

# Canada Watch

PRACTICAL AND AUTHORITATIVE ANALYSIS OF KEY NATIONAL ISSUES

## The Charter dialogue between courts and legislatures\*

### THE LEGITIMACY OF JUDICIAL REVIEW

Judicial review is the term that is used to describe the action of courts in striking down laws. Lawyers and political scientists, especially those employed at universities, love to debate the question whether judicial review is legitimate. The question arises because, under the *Charter of Rights and Freedoms*, the judges, who are neither

BY PETER W. HOGG and ALLISON A. THORNTON

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elected to their offices nor accountable for their actions, are vested with the power to strike down laws that have

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## Judicial review in an age of legal realism The debate over judicial activism

*People have been taught to believe that when the Supreme Court speaks, it is not they who speak but the Constitution, whereas of course, in so many vital cases, it is they who speak and not the Constitution.*

— Felix Frankfurter, former Justice of the US Supreme Court, in a letter to President Franklin D. Roosevelt

### JUDICIAL ACTIVISM DEFINED AND APPLIED

The debate over judicial activism continues to grow in Canada.

BY F.L. MORTON

F.L. Morton is a professor of political science at the University of Calgary.

Some question whether there really is anything called judicial activism. This seems a bit undue. The term has been used by American and Canadian constitutional commentators for decades. In its simple and ordinary usage, it denotes the propensity of a judge (or a

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### SPECIAL EDITION ON THE SUPREME COURT'S 1999 CONSTITUTIONAL CASES

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been made by the duly elected representatives of the people. Is this a legitimate function in a democratic society? This question also challenges the legitimacy of the Charter because it provides the authority for a much-expanded role of judicial review.

The conventional answer to the question is that judicial review is legitimate in a democratic society. The reason is based on our commitment to the rule of law. All of the institutions in our society must abide by the rule of law, and judicial review simply requires obedience by the legislative bodies to the law of the constitution. When the Supreme Court of Canada strikes down a prohibition on the advertising of cigarettes (as it did in the *RJR-MacDonald* case, 1995), it is simply forcing the Parliament of Canada to observe the Charter's guarantee of freedom of expression. When the Supreme Court of Canada adds sexual orientation to the list of prohibited grounds of discrimination in Alberta's human rights legislation (as it did in the *Vriend* case, 1998), it is simply forcing the legislature of Alberta to observe the Charter's guarantee of equality.

The difficulty with the conventional answer is that the Charter is, for the most part, couched in such broad, vague language that, in practice, the judges have a great deal of discretion in applying its provisions to laws that come before them. The process of applying the Charter inevitably involves "interpreting" its provisions into the likeness favoured by the judges. The problem has been captured in a famous American aphorism: "We are under a Constitution, but the Constitution is what the judges say it is"!

## THE CONCEPT OF "DIALOGUE"

In this article, we argue that, in considering the debate about the legitimacy of judicial review, it is helpful to think of judicial review as part of a "dialogue" between the judges and the legislatures. At first blush, the idea of a dialogue does

not seem particularly apt considering that the Supreme Court of Canada's decisions have to be obeyed by the legislatures. Can one have a dialogue between two institutions when one is so clearly subordinate to the other? The answer, we suggest, is "yes" in those cases where a judicial decision is open to reversal, modification, or avoidance by the competent legislative body. The judicial decision can cause a public debate in which Charter values are more prominent than they would have been if it were not for the judicial decision. The legislative body is then in a position to decide on a course of action—the re-enactment of the old law, the enactment of a different law, or the abandonment of the project—that is informed by the judicial decision and the public debate that followed the decision.

## SECTION 33 OF THE CHARTER

Dialogue will not work if the effect of a judicial decision is that the legislative body whose law has been struck down cannot now accomplish its legislative objective. But it nearly always will. The first reason why a legislative body is rarely disabled by a judicial decision is the existence in the Charter of the override power of s. 33. Under s. 33, a legislature need only insert a "notwithstanding" clause into a statute and this will liberate the statute from most of the provisions of the Charter, including the guarantees of freedom of expression and equality. Recall that s. 33 was added to the Charter late in the drafting process at the behest of provincial premiers who feared the impact of judicial review on their legislative agendas.

When the Supreme Court of Canada struck down a Quebec law forbidding the use of English in commercial signs on the ground that the law violated the guarantee of freedom of expression (*Ford*, 1988), Quebec followed the decision by enacting a new law that continued to ban the use of English on all outdoor signs. The new law continued to

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# The Supreme Court of Canada in 1999: The year in review

BY PATRICK J. MONAHAN

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In the 1999 calendar year, the Supreme Court of Canada handed down 18 constitutional cases, down slightly from 21 constitutional decisions in 1998 and 22 in 1997. But, overall, the output of the court in 1999 was significantly lower than in previous years, with the court handing down a total of just 73 decisions. This represents a drop from the established pattern in the 1990s—a period during which the court tended to decide over 100 cases annually (including 124 decisions in 1996 and 150 in 1993). In 1999, about one of every four decisions was decided on constitutional grounds (including Charter, division or powers, and aboriginal issues).

Not only was output down in 1999, but the court sat for just 55 days during the year, which is significantly lower than the average of 75 sitting days over the 1995–98 period. The period between filing an application for leave to appeal and the decision on leave also increased to 5.2 months (up from 3.9 months in 1998), and the period between the hearing of an appeal and judgment increased to 5.4 months (almost double the 2.8 months achieved in 1998 and 1997).

There is no obvious explanation for this decline in output and workload in 1999. One possibility is that the retirements of Chief Justice Lamer and Justice Cory somehow left the court shorthanded for part of the year. On the other hand, the transition to the new appointees, Justices Arbour from Ontario and Lebel from Quebec, appeared (to outside observers at least) to be fairly smooth and seamless. It will be interesting to track these output and workload figures for the 2000 year to see whether the numbers move back up to the levels achieved in earlier years.

It continues to be very difficult to obtain leave to appeal to the highest court, with just 12 percent of applicants for

successful leave applications was significantly lower.

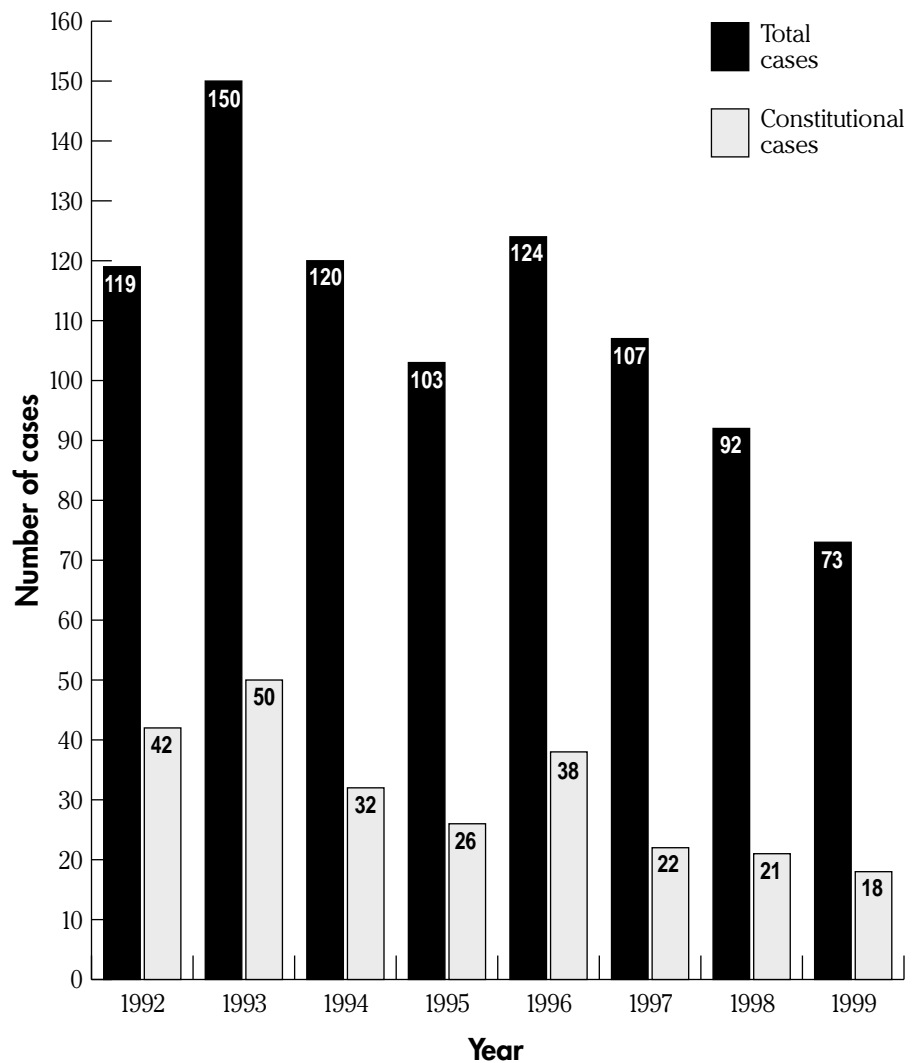
## CONSTITUTIONAL CASES

Of the 18 constitutional cases in 1999, 14 were Charter cases, 2 were federalism cases, and 2 were aboriginal rights cases. The claimants succeeded in their claims against government in 5 of the 14 Charter cases in 1999, a “success rate” of 36 percent. This is consistent with the established pattern that we have tracked in recent years, with about one in every three Charter cases decided by the Su-

The SCC in 1999, page 4

leave being successful in 1999. Also noteworthy is that the court received about 20 percent fewer applications for leave in 1999 as compared with 1998 (458 versus 572), which means that although the percentage of successful applicants remained relatively constant last year, the absolute number of suc-

FIGURE 1 CASELOAD 1992–1999



preme Court resulting in a “win” for the individual claimant. In the two federalism cases, success was divided: the federal government succeeded in the *M & D Farms* case and the provinces were successful in the *Westbank First Nation* case. The two aboriginal claimants were both successful (in *Sundown* and *Marshall*), although the court in *Marshall* later attempted to narrow the implications of its reasoning when it dismissed an application for a rehearing by one of the intervenors.

## KEY DECISIONS IN 1999

Of the 1999 constitutional cases, the equality rights decision in *Law* appeared to be the most significant in broader jurisprudential terms. In *Law* the court attempted to consolidate the disparate strands of analysis that had emerged in the mid-1990s in relation to the meaning of s. 15 of the *Charter*. The court put forward a complicated and multi-layered test that seems to turn on whether a particular distinction amounts to a denial of a claimant’s human dignity. As Chris Brecht notes elsewhere in this issue, the question whether a legal distinction violates human dignity is an extremely indeterminate criterion that lower courts will have considerable difficulty in applying in the future.

