be deconstructed. This is the feminist project: to abolish gender difference by transforming its institutional source — the patriarchal family. Certain streams of the Gay Rights movement have taken this analysis one step further. The problem is not just sexism but heterosexism, and the solution is to dismantle not just the patriarchal family but the heterosexual family as such. As Gregory Hein puts it the "indictment of modern life" brought by such movements "is so scathing" that they "want to transform social attitudes, economic relationships, and political institutions."⁶⁹

The unconstrained vision, which has been and continues to be an influential dynamic in modern politics, can lead to two quite different approaches to democracy: populism and democratic elitism. The populist approach arises when the societal corruption of natural human goodness is understood as affecting only a nefarious elite, in which case the obvious

answer is to promote increased democracy. The rule of the "whole uncorrupted portion of the people"⁷⁰ can then be seen as an unmitigated good, bringing social and political life to a state of perfection. But, of course, the unconstrained vision does not in principle exclude the systemic corruption of the people as a whole. They too can be deformed by the social system. When this happens, democracy may still be the ultimate end, after the people have been returned to their natural purity, but it cannot be the immediate means. The achievement of true democracy will first require a period of purification through social reconstruction by a vanguard of purifiers. This is the route of major social engineering, and it necessarily involves democratic elitism or "Guardian democracy."⁷¹

Democratic elitism is the position many proponents of the unconstrained vision are drawn toward today. Wishing to transform the formative system, they cannot entrust power to the people who have been formed by that system and who are likely simply to reproduce it. Thus the vanguard elite must temporarily exercise transformatory power — i.e., it must engage in social engineering — which it can do only through institutions relatively unresponsive to the will of the corrupted many.

This is why Lenin, in his attempt to establish Marxism, had to invent the idea of the Communist Party as the "vanguard of the proletariat" (i.e., the enlightened leaders of the not-yet enlightened masses). For social engineers in Canada's Court Party, the judiciary performs this vanguard role.

Significantly, elements of the social engineering perspective can be found in the thinking of Pierre Elliott Trudeau, the architect of the Charter. Trained as a lawyer and endowed with a Rousseauian view of human nature, Trudeau clearly featured himself as the omnipotent "legislateur" or law-giver for Canadian society. When he entered federal politics in 1967, he announced a new role for the Department of Justice and its new Minister — himself:

Justice should be regarded more and more as a department planning for the society of tomorrow, not merely as the government's legal advisor. It should combine the function of drafting new legislation with the disciplines of sociology and economics, so that it can provide a framework for our evolving way of life. Society is throwing up problems all the time — divorce, abortions, family planning, LSD, pollution, etc. — and it's no longer enough to review our statutes every twenty years. If possible, we have to move the framework of our society slightly ahead of the times, so there is no curtailment of intellectual or physical liberty.⁷²

Given this ambitious mission, Trudeau's subsequent actions should not surprise us. As Minister of Justice, he introduced reforms that expanded access to legal abortions, decriminalized homosexuality, and made divorce easier. As Prime Minister, his first act was to push through the Official Languages Act (1969) to form a more unified Canada. He pursued his ideal of a more just society through the rejuvenated office of the Secretary of State: the multicultural program (1973-74) and the women's program (1973-74).⁷³ He also initiated a host of other law-reforming agencies: the Law Reform Commission and the Federal Court (1970); the federal Human Rights Commission (1977), and the Federal Commissioner for Judicial Affairs (1978).⁷⁴ For Trudeau the law-giver, the 1982 Charter of Rights was the culmination of a decade and a half of social-transformation.

As the preceding discussion suggests, social engineering is associated more with equality seekers than libertarians. The economic left's attempts to redistribute wealth through social benefit programs (employment insurance, old age security, etc.) and public services (health care, education, etc.) require the construction of the modern welfare state and its legions of bureaucrats. The social left's new but no less ambitious egalitarian projects of moral and social transformation require the institutional engines of democratic elitism, be they vanguard political elites or unaccountable judicial elites. Given the libertarians' scepticism about the benevolence of the "king of the vultures," they are hardly enthusiastic about such state-building projects. This difference explains much of the tension between groups like LEAF and the CCLA, and also the differences between the CCLA and the National Citizens' Coalition.

Postmaterialists

To describe the Court Party as composed of unifiers, civil libertarians, equality seekers, and social engineers is accurate as far as it goes, but it misses the institutional and social nexus that nurtures the coalition. Historians and political analysts have long recognized that inter-institutional struggles reflect competing social forces. As James Mallory puts it, "In a constitutional state with some degree of separation of powers, it may happen that a particular vested interest will capture control of one branch of the government but not another."⁷⁵ Often newly emergent government institutions are strongly associated with rising social classes. Thus, the triumph of parliament over the monarchy in the seventeenth century and the eclipse of the House of Lords by the House of Commons in the nineteenth century signaled the rising influence of first the landed aristocracy and then the urban

bourgeoisie. Similarly, Canada's nineteenth century struggles for responsible government saw the defeat of executive-ensconced social and economic elites – the Family Compact in Upper Canada; the Chateau Clique in Lower Canada – by democratic and, in the case of Lower Canada, nationalistic partisans of the legislature. The modern Court Party is also rooted in a new class: the so-called postmaterialist or postindustrial knowledge class.

Seymour Martin Lipset has observed that in post-war western democracies, the most dynamic agent of social change has been not Marx's industrial proletariat but a new "oppositionist intelligentsia," drawn from and supported by the well-educated, more affluent strata of society. Inglehart and others explain this change as a consequence of new and growing concerns with noneconomic and social issues – "a clean environment, a better culture, equal status for women and minorities, the quality of education, international relations, greater democratization, and a more permissive morality, particularly as affecting familial and sexual issues."⁷⁶

Lipset and others attribute this political realignment to deeper structural changes in the political economies of most western industrial democracies: historically unprecedented levels of material affluence, education, communication, mobility, and the displacement of the manufacturing and agricultural sectors of the economy by the new service sector. Structural change produces value change. Economic growth, public order, national security, and traditional morality decline in importance. They are replaced by concerns for individual freedom, social equality, and quality of life issues.

These postmaterialist issues have spawned a new kind of interest group. Traditionally, most interest groups have been occupationally based and motivated by the explicit self-interest of their members. Trade unions and manufacturers associations are classic examples. Postmaterialist groups, by contrast, promote "an idea or cause," and thus stand "in contrast to [groups] with an occupational prerequisite."⁷⁷ The principal Charter groups – LEAF and the CCLA, for example – fit this postmaterialist mold. Since the 1960s, such postmaterialist groups have been the fastest growing kind of interest group in both Canada and the US.⁷⁸ All of the principal postmaterialist groups – feminists, racial minorities, environmentalists, criminal law reformers, anti-nuclear/peace groups – have, to varying degrees, increased their use of litigation as a political tactic.

While postmaterialist interest groups are not occupational groups, they do have a class character. In particular, the new postmaterialist concerns are most prevalent outside the working classes. "The reform elements concerned with postmaterialist or social issues largely derive their strength not

from the workers and the less privileged, the social base of the [economic] left in industrial society, but from segments of the well educated and affluent, students, academics, journalists, professionals and civil servants." The latter are all participants in the "knowledge industry" that is a new locus of power in post-industrial democracies. "Just as property was the foundation of elite power in industrial society, so knowledge (based on high levels of education) is the vehicle of power in post-industrial politics of the administrative state."⁷⁹

Of course, it is as difficult today as it has always been for a "knowledge class" to exercise power through majoritarian institutions (consider Plato's philosopher kings). This helps to explain why postmaterialism is attracted to the anti-majoritarian power of the courts. Unlike the progressive reformers of past generations who sought to transfer power from the few rich to the many poor, the postmaterialist left finds itself in the minority and sees the majority as a problem. Inglehart has demonstrated that postmaterialist values are much more prominent among intellectual, bureaucratic, media, and political elites than among the general population. This fact, he argued, created a "tactical dilemma" for "the Left in contemporary society."

