Now that the constitutional bloodletting has been completed and the political titans have retired to their capitals it is left to the lowly lawyers and judges to "do something" with the new Charter of Rights. Locker room opinion is quite cynical that the Charter will not make any difference at all. Conservative judges will savage any argument based on the new "rights" that might inconvenience the powers that be. Unfortunately the work-a-day legal world has advnaced little beyond such gut feelings about the Charter. It is hardly ready for the new powers and responsibilities that are about to be thrust upon it.

The relative indifference of the legal profession accurately reflects the non-political view most lawyers and judges have of themselves and their jobs. Yet the Charter gives them a definitely political job to do. They are supposed to argue about, and sit in judgment of, not just the application and meaning of, but also the fundamental merits of, the laws of the land. The very idea is an anathema to the vast majority of the legal profession.

Our legal tradition does not think in political terms. Making explicit the political implications of a case is regarded as the height of folly by skilled counsel. Fundamental rights are rarely spoken of in Court or discussed in our Law Schools. The very words conjure an image of "crazed radicals storming the bench in their beards and blue jeans." The idea is American; at root it symbolizes their primordial rebellion against lawful government. Our judges by temperament do not want political responsibility. They do care passionately that the law, whatever it is, is administered in an orderly fashion.

The cynics may be right that dead hand of tradition will smother the Charter. But they may also sleep through the critical ~~moves in the~~ opening moments of the game and the chance to score a few points for civil liberties. Take the volatile free speech issues of censorship and obscenity as an example.

The day the Charter is declared the provisions of The Theatres Act requiring films to be submitted to the Board of Censors for cuts will be arguably unconstitutional. Why? Because there is literally no standard at all in the Act or its regulations establishing a standard of censorship.

The Charter tells our courts to overrule any laws that infringe fundamental rights and freedoms such as free speech spelled out in the Charter are deemed to be infringed. But clause one says that "rights and freedoms" are "guaranteed ... subject only to such reasonably limits prescribed by law as can be demonstrably justified in a free democratic society." If The Theatres Act is silent, giving as it does an unlimited right to censor, surely this is not a "reasonably limit prescribed by law". It is almost certain that in the United States the censorship powers of Ontario's Theatres Act would be declared void for vagueness.

Perhaps the Queen's Park Tories can cure this defect. The Theatres Act is presently before the legislature for amendment anyhow. But now without a serious and difficult debate as what that standard should be.

Even with a definition in place the Censor Board's problems have just begun. Their current practice of viewing films and

ordering cuts after secret sessions with no chance for a filmmaker to argue will come under heavy attack. Here is raised another problem of interpreting clause one of the Charter. Will clause one force the Censor Board to a higher standard of procedural safeguards before the Courts will allow them the power to control what we see. American case law is very strict that there can be no censorship except after an adversarial hearing on the merits.

And what will happen when the Courts get to the substantive test of defining the limits of "free speech" either in interpreting the "obscenity" sections of the Criminal Code or the powers of the Censor Board.

The current test under The Criminal Code is the "undue exploitation of sex" as determined by the "community standard" of tolerance as determined by a jury (or a Judge pretending he is the "community"). The American case law interpreting "free speech" under the Bill of Rights is much more liberal, In order to be obscene a book or film must be all of the following: purient, patently offensive and without redeeming social value. Almost all of the material that the Censor Board has attacked in the arts community in the recent rash of publicized cases would be protected by American standards for its "redeeming social value" regardless of the fact small town censors find it offensive, and regardless of a jury or judge opinion that the community would not tolerate it. At least this will be the issue as "obscenity" cases flood the courts.

The censorship/obscenity issue illustrates the important

problem involved in interpreting clause one. Will the courts take a positivist, a procedural or a substantive view of the guarantees in the Charter? The British tradition of "positivist" jurisprudence tells us that the law is what says. Nothing more. And that we presume that laws are not contradictory, and that they make sense. Is the obscenity test in the Criminal Code "demonstrably justified" simply because it is the test declared by Parliament? The positivists have a strong urge to say "yes".

A more aggressive posture by the Courts would be to say the abridgement of fundamental freedoms can be reasonably and demonstrably by justified if proper procedures are followed. This is illustrated by the claim there is a right to an adversarial hearing before an order of censorship. Whatever the definition of obscenity, and however interpreted, free speech can be limited if it is done properly by the bureaucrats. So say the proceduralist. But perhaps the main effect of the Charter will be to strengthen the role of the Courts as a procedural policeman.

Will the Courts go the next step? Will they make substantive interpretations of the law based on the fundamental freedoms in the Charter? For instance, in dealing with the definition of "obscenity" will they say the guaranteed right of free expression cannot be limited unless no redeeming social value is shown.

It seems that the Charter asks the Courts to take on a profoundly political task which is at odds with legal tradition. The job can easily be put aside in the interpretation of clause one. The question has no technically correct answer. It depends

on the predisposition of the person on the bench. If we truly want wise judicial attention to these political questions will we have to change the manner of appointing judges.

We must give our senior judicial appointments serious political, not just professional, scrutiny before appointment. It may seem distasteful to read of American Supreme Court appointees being questioned by Senate Committees about their views on abortion and other political topics but it quite legitimately comes with the territory. This means taking the job of picking judges away from the backroom boys in the Canadian Bar Association and the Prime Minister's office. There will be howls of rage from the legal establishment. But that too comes with the territory.