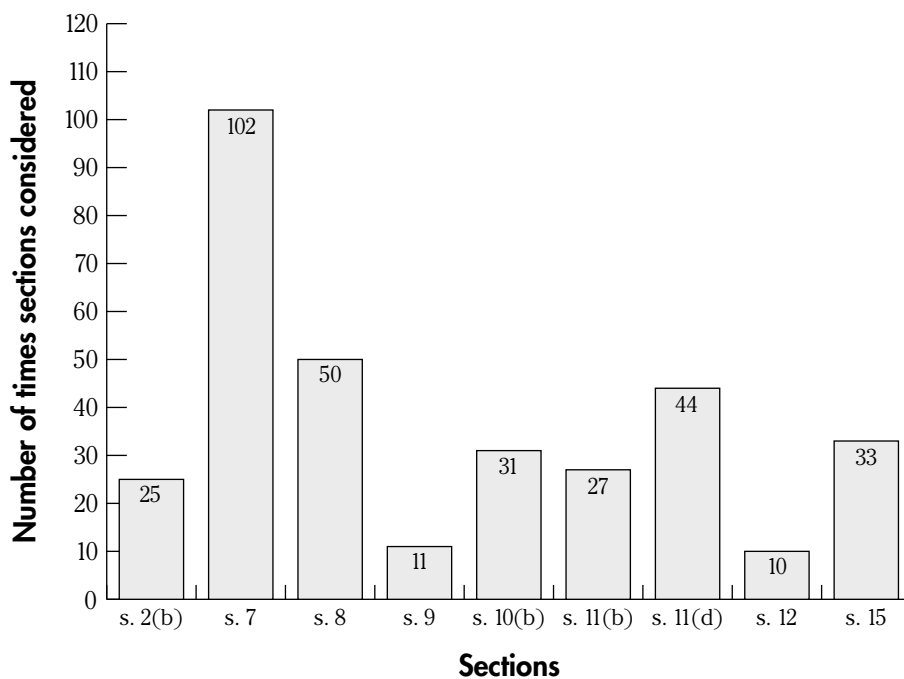
The puzzle is why the court continues to regard it as so important to dismiss cases at the s. 15 stage, rather than let the claim through to s. 1 where the *Oakes* test could be applied in the normal fashion. The *Oakes* test has proven itself flexible and adaptable to a wide variety of contexts in recent years. It thus seems difficult to understand why it should be made so difficult for a claimant in a s. 15 case to get through to s. 1. Significantly, of the 33 equality rights cases decided by the Supreme Court in the 1990s, s. 1 was determinative in just one instance—the 1995 decision in *Egan*. In the other 32 cases, the claim was either dismissed at the s. 15 stage or, if the claimant succeeded in establishing a s. 15 violation, the *Charter*

**In *Law* the court attempted to consolidate the disparate strands of analysis that had emerged in the mid-1990s in relation to the meaning of s. 15 of the *Charter*. The court put forward a complicated and multi-layered test that seems to turn on whether a particular distinction amounts to a denial of a claimant’s human dignity.**

claim succeeded at the s. 1 stage. This pattern seems the natural consequence of the Court’s s. 15 jurisprudence, which in effect substitutes the “dignity” analysis developed under s. 15 in place of the *Oakes* s. 1 test. (Note, however, that the court has been relatively receptive to s. 15 claims overall, with about one in three such claims succeeding. The point is that the s. 1 *Oakes* test almost never proves determinative in the outcome.)

In previous years we have noted that *Charter* claims were more likely to succeed in criminal cases than in non-criminal cases. That trend was reversed in 1999, where just one of the six criminal law *Charter* claimants was successful, while four of the eight non-criminal claimants succeeded. Over the entire decade, however, claims in the criminal law context have resulted in the greatest success at the Supreme Court level. For

**FIGURE 2 FREQUENCY OF CHARTER CLAIMS BY CHARTER SECTION**



example, claims based on s. 11(d) (the presumption of innocence and guarantee of trial by an independent tribunal) succeeded in nearly one out of every two cases in which they were raised over the decade. This is followed by claims based on s. 15 (with a 33 percent success rate), and s. 10(b) (right to counsel, with a 32 percent success rate). At the other end of the scale, claims based on s. 12 (cruel and unusual punishment) were rejected in each of the 10 cases in which such claims were raised.

## CHARTER ACTIVISM

The debate over judicial activism has gained additional momentum over the past year, as the contributions by Peter Hogg, Guy Giorgio, and Ted Morton underline. But regardless of one's views on the relative merits of the different positions in the debate, the fact remains that the Supreme Court itself is divided over the extent to which it is appropriate to use the Charter to overturn the decisions of legislatures and public officials. The most "activist" member of the court over the past decade has been Justice John Major from Alberta, who has favoured the Charter claimant in 42 percent of the Charter cases in which he has participated. Relative newcomer Justice Ian Binnie has also favoured the claimant in 42 percent of cases (albeit having sat on far fewer cases than Justice Major). In contrast, the new Chief Justice, Beverley McLachlin, has fa-

In previous years we have noted that Charter claims were more likely to succeed in criminal cases than in non-criminal cases. That trend was reversed in 1999, where just one of the six criminal law Charter claimants was successful, while four of the eight non-criminal claimants succeeded.

voured the Charter claimant in 27 percent of cases in which she has participated. Quebec Justices L'Heureux-Dubé and Gonthier are least likely to rule in favour of the Charter claimant (each with a 20 percent success rate in the 1990s), although it should be noted that Justice L'Heureux-Dubé is very receptive to s. 15 claims and much less receptive to other kinds of Charter arguments.

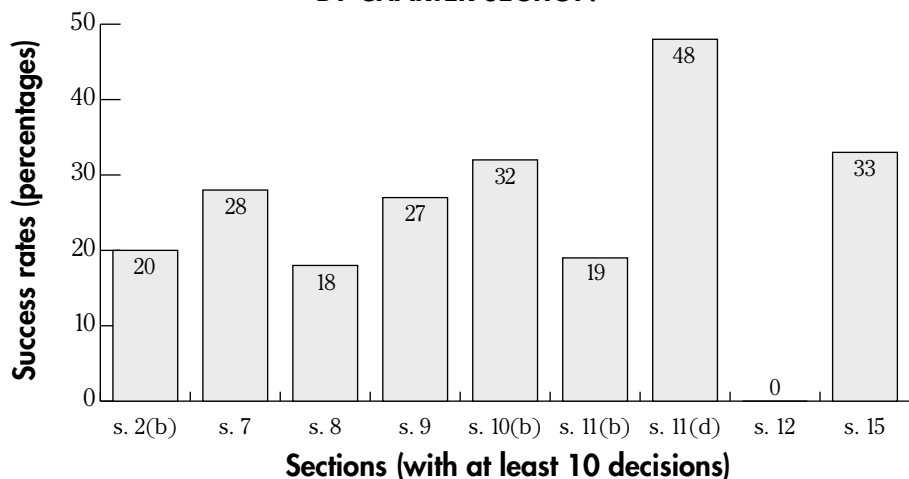
## THE ROLE OF INTERVENORS

Over half of the constitutional cases before the Supreme Court now feature the participation of "intervenor"—persons or groups that are not parties to the case itself but are given the right to file written materials and sometimes make oral arguments. This is in stark contrast to the situation as recently as the late 1980s, when the Supreme

Court was criticized for being overly restrictive in granting third parties the right to make submissions.

As might be expected given their automatic right to intervene in constitutional cases, the most frequent intervenors are governments, with slightly less than one-half (168) the total 354 interventions over the past four years having been by governments. Significantly, the most frequent government intervenor before the Supreme Court during this period has been the Attorney General of Quebec, which intervened in 28 cases over the past four years. This was followed by the government of Canada (25 interventions), British Columbia (24), and Alberta (21). Ontario intervened 19 times in the past four years. The fact that Quebec was the most frequent government intervenor is surprising since there tend to be fewer constitutional cases at the Supreme Court level from the province of Quebec than from either of Ontario or British Columbia. One might have expected the most frequent provincial government intervenor to have been one of these two provinces, rather than Quebec. The four Atlantic provinces, Prince Edward Island (3), Newfoundland (2), Nova Scotia (3), and New Brunswick (3), are the least likely to intervene in constitutional cases before the Supreme Court. These provinces also tend to have relatively fewer constitutional cases heard by the Supreme Court.

**FIGURE 3 CHARTER SUCCESS RATE BY CHARTER SECTION**



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Apart from governments, the largest single group of intervenors are non-profit organizations, including registered charities, law-related organizations, industry associations, and other non-profits. A total of 76 different non-profit organizations intervened before the Supreme Court during the last four years, including 27 registered charities, 14 law-related organizations (such as the Canadian Bar Association and the Criminal Lawyers Association), and 5 industry groups (such as the Canadian Manufacturers' Association and the Retail Council of Canada). There were 19 aboriginal organizations, 3 trade unions, 5 corporations, and 11 individuals who also intervened over the past four years.

Among non-profit organizations, registered charities have been the most frequent intervenors in constitutional cases, with 27 charitable organizations making a total of 41 appearances. This is followed by law-related groups (23 times) and individuals (17 times). The 19 aboriginal organizations have appeared 28 times over the past four years. Corporations and trade unions rarely intervene in constitutional cases.

The relevant numbers are set out in tables 1 and 2.

Certain organizations tend to intervene more frequently than others. The most frequent non-governmental intervenor during this period was the Canadian Civil Liberties Association (CCLA), which intervened eight times. Moreover, in all eight instances, the CCLA intervened in support of the Charter claimant. This was followed by the Women's Legal Education and Action Fund (LEAF), the BC Fisheries Survival Council, the BC Wildlife Federation, and Delgamuukw et al., each of whom intervened five times. However, these intervenors (unlike the CCLA) did not always intervene in support of the individual claimant, but sometimes intervened to uphold the legislation or government action that was under scrutiny. (It should also be noted that the BC Fisheries Survival

**The fact that Quebec was the most frequent government intervenor is surprising since there tend to be fewer constitutional cases at the Supreme Court level from the province of Quebec than from either of Ontario or British Columbia.**

Council, the BC Wildlife Federation, and Delgamuukw all intervened in a series of aboriginal rights cases in 1996, but have not intervened in any other year or in any other context.) Only one trade union organization (the Canadian Labour Congress) and one private corporation (Canadian National Railway Company) intervened three or more times in the Supreme Court.

In 1999, at least, government intervenors were more successful than non-

government ones. The Centre for Public Law and Public Policy contacted all of the intervenors who appeared in 1999 in an attempt to ascertain whether or not their intervention was successful. (Success is defined here in terms of supporting the party that eventually prevailed in the litigation.) The 29 interventions by attorneys general that we reviewed resulted in a successful intervention in 21 instances. In contrast, in the 53 interventions by non-governmen-

**TABLE 1 APPEARANCES BY PUBLIC INTEREST ORGANIZATIONS, 1996-1999**

Year	Registered charities	Law-related organizations	Industry groups	Misc. non-profit organizations	Total appearances
1996	0	1	4	17	22
1997	18	10	1	10	39
1998	9	8	0	12	29
1999	14	4	4	15	37
Total	41	23	9	54	127

**TABLE 2 APPEARANCES BY OTHER ENTITIES, 1996-1999**

Year	Trade unions	Corporations	Aboriginal organizations	Individuals	Total appearances by year
1996	0	3	14	12	29
1997	0	3	3	0	6
1998	1	0	4	4	9
1999	5	2	7	1	15
Total	6	8	28	17	59

tal entities that we reviewed in 1999, the intervention was successful in 28 cases.

These data are relevant to the continuing debate over the role of the courts in constitutional litigation. In the early years of the Charter, certain Charter critics argued that only profitable corporations and wealthy private individuals would have the resources necessary to fund expensive litigation all the way to the Supreme Court level. Partly in response to these fears, the government of Canada instituted a Court Challenges Program, designed to fund litigation in language rights and equality rights cases. The theory of the Court Challenges Program is that, by providing funding to groups or interests that would not otherwise have the resources to undertake litigation, such groups will have the opportunity to use constitutional rights to advance their interests before the courts. Although the Court Challenges Program was cancelled in the early 1990s, it was reinstated following the 1993 federal election and currently funds litigation in language rights and equality rights cases.

We have not attempted to ascertain how many of the intervenors in the cases examined received funding directly or indirectly (either in the form of grants or other subsidies). (It should also be remembered that our study examined only the intervenors, not the principal parties in the litigation.) Nevertheless, these data suggest that non-traditional interests, particularly charities, aboriginal groups, and non-profit organizations, have effectively seized the opportunity to intervene in litigation before the Supreme Court. In this sense, the fears that the Charter would be used unduly by profitable corporations or the wealthy to reinforce their pre-existing privilege do not seem to be borne out by these statistics.

### **BALANCING THE ROLES OF INTERVENORS AND PARTIES**

There is a strong tendency to have multiple intervenors in a single proceeding. In those cases where intervenors appear at all, there is an average of almost

## **Data suggest that non-traditional interests, particularly charities, aboriginal groups, and non-profit organizations, have effectively seized the opportunity to intervene in litigation before the Supreme Court.**

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six intervenors in a single proceeding. Moreover, in these cases one typically finds that there are intervenors on both sides of the issue. For example, in the recent *Mills* case (*R. v. Mills* (1999)) dealing with the right of an accused person to obtain psychiatric records of a complainant in a sexual assault case, there were a total of 18 intervenors, including 8 attorneys general and 10 non-governmental bodies or persons. Although it is not clear from the court's opinion precisely what position was taken by all the intervenors, most of them appear to have intervened in support of the constitutionality of the legislation and against the position taken by the accused, whose liberty was at stake in the proceeding.