Postmaterialist forces have become powerful at the elite level; they demand major policy shifts in key areas, and they are far too influential among the militants and elites of Left parties to be ignored. But postmaterialists are not equally strong at the mass level – which means that the parties of the Left are in danger of electoral defeat if they swing too far to the Postmaterialist side.

While the postmaterialist left may face a tactical dilemma, it is hardly insuperable. The problem looms large only insofar as the postmaterialist left must compete in the democratic politics of elections and parliaments. To the extent that postmaterialists can move their policy agenda into the courts, the bureaucracy or international organizations such as the United Nations, they can pursue it through the rulings of sympathetic judges and administrators and thus minimize the problem. Inglehart explicitly recognizes that postmaterialists are "better equipped to attain their goals through bureaucratic institutions or the courts than through the electoral process." He points out that, while during the 1960s postmaterialism was symbolized by "the student with a protest placard," it is now symbolized by "the public interest lawyer, or the technocrat with an environmental impact statement."⁸⁰

In Canada, environmental litigation has special significance, because it shows that the attraction of judicial power to postmaterialists exists independently of the Charter. Despite the fact that environmentalists lack any specific constitutional hook (analogous to sections 15 and 28 of the Charter for feminists) and have consequently enjoyed less litigation success, the pace of environmental litigation has increased steadily – from 62 cases in the pre-Charter period to 116 from 1982 to 1995. In just the five-year period between 1990 and 1995, environmentalists initiated 73 actions. This increasing number of cases coincided with the formation of new environmental groups with a strong bent toward litigation – three in the decade preceding the adoption of the Charter in 1982 and another five in the decade following.⁸¹ These groups used an array of legal procedures from writs of mandamus to private prosecutions to advance specific environmental projects. They also lobbied, sometimes successfully, for new legislation that would relax the law of standing, amend the law of public nuisance, fashion new causes of actions, and create mandatory statutory duties – all changes that would facilitate still more use of litigation. In 1986, the Supreme Court opened the door for more environmental litigation by significantly loosening the standing rules governing challenges to administrative actions.⁸²

While Mark Silverstein does not employ postmaterialist theory to explain the most recent ascendancy of judicial power in the US, his description of the modern Supreme Court's power base clearly fits the postmaterialist model. "The Warren and Burger Courts," Silverstein writes, "benefited not only the disadvantaged but many affluent, middle and upper-middle class interests.... [E]nvironmentalists, feminists, consumer groups [and] political reformers found in the judiciary an attractive alternative to the other branches in the battle to secure their goals...."⁸³

The Elitism of the Court Party

Silverstein says that "[w]hat began as the Warren Court's efforts to empower the underdogs now often serves the interests of the affluent and politically powerful."⁸⁴ In other words, the postmaterialist knowledge class is an elite. Furthermore, social engineers engage in democratic elitism. There is, in fact, a symbiotic relationship between these two Court-Party categories: social engineering necessarily involves the transformatory power of a vanguard elite and that elite is drawn from the postmaterialist knowledge class. LEAF provides a characteristic illustration of this Court-Party elitism. Founded by a self-described "elite cadre of professionals," LEAF's initial fundraising

efforts targeted "select businesses, well-established law firms, philanthropic institutions [and] upper-class women." With the help of "several large corporations" and Nancy Jackman, the heiress of one of Toronto's wealthiest families, LEAF established an independent endowment fund. In these crucial first years (1985-1988), it also received over a million dollars from Ottawa and the newly elected Liberal government in Ontario.⁸⁵

True, much of the social engineering proposed by Court Party elites is said to serve the interests of disadvantaged Charter-Canadian constituencies, but the rank and file of those constituencies must often undergo "consciousness raising" before they understand their true interests. For the "false consciousness" of the rank and file to be overcome, they must be led by their vanguard, postmaterialist elite. Similarly, the symbolic preoccupations of the unifiers seem most prominent among the same postmaterialist class. The Court Party, in short, is a party of elites. Indeed, it is an important manifestation of what Christopher Lasch calls the "Revolt of the Elites."⁸⁶

The symbiosis of social engineering and the knowledge class, especially with respect to the equality seeking part of the Court Party, should not surprise us. The postmaterialist knowledge class is attracted to the unconstrained vision of the social engineer because that vision places a premium on the concentrated and articulated knowledge of the intellectual. Again, this is best understood against the backdrop of the constrained vision, which emphasizes the dispersed and experiential knowledge of the citizenry at large.

Because the constrained vision views the knowledge of any individual as "grossly inadequate for social decision-making," it conceives of socially relevant knowledge predominantly as "experience – transmitted socially in largely inarticulate forms, from prices which indicate costs, scarcities, and preferences, to traditions which evolve from the day-to-day experiences of millions in each generation, winnowing out in Darwinian competition what works from what does not work." Such mechanisms as prices and traditions make a complex society possible by coordinating "knowledge from a tremendous range of contemporaries, as well as from the even wider numbers of those from generations past."⁸⁷ The social mechanisms of prices and traditions are much more powerful and effective agents of human progress than articulated intellectual knowledge because they coordinate a much vaster body of social knowledge than any individual or intellectual elite could hope to possess.

For the unconstrained vision, by contrast, experience is "vastly overrated" as compared to "the general power of a cultivated mind," and the

"wisdom of the ages" is therefore seen "as largely the illusions of the ignorant." In the words of William Godwin, "The pretense of collective wisdom is the most palpable of all impostures."⁸⁸ True wisdom, in this view, is to be found in the articulated rationality, and individual judgment, of intellectual knowledge; i.e., the knowledge of the instructed and cultivated elite. Thus, far from respecting the collective wisdom of the many, as embodied in such mechanisms as prices and traditions, the unconstrained vision emphasizes the role of the intellectual elite in reconstructing the unenlightened many. In other words, it flatters precisely the defining characteristic of the postmaterialist knowledge class.

It is not knowledge *per se* that is being flattered, of course, but knowledge as a prime lever of power. The model of knowledge that has gained prominence among postmaterialists further abets this connection between the knowledge and the power of their class. Postmaterialism is associated with postmodernism, a central tenet of which is that knowledge does not stand apart from power, but in fact is power. The reality we purport to understand does not exist independently of that understanding; on the contrary, reality is *constituted* or constructed by our understanding of it. There is no knowledge independent of power; there is only power-knowledge. It is power-knowledge that drives the social construction or social engineering of reality by the knowledge class. The idea that there is no reality independent of human making reflects precisely the perceived lack of limits or constraints that characterizes the unconstrained vision.

The combination of the unconstrained vision and the postmodern model of knowledge is attractive to the knowledge class not only because it flatters its interests, but also because it is consistent with its life experience. Richard Herrnstein and Charles Murray have systematically described and analyzed what others have also observed: the evolution of society's natural cognitive elite from a statistical aggregation into a true class, with its own life experience and distinct interests. They point out that until recently the best and the brightest were distributed throughout society, both geographically and occupationally. Nowadays, by contrast, a variety of sorting mechanisms, particularly the education system, culls them out and concentrates them in high status, knowledge-based occupations and in the communities and networks of what one might call the "internet society," in which they interact mainly with others like themselves.⁸⁹ One result, in Christopher Lasch's words, is that "The thinking classes are fatally removed from the physical side of life."

Their only relation to productive labor is that of consumers. They have no experience of making anything substantial or enduring. They live in a world of abstractions and images, a simulated world that consists of computerized models of reality — "hyperreality," as it has been called — as distinguished from the palpable, immediate, physical reality inhabited by ordinary men and women.