Before 1987, it was generally not possible to intervene in a criminal case, with the court taking the position that criminal cases involve only the citizen and the state rather than third parties. Now, however, interventions are commonly granted in criminal matters. For example, there were intervenors in 28 of the 70 criminal law constitutional cases decided over the past 4 years (approximately 40 percent.) Although this level of intervention is lower than for non-constitutional cases, it nevertheless raises some concerns about the appropriateness of the court's current practice, since an individual accused may be forced to confront not only the Crown but also an array of other groups and organizations. Moreover, these other organizations will typically be far better funded than the individual ac-

cused and, indeed, may be governments or other organizations that are funded partly or wholly through grants, subsidies, or the tax system.

The Supreme Court announced in August 1999 that, in future, it would strictly enforce the 60-day time limit for filing of applications for intervention. (See the Notice to the Profession, discussed in Crane and Brown, *Supreme Court of Canada Practice* (Carswell, 2000), at 200.) The court also announced that intervenors should not assume that they will be granted the right to make oral submissions to the court. Anecdotal reports from applicants for intervenor status suggest that the court is now taking a much more restrictive view of the right of intervenors to make oral argument.

A somewhat more rigorous enforcement of the requirements of the Supreme Court Rules seems appropriate, particularly in the criminal law context. Moreover, while the court clearly has an interest in obtaining all relevant information and viewpoints on important issues of public policy, there does not seem to be any reason in principle why such information need be provided by way of oral argument. Granting intervenors the right to make written submissions alone seems to strike an appropriate balance between the need to obtain relevant information and viewpoints on the one hand and the fact that the actual parties to the litigation, whose interests are most directly at stake, should be the primary focus of the actual oral argument before the court on the other. ♣

# The judicial role in a democratic state

BY ROSALIE SILBERMAN ABELLA

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with the Ontario Court of Appeal.

Like their British  
colleagues,  
American judges  
tended to wrap their  
mandate  
protectively around  
the status quo,  
becoming activist  
only to keep  
government from  
encroaching on the  
traditions and rights  
of vested interests.

Let me start this article about the judicial role in a democratic society by offering a theory of what democracy is. For me, the components of democracy are most starkly revealed in comparison to its antonym—totalitarianism. What democratic societies promote—and repressive ones do not—are the rights of their citizens and their participation in decision making about the rules by which they will be governed. Democracy promotes choice, voice, and access to rights. Totalitarianism promotes none of those.

The effectiveness of the rules or rule makers any given democracy generates may vary, but their defining similarities will be a commitment to rights and to participation.

And so it is somewhat ironic to find that in Canada today, the debate about the judicial role has, to a vocal extent, come to centre on the vigour with which courts are protecting rights, and the expanded participation we have promoted to those rights. The sources of this debate are the *Charter of Rights and Freedoms* and the institution responsible for implementing it—the judiciary.

The criticism appears to be that rights should be distributed by legislatures, not courts, and that the enforcement of the Charter by courts has therefore resulted in judicial trespass on legislative supremacy, resulting in an impairment of democratic governance.

## TOO MUCH DEMOCRACY?

What is for me odd about this criticism, aside from its underlying—and historically erroneous—premise that judicial institutions do not form an integral part of the democratic framework, is that it is, at its core, a complaint that the Charter has created too many rights for too many people. But since rights and participation define democracies, does the criticism not come down to the proposi-

tion that we have too much democracy and too many institutions available to enforce it? As England, Israel, and the European Community also embrace a legislated commitment to an overriding *Bill of Rights*, it strikes me that Canada's decision to constitutionalize rights, placing them at the apex of the system, should be a source of great pride in our democratic compliance, not a source of cranky agitation.

I would have thought that in a democracy, the majority would applaud no less enthusiastically the possibility that its rights would be vigorously protected by the judiciary, as that their opinions

would be seriously taken into account by legislators.

In fact, statistics repeatedly confirm that most Canadians—that majority whose interests are consistently invoked in arguments against judicial intervention, while expressing wariness or even outright disapproval over a particular result in a given case—do in fact remain committed to the Charter as a defining democratic instrument.

What I would like to do, therefore, is try to show why and how democracy is enhanced, not cauterized, by a judiciary effectively fulfilling its Charter mandate, and how democratic values are strengthened not only by a strong legislature, but also by a strong judiciary so that together a mutually respectful and independent partnership on behalf of the public's right to justice is maintained.

## LOOKING TO THE SOUTH

Let me start the analysis with a familiar proposition uttered by a well-known figure: “[W]here the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the latter, rather than the former.” This exhortation to the judiciary to defend the people from legislative acts not in conformity with the constitution were not spoken by a Charter believer—or even a Charter agnostic. They were spoken over 200 years ago by Alexander Hamilton, one of the framers of the American constitution. These words, articulated to confirm that the wishes of the majority, as expressed through elected governments, are subject to the demands of the constitution, are at the very core of the democratic commitment to judicial independence and constitutional supremacy.

And what was there in the American constitution that made its framers so determined to keep its judicial reach



beyond the grasp of the state? The protection of rights, the culmination of a historical evolution that started with the Magna Carta, wandered through the war with the Stuart Kings, found expression in the Act of Settlement and denial in the execution of Sir Thomas More, and ultimately escaped full-panoplied from the bizarre brow of King George III. The framers had experienced the ignobility of noble rule, and were determined to create a new polity in which the government derived its moral authority from the will of the people and its parameters from the constitution. Governments were constrained from encroaching on the constitutive rights of its citizens, but if they did, there was an independent judiciary to keep those rights safe.

The institutional arrangements at the heart of this new, American democracy, therefore, provided that the will of the people as reflected in their elected representatives was subject to the will of the constitution, as reflected in the decisions of an independent judiciary.

Notwithstanding the formulization and constitutionalization of these democratic aspirations in the United States, however, it cannot be said that the actual implementation met with universal enthusiasm. The elites who debated their way to a *Bill of Rights* were far more comfortable as drafters than they were, once elected to government office, as recipients of their own rhetoric. When John Marshall, the first Chief Justice of the American Supreme Court, rendered his dramatic judgment in *Marbury v. Madison* in 1803, boldly asserting the court's right to invalidate unconstitutional legislation, he started the first act of what has turned out to be a very long-running play whose opening words are "to defer or not to defer, that is question."

Ironically, it would be many years in the United States before these judicial muscles were again so strenuously flexed as to knock out legislative action, but when they were, as they routinely were earlier in the 20th century, the flexing was not to protect people's rights,

**When legislatures elected by majorities enact laws like the Charter, the majority is presumed to agree with that legislature's decision to entrench rights and extend a constitutionally guaranteed invitation to the courts to intervene when legislative conduct is not demonstrably justified in a democratic society.**

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but to protect business and the public purse from redistributive social welfare legislation designed to assist those who needed assistance. Like their British colleagues, American judges tended to wrap their mandate protectively around the status quo, becoming activist only to keep government from encroaching on the traditions and rights of vested interests. As a result, until the mid-fifties, segregation, McCarthyism, and the internment of Japanese Americans did not receive judicial rebuke; the same could not be said, however, for women's advancement, minimum wage laws, or many of the measures introduced to confront the economic nightmare that was the Depression. Activism, today a verbal missile routinely deployed against a judiciary with an expansive view of rights, was once the proud hallmark of a judiciary determined to restrict them. Hence, the futility of labels. But more of that later.

The democratic era that started with the American constitution witnessed a relationship between the judiciary and the *Bill of Rights* that cannot be described as being anything closer than polite until halfway through this century. But with the 1954 decision in *Brown v. Board of Education* banning segregation in American schools, the relationship turned intense. Shaken by the unimaginably devastating consequences of intolerance in World War II, and

shamed by the indifference that permitted the Holocaust's horrifying tenure, the Western world revisited the role of rights, and uttered the international *mea culpa* found in the *Universal Declaration of Human Rights*. The domestic response in the United States was slower, and did not flower until the pollution emitted from the House Un-American Activities Committee had evaporated. But blossom it did, with the American judiciary and government taking turns at the head of the rights parade until, more recently, partisan ideology has merged sufficiently with the judicial appointment process to seemingly make rights protection less of a preoccupation.

This background helps us to understand that while constitutional mandates rarely change, governments, judges, and attitudes do. The ebbing and flowing, the critical scrutiny, and the inherent relational tensions are inevitable. They are a function both of perspective and of political will, each of which will likely vary with time and with the times.

## **THE CHARTER ERA**

Why does this matter now, when we are supposed to be looking forward to millennial goals rather than backward to romanticized history? It matters because we seem to be trapped at the mo-

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# The judicial role continued from page 9

ment in a conversational whirlpool about judges and constitutions and rights—a conversation in which loaded phrases are perpetually spun and important concepts are conveniently disregarded. The most basic of the central concepts we need back in the conversation is that democracy is not—and never was—just about the wishes of the majority. What pumps oxygen no less forcefully through vibrant democratic veins is the protection of rights, through courts, *notwithstanding* the wishes of the majority. It is this second, crucial aspect of democratic values that has been submerged by the swirling discourse.

Which brings us to Canada. I think it is fair to say that until 1981, when the Charter was donated to the *British North America Act* by the federal government, no one ever accused the Canadian judiciary of aggressive rights protection. In fact, many of us reared on the constitutional diet of division-of-powers jurisprudence, looked wistfully at the wide selection on the constitutional menu available to American judges. With rare exceptions, the Canadian Supreme Court not only shared the apparent inhibitions of its American and British counterparts about welcoming rights into the judicial fold, but also remained reluctant at least a generation longer. By the time I graduated from law school in 1970, the perception was that the Supreme Court was the place that decided constitutional issues such as whether “persons” in the *British North America Act* included women and whether egg marketing boards were a provincial or a federal undertaking.

Then, in 1978, just before we got a Charter, the Supreme Court in *Rathwell v. Rathwell* reversed a decision it had made only 5 years earlier in *Murdoch v. Murdoch*, thereby rewriting the archaic matrimonial property regime we had been subject to for over 100 years. No longer equitable, said the court. Time to adjust to a new appreciation about the role played by husbands and wives in a marriage. Time, in short, to create a new

**In the first decade of Charter adjudication, the Supreme Court was energetic. It struck down Sabbatarian and sign laws, said equality meant more than treating people the same, and decriminalized abortion. It ventured fearlessly into the overgrown fields of the law and cut a wide path for other courts to follow. Again the public cheered.**

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social contract. The public cheered. The media cheered. Within months, practically every province had amended its family property laws accordingly.

Then we got the *Charter of Rights and Freedoms*. To the constitution’s division of powers, it added rights: civil rights, like the freedoms of religion, association, and expression; the right to counsel; and the right to security of the person. And human rights, like equality, linguistic rights, aboriginal rights, and multiculturalism. What Canada got with the Charter was a dramatic package of guaranteed rights, subject only to those reasonable limits that were demonstrably justified in a free and democratic society, a package assembled by the legislature, which in turn—it bears repeating—assigned to the courts the duty to decide whether its laws, policies, or practices met the constitutional standards set out in the Charter.

In the first decade of Charter adjudication, the Supreme Court was energetic. It struck down Sabbatarian and sign laws, said equality meant more than treating people the same, and decriminalized abortion. It ventured fearlessly into the overgrown fields of the law and cut a wide path for other courts to follow. Again the public

cheered. Even the media cheered. It was clear that the sixties and seventies had generated a public thirst for rights protection, and *Charter* adjudication in the Supreme Court in the eighties was beginning to quench that thirst.

## THE NEW INHIBITORS

With the arrival of the nineties, a few abrupt voices were heard to challenge the Supreme Court, voices in large part belonging to those whose psychological security or territorial hegemony were at risk from the Charter’s reach. As the decade advanced, so did the courage and insistence of these “new inhibitors”—most of whom appeared to congregate at one end of the ideological spectrum. While their articulated target was the Supreme Court of Canada, their real target was the way the Charter was transforming their traditional expectations and entitlements.

They made their arguments skillfully. In essence, they turned the good news of constitutionalized rights—the mark of a secure and mature democracy—into the bad news of judicial autocracy—the mark of a debilitated and devalued legislature. They called minorities seeking the right to be free from discrimination “special interest groups” seeking to

jump the queue. They called efforts to reverse discrimination “reverse discrimination.” They pretended that concepts or words in the Charter like freedom, equality, and justice had no pre-existing political aspect and bemoaned the politicization of the judiciary. They trumpeted the rights of the majority and ignored the fact that minorities are people who want rights too. They said courts should only interpret, not make law, thereby ignoring the entire history of common law. They called advocates for equality, human rights, and the Charter “biased,” and defenders of the status quo “impartial.” They urged the courts to defer to legislation, unless, ironically, they disagreed with the legislation. They said judges are not accountable because they are not elected, yet held them to negative account for every expanded right. They claimed a monopoly on truth, frequently used invectives to assert it, then accused their detractors of personalizing the debate.

The essence of their message was that there was an anti-democratic, socially hazardous turbulence in the air, most notably during judicial flights. And while it is a message that has every right to be heard, it is not the whole story. The whole story is that the Charter does not represent heterodoxy about democracy, but rather its finest manifestation. People elect legislators who enact the laws they think the majority of their constituents want them to enact, and appoint judges who are expected to be independent from those legislators and impartial in determining whether the legislature’s actions meet constitutional standards. When legislatures elected by majorities enact laws like the Charter, the majority is presumed to agree with that legislature’s decision to entrench rights and extend a constitutionally guaranteed invitation to the courts to intervene when legislative conduct is not demonstrably justified in a democratic society.

### THE JUDICIAL MANDATE

In enforcing the Charter, therefore, the courts are not trespassing on legislative

Public opinion, in its splendid indeterminacy, is not evidence. It is a fluctuating, idiosyncratic behemoth, incapable of being cross-examined about the basis for its opinion, susceptible to wild mood swings, and reliably unreliable.

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authority, they are fulfilling their assigned democratic duty to prevent legislative trespass on constitutional rights.

While all branches of government are responsible for the delivery of justice, they respond to different imperatives. Legislators, our elected proxies, consult constituents, fellow parliamentarians, and available research until the public’s opinions are sufficiently digestible to be swallowed by a parliamentary majority. And if they cannot be made sufficiently palatable, they are starved for want of political nourishment.

This is the dilemma all legislators face—they are elected to implement the public will, the public will is often difficult to ascertain or implement, and they are therefore left to implement only those constituency concerns that can survive the gauntlet of the prevailing partisan ideology. At the end of any given parliamentary session, many public concerns lay scattered of necessity on the cutting room floor, awaiting either wider public endorsement or a newly elected partisan ideology.

The judiciary has a different relationship with the public. It is accountable less to the public’s opinions and more to the public interest. It discharges that accountability by being principled, independent, and impartial. Of all the public institutions responsible for delivering justice, the judiciary is the only one for whom justice is the exclusive mandate. This means that while legislatures respond of necessity of the urgings of the public, however we define

it, judges, on the other hand, serve only justice. As Lillian Hellman once said: “I will not cut my conscience to fit this year’s fashions.” This means that the occasional judgment will collide with some public expectations, which will, inevitably, create controversy. But judgments that are controversial are not thereby illegitimate or undemocratic; they are, in fact, democracy at work.

What of the role of public opinion? Should judges really transcend these views as they discharge their duties? Probably. Should they be aware of them anyway? Certainly. But first, we have to think about what public opinion really means and why it does not guide the courts the way it does legislatures.

Society is horizontal and it is vertical, and it is practically impossible to know at which point a consensus emerges. Until we know who the public is and how it forms opinions, courts deciding cases are entitled to regard public opinion as largely the responsibility of the legislature. This does not mean that courts are oblivious to what they perceive the public’s opinions to be, but it means that they cannot abdicate their responsibility to decide the particular case before them because of their perception of public opinion. Public opinion, in its splendid indeterminacy, is not evidence. It is a fluctuating, idiosyncratic behemoth, incapable of being cross-examined about the basis for its opinion, susceptible to wild mood swings, and reliably unreliable. In framing its

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opinions, the public is not expected to weigh all relevant information or to be impartial. The same cannot be said of judges.

This defence of constitutional rights does not mean that there are no outstanding issues. There are several to discuss: public information about who judges are and how they are appointed; the interrelationship between courts and legislatures, including the reminder that the notwithstanding clause gives legislatures the final say; when to read in corrective words to effect constitutional compliance and when to leave corrective compliance to the legislature; the tension between those who think the rights stage is overpopulated and those who are in the wings waiting to join the cast; whether labels such as progressive, conservative, activist, restraint, or politicization really contribute to a thoughtful analysis of judicial behaviour; whether the search for consensus is replacing compassion and courage as the defining justice objective and, as a corollary, whether the proposition that entitlement should be a matter of timing can ever be consistent with the fact that rights are guaranteed now.

All of these, and more, are issues we are and should be talking about. It is an important conversation, and one I hope we will keep constructive, rigorous, and continuous.

## CONCLUSION

The play *Art*, by Yasmina Reza, is about three close male friends and what happens to their relationship when one of them, Serge, spends \$200,000 on a painting. The painting is white, with fine white diagonal lines. Serge's oldest friend Marc is astonished by the purchase. He sees nothing of merit in it, and is offended by Serge's devotion to what seems to him to be a ridiculous purchase. The third friend, Yvan, does not understand the painting but neither does he mind it, thereby annoying Marc. The relationship among the three men unravels over the meaning and worth of the painting, and

We will have to learn to see first and then define . . . but we will probably, as we learn to listen and be open to each other's perspective, emerge from the transition with confidence that our decision to acquire the Charter was justified.

each of them stakes his pride to his point of view. They are simply unable to persuade one another of the value of their respective opinions.

On the tensest evening in the course of this dispute, Yvan's solipsistic hysteria over his pending wedding distracts Serge and Marc from their animosity toward each other and unites them in laughter at Yvan's hyperbolic behaviour. The tension is broken when Serge suddenly throws Marc a blue felt pen and invites him to draw on the painting. Marc cautiously approaches the painting, and slowly draws a little skier with a woolly hat along one of the diagonal white lines. Yvan is stunned; Serge and Marc survey the painting calmly, then decide to go for dinner.

Serge's act in permitting Marc to deface the painting proved to Marc that Serge considered their friendship to be more important than the painting, and the two friends recommitted themselves to rebuilding their relationship with a "trial period." Together, they wash the skier off the painting and then, as the play ends, Marc stands in front of the picture, willing to see it differently now that its significance is in perspective for him. Here are his closing words as he stares at the white canvas:

*Under the white clouds, the snow is falling.*

*You can't see the white clouds, or the snow.*

*Or the cold, or the white glow of the earth.*

*A solitary man glides downhill on his skis.*

*The snow is falling.*

*It falls until the man disappears back into*

*the landscape.*

*My friend Serge, who's one of my oldest friends,*

*has bought a painting.*

*It's a canvas about five foot by four.*

*It represents a man who moves across a space*

*and disappears.*

That new white canvas is the Charter. Different people see different things in it and approach it in different ways: some with devoted passion, some with passionate antipathy, and some with benign curiosity. The acquisition of the Charter is sufficiently recent that we are still going through a "trial period" and building understanding. We will have to learn to see first and then define, rather than the other way around, but we will probably, as we learn to listen and be open to one another's perspective, emerge from the transition with confidence that our decision to acquire the Charter was justified.

In my view, we have added a magnificent acquisition to our democratic gallery. Audiences will continue to debate it for generations, but I have no doubt that time and experience will only increase our appreciation. ❁

# Judicial activism and the Constitution\*

As one who has seen the inside of the government decision making and legislative drafting process, I hope this article brings a different, yet useful, perspective to this issue of *Canada Watch*. This article touches on three topics:

1. the position of the present Ontario government concerning the constitution and the rule of law;
2. the essential role of the people in any constitutional dialogue.; and
3. the importance of mutual respect among all parties to the dialogue.

## THE ONTARIO GOVERNMENT'S POSITION

A telling exchange occurred in 1988 while the Ontario legislature debated the Meech Lake Accord. As Mike Harris was speaking about the possibility of a court reference on the Accord, a Liberal backbencher interrupted. *Hansard* records the following exchange:

Mr. Miller (Norfolk): This is the highest court, right here.

Mr. Johnston (Scarborough West): I wish it were true. . . .

Mr. Harris: This is no longer the highest court in the land, as the member for Scarborough West has pointed out. By virtue of our Charter and our constitution, we have given that to the Supreme Court of Canada.<sup>1</sup>

The present Ontario government supports the constitution, supports the rule of law, and supports the role of the judiciary (particularly the Supreme Court of Canada) in upholding the law and Constitution.

Last May, when the Supreme Court released its reasons for judgment in *M. v. H.*, Premier Harris issued an official statement that I'd like to quote in its entirety:

The case in question has made its way through due process, and has

BY GUY W. GIORNO

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If this is truly the people's Constitution, then the public has a particular stake in decisions that expand the Charter beyond what was contemplated in 1981 and 1982.

been ruled upon by the highest court in Canada. There is no further avenue of appeal. The Province of Ontario will respect the Supreme Court's ruling. Ontario respects the constitution of Canada.<sup>2</sup>

Although since 1995 the Ontario government had argued with vigour a different position, immediately upon release of the ruling its response was one of conformity and compliance.

The Ontario government respects not only that the constitution is the "supreme law of Canada" but also that the Supreme Court of Canada is the ultimate arbiter of its meaning.

Out of respect for constitutional rights, the government quickly rejected any suggestion that it would introduce legislation to invoke s. 33 of the Charter—the notwithstanding clause. "I'm not a fan of the notwithstanding clause at the best of times," the premier was

quoted as saying.<sup>3</sup> That's not a new policy. Indeed, it's been his position for as long as I can recall.

Section 1 already contemplates the imposition of "reasonable limits" on Charter rights and freedoms. For a legislature to go further and impose restrictions not saved by s. 1—by definition, *unreasonable* limits—while technically permitted by s. 33, is inconsistent with respect for those very rights and freedoms. This perspective closely accords with the political reality that section 33 is difficult to invoke. Government bills that employ the notwithstanding clause have been introduced only in four jurisdictions, passed only in three, and brought into force only in two.

Respect for the Constitution also requires respect for the judiciary that upholds it. After all, as Professor Ian Hunter has said, "constitutions are not self-interpreting."<sup>4</sup> The amount of interpretation required depends partly on the precision of the constitutional drafters. The *Constitution Act, 1982*, while containing some very precise sections (such as references to first ministers' conferences), describes rights and freedoms in very general language. Perhaps that explains why in a little under 18 years (18 years less 8 days, to be exact), a *Charter of Rights of Freedoms* of some 2,200 words has generated more jurisprudence than a constitution of more than 11,000 words has produced during a century and one-third.

The importance of judicial interpretation is also the reason why the Ontario government has sought to open a dialogue on the appointment of Supreme Court judges.

Last October, Ontario's minister of intergovernmental affairs, the Hon. Norm Sterling, wrote the federal attorney general, urging "a more public debate on the process of appointments at

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the federal level.”<sup>5</sup> Noting public demand for “more transparency and accountability by all levels of government,” the letter cited a 1999 survey indicating that only 8 percent of Canadians accept the current system of prime ministerial appointments to the Supreme Court.

Since the Hon. Anne McLellan didn’t reply,<sup>6</sup> the federal government seems unwilling to entertain that debate. Its position appears to be that this issue went away with the deaths of the Meech Lake and Charlottetown accords.

The reform proposed by Meech Lake and Charlottetown was modest—namely, that the federal Cabinet choose puisne Supreme Court justices from lists of provincial nominees. This was not a new idea, having been included in constitutional reform proposals dating back to 1971.

Twelve years ago, the Ontario legislature went much further, when on a vote of 112:8 it adopted a select committee report critical of the lack of public participation in appointments and calling for “a further opening up of the process . . . in the post-Charter era.”<sup>7</sup> (As a matter of historical curiosity, that select committee included among its membership the current premier and deputy premier.)

## A LIVING TREE

My second observation is that, for dialogue to be truly meaningful, it must involve the public, both directly and through its elected representatives.

During the 1968 constitutional conference, as then-Justice Minister Pierre Trudeau was trying to allay provincial fears about a constitutionally entrenched bill of rights, this is what he said:

[T]here is no suggestion that the federal government is seeking any power at the expense of the provinces. We are stating that we are willing to surrender some of our power to the people of Canada, and we are suggesting that the provincial governments surrender some of their power to the people in their respective provinces. [Emphasis added.]<sup>8</sup>

[A]cceptance that the constitution must expand into the future begs the question of whose values will guide that growth. Presumably, those of the Canadian people.

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He saw a constitutionally entrenched charter not just as *protection* of the public, but as *empowerment* of the public. His approach looked on the constitution not as something *for* the people, but *of* the people.

A corollary is that both the content and the interpretation of such a constitution must embody public sentiment and values.