This, according to Lasch, helps to explain "their belief in the 'social construction of reality' — the central dogma of postmodernist thought." Belief in this dogma

reflects the experience of living in an artificial environment from which everything that resists human control (unavoidably, everything familiar and reassuring as well) has been rigorously excluded. Control has become their obsession. In their drive to insulate themselves against risk and contingency — against the unpredictable hazards that afflict human life — the thinking classes have seceded not just from the common world around them but from reality itself.

The knowledge class doesn't believe in a reality that stubbornly escapes human control, in other words, partly because it has seceded from reality.

The masses, by contrast, have not seceded from reality because they have not been able to. For the farmer, the assembly worker, the homemaker, and the like, bedrock reality is palpable and inescapable. For Lasch this explains why the political instincts of the masses "are demonstrably more conservative than those of their self-appointed spokesmen and would-be liberators." The conservative instincts Lasch has in mind are largely those of Sowell's constrained vision. In particular, the masses "have a more highly developed sense of limits than their betters. They understand, as their betters do not, that there are inherent limits on human control over the course of social development, over nature and the body, over the tragic elements in human life and history." When Ortega y Gasset wrote *The Revolt of the Masses*, he had in mind a mass man who "looked forward to a future of 'limitless possibilities' and 'complete freedom.'"⁹⁰ For Lasch, it is the knowledge elite, not the masses, that now reflect this unconstrained vision of human possibility in western democracies, and it is thus now more appropriate to speak of "The Revolt of the Elites." The Court Party is one manifestation of this revolt of the Elites.

But why is it that these elites present themselves as the self-appointed

spokesmen and would-be liberators of disadvantaged groups (in Canada, the Charter groups)? How is it, in other words, that an obviously unequal elite comes to support the cause of equality? For the unconstrained vision, the answer is that the intellectual elite's power of reason – its defining virtue – will lead it to a reasoned support for justice. As Sowell points out, proponents of this vision often assume that intellectual elites are disinterested or "strangers to ambition."⁹¹ This might make sense for some philosophers, under an older view of the disinterested pursuit of knowledge, but it makes little sense within the postmodern perspective of intellectual activity as power-knowledge. In this postmodern view, all knowledge reflects interests, except for an interest in the universal truth, which allegedly doesn't exist, and it thus becomes unclear why anyone's reason would lead him to promote another's interest. We are thus compelled to wonder how the interests of the knowledge classes might be served by projects in the egalitarian transformation of society.⁹²

An obvious answer is that such projects serve the power interests of the intellectual elite. Egalitarian social engineering does not give power to the many, whose consciousness needs to be reconstructed, but to the vanguard elite that undertakes the reconstruction. True, the unconstrained vision sees this as *democratic* elitism – i.e., as temporary elitism in the service of more perfect future democracy – but in even the most extreme attempts at societal reconstruction (the Soviet experiment comes to mind), the goal, like a shimmering mirage in the distance, never seems to get any closer, and short of abandoning the reconstructive attempt, the "transitional" period of democratic elitism turns out to be permanent. This is, of course, precisely what the constrained vision would predict: any attempt to achieve the impossible will not end unless those making the attempt recognize and concede its impossibility. A cynic might add that if attempting the impossible enhances one's power, one will be less likely to recognize or concede its impossibility. In this cynical view, the elite's egalitarian rhetoric turns out to be little more than a legitimating cover for its own unending (and unequal) power.⁹³ The power of the knowledge elite, of course, is best exercised through an institution that emphasizes the articulated rationality of the intellectual. Again, the judiciary is a leading candidate.

The Court Party in Context

The Court Party is interested in the systematic, policy-oriented use of judicial power. It does not, therefore, include such individual litigants as the criminally accused, who raise constitutional issues as part of their defence.

Such individuals certainly try to get the courts to change criminal justice policy, but they do so as a means to their main objective: going free. Policy change may be a byproduct of their courtroom arguments, but such change is not their main concern. Court Party constituencies certainly sponsor or intervene in criminal-justice cases that seem appropriate vehicles for their policy agendas – and it is precisely such cases that tend to end up in the Supreme Court – but ordinary criminal defendants remain responsible for most of the legal rights cases brought under the Charter.

Similarly, corporate litigants cannot be counted as part of today's Court Party. As Hein's review of Supreme Court and Federal Court cases shows, although corporations and Court Party interests generated roughly the same number of legal challenges to cabinet decisions and public policies between 1988 and 1998 – about 100 cases each – there are many more corporations than Court Party associations. Hein finds that one in eight interest groups launched court cases, while only one in 399 corporations did so, showing that corporations have a much lower propensity to litigate than do Court Party interests. In addition, most corporate litigation is directed at other corporations with whom they are competing.⁹⁴ When they do challenge government statutes, it is in a defensive, reactive mode. To date, there appear to be no corporate examples of the kind of sustained, systematic Charter litigation undertaken by Court Party interests.

Thus, most Charter litigation is opportunistic in nature; it is undertaken defensively by individuals or corporations out of immediate self-interest. The development of broader policy may be the ultimate outcome of such litigation, but much narrower concerns tend to motivate the individual or corporate parties. For the systematic litigators of the Court Party, by contrast, the bottom-line outcome of the particular case is often secondary to the more general policy reasoning used to justify that outcome.

The comparatively greater attraction litigation holds for Court Party interests should not be exaggerated. Political interests, opportunistic by nature, make use of whatever resources and policy resources they can. Litigation may not figure as prominently in the policy arsenal of corporations, but they certainly make use of it when they can. Similarly, although Court Party interests find litigation more attractive, they do not foolishly ignore other avenues of political influence.⁹⁵ Courts have certainly become more important policymaking arenas, but no political interest can afford to ignore the power of cabinets or bureaucracies. Media campaigns and the lobbying of politicians and bureaucrats remain important parts of the overall political strategy of any sensible political interest, and Court Party interests are no exception. The fact remains, however, that Court Party interests

are not only more inclined to litigate, but that they generate the main defences of judicial power and devote considerable resources to lobbying the judiciary. It is this comparative attraction to judicial power, not a counter-productive abandonment of other political strategies, that characterizes the Court Party.

If the Court Party doesn't include individuals or corporations that litigate opportunistically rather than systematically, neither does it include all judges. As we have seen, the Supreme Court has accepted many, but definitely not all, Court Party positions. Indeed, the Court Party agenda occasions significant and ongoing disagreement among judges partly because the Court Party is itself divided on certain issues. Explaining why the Court Party is attracted to judicial power and how it has contributed to the growth of that power, as this book tries to do, is one thing. Determining the precise extent to which the Court Party has, to use Mallory's term, "captured" the courts is quite another, and must be reserved to another occasion.

Conclusion

The influence of political institutions reflects the power or weakness of their supporters. The ascendancy of the courts is linked to the ascendancy of the social interests that support the judicialization of politics. In Canada and other postmaterialist western democracies, a new and powerful knowledge class has arisen with an ambitious agenda for social reform.

While the agendas of Court Party interests differ and sometimes even conflict, what unites these groups is a shared commitment to the project of empowering the courts, although not to the exclusion of more traditional political strategies. While many Charter cases are generated by the opportunistic litigation of individuals and corporations, it is the Court Party that has systematically promoted and defended increased judicial power. The Court Party has breathed political life into the Charter, transforming it from a mere parchment barrier into a potent political symbol and resource and making its oracle, the judiciary, a powerful new player in Canadian politics. In theory, the constitution constrains society, but in practice, it is society that shapes – and reshapes – the constitution.⁹⁶

FOUR

THE STATE CONNECTION

What there's money for, you tend to do.