Professor Hogg’s 1997 paper on dialogue refers to the legislative bodies as “subordinate” to the courts. While, in the sense he meant it, that description is accurate, in another sense, legislators, judges, and the constitution itself are subordinate to the interests of the public they serve. If this is truly *the people’s* Constitution, then the public has a particular stake in decisions that expand the Charter beyond what was contemplated in 1981 and 1982.

Very early, in *Big M Drug Mart*,<sup>9</sup> Chief Justice Dickson wrote that the *Charter* was intended not just as a present but as a *future* standard, and that s. 2 freedoms could not be determined solely by the degree to which they were enjoyed pre-Charter.

In the Saskatchewan *Reference re Provincial Electoral Boundaries*,<sup>10</sup> Justice McLachlin picked up the theme, saying:

[T]he past plays a critical but non-exclusive role in determining the content of the rights and freedoms granted by the Charter. The tree is rooted in past and present institutions, but must be capable of growth to meet the future.

Her Ladyship relied on the aphorism of Lord Sankey, that the constitu-

tion is a “a living tree capable of growth and expansion within its natural limits.”<sup>11</sup> Two comments about the “living tree” metaphor are apposite. First, the last four words of Sankey’s dictum are often forgotten—*within its natural limits*. The language hints at interpretations that fill the interstices rather than take off in an entirely new direction. Second, acceptance that the constitution must expand into the future begs the question of whose values will guide that growth. Presumably, those of the Canadian people.

Consider the circumstances surrounding the case in which the “living tree” judgment was rendered: the so-called *Persons Case* of 1929.

Voters had already been electing women to the House of Commons and provincial legislatures for some time. Prime Ministers Meighen and King both promised to appoint a woman to the Senate, but the former was defeated in 1921 before he could keep the promise, and the latter was told by Justice Department lawyers that the constitution prevented him from doing so. King’s attorney general, Ernest Lapointe, promised a constitutional amendment if necessary, and the duly elected government supported the petitioners’ position before the Judicial Committee of the Privy Council.

To the extent that newspaper editorials were a barometer of public opinion, the appointment of women to the Senate enjoyed popular support. Thus, the Privy Council’s judgment merely allowed the constitution to expand in a direction that the Canadian people had already moved. The “living tree” princi-

ple was that the constitution can grow in step with the country, not ahead of it.

As Justice Iacobucci implied in *Vriend*,<sup>12</sup> making value judgments and upholding the constitution are *different* exercises. Most of us agree with the majority in *Vriend* that democracy means more than majority rule. Most agree, too, that dignity of the person, equality, pluralism, and the other principles listed by Chief Justice Dickson in *Oakes*<sup>13</sup> are important to Canadians. Yet none of that resolves the question of *whose* principles should breathe life into constitutional text.

### MUTUAL RESPECT

My third and final comment is that any dialogue must be based on mutual respect among all participants. I have noted earlier that the present government respects both the constitution and the judiciary that interprets it. The case law suggests that, from the judiciary's perspective, that respect is mutual. Justice Iacobucci's reasons in *Vriend*, in which he endorsed the "dialogue" thesis, say precisely that.

According to the court, respect for the legislature entails some degree of deference. Deference is not a complete bar to Charter scrutiny, but it is relevant to both the s. 1 analysis and the choice of remedy under s. 52.

In choosing a remedy for Charter breaches, the courts are concerned about minimal interference with legislative purposes—and often the analysis turns on guess work as to what the legislature might have done.

For example, in *Schachter*,<sup>14</sup> referring to what Parliament *would have wanted* to enact, Chief Justice Lamer used the word "assume" or "assumption" 18 times.

In *Miron v. Trudel*,<sup>15</sup> the majority imposed a definition, saying it was "what the Legislature would have done had it been forced to face the problem the appellants raise."

In the interest of genuine dialogue, one might ask whether *assumptions* about legislative response are preferable to letting the legislature actually re-

## In the interest of genuine dialogue, one might ask whether *assumptions* about legislative response are preferable to letting the legislature actually respond.

spond. The public is also a participant in this dialogue, and is worthy of equal respect. And as participants in this dialogue, sometimes the public applauds, and sometimes it disagrees—strongly.

I work for a politician, so I know something about public criticism. It can be uncomfortable. It can be unfair. But not only is criticism the people's right, it also serves to strengthen our public institutions. The Supreme Court itself has recognized the importance of public debate, even when it turns to criticism.

In the *PEI Reference*<sup>16</sup> on judges' remuneration, Chief Justice Lamer cited with approval the 1938 observation of Chief Justice Duff that our democratic institutions

derive their efficacy from the free public discussion of affairs, from criticism and answer and counter-criticism, from attack upon policy and administration and defence and counter-attack, from the freest and fullest analysis and examination from every point of view of political proposals.<sup>17</sup>

Far from weakening the nation's institutions, public debate, even public criticism, are what make democracy strong. That type of public participation makes our institutions accountable and grants them legitimacy. However discomfiting, however inconvenient, that sort of public participation comes with the territory called "democracy," and we should welcome it. ❀

\* The comments in this article are my own; they do not reflect the views of Premier Harris or his government.

- 1 *Debates*, Legislative Assembly of Ontario, June 28, 1988, 4758.
- 2 Office of the Premier, *News Release*, May 20, 1999.
- 3 "Ontario's 3 leaders will honour new ruling," *Toronto Star*, May 21, 1999.
- 4 Ian Hunter, "Taking the law in vain," *National Post*, July 29, 1999.
- 5 Norman W. Sterling, letter to Anne McLellan, October 22, 1999.
- 6 As of the date of this presentation, April 7, 2000. A reply ultimately was sent on May 12, 2000.
- 7 Select Committee on Constitutional Reform (Ontario), "Report on the Constitution Amendment 1987" (June 1998), 51.
- 8 Pierre Elliott Trudeau, remarks during Constitutional Conference, February 5-7, 1968, quoted in *Conversation with Canadians* (Toronto: University of Toronto Press, 1972), 90-91.
- 9 [1985] 1 S.C.R. 295.
- 10 [1991] 2 S.C.R. 158.
- 11 *Edwards v. Attorney-General for Canada*, [1930] A.C. 124, at 136.
- 12 *Vriend v. Alberta*, [1998] 1 S.C.R. 493.
- 13 *R. v. Oakes*, [1986] 1 S.C.R. 103, at 136.
- 14 *Schachter v. Canada*, [1992] 2 S.C.R. 679.
- 15 *Miron v. Trudel*, [1995] 2 S.C.R. 418.
- 16 *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3.
- 17 *Reference re Alberta Statutes*, [1938] S.C.R. 100, at 133.

# The Supreme Court's new equality test: A critique

In *Law v. Minister of Human Resources Development*,<sup>2</sup> Mr. Justice Iacobucci, writing for a unanimous Supreme Court, articulated the principles for analysis under s. 15(1) of the Charter. The unanimity of the court is important, as in prior decisions such as *Miron v. Trudel*<sup>3</sup> and *Egan v. Canada*,<sup>4</sup> the court was divided in its views on the appropriate approach to s. 15(1). However, in its quest to achieve a common approach, the court has articulated a test that gives rise to the following problems: (1) the new test relies heavily on “context,” is overly complex, and accordingly, is difficult for trial judges to apply; and (2) it effectively eviscerates s. 1 of the Charter. We review below the test articulated by the court in *Law*, briefly analyze the problems with the *Law* test, and finally, propose an alternative approach.

## THE LAW EQUALITY TEST

The court summarizes the test in *Law* as follows:

The approach adopted and regularly applied by this Court to the interpretation of s. 15(1) focuses upon three central issues:

- (A) whether a law imposes differential treatment between the claimant and others, in purpose or effect;
- (B) whether one or more enumerated or analogous grounds of discrimination are the basis for the differential treatment;
- (C) whether the law in question has a purpose or effect that is discriminatory within the meaning of the equality guarantee.<sup>5</sup>

The court then discusses in detail each of these steps.

**Differential treatment:** The court expresses the first step of the test as follows:

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The *Law* test is unduly complex, contextual, and difficult for trial judges to apply. Further, the *Law* test unnecessarily overlaps the analysis of breach under s. 15(1) and the analysis under s. 1, in a manner that effectively eviscerates s. 1.

Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?

**Distinction based on enumerated or analogous grounds:** The enumerated grounds under s. 15(1) are clear. The court, however, gives guidance on analogous grounds as follows:

An analogous ground may be shown by the fundamental nature of the characteristic . . . [which] is important to [the claimant's] identity, personhood or belonging. The fact that a characteristic is immutable, difficult to change, or changeable only at unacceptable personal cost may also lead to its recognition as an analogous ground.<sup>6</sup>

The court further states that the fundamental consideration for recognition of a new analogous ground is whether such recognition would further the purposes of s. 15.

**Discrimination:** The final step is to ask whether the law in question has a purpose or effect that is discriminatory within the meaning of the equality guarantee. The court elaborates the third part of the test in the following terms:

Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?

## SECTION 1

Once a violation of s. 15(1) has been found, a court must consider whether the impugned legislation is saved by s. 1. As with its s. 15(1) jurisprudence, the court has refined the s. 1 test in re-



cent decisions such as *Egan v. Canada*<sup>7</sup> and *Vriend v. Alberta*.<sup>8</sup> The court has emphasized that analysis under s. 1 must be undertaken with close attention paid to the context of the impugned law. The objective of a law can be determined only by canvassing the social problem that it addresses. The importance of that objective will also turn on contextual factors. The proportionality of the means employed, and whether they justify the violation of a right, require reference to the factual context of the law. Accordingly, “context is the indispensable handmaiden” of an analysis under s. 1.<sup>9</sup>

### CRITIQUE OF THE LAW TEST

The *Law* test is unduly complex, contextual, and difficult for trial judges to apply. Further, the *Law* test unnecessarily overlaps the analysis of breach under s. 15(1) and the analysis under s. 1, in a manner that effectively eviscerates s. 1.

If the s. 1 analysis is included, a trial judge must now consider as many as 14 different factors in order to determine whether there has been a breach of the Charter’s equality guarantees. The trial judge’s task is made more difficult by the use of terms such as “essential human dignity,” which, while a noble sentiment, do not provide a practical standard to be applied. The subjectivity of the test is further augmented by the court’s repetitive resort to “contextual” analysis. This inevitably leads to results that turn on the individual viewpoints of the judges—a modern day equivalent of the “length of the Chancellor’s foot.” While some subjectivity is inevitable, the *Law* test provides minimal constraints.

The complexity of the test is compounded by the obvious overlap between the s. 15(1) analysis, and the traditional s. 1 analysis. A trial judge is now required to consider the purpose of the legislation both under s. 15(1) and under s. 1. As well, the test articulated by the court for the determination of “discrimination” under s. 15(1) contains many of the same elements found in the proportionality part of the s. 1 analysis. Finally, the heavy reliance on “context”

The net effect of this overlap between the s. 15(1) analysis and the s. 1 analysis is to create a repetitive test, which, in its application, tends to strip s. 1 of any meaningful role.

in s. 15(1) is matched by the court’s insistence on “context” in the application of the s. 1 test. The net effect of this overlap between the s. 15(1) analysis and the s. 1 analysis is to create a repetitive test, which, in its application, tends to strip s. 1 of any meaningful role.

In order to create an approach that is more straightforward and easier to apply, the underlying factors relevant to an analysis of equality issues should be considered. Once the relevant factors have been identified, the final section of this article examines the issue whether these factors are more appropriately considered under s. 15(1) or under s. 1.

### RELEVANT FACTORS IN EQUALITY ANALYSIS

There are three basic factors that underpin any analysis of equality rights:<sup>10</sup>

**1. The purpose of the legislation:** The essence of legislating is often to create distinctions or classifications. Analysis of the purpose of the legislation is thus an important first step in the equality analysis. What is the problem that the legislation was designed to address? Analytically distinct from the purpose of the legislation is its effect: legislation can create classifications not only directly, but also indirectly through its effect. For example, a requirement that police officers be at least 6 feet tall and weigh 200 pounds creates classifications based upon height and weight that in turn have adverse effects on women. The effect of the legislation should be considered as part of the analysis of the classification in question.

**2. The classification in question:** As noted above, legislation can

create classifications either directly, or through adverse effects. Common sense tells us that certain classifications are more “suspect” than others. For example, a law that classifies persons on the basis of race is generally more suspect than a law that classifies persons based on income level. Some weight should be given to the text of s. 15(1), which specifically enumerates a number of suspect types of classifications.