US Civil Rights litigator.¹

The rapid growth in influence of Canada's Court Party is paradoxical. It has thrived despite good reasons to expect such political interests to fail. In 1965 Mancur Olson published a pathbreaking explanation of why the kinds of postmaterialist interest groups that comprise the Court Party are at a serious organizational disadvantage as compared to traditional, occupation-based interest groups.² Postmaterialist groups often pursue relatively "public" goods – for example, clean air or improved gender relations – which by their very nature benefit many people in addition to the group's activists. Under these circumstances, the incentives to become a member of the group are weak. Membership has costs: dues, time, and effort. Since one will get the benefits anyway, why not free ride on the efforts of others? Occupational groups, by contrast, pursue goods that are more private, in the sense that they benefit mainly group members; for example, better wages and working conditions for a union, or a more favourable tax or royalty regime for a producer's association. Here, too, problems of free ridership occur, but they are less acute and easier to manage. Thus, Olson predicted that occupational interest groups would remain more successful than cause-based citizens groups.

Unfortunately for Olson, his thesis appeared to be exploded by events almost as soon as it was published. The 1960s and 1970s saw the rapid growth of precisely the kinds of groups Olson believed would remain rare. Olson was not entirely wrong, however. Indeed, his logic was impeccable. He had simply failed to foresee the extent to which "patrons of political action" would come to the rescue of otherwise weak groups. As Jack Walker and others have pointed out, external aid makes it possible for groups with acute free ridership problems to achieve prominence. Such aid has come from wealthy individuals, private foundations, and the state. In the United States, the first two figure prominently, but in Canada the state is the most significant source. As Leslie A. Pal says of the Canadian context, "The problem of

collective action resolves itself into the problem of the state."³

The rise of the new so-called "citizens' interest groups," in other words, is not explained by the traditional (or pluralist) view of democracy, which posits the spontaneous generation of interest groups. According to this pluralist view, when a critical threshold of sufficient common interest is reached, a group spontaneously forms and begins to lobby government for policies that protect the group's interests. Dairy farmers come together to lobby for tariff protection against cheaper imports, workers organize to demand maximum hour legislation, students petition for lower tuition fees, and so forth. In these instances, the group always precedes the relevant legislation.

In fact, as Alan Cairns has so vividly explained, the idea of the state as simply responding to an independent societal realm cannot be sustained. The state has become much too thoroughly "embedded" in society, and vice versa. For example,

It is common, for one state actor to involve segments of society in competition primarily directed against another state actor ... [and] equally common for private socio-economic actors to involve the state to their own advantage relative to other private actors.⁴

In the embedded state, accordingly, interest groups will not necessarily precede their legislation.

Indeed, what is distinctive about recent Canadian (and American) experience is that many "citizens' interest groups" sprang up *after* the passage of legislation establishing public policy in their areas. This trend is attributable in part to the rapid growth of the welfare state since World War II. New redistributive public policy creates incentives for the recipients of these goods to organize. Their interest is obvious: they can lobby to maintain or increase benefit levels. But organizing recipient groups is also in the interest of the state patron or service providers. "Public officials ... [realize] the political value of organized constituents working to promote their programs from outside of government."⁵ This reciprocal interest explains the explosion of public interest or cause-based interest groups in recent decades.

In the United States, for example, the elderly organized only after "the great legislative breakthroughs of Social Security, Medicare and the Older Americans Act of 1965." This same pattern held for many of the other US citizens groups formed in the last three decades: the handicapped, mentally ill, children, and other disadvantaged or vulnerable elements of the population. In each instance, these new client-based associations "were more the

consequence of legislation than the cause of its passage." Walker describes them as examples of top-down mobilization led by "social services professionals [who acquire] crucial assistance in the early stages from government agencies, private foundations, and elected officials."⁶

Canadian experience has followed a similar pattern. Predictably, the catalyst here was national unity politics and language. After the passage of the Official Languages Act in 1969, the Cabinet authorized the Social Action Branch of the Secretary of State (SOS) to undertake a policy of social animation among francophone communities outside of Quebec. There had been no prior request for such a program from francophone communities, nor had the 1960s Royal Commission on Bilingualism and Biculturalism recommended it. (Indeed, the Commission's report recommended preserving the voluntary private-sector character of such organizations.) The concept of social animation was defined as "a program which ... attempted an in-depth attack on mass apathy and concentrated ... on sensitizing and preparing confirmed or potential leaders."⁷

Ottawa's mobilization of OLMGs illustrates the top-down, state-initiated interest group formation process. While the Official Languages Program funneled new funds to already existing provincial OLMG associations, it also facilitated the creation of several new ones: the Council of Quebec Minorities in 1978 and its successor group, Alliance Quebec, in 1982; the Fédération des francophones hors Québec (FFHQ) in 1975; and Canadian Parents for French (CPF) in 1977.⁸

The SOS program of social animation for OLMGs became Ottawa's policy template as it set out to facilitate the formation of other groups that purported to represent the various new social movements spawned during the 1960s. In each instance, government passed program legislation (or orders in council) and then charged the SOS to engage in social animation to help organize the client groups that would benefit from these programs. The newly organized clientele groups would then lobby the government to increase the budgets of their bureaucratic patrons.

The rapid growth of multicultural associations occurred only after Prime Minister Trudeau announced multiculturalism as an official government policy in October 1971. Again there was no grass-roots support for the formation of such groups. The programs were based on "elite support from ethnic organizational leaders, politicians and government agencies." The Multicultural Program facilitated the organization of the Council of National Ethnol-cultural Organizations (CNEO) and later its better known successor, the Canadian Ethnocultural Council (CEC), as well as the National Association of Canadians of Origins in India (NACOI).⁹

In 1967 the Liberal government had responded to the nascent women's movement by creating a Royal Commission on the Status of Women. The Commission's report recommended government funding of women's groups, and Ottawa created the National Action Committee on the Status of Women (NAC) in 1971 to help implement the report's other recommendations.¹⁰ In 1974, the SOS created a new Women's Bureau, which then became a primary funder of Status of Women Councils in every province. The Women's Program subsequently generated the Canadian Advisory Council on the Status of Women (CACSW) in 1973, the National Association of Women and the Law (NAWL) in 1974,¹¹ the Canadian Congress for Learning Opportunities for Women (CCLO) – which was also supported by the Ontario government – in 1979, and the Canadian Day Care Advocacy Association (CDCAA) in 1983.

Ottawa also encouraged the formation of Native groups during this period. The SOS helped to organize and fund Indian, Métis, and Inuit social and political organizations in the late 1960s, despite opposition from the Department of Indian Affairs. By 1970, taking all funding sources into consideration, Natives were receiving nearly \$1 million for organizational activities. The National Indian Brotherhood (NIB) was formed in 1968. By the end of the 1970s, it had become one of largest advocacy groups in Ottawa, with over 50 full-time paid staff. The NIB played a leadership role in challenging the assimilationist thrust of Ottawa's 1969 White Paper on Aboriginal Affairs, with its opposition leading to the creation of the Office of Native Claims in 1974. The NIB acted as a strong advocate for aboriginal concerns during the constitutional negotiations of 1980–81. These efforts culminated in sections 25 and 35 of the Constitution Act, 1982, sections that protected and promoted "existing aboriginal rights." While the NIB was bitterly disappointed that its constitutional lobbying did not achieve more, these sections have subsequently proven to be valuable assets in the hands of sympathetic judges.¹²

In addition to citizenship initiatives coming out of the SOS, the Trudeau government introduced several other important law-reform and law-reforming programs, which had important implications for the adoption and development of the Charter a decade later. While legal aid programs began to appear at the provincial level after 1965, in 1972 Ottawa used its spending power to nationalize the program.¹³ In addition to providing "free" legal representation to poorer Canadians, nationalized legal aid created a new constituency of service-providers – lawyers – with a vested interest in promoting the program.

In 1971, Trudeau, "the law-giver," created the Law Reform Commission of Canada (LRC), whose mandate was to make "recommendations for ... the improvement, modernization and reform ... [of] the laws of Canada."¹⁴ The \$20 million dollars spent by the LRC over the next two decades helped to create a new generation of criminal law reform specialists. These experts subsequently proved to be a small but influential constituency for the legal rights components of Trudeau's Charter initiative in 1980–81. Two former LRC officers, Antonio Lamer and Gerald La Forest, were subsequently appointed to the Supreme Court. As judges, they used the Charter to implement many of the reforms that they had recommended as commissioners during the 1970s.¹⁵

The creation of the Canadian Human Rights Commission (CHRC) in 1977 proved to be another federal initiative that subsequently influenced the shaping and development of the Charter. The CHRC culminated two decades of anti-discrimination policy during which all of the provinces had adopted consolidated human rights codes and commissions to administer them.¹⁶ While the CHRC was formed after its provincial counterparts, it quickly became the central node in the new nationwide policy-network of anti-discrimination watchdogs. The CHRC's clientele groups included women, visible-minorities and other "historically disadvantaged groups," so there was considerable overlap with SOS. Like SOS, the CHRC encouraged equality-seeking groups to form organizations that could consult with them and also serve as political allies in the new war on discrimination. During the constitutional struggles of 1980–81, CHRC representatives proved valuable allies to Trudeau. Three different human rights commissions testified in support of the Charter, and especially for a strong version of equality rights, before the Joint Senate-House Committee on the Constitution. Once the Charter was adopted, both federal and provincial commissions played important roles in steering the judicial development of section 15 equality rights away from protecting individuals and toward the group rights approach.¹⁷

Indeed, all the groups that Ottawa helped to organize during the 1970s lined up to support Trudeau's Charter-project in 1980–81. OLMG groups, multicultural groups, native groups, women's groups, disability groups, and human rights commissions – all came out in force to testify before the Joint Parliamentary Committee on the Constitution in 1980–81. Penny Kome's account of the Charter-making process provides repeated examples of state support for the feminist lobbying effort. Feminist groups spawned by SOS, such as NAWL, CRIAW, and NAC, held meetings so often that there was

always an organized feminist presence in Ottawa at critical moments in the patriation process. As Kome put it, "feminist meetings occur so regularly as to be ready for any campaign that might be mobilized.... You could pick almost any month and find a national meeting."¹⁸

To summarize, the Charter of Rights may be understood as both an effect and a cause of interest group formation. The federal government played the key role of patron for many of the social interests that supported the adoption of the Charter in 1980-81 and that have become active Charter litigators. OLMGs, feminist organizations, multicultural groups, and aboriginal organizations were often as much the result of key public policies as the source of those policies. The laws involved provide the relevant groups with enhanced public status and important legal resources. Even more important, public agencies provided the emerging Court Party with financial and bureaucratic resources. The next chapter focuses on the bureaucratic dimension; the rest of this chapter looks at the major sources of public funding.

Prominent among funding sources are the various programs historically associated with the Department of Secretary of State. During the 1980s, most SOS programs were shifted to the Department of Multiculturalism and Citizenship; presently, they are under the jurisdiction of the Department of Canadian Heritage. For the sake of simplicity, we will refer to them all as SOS programs. The Court Challenges Program, two aboriginal-rights funding programs, and research granting agencies are also important sources of public funding. To round out the story of litigation funding, we also discuss two sources, legal aid and provincial law foundations, that do not as clearly fit the model of state funding for interest groups. Legal aid is certainly a form of state funding, but its recipients are individual criminal defendants who, for reasons set out in the previous chapter, do not fall within our definition of the Court Party. If legal aid benefits Court Party constituencies – civil libertarians, for example – it does so indirectly, by increasing opportunities to intervene in cases. The reverse is true of Law Foundations, which fund interest groups but with funds that are not as obviously public – though they are arguably based on an unacknowledged tax.

Secretary of State Funding

SOS programs have been a longstanding and crucial source of money for groups with official Charter status. From initially modest grants, funding for these groups spiraled upward as Trudeau's obsession with the national unity

issue, and thus his need for political allies, grew. Between 1969 and 1973, the SOS budget grew tenfold from \$4 million to \$40 million as Trudeau launched the bilingual, multicultural, and women's programs.¹⁹

This was just the beginning. The Official Language Community Grants budget grew sixfold between 1976, the year the separatist PQ was first elected in Quebec, and 1982. At its outset in 1973, the Women's Program had a budget of \$223,000. By 1980, its budget had risen to \$1.2 million. In the next two years it more than doubled to \$3.2 million, and that amount quadrupled again to \$12.5 million by 1985. Among the Women's Program's projects in 1992-93 was a \$15,000 grant to the Western Judicial Centre to "organize a judges' congress on the role of judges in the 'New Canadian Reality' with specific workshops on issues relating to women." Multiculturalism expenditures kept pace, expanding from \$2.5 million in 1976 to \$19.6 million by 1987.²⁰ After the election of the second Mulroney government in 1988, funding for most of these programs was cut back, but none were canceled. For example, the National Association of Women and the Law's annual grant from the Women's Program grew from \$64,000 in 1983 to \$256,000 by 1987-88. After seven years of cut-backs, NAWL's 1996-97 grant was still \$171,000.

The best way to gauge the significance of state funding for Court Party groups, and how they differ from vocation-based groups, is to compare the relative contribution of members and state patrons to the groups' financial coffers. When Walker did this in the US, he discovered that 89 per cent of citizen groups received government or foundation money to launch their organizations, compared to just 34 per cent of the occupation-based groups. Even after initial start up costs, he found that less than a quarter of the citizen groups received more than 70 per cent of their budgets from membership.²¹ While private foundations are the main funders in the US, in Canada, governments, chiefly Ottawa, are the primary financial patrons.²²

Pal's seminal study found that Canadian feminist, multicultural, and official language minority groups typically depend on government grants for 50 to 80 per cent of their budgets. For example, in 1990 Alliance Quebec had an annual budget of \$1.7 million, 88 per cent of which came directly from Ottawa. Its counterpart in English-speaking Canada, Fédération des francophones hors Québec (FFHQ), was dependent on Ottawa for 83 per cent of its budget.²³ Similarly, in its first three years of operation (1985-1988), LEAF received over one million dollars from the Secretary of State and the recently elected Liberal government of Ontario.²⁴

In 1988-89, the Canadian Ethnocultural Council – an association whose original purpose was cultural preservation but which has become the lead-

ing advocate for employment equity for visible minorities – was dependent on Ottawa for 90 per cent of its annual budget. This actually overstates its independence: that year less than 2 per cent of its revenue came from membership fees and private contributions. The Canadian Day Care Advocacy Association (CDCAA), started in 1982 with a grant from the Women's Program, varied between 84 and 93 per cent dependency on SOS funding.²⁵

Pal's findings are replicated in McCartney's 1991 study. McCartney found that federal and provincial funding accounted for three-quarters of the budgets of Native organizations, approximately half for women's groups, and one-third for multicultural and environmental groups. Noting that state funding was the primary source of money for both women's and Native groups, McCartney concluded that, "voluntary organizations in this country are much more likely to receive government moneys than their counterparts in the US."²⁶

In theory, there is no necessary connection between SOS-funded interest groups and Charter politics. In practice, however, they are deeply intertwined. When Ian Brodie cross-referenced Charter case interventions with years of SOS funding for the period 1982-93, he found that the top ten interveners, who were collectively responsible for 53 interventions, had all received SOS funding, some of them for many years.²⁷ The following chart displays his findings.