**3. Reasonableness of the classification:** The reasonableness of the classification in question requires an examination of the classification in the context of the purpose of the legislation.<sup>11</sup> When one examines the problem that legislation is designed to address, typically the argument is made that the classification created does not include all of the people who are affected by the problem and accordingly is “under-inclusive”; or, alternatively, the argument is made that the classification created includes people who are not affected by the problem, and accordingly is “over-inclusive.” Legislation that is “under-inclusive” is often sustainable on the basis that the legislation may proceed “one-step-at-a-time” to ameliorate the condition of at least some persons affected by the problem. Legislation that is “over-inclusive” is often more problematic.<sup>12</sup>

When one compares these basic factors with the three central issues that the court identified in the *Law* decision, it is evident that there is a high degree of similarity. The problem is not so much with the court’s identification of the central issues, but with the layering on top of these issues of “contextual” analysis,

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and in the failure to allocate to s. 1 an appropriate role. We suggest below an alternative approach that addresses these problems.

## SIMPLIFYING THE EQUALITY TEST

Equality analysis can be greatly simplified by considering the above factors, and by returning s. 1 to a meaningful role in the analysis. An essential element of the simplification process is to allocate the analysis of the three factors identified to either s. 15 or s. 1, but not to both. Two fundamental changes to the *Law* test are necessary to accomplish this result.

First, where the classification is made on the basis of an enumerated ground, discrimination should be presumed. The text of s. 15(1) must be given some meaning, and the classifications that are specifically enumerated should be presumed to be "suspect." In these cases, once a presumption of discrimination is made, the court should proceed directly to the s. 1 analysis. There is nothing to be gained by conducting what is, in effect, a s. 1 analysis only to repeat that analysis once it has been determined that a law is discriminatory. The real battle should be waged within s. 1. The s. 1 test should focus on the three factors identified above: the pur-

pose of the law, the classification in question, and the reasonableness of the classification.

Second, the focus of the s. 15(1) analysis should be limited to two issues: analogous grounds and classification by adverse effect. Where discrimination is alleged on the basis of an analogous ground, the court should, as part of the s. 15(1) analysis, determine whether the classification in question is in fact analogous to the enumerated grounds. In this regard, the court's existing analysis of this issue is appropriate. The second area of analysis reserved for s. 15(1) is the question of whether legislation has created an enumerated or analogous classification not directly, but by adverse effect. This inquiry should be primarily factual in nature so as to avoid trenching on the ground that has been left to s. 1. Once a classification has been deemed to be analogous, or an adverse effect on an enumerated or analogous classification found, the court should move directly to the s. 1 analysis in the same manner suggested above.

## CONCLUSION

In the *Law* decision, the Supreme Court of Canada attempted to reconcile the different approaches to an equality analysis that had previously divided the court.

However, the unification of the court has been accomplished at the expense of clarity and simplicity. By simplifying the test in the manner suggested, and by according s. 1 an appropriate role, we believe that trial courts will have an easier time conducting an equality analysis. ♦

- 1 The authors wish to thank Professor Jamie Cameron for her helpful comments.
- 2 [1999] 1 S.C.R. 497. The court applied the *Law* test in two subsequent decisions, *Corbiere v. Canada*, [1999] 2 S.C.R. 203 and *M. v. H.*, [1999] 2 S.C.R. 3.
- 3 [1995] 2 S.C.R. 418.
- 4 [1995] 2 S.C.R. 513.
- 5 *Law*, above note 2, at 548.
- 6 *Corbiere*, above note 2, at 251-52.
- 7 Above note 4.
- 8 [1998] 1 S.C.R. 493.
- 9 *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, per Bastarache J.
- 10 See, generally, Tussman and tenBroek, "The Equal Protection of the Laws" (1949), 37 *Calif. L.R.* 341.
- 11 Tussman and tenBroek, *ibid.*, at 346 and 366.
- 12 *Ibid.*, at 351.

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violate the guarantee of freedom of expression in the Charter, but the province protected the new law from challenge by inserting a s. 33 notwithstanding clause into the law. The Quebec legislature recognized that it was offending the freedom of expression of its Anglophone citizens, but concluded that the enhancement of the French language in the province was important enough to override the Charter value.

When the Supreme Court of Canada held that Alberta's human rights legislation violated the guarantee of equality by not providing protection for discrimination on the ground of sexual orienta-

**In considering the debate about the legitimacy of judicial review, it is helpful to think of judicial review as part of a "dialogue" between the judges and the legislatures.**

tion (*Vriend*, 1998), there was much debate in the province about reenacting the law in its old form under the protection of a s. 33 notwithstanding clause. In the end, the government of Alberta decided to live with the decision of the

court. But it was clear that this outcome was not forced on the government, but was the government's own choice based on, among other things, what the court had said about the equality guarantee in the Charter.

Both these cases are examples of the dialogue that is permitted by the override clause of s. 33 of the Charter.

## SECTION 1 OF THE CHARTER

The second element of the *Charter of Rights and Freedoms* that facilitates dialogue is s. 1. Section 1 provides that the guaranteed rights are subject to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” This means that the Parliament or a legislature is free to enact a law that infringes on one of the guaranteed rights, provided the law is a “reasonable limit” on the right.

The Supreme Court of Canada has established some rules to determine whether a law is a reasonable limit on a Charter right. The rules can be boiled down to two: (1) the law must pursue an objective that is sufficiently important to justify limiting a Charter right, and (2) the law must limit the Charter right no more than is necessary to accomplish the objective. In practice, the court usually holds that the first requirement is satisfied—that is, the objective of the law is sufficiently important to justify limiting a Charter right. In most cases, the area of controversy is whether the second requirement has been satisfied—that is, whether the law limits the right by a means that is the least restrictive of the right.

When a law that limits a Charter right is struck down, it normally means only that the law impairs the right more than is necessary to accomplish the legislative objective. If that is the case, then a law that accomplishes the same objective but by a means that is more respectful of the Charter right will be open to the legislature. Moreover, the reviewing court that struck down the law will have explained why the law did not satisfy the s. 1 justification tests, and that explanation will suggest to the legislative body how a new law can be drafted that will satisfy the s. 1 justification.

In the Quebec language case (*Ford*), for example, the Supreme Court of Canada acknowledged that the protection of the French language was a legis-

To be sure, the Supreme Court of Canada is a non-elected, unaccountable group of middle-aged lawyers. To be sure, from time to time the court strikes down statutes enacted by the elected, accountable, representative legislative bodies. But the decisions of the court almost always leave room for a legislative response, and they usually get a legislative response.

lative objective that was sufficiently important to justify limiting freedom of expression, but the court held that a total ban on the use of other languages in commercial signs was too drastic a means of accomplishing the objective. The court suggested that the province could make the use of French mandatory, without banning the use of other languages, and could even require that the French version be predominant. Such a law, the court implied, would be justified under s. 1. Initially, as we have explained, the province was not inclined to take this advice and simply reenacted the total ban under the protection of the s. 33 notwithstanding clause. However, five years later when language passions had died down a bit, the province did reenact the law that the Supreme Court had suggested, requiring the use of French and requiring that it be predominant, but permitting the use of other languages on commercial signs.

Many other examples could be given. The point is that s. 1 permits a dialogue to take place between the courts and the legislatures.

## QUALIFIED CHARTER RIGHTS

Several of the rights guaranteed by the Charter are expressed in qualified terms. For example, s. 8 guarantees the right to be secure from “unreasonable” search or seizure. Section 9 guarantees

the right not to be “arbitrarily” imprisoned. Section 12 guarantees against “cruel and unusual” punishment. When these rights are violated, the offending law can always be corrected by substituting a law that is not unreasonable, arbitrary, or cruel and unusual.

For example, the enforcement provisions of the *Competition Act* have been struck down on the basis that they authorized unreasonable searches and seizures contrary to s. 8 of the Charter (*Hunter*, 1984). So too have the comparable provisions of the *Income Tax Act* (*Kruger*, 1984). But the Supreme Court of Canada also laid down guidelines as to how s. 8 could be complied with. What was required was the safeguard of a warrant issued by a judge before government officials could search for evidence. Parliament immediately followed this ruling, and amended the *Competition Act* and the *Income Tax Act* so that they now authorize searches and seizures only on the basis of a warrant issued by a judge. In other words, the legislative objective is still secured, but in a way that is more respectful of the privacy of the individual.

Once again, many other examples could be given, but the point is that the qualified rights encourage a dialogue between the courts and the legislatures.

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# A mirage or an oasis? Giving substance to substantive equality

The Supreme Court of Canada released three equality rights decisions in the Spring of 1999: *Law*,<sup>2</sup> *Corbiere*,<sup>3</sup> and *M. v. H.*<sup>4</sup> In all three cases, the court applied a substantive, rather than formal, equality rights analysis. Section 15 now clearly requires a focus on adopting the perspective of the rights claimant, a review of the larger historical and social context, and an emphasis on considering the impact or effects of the differential treatment. This approach should assist the court in resisting the tendency to drift into a “similarly situated” formal equality analysis.<sup>5</sup>

In *Andrews*, the Supreme Court expressly rejected a formal equality approach.<sup>6</sup> However, over the next decade of s. 15 jurisprudence, the court often slipped back into a reliance on the similarly situated test. The promise of a substantive equality approach was not fully realized.

The problem reached a breaking point in the 1995 trilogy of *Egan*,<sup>7</sup> *Miron*,<sup>8</sup> and *Thibaudeau*,<sup>9</sup> where the court was divided as to the proper test for discrimination. The split was between those Justices who wished to inject consideration of “relevance” into s. 15<sup>10</sup> and those who wished to leave the issue of justification to s. 1.<sup>11</sup> The decisions of the minority supporting “relevance” showed many of the markers of a formal equality analysis. The reasoning was bound up with us-them comparisons, without consideration of the perspective of the claimant.

Following this fracturing, the court released a series of decisions in which there was unanimity as to the result. However, there was no clear resolution of the interpretation of s. 15.<sup>12</sup> The court then called for a rehearing of *Law v. Canada (Minister of Employment and Immigration)*, a case about age discrimination that had first been argued

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With continuing criticism of the court as overly activist, it may be politically difficult for it to grant remedies that accord with the substantive equality guarantee.

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several months earlier, before a change in the composition of the court. When a unanimous decision in *Law* was released, the court pronounced that it had resolved its division over s. 15 and that *Law* would now “provide a set of guidelines for courts that are called upon to analyze a discrimination claim under the Charter.”<sup>13</sup> The guidelines suggest a commitment to a substantive equality approach—at least in theory.

With continuing criticism of the court as overly activist, it may be politically difficult for it to grant remedies that accord with the substantive equality guarantee. The approach to s. 15 may be beautifully articulated in the abstract, as was the case with *Law*, but it will not be helpful if there is hesitation to give effect to that vision of equality in the difficult cases. In *M. v. H.* and *Corbiere*, there is a

sense of caution about remedy, a deference that was not so apparent in pre-*Law* equality cases like *Vriend* and *Eldridge*.<sup>14</sup>

The issue of judicial deference is not new to equality law. The governor of Alabama decried the activism of the Warren court when he refused to comply with the desegregation mandated by *Brown v. Board of Education*.<sup>15</sup> Deference is not new to the Supreme Court of Canada either—if anything, it is a persistent theme. In one of the earliest Charter cases, Justice Lamer felt it necessary to comment on the legitimacy of constitutional adjudication under the Charter, stating: “It ought not to be forgotten that the historic decision to entrench the *Charter* in our Constitution was taken not by the courts but by the elected representatives of the people of Canada.”<sup>16</sup> For the next two decades, many justices spoke out in support of the court’s mandate as a guardian of human rights appointed by the legislature. When Chief Justice McLachlin was sworn in this year, the notion of an “activist court” continued to be a central topic in media coverage and academic discussion.

While everyone knows that a right is worthless without a remedy, it appears that a serious judicial appreciation of this reality will be an ongoing challenge for equality jurisprudence in the coming years. A substantive equality analysis will allow the court to find discrimination. The court’s courage cannot falter at the precise moment when it is called upon to do something about it. We must give substance to the promise of substantive equality.

## LAW v. CANADA (MINISTER OF EMPLOYMENT AND IMMIGRATION)

*Law* provides a comprehensive review of s. 15 jurisprudence following *Andrews*, and sets out the best articulation

of the substantive equality analysis from the court to date. Of course, the test was defined in the abstract, in response to an “easy case.” Nancy Law’s appeal was unanimously dismissed by the court. The court held that she had not established discrimination in being denied CPP survivor’s benefits available only to those who are 45 years of age or older, have children, or have a disability.<sup>17</sup> There was no discrimination because the differential treatment in the case did not “reflect or promote the notion that [those excluded from the benefit scheme] are less capable or less deserving of concern, respect and consideration. . . . Given the contemporary and historical context of the differential treatment and those affected by it, the legislation [did] not stereotype, exclude or devalue adults under 45.”<sup>18</sup>

After years of division among the Justices, the court recognized that it was necessary to “revisit the fundamental purpose of s. 15 and . . . seek out a means by which to give full effect to this fundamental purpose.”<sup>19</sup> Writing for the court, Justice Iacobucci reviewed *Andrews* and subsequent decisions, concluding that the aim of s. 15 is to “prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political and social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable of and equally deserving of concern, respect and consideration.”<sup>20</sup>

The court affirmed that equality is a comparative concept and stated that it is necessary to consider the purpose and effect of the legislation and “biological, historical, and sociological similarities or dissimilarities” to locate the appropriate comparator. Importantly, however, “the determination of the appropriate comparator, and the evaluation of the contextual factors which determine whether the legislation has the effect of demeaning a claimant’s dignity must be conducted from the perspective of the claimant”—it is a subjective-objective

assessment. A discrimination claim may involve more than one ground simultaneously.

Pre-existing disadvantage is “probably the most compelling factor favouring a conclusion that differential treatment imposed by legislation is truly discriminatory.” Historic disadvantage is not, however, a necessary pre-condition to proving discrimination. In determining whether the claimant’s dignity has been violated, another factor to be assessed is the relationship between the ground of discrimination and the nature of the differential treatment. In some cases, differential treatment may reflect the claimant’s actual needs, capacities, or circumstances, and so not be discriminatory. Still, differences must be recognized in a manner that respects a person’s value as a human being and member of Canadian society.

Justice Iacobucci held that a three-step approach is appropriate for the assessment of equality claims. The claimant must establish differential treatment, the presence of enumerated or analogous grounds, and discrimination that brings into play the purpose of s. 15(1).

The *Law* decision retains many of the same problems that have threatened equality analysis since *Andrews*. While the minority’s “relevance” step was not expressly accepted as a guideline in assessing equality claims, the court also failed to explicitly condemn it. Indeed, the court continued to advocate a three-step comparative approach that may invite a formal equality analysis. Justice Iacobucci states that the court must consider the purpose of legislation under s. 15 and “biological, historical, and sociological similarities or dissimilarities” of groups claiming equality to current rights holders. This might allow a relapse into the reasoning of the minority in *Egan* and *Miron*.

The court’s consistent focus on the perspective of the rights claimant may help to prevent a regression to formal equality reasoning. Still, the *Law* decision was written purely in the abstract—those denied the benefit were not victims of stereotyping or prejudice; they

had no history of vulnerability; their exclusion was not a threat to their human dignity.<sup>21</sup> The court had no need to actually “pivot the centre” and appreciate the experience of a vulnerable group.<sup>22</sup>

### **CORBIERE v. CANADA (MINISTER OF INDIAN AND NORTHERN AFFAIRS)**

On May 20, 1999, the Supreme Court released its decisions in *Corbiere* and *M. v. H*. In both cases, the court found a violation of s. 15 that could not be demonstrably justified in a free and democratic society.<sup>23</sup>

The issue in *Corbiere* was whether the exclusion of off-reserve members of an Indian band from the right to vote in band elections was inconsistent with s. 15(1) of the *Canadian Charter of Rights and Freedoms*.<sup>24</sup> The court was unanimous that disenfranchisement was discriminatory, but the court split 5:4 with respect to the means to identify an analogous ground of discrimination.

Chief Justice McLachlin and Justice Bastarache authored joint reasons for the majority,<sup>25</sup> with Justice L’Heureux-Dubé writing minority concurring reasons.<sup>26</sup> All agreed that the impugned law made a distinction that denied the equal benefit of the law.<sup>27</sup> Aboriginals living off-reserve were completely denied the right to vote in band elections granted to those living on-reserve.

It was also agreed that off-reserve band member status constitutes a ground of discrimination analogous to the enumerated grounds. However, the majority rejected the assertion that the same ground may or may not be analogous depending on the circumstances. In their view, analogous grounds are simply markers of suspect classifications. The third step of the s. 15 test will determine whether a distinction drawn on the basis of an analogous ground is discriminatory. The determination of an analogous ground and the determination of discrimination must be kept distinct.

Chief Justice McLachlin and Justice Bastarache also wished to comment on the criteria that identify an analogous

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ground. They suggest that an analogous ground may be identified on the basis that these “often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity.” These are personal characteristics which “the government has no legitimate interest in expecting us to change to receive equal treatment under the law.” Other considerations, such as historical disadvantage and vulnerability, are said to flow from the immutability of the personal characteristic.

In contrast, Justice L’Heureux-Dubé set out a more extensive list of relevant, but not necessary, contextual factors that may be considered in making the determination of whether a characteristic may be considered an analogous ground of discrimination. She states that “an analogous ground may be shown by the fundamental nature of the characteristic: whether from the perspective of a reasonable person in the position of the claimant, it is important to their identity, personhood, or belonging.”

The third stage of the s. 15 analysis is whether the differential treatment results in a discriminatory impact. “In plain words, does the distinction undermine the presumption upon which the guarantee of equality is based—that each individual is deemed to be of equal worth regardless of the group to which he or she belongs?”

The majority concluded that disenfranchisement was discriminatory. The denial of voting rights perpetuated historic disadvantage, and treated off-reserve band members as less worthy and entitled. It denied the right to vote on the arbitrary basis of a personal characteristic, it attacked cultural identity, and it presumed a lack of interest in meaningful participation in the band. “This engages the dignity aspect of the s. 15 analysis and results in the denial of substantive equality.”

The minority held that the finding of discrimination was based on the situa-

tion of the claimants and the general off-reserve population. However, the minority’s reasons would not necessarily apply to off-reserve members who had a different composition or history from that of the general population of off-reserve band members in Canada.

The discriminatory treatment was not justified because off-reserve band members were completely denied the right to vote. While it was not necessary for non-residents to have identical voting rights to residents, it was necessary to develop an electoral process that considered the rights of both off-reserve and on-reserve band members.

When it came to remedy, the minority and majority decisions reached the same result, showing sensitivity to the legislative role and social context. The court granted a declaration of invalidity, and struck out the words in the statute that effected the exclusion of off-reserve members. A constitutional exemption was not granted, and the remedy was suspended for 18 months to allow the government time to respond.

## **M. v. H.**

In *M. v. H.*, an 8:1 majority of the court, applying the s. 15 test articulated in *Law*, concluded that Ontario’s *Family Law Act*<sup>28</sup>(FLA) discriminated on the basis of sexual orientation by excluding same-sex couples from the definition of “spouse” for the purposes of spousal support.<sup>29</sup>

The court held that the infringement of gays’ and lesbians’ equality rights was not justified under s. 1. The appropriate remedy was to declare s. 29 of the FLA of no force and effect, and to suspend the application of the declaration for a period of six months. The court suggested that the legislature ought to address the rights of same-sex spouses in a more comprehensive fashion rather than burden private litigants and the public purse with piecemeal court reform.

*M. v. H.* was a huge achievement for gays and lesbians and for all those who believe in equality and justice. The result

in *M. v. H.* confirmed that the court had fundamentally changed its perspective since *Egan*. The court adopted a truly substantive approach to equality, recognizing the history of discrimination and invisibility faced by lesbian and gay relationships. Given the larger social and political context of homophobia, the non-recognition of same-sex spouses was rightly regarded as offensive to the dignity of gays, lesbians, and bisexuals.

As Justice Cory explained, “the exclusion of same-sex partners from the benefits of the spousal support scheme implies that they are judged to be incapable of forming intimate relationships of economic interdependence, without regard to their actual circumstances.” The court assessed the equality claim from the perspective of the rights holder, considered historical disadvantage and vulnerability, and weighed the nature of the interest affected. The court thereby concluded that the exclusion of same-sex spouses from the spousal support protections of the FLA was discriminatory.

The government failed to justify the violation of equality rights as a reasonable limit in a free and democratic society under s. 1 of the *Charter*. The government argued that the exclusion of same-sex couples was constitutional because the legislation was really aimed at protecting heterosexual couples. This was legitimate because only heterosexuals get married, only they have heterosexual sex that “naturally” produces children, or only they have economically dependent relationships.

Alternatively, Ontario suggested that the provision was primarily aimed at protecting dependent women, because heterosexual women are disadvantaged by relationships marked by gender inequality, unlike lesbians and gay men who enjoy egalitarian relationships. In support of the “anti-assimilationist” arguments, the government and “H” heavily relied on progressive law reform work and feminist writings.<sup>30</sup> The government’s submission was that same-sex couples are simply different, forming more equal and

fair relationships. Therefore, the equal benefit of the law is unnecessary. In fact, spousal recognition would promote inequality by encouraging lesbians and gays to adopt a heterosexual model.<sup>31</sup>

The Supreme Court rejected the government's articulation of the objectives.<sup>32</sup> Instead, the court took a "broad and purposive" approach to determining the laudatory purpose of the legislation. The court had regard to legislative debates, as well as the past jurisprudence of the court, which indicated that the goal of the legislation had never been entirely limited to women or children. Most important, the government's articulation of the objectives was not supported by the legislation, which was a gender-neutral scheme including mutual support rights and obligations for unmarried and childless spouses, as long as they are of the opposite sex.<sup>33</sup>

The objective of the legislation could not be framed in terms that reinforce the discrimination, such as "to provide support for heterosexual families." The resulting reasoning would be circular.<sup>34</sup> Viewing heterosexuality and heterosexual sex as legitimate grounds for distinction would have been antithetical to s. 15's purpose of promoting the equality of lesbians and gay men.

Even if the objective of the legislation was to protect and assist heterosexual families because of their reproductive potential, the court held that there would be no rational connection between this objective and the exclusion of lesbians, gays, and bisexuals. The exclusion of same-sex couples from the spousal support regime of the FLA did nothing to assist heterosexuality or children. Moreover, the legislation provided mutual support rights and obligations irrespective of whether the spouses had children.

Having found that the definition of "spouse" is contrary to the constitution, the court should have designed a remedy to protect the substantive equality rights of same-sex couples and other disadvantaged groups. Instead, the relief granted by the court had the very real potential of permitting greater inequality. The majority held that:

**Having found that the definition of "spouse" is contrary to the constitution, the court should have designed a remedy to protect the substantive equality rights of same-sex couples and other disadvantaged groups. Instead, the relief granted by the court had the very real potential of permitting greater inequality.**

In this case, . . . [t]he appropriate remedy is to declare s. 29 of no force and effect and to suspend the application of the declaration for a period of six months.

As a result of the remedial order, the extended definition of "spouse" under s. 29 of the FLA of Ontario was to be struck down on November 20, 1999. The legislature had until that date to amend s. 29 in accordance with equality principles. Rather than fixing the problem by striking out the offending words, as was done in *Corbiere*, the court struck down the whole extended definition of "spouse" and suspended the declaration.

The remedy granted could have created substantive inequality between married couples on the one hand, and unmarried opposite and same-sex couples on the other. Striking down the underinclusive extension of rights might have left all unmarried couples equally disadvantaged, with no unmarried spouses having spousal support rights and obligations in Ontario. This result cannot be easily reconciled with equality principles, particularly since the decision in *Miron* suggests that differential treatment between married spouses and unmarried opposite-sex spouses is unconstitutional. In *Corbiere*, the court fashioned its remedy with an eye to the entire social context, including the possibility of legislative inaction. In con-

trast, it failed to ensure a Charter-respecting remedial result in *M. v. H.*

Although there was remedial precision, the court held that it could not "read in" because that would not ensure the validity of the legislation as a whole. There were two other parts of the FLA that would have to be considered to ensure constitutional validity: part IV, concerning the right to make statutorily recognized agreements, and part V, dealing with the right to claim damages for the injury or death of a family member. This seems an odd justification for the remedial choice, especially since the court had made tough remedial orders in similar circumstances in *Vriend*. Perhaps the remedial order was an understandable expression of judicial reluctance to dictate social policy. Or was it a failure to be truly accountable, rooted in the concern that the decision would be unpopular?