Intervener	Number of interventions	Years of SOS funding
LEAF	11	8
Alliance Quebec	6	11
Canadian Jewish Congress	6	6
B'Nai Brith	6	2
La société franco-manitobaine	5	11
La fédération des francophones hors Québec	4	11
COPOH	4	11
Canadian Disability Rights Council	3	3
L'Ass'n canadienne-française de l'Alberta	2	11
Canadian Labour Congress	2	3
L'Ass'n francophone des conseils scolaires de l'Ontario	2	1
Roger Bilodeau	2	1

Court Challenges Program

The most important state funder of Court Party litigation, however, is not SOS (or its successors) but the Court Challenges Program.²⁸ The CCP actually predates the Charter. Created in 1977 in response to the election of the Parti Québécois government, its original mandate was limited to funding language rights litigation by anglophones in Quebec and francophones outside Quebec. It thus provided an additional source of funding for OLMGs who were already receiving core funding from SOS.

Since its inception, the CCP has funded major OLMG Charter challenges to provincial laws in Quebec, Nova Scotia, New Brunswick, Ontario, Manitoba, Saskatchewan and Alberta.²⁹ In the landmark OLMG education rights case, *Mahé v. Alberta*, the CCP funded the Alberta francophone group that brought the case as well as the intervention of the Association Canadienne-Française de l'Ontario. This funding has contributed to one of the most successful litigation records of any Court Party group. At the appellate level, OLMGs have won all minority-language education rights cases to date. The only language rights losses occurred in two traffic-ticket cases and a claim to be heard by a bilingual judge.³⁰ A study of 21 appeal court rulings in language rights cases, Charter and non-Charter, revealed a success rate of 81 per cent – more than double the 33 per cent average for Supreme Court Charter decisions.³¹

As noted in chapter 3, the CCP serves the interests of Ottawa as well as OLMGs and other groups that are weak locally but enjoy the support of Ottawa. Especially in the area of provincial language issues, the CCP allows the federal government to achieve indirectly what it could not have achieved directly. Indeed, combining the Charter with CCP and SOS funding was somewhat of a political masterstroke. The financial support ensures that unsympathetic provincial legislation will be challenged, but also provides Ottawa with political cover. Just as the earliest opponents of the Supreme Court had criticized its power of judicial review as disallowance in disguise, the Charter/CCP combination achieves a double indirection, a form of disallowance twice removed from the Cabinet.³²

No case better illustrates how this works than *Mahé*, the first major OLMG education rights case outside of Quebec.³³ Francophone parents in Edmonton challenged Alberta's provision of French-language education as falling short of the standards required by section 23 of the Charter. Ottawa wanted this claim to succeed. The Court had already used section 23 to strike down the Parti Québécois's restrictions on access to English-language educa-

tion in Quebec, a decision also favoured by Ottawa, but one that had excited strong criticism among Quebec nationalists. It was thus important to national unity advocates that the Supreme Court balance things out with a similar ruling in support of francophones in English-speaking Canada. Also, a francophone victory in Alberta would, by way of precedent, strengthen the education rights of Anglophones within Quebec, which explains why the Quebec government intervened to defend the Alberta government against the constitutional challenge. Ottawa, in addition to intervening directly in opposition to Alberta and Quebec, used the Court Challenges Program to provide funding to the Quebec Association of Protestant School Boards to intervene on behalf of the French-speaking families in Edmonton. As Ian Brodie has observed, "Here is an example of one arm of the state funding another arm of the state to influence a third, and indirectly, a fourth arm."³⁴ A unanimous Supreme Court played its role to the letter and ordered Alberta to expand its francophone education programs.

In 1985, after extensive lobbying by feminists and other would-be equality-litigators, the CCP was expanded to include section 15 claims and given a new five-year grant of \$5 million. To qualify for funding, a case was supposed to have "substantial importance ... legal merit [and] consequences for a number of people." In other words, the CCP's mandate was to fund cases that could change public policy, not to help unfortunate individuals. Between 1985 and 1992, the CCP funded 178 equality cases.³⁵

The CCP, however, did not just fund litigation for existing interest groups. It undertook an active public education campaign (reminiscent of the SOS's social animation of the 1970s) to create new clients for its services. CCP directors "began sponsoring workshops and meetings that created new networks of equality rights groups and, in turn, created new cases."³⁶ The CCP played a lead role in organizing new interest group litigators such as the Canadian Prisoners' Rights Network (CPRN), the Charter Committee on Poverty Issues, the Working Group on Aboriginal and Treaty Rights, and the Equality Rights Committee of the CEC. In 1989, an internal review of the program remarked that, "To some observers, the kinds of activities carried out might seem more like product promotion than providing public information and education."³⁷

The "new" CCP was initially administered by the (publicly funded) Canadian Council on Social Development, whose stated policy was to "emphasize the setting of social justice priorities" in selecting cases to fund. As it turned out, these social justice priorities meant funding only groups that shared the equality seeking perspective of the postmaterialist left. Non-

feminist groups such as REAL Women and Kids First saw their applications for litigation funding either ignored or rejected. This was hardly surprising. One of the criteria for selecting members of the Equality Panel was that "each member should be committed to social reform."³⁸ This was thinly-disguised code for staffing the panel with recognized activists from feminist, gay, disabled, and racial minority groups.

The CCP has been a funding bonanza for LEAF and other equality seeking groups on the left. In addition to funding almost every language rights case that has made it to the Supreme Court, the CCP has directly funded the litigants in a number of leading equality rights cases, including *Canadian Council of Churches* (challenging limits on third-party interventions), *Schachter* (authorizing judges to impose affirmative remedies), and *Sauvé and Belczowski* (affirming prisoners' voting rights). The CCP has also funded many of the leading homosexual rights cases. These include challenges involving conjugal visits by homosexual partners for prisoners in a private family visit program (*Veysey*), family leave for homosexual partners (*Mossop*), and rights of homosexuals in the military (*Haig*).³⁹

In some cases, CCP grants appear to have little to do with financial need and much to do with connections and ideology. Toronto feminist lawyer Beth Symes received a CCP grant to challenge the limit on tax-deductible childcare expenses. At the time her case was heard by the Supreme Court, Symes's annual family income was approximately \$200,000. She employed a full-time nanny, whose salary far exceeded the allowable limit.⁴⁰ Symes, as it turns out, was one of the founders of LEAF and was represented by Mary Eberts, another LEAF founder.

As in the case of OLMG litigation, the CCP funds not only litigants but also interveners in equality-rights cases. It has funded interventions by EGALE (Canada's leading homosexual rights advocacy organization), COPOH, and the Canadian Council for Refugees. The leading recipient of CCP intervener funding is LEAF, whose grants include *Andrews* (the first section 15 case), *Borowski* (opposing a right-to-life for the unborn), *Taylor and Keegstra* (supporting censorship of hate literature), *Seaboyer* (defending the new rape-shield provision), *Schachter* (supporting the power of judges to impose affirmative remedies), and *Canadian Newspapers* (supporting the ban on newspaper publication of the names of victims in rape cases).⁴¹ Janine Brodie, one of Canada's leading feminist scholars, has bluntly referred to the CCP as providing "the financial underpinning for LEAF."⁴²

In 1990, when the CCP's mandate ended, it was reviewed by a Parliamentary committee. Predictably, all the groups who had been funded by CCP

urged its renewal. Other CCP supporters included the Commissioner of Official Languages, the Assembly of First Nations, the Canadian Bar Association, and the Justice Department.⁴³ Despite the beginning of federal budget cutbacks, the CCP was renewed, and its budget expanded to \$12 million over the next five years.

The 1990 renewal legislation further strengthened the *de facto* link between Court Party constituencies and the CCP by moving the CCP's administrative home to the Human Rights Research and Education Centre (also publicly funded) at the University of Ottawa. The Director of the Centre at the time was Professor William Black (on leave from the UBC Faculty of Law), one of Canada's foremost academic proponents of affirmative action and pay equity policies.

Unlike the CCP's OLMG funding, its section 15 mandate prohibited it from funding cases challenging provincial legislation. Despite this restriction, by 1989 CCP was spending more than twice as much on equality cases as language cases. Nor did this restriction stop CCP administrators from funding the intervention costs of LEAF and COPOH in the landmark *Andrews* case, which challenged a British Columbia statute. As noted earlier, the CCP has not been a passive administrator. It has actively facilitated the creation of new equality advocacy groups and then provided them with funding.

While funding Charter litigation is the CCP's primary task, it also serves as an ideological screen for unmeritorious Charter claims. Rejection by the CCP has obvious financial consequences, but the symbolic failure to receive the CCP imprimatur may be equally important. In terms of achieving litigation success, Patrick Monahan has observed, "the credibility and recognition which the Court Challenges Program conferred on funding recipients may well have been as important as the funding itself."⁴⁴ Monahan's hunch is corroborated by the facts. The most frequent recipient of CCP funding, LEAF, is also the Charter litigant with the highest success rate before the Supreme Court of Canada.⁴⁵

In its 1992 budget, the Mulroney government unexpectedly canceled the CCP. The official reason was a combination of budget balancing and completed mandate. Cancellation of the CCP was denounced by the Court Party interests, former Supreme Court Justice Bertha Wilson, and the Canadian Bar Association. Critics charged that the action was politically motivated.

In the 1993 election campaign the Liberal Red Book promised to re-instate the CCP. On 24 October 1993, the Liberals made good on this promise, announcing the formation of a new CCP as an independent, limited corporation with an annual federal grant of \$2.75 million. This independent corpo-

rate status means that Ottawa cannot shut down the CCP in the future. In addition, any money the CPP raises above and beyond its federal grant, such as the \$100,000 grant from the BC Law Foundation in 1996, can be used to challenge provincial laws. As a result of intense lobbying by the various equality-advocacy groups, 75 per cent of the new CCP budget is designated for section 15 litigation, and only 25 per cent for OLMG claims.⁴⁶ This change reflects the shifting balance of power away from OLMGs to feminists and their equality-seeking allies.

The reorganization of the CCP was guided by the premise that, "The program must belong to those groups that are likely to use it," and its new mandate included the establishment of "partnerships with universities, research centres and various bar associations." This meant that Court Party advocacy groups would have even stronger control of the program than before. Not surprisingly, the first set of directors of the new CCP were all associated with Charter-based interest groups, law schools, or both.⁴⁷ The credentials of the seven members of the CCP's first Equality Rights Panel, the committee that screens the applications for funding, read like a who's who of the equality wing of the Court Party. All had either held office or done work for rights-advocacy groups. Five were lawyers, and four had worked for human rights commissions. Two were former members of the Equality Rights Panel, and two were law professors.⁴⁸

By the 1999-2000 budget year, Ottawa had raised the annual CCP grant to \$4.4 million and a \$5.9 million grant was projected for 2000-2001.⁴⁹ In sum, the CCP not only survived the funding cutbacks that characterized federal budgets since 1993, but emerged stronger than ever with a secure funding-source and greater control by Court Party partisans.

Funding for Aboriginal Rights Litigation

Native rights litigation — land claims, treaty claims, Indian Act disputes, C-31 litigation, and hunting and fishing rights — has become a multi-million dollar a year industry in Canada. The surest sign of this is that in the past two decades many major national law firms have added aboriginal rights specialists to their roster in order to get a piece of the action.

There are two readily identifiable sources of federal funding for aboriginal rights litigation. The first is a one-time-only grant of \$3 million to pay for legal costs in cases arising out of the implementation of Bill C-31 in 1985. C-31 sought to restore Indian status and band membership to thousands of Indian women and children who had lost their status under a discriminatory section of the Indian Act.

The second is the Test Case Funding Program administered by the Department of Indian Affairs and Northern Development. Established in 1983, the mandate of the TCF Program is "to fund cases in Indian law that result in the setting of precedent(s) with application for a broad number of Indians; and to increase the body of Indian case law."⁵⁰ It is administered in a manner similar to the Court Challenges Program. Indian bands or associations apply for grants to bring specific test cases. If the screening committee deems the application worthy, it can grant up to \$100,000 per case. However, permission has been granted to exceed this limit in several cases. The *Gitksan* case, for example, was allotted \$1.5 million in 1986, \$2.1 million in 1987, and another half million dollars in 1988. Similarly the *Meares Island* case was awarded a \$674,150 grant. In its first five years, the Program funded 59 cases to a total of \$7.5 million dollars.⁵¹

Academic Research Funding

Less direct but still significant funding is channeled through education and research programs administered by a variety of federal funding programs: the Social Sciences and Humanities Research Council (SSHRC), the Justice Department's Human Rights Fund, and the Canadian Research Institute for the Advancement of Women (CRIAOW). In 1990, SSHRC, in conjunction with the Justice Department, launched a new strategic grants program in law and social issues research. Among the thirteen winning grants were four on feminist issues, two on Charter remedies, and one each on aboriginal rights, elder abuse, rights of the mentally-handicapped, and environmental rights. Two of the grants were specifically targeted to create networks that would facilitate the propagation of advocacy research to support feminist and environmental litigation efforts.⁵²

After the adoption of the Charter, the federal Justice Department created an internally administered Human Rights Research Fund. In 1984 one of its first grants went to feminist litigator, Mary Eberts, thus assisting her in the founding of LEAF. It also paid for the preparation of briefs by NAC (\$40,000), NAWL (\$10,000), and other equality seeking groups, for presentation to a parliamentary committee reviewing equality rights. Many of its grants go to Charter experts in the universities. Since most Charter experts are also Charterphiles, to support their research is usually to support the new genre of advocacy scholarship intended to advance the policy agenda of the various Charter groups.⁵³

Legal Aid

Provincial legal aid programs are another major source of funding for Charter litigation. Unlike other funding programs, legal aid is not targeted at organized interest groups. Rather, any criminal defendant who meets the financial means test qualifies for legal aid to pay for a lawyer. Since 75 per cent of all Charter cases involve criminal prosecutions, legal aid programs have actually funded more Charter litigation than any other funding source. Predictably, legal aid budgets soared with the advent of the Charter.

Prior to the Charter, the defense of the majority of criminal prosecutions was straightforward and short. Other than plea bargaining (pleading guilty in exchange for a reduced charge), there were usually only two or three possible defenses, all known ahead of time to prosecution, defense, and the judge. This has all changed with the Supreme Court's expansion of the rights of the accused. As one experienced criminal lawyer has observed, "what is on trial is no longer the evidence respecting the guilt of the accused, but the police procedures used to collect the evidence." The result, he continued, is that "the scope of the defense is limited only by the lawyer's own imagination and the client's pocketbook."⁵⁴ Until recently, the legal-aid pocketbook was very flush.

The effect of the Charter on legal aid is illustrated by the growth rates in the Legal Aid Plan of Ontario (LAPO). Between 1967, the year it started, and 1982, the year the Charter was adopted, LAPO's cost doubled from \$27 million to \$56.2 million. Once the Charter was in place, the LAPO budget doubled again in only six years to \$113.5 million in 1988 and then doubled again in the next six to over \$200 million in 1994!⁵⁵ These increases cannot be attributed to similar increases in population, crime or economic growth. By 1993, the total bill to Canadian taxpayers for legal aid programs in all jurisdictions was \$603 million per year, double the amount only five years earlier.⁵⁶

One of the most dramatic instances of Charter-driven explosion of legal aid costs has been outside the area of criminal law in the field of immigration. In the Ontario legal aid plan for 1994-95, immigration and refugee lawyers received \$29.5 million. In 1989, Ontario legal aid issued only 1610 certificates for immigration and refugee cases. The following year, that figure rose to 15,247, a whopping 950 per cent increase in one year. The reason was the new Federal Immigration Act requirement for additional oral hearings, an amendment that was forced on the government by the Supreme Court's ruling in *Singh v. Canada*.⁵⁷

While the lion's share of criminal legal aid goes to garden variety cases, it

has also helped to fund many of the landmark legal rights decisions. Taking a criminal case all the way to the Supreme Court of Canada is an expensive proposition, costing a minimum of \$100,000, well beyond the means of the average criminal defendant. An experienced criminal lawyer who has argued many cases before the Supreme Court has observed: "[I]t was legal aid, of course. None of those cases could have gotten to the Canadian Supreme Court without it."⁵⁸ This is born out by data, which show that legal aid expenditures for appeals to the Supreme Court have more than doubled since the adoption of the Charter.⁵⁹

Partly as a result of the Court's Charter decisions, provincial legal aid programs have experienced a funding crisis in the 1990s. This has not deterred the Supreme Court from continuing to order the expansion of legal aid to new constituencies. In September 1999, the Court ordered a new right to legal aid for poor parents at risk of losing their children to government social service agencies. Feminist and anti-poverty groups applauded this ruling and predicted that it provided a "great precedent" for a future ruling that poor women involved in custody disputes must also be given a government-funded lawyer.⁶⁰ The following week, the Court ruled that prison inmates involved in internal disciplinary hearings have a Charter right to free legal counsel.⁶¹

Provincial Law Foundations

Another increasingly important source of Court Party funding comes from the various provincial law foundations. Created in the early 1970s, these foundations were originally intended to provide funding for legal education, legal aid, law libraries, legal research, and law-reform. The foundations are funded by the interest on lawyers' trust (escrow) accounts held by Canadian banks. Initially modest in size, these accounts can now generate annual interest income in the \$13 million (Alberta, 1990) to \$23 million (BC, 1990) range. The oldest and most affluent of the provincial Law Foundations is British Columbia's. Founded in 1969, by 1995 it had paid out over \$164 million dollars for law-related programs in the province.⁶²

Since the lawyers' trust funds consist of their clients' money held temporarily during the course of purchases by corporations and private citizens, skimming off the interest that would otherwise fall to the client amounts to a kind of unofficial tax. The law foundations based on this tax are thus yet another example of citizens subsidizing the Court Party. The general public is unaware of the existence of law foundations, and the grant process is com-

pletely independent of government. Save for subsidizing provincial legal aid programs, the law foundations enjoy unfettered discretion in the distribution of grants.

While spiraling legal aid budgets now consume a large percentage of these funds, Court Party interests have successfully captured a healthy share of the balance. The BC Law Foundation has been especially generous to Court Party interests. In 1981, it awarded a \$140,500 grant to the BC Public Interest Advocacy Centre to assist the "disadvantaged" and the "underrepresented."⁶³ The following table shows some of the recipients of BC law foundation grants in 1994:⁶⁴

Law Foundation of British Columbia 1994 Grants [partial listing]

BC Civil Liberties Association	\$135,803
LEAF (West Coast Chapter)	\$90,240
BC Public Interest Advocacy Centre	\$550,000
West Coast Environmental Law Association	\$460,000
Community Legal Assistance Society	\$700,000
BC Coalition of People with Disabilities	\$150,678
BC Human Rights Coalition	\$109,744
BC Law Reform Coalition	\$150,000
Law Clinic and Prison Legal Services (Univ. of Victoria)	\$204,676
Native Law Centre (Univ. of Saskatchewan)	\$11,000
Total Grants Budget	\$5.2 million
Legal Aid	\$7.9 million
1994 Total	\$13.1 million

Nor is this pattern of funding by the BC foundation likely to change. In 1996, Lynn Smith, arguably the most influential feminist legal advocate in the province, became the new chair of the BC Law Foundation.

It might be thought that British Columbia is an anomaly with respect to Court Party funding. Dominated politically by Vancouver and the lower-mainland, BC politics has always had a more influential postmaterialist element than the other Western provinces. This hunch is disproven by Alberta's experience. The Alberta Law Foundation grants for 1994-95 were equally generous to Court Party affiliates.

Law Foundation of Alberta 1994-95 Grants [partial listing]*

Alberta Civil Liberties Research Centre	\$103,940
Calgary Association of Women and the Law	\$14,000
Environmental Law Centre	\$237,680
Alberta Law Reform Institute (Univ. of Alberta)	\$468,847
Centre for Constitutional Studies (Univ. of Alberta)	\$149,975
Indigenous Law Program (Univ. of Alberta)	\$29,000
Native Law Centre (Univ. of Saskatchewan)	\$10,250
Native Counseling Services of Alberta Yellowhead Tribal Community	\$160,930
Corrections Society	\$30,000
Total Grants Budget	\$4.4 million
Legal Aid	\$1.3 million
Total	\$5.7 million

* Alberta Law Foundation, Twenty-Second Annual Report 1995

In theory, Ontario should be the litmus test for the law foundation-Court Party connection. In fact, it is not. The Ontario Law Foundation's statutory mandate states that a minimum of 75 per cent of its grants must go the Ontario Legal Aid Fund. In 1993, this came to \$9.6 million, leaving only \$3.6 million for all other grants. Of this, \$3.4 million went to Ontario's six law schools (\$1.6 million) and the Law Society for Upper Canada (\$1.8 million). This left less than \$200,000 for grants to individuals and other organizations. Of eighteen grants funded by this \$200,000, eight went to familiar Court Party constituencies and/or causes: Aboriginal Legal Services of Toronto, the Canadian Human Rights Foundation, Canadian Journal of Women and the Law, the HIV/AIDS Advocacy Project, the Native Law Centre (University of Saskatchewan), the Advocacy Centre for the Handicapped, and publishing subsidies for two books: "Refugee Determination in Canada" and "Handbook to the Ontario Human Rights Code."⁶⁵

Conclusion

In both Canada and the United States, so-called "citizens groups" have been the fastest growing type of interest group since the 1960s. They have also been

the most dependent on non-membership funding. In Canada, the principal patron has been the federal state, and its motives have been transparent. Whether the agenda was national unity in the 1970s or social justice in the 1980s and 1990s, the state patrons and the social interests they fund have a shared agenda. As Pal observes, "By channeling taxpayers' dollars to left-wing organizations, the bureaucracy is merely rewarding its friends and providing support for those who will reciprocate by lobbying for increased programs and budgets."⁶⁶

In Canada, the primary objective of the Trudeau government's policy and spending initiatives was to counter Quebec nationalism by promoting a new sense of Canadian citizenship. But what began as a state attempt to reshape Canadian society ended with a set of newly organized social interests capturing various agencies of the state. As a consequence of their overlapping memberships and shared ideals, these increasingly autonomous social justice bureaucracies soon became advocates for their constituencies. In this sense, much of the institutional infrastructure of the (future) Court Party was already in place prior to the actual adoption of the Charter. While the Charter launched a new era of judicial power and government by lawsuit, it was also the culmination of a decade of state building and social engineering. Thanks to Trudeau's SOS citizenship policies, the minoritarian politics of identity that has thrived under the Charter was already in place by the end of the 1970s.⁶⁷

The aphorism that "Money is the 'mother's milk' of politics" certainly applies to the Court Party. While the absolute dollar value of this state funding may be modest as a percentage of overall government spending, without it, none of the Court Party groups could operate at anywhere near their current levels of influence. In addition to allowing them to pursue extensive litigation, this funding confers the legitimacy that allows these groups to attract favourable media attention as the "official" representatives of whatever social interests they claim to represent. It also provides the permanent office space, paid staff, policy research, and newsletters that are required to be effective. With the assistance of a sympathetic media, state funding has allowed Court Party groups to command a public presence in national and local politics significantly out of proportion to their actual membership.