One strong possibility is that the remedial order was a response to Ontario's approach to the litigation. In its s. 1 argument, the government claimed that the challenge to s. 29 of the FLA threatened the validity of 80 provincial statutes. However, when it came to argument on remedy, Ontario asked—pleaded even—that the court not suspend any declaration of invalidity. In fact, counsel went so far as to suggest that the court was *not permitted* to suspend the remedy be-

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cause the government was not seeking it. The other 80 statutes were suddenly less an issue. It was clear that Ontario did not want to engage in law reform in this politically troublesome area; it wanted the court to handle the problem instead.

Viewed in this context, the decision on remedy could be an almost subversive response to the position in which the court found itself. It was certainly clear during argument that the panel was shocked, even horrified, by the submissions that the court should read in, and that a suspension should only be granted if the government asked for it. The remedy chosen, striking down all of s. 29 with only a brief suspension, may have been an effort to force Ontario's hand, to make the government take responsibility.

To be fair, the court appeared to have complete faith that the government would respect its decision. We argued strenuously that the court should read in without any suspension of its remedy, given Ontario's clear position that it was not interested in engaging in responsive legislative reform. When pressed by former Chief Justice Lamer about why we cared about remedy if the court agreed that s. 29 was unconstitutional, we responded that our client wanted to know that this case, her case, resolved the issue. She wanted to be sure that her case meant an end to discrimination and that nobody else would be required to fight this particular battle again. In response, Lamer C.J. said that there had never been a case in which suspension had been granted and the court's decision had been ignored. Sometimes extensions were sought, and granted, but there was always compliance.

The court may have been too trusting because of that past history. By throwing the challenge back to the legislature after Ontario attempted to burden the court with the responsibility of law reform, the court perhaps lost sight of the social context—the same social context of homophobia that it had fully grasped when applying the s. 15 substantive

## When it came to remedy, the minority and majority decisions reached the same result, showing sensitivity to the legislative role and social context.

equality analysis. Whatever the reason for the remedial order, the result was extremely problematic.

On October 27, 1999, without any community consultation and after releasing the Bill to the public for the first time only 48 hours earlier, Ontario passed *An Act to Amend Certain Statutes Because of the Supreme Court of Canada Decision in M. v. H.* Second and third readings for the Bill were held in an evening session of the legislature, without any substantive debate, and without a recorded vote.

The *M. v. H.* Act introduces separate nomenclature for same-sex couples. Where married and unmarried heterosexuals are "spouses" and "families," gays and lesbians are deemed "same-sex partners" and "households."<sup>35</sup> The legislation introduces, in 67 statutes, an express distinction on the basis of sexual orientation. Rather than amend the discriminatory definition of "spouse" ruled to be unconstitutional in *M. v. H.*, Ontario has responded with defiance, saying in its press releases and in the debates that the purpose of the legislation was to "protect" traditional family values and to preserve the concept of spouse for heterosexuals only.<sup>36</sup>

Having argued consistently since the early '80s that "spouse" is an inherently heterosexual definition, having lost that argument in numerous lower court cases, and having heard once and for all from the Supreme Court in *M. v. H.* that it cannot be sustained, the government has responded with a new tactic—segregation. Having lost the right to deny gays and lesbians equal financial benefit of the law by the use

of the term "spouse," Ontario now seeks to "protect" the label itself as the last bastion of discrimination. Segregated status sends a clear message of exclusion—gays and lesbians are a threat to "our" concept of family from which society must be "protected."

We went with M. and sat in the legislature on October 27, 1999, to bear witness to the passage of the Act. Instead of affirming the equality of gays and lesbians, the statute that credits her tireless court battle as its rationale instead contributes to the very real discrimination M. was seeking to remedy. That evening, it was clear to us that the Act flaunted both the letter and the spirit of *M. v. H.* Our client wondered aloud if any of the politicians had even read the court's decision. Watching MPPs do crossword puzzles and pass around family photos during the self-congratulatory "debate," it was difficult to answer in the affirmative.

While the suspension may have been an effort by the court to force Ontario to take responsibility for ensuring equality, it also permitted the government to introduce a new discriminatory regime. In the end, the legislature has reconfigured inequality while pretending compliance.

With faith that this was not the conclusion that the court had imagined, M. will shortly file a motion for rehearing before the Supreme Court of Canada. We will argue that the amendment of s. 29 of the FLA has not cured the constitutional violation, and we will request a remedy for the continuing infringement. Given the larger social, political, and historical context of homophobia, M. asserts that Ontario's separate nomenclature promotes a feeling



of exclusion and second-class status among members of the gay and lesbian community. It has the effect of condoning and promoting the discriminatory view that gays and lesbians are a threat to the cherished values of society, and that same-sex relationships are inherently different from and inferior to those of heterosexuals. The segregated scheme threatens the development of law in compliance with equality principles. It promotes, if not requires, separate interpretation and separate case law for “same-sex partners” as opposed to “spouses.”

The constitutional question brought forward by *M.* continues to be answered in the same manner: the definition of “spouse” discriminates, without any rational justification for the rights infringement. If the court’s promise of substantive equality, and its very remedial process, are to have integrity, the court should allow the rehearing and grant a declaration that the definition of “spouse” under s. 29 of the FLA continues to unjustifiably discriminate against gays and lesbians.

The rehearing application will show whether the new commitment to substantive equality is a mirage or an oasis for the disadvantaged. This contrast between the theoretical victory and the practical reality is one that we have lived in *M. v. H.* Throughout her decade-long battle for equality, *M.* was consistently successful on an entirely theoretical level, fighting only for a right to *claim* support, and eventually settling her case with *H.*, without ever receiving any relief from the financial stress of separation. If her case ends with the court condoning the *M. v. H.* Act, she will have achieved nothing more than having her pseudonym on a piece of discriminatory legislation. Substantive equality will be a loose and meaningless theory—an enticing mirage that disappears when you finally think you’ve arrived. ❀

1 The authors must thank Jung-Kay Chiu, Student-at-Law, for his assistance with the citations and revisions to this paper.

- 2 *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497.
- 3 *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203.
- 4 *M. v. H.*, [1999] 2 S.C.R. 3.
- 5 M.A. McCarthy and J.L. Radbord, “Foundations for 15(1): Equality Rights in Canada” (1999), 6 *Mich. J. Gender & L.* 261.
- 6 *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.
- 7 *Egan v. Canada*, [1995] 2 S.C.R. 513.
- 8 *Miron v. Trudel*, [1995] 2 S.C.R. 418.
- 9 *Thibaudeau v. Canada*, [1995] 2 S.C.R. 627.
- 10 Justices LaForest, Gonthier, and Major, and Chief Justice Lamer.
- 11 Justices Cory, Iacobucci, L’Heureux-Dubé, McLachlin, and Sopinka.
- 12 *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 385; *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624.
- 13 *Law*, above note 2, at para. 5.
- 14 *Vriend v. Alberta*, [1998] 1 S.C.R. 493; *Eldridge*, above note 15.
- 15 *Brown et al. v. Board of Education of Topeka et al.*, 347 U.S. 483 (1954).
- 16 *Re B.C. Motor Vehicles Act*, [1985] 2 S.C.R. 486 at 497.
- 17 *Canada Pension Plan*, R.S.C. 1985, c. C-8, ss. 44(1)(d) and 58.
- 18 *Law*, above note 2, at para. 102.
- 19 *Egan*, above note 7, at 541.
- 20 *Law*, above note 2, at para. 51.
- 21 *Ibid.*, at para. 100: There was no discrimination because Nancy Law could not demonstrate that either the “purpose or effect of the impugned legislative provisions violate[d] her human dignity.”
- 22 For a helpful discussion of the multiplicity and particularity of experience, and the ability to centre in the experience of another, without the need for comparison and without

adopting that framework as one’s own, see Elsa Barkley Brown, “African-American Women’s Quilting: A Framework for Conceptualizing and Teaching African-American Women’s History” (1989), 14 *Signs* 921.

- 23 *Corbiere*, above note 3; and *M. v. H.*, above note 4.
- 24 *Corbiere*, *ibid.*, at para. 3.
- 25 The majority also included Justices Lamer, Cory, and Major.
- 26 The minority also included Justices Gonthier, Iacobucci, and Binie.
- 27 *Corbiere*, above note 3, at paras. 4 and 57.
- 28 *Family Law Act*, R.S.O. 1990, c. F.3.
- 29 Spousal support (alimony) has been available to unmarried opposite-sex couples in Ontario since 1978 (see *Family Law Reform Act, 1978*, S.O. 1978, c. 2). Although the number of years required for cohabitation varies, all Canadian provinces except Quebec have similar legislation. Generally, unmarried heterosexual spouses are granted many of the same benefits and responsibilities as married couples. See also, *Miron*, above note 8, establishing that differential treatment between unmarried opposite-sex cohabitants and married spouses is unconstitutional.
- 30 The Ontario government particularly relied on the Ontario Law Reform Commission, *Report on the Rights and Responsibilities of Cohabitants under the Family Law Act* (Ministry of the Attorney General: Toronto, 1993), at 46-47, and B. Cossman and B. Ryder, *Gay, Lesbian and Unmarried Heterosexual Couples and the Family Law Act* (Research paper prepared for the Ontario Law Reform Commission, Osgoode Hall Law School, June 1993), at 142 and 143, citing works by feminist scholars like Didi Herman, Shelley Gavigan, and Ruthann Robson.
- 31 Factum of the attorney general of Ontario before the Supreme Court of

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Canada, see discussion *ibid.* A note of caution for academic writers. Dialogues internal to the community as to the desirability of pursuing spousal recognition can and will be used by conservatives, particularly as their sectarian religion-based arguments lose force. Although such critical commentary is intended to promote and further equality, if not sufficiently nuanced, it will most certainly be used for anti-equality purposes. In *M. v. H.*, the Government also argued that the court should not grant a remedy because the community was

deeply divided over the issue of spousal recognition.

32 Justice Gonthier dissented. Justice Bastarache adopted a different approach with respect to the identification of the objectives.

33 *R. v. Big M. Drug Mart*, [1985] 1 S.C.R. 295; *Egan*, above note 7, at 558-59.

34 *Egan*, above note 7, at 547-48 and 596; *Miron*, above note 8, at 488; *Re K.* (1995), 23 O.R. (3d) 679 (Prov. Div), at 699; P.W. Hogg, *Constitutional Law of Canada*, 3d ed.

(Supp.) (Scarborough: Thomson Canada, 1992), at 35-18.

35 *An Act to Amend Certain Statutes because of the Supreme Court of Canada Decision in M. v. H.*, S.O. 1999.

36 Ontario Ministry of the Attorney General, *Press Release*, "Ontario protects traditional definition of spouse in legislation necessary because of Supreme Court of Canada decision in *M. v. H.*" (October 25, 1999); Legislative Assembly, *Ontario Hansard* (October 27, 1999), at 1-4.


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### CONCLUSION

The proof of the pudding is in the eating, and our researches have showed that most of the decisions of the Supreme Court of Canada in which laws have been struck down for breach of a Charter right have in fact been followed by the enactment of a new law. In a study published in 1997 (35 *Osgoode Hall Law Journal* 75), we found that there had been 66 cases in which a law had been struck down by the Supreme Court of Canada for breach of the Charter. Only 13 of these had received no legislative response at all, but they included some of the most recent cases (to which there had been little time to react) and some cases in which corrective action was under discussion. In 7 cases, the legislature simply repealed the law that had been

found to violate the Charter. In the other 46 cases, a new law was enacted to accomplish the same general objective as the law that was struck down.

It seems reasonable to conclude that the critique of the Charter based on democratic legitimacy cannot be sustained. To be sure, the Supreme Court of Canada is a non-elected, unaccountable group of middle-aged lawyers. To be sure, from time to time the court strikes down statutes enacted by the elected, accountable, representative legislative bodies. But the decisions of the court almost always leave room for a legislative response, and they usually get a legislative response. In the end, if the democratic will is there, the legislative objective will still be capable of accomplishment, albeit with some new safeguards to protect

individual rights. Judicial review is not "a veto over the politics of the nation," but rather the beginning of a dialogue as to how best to reconcile the individualistic values of the Charter with the accomplishment of social and economic policies for the benefit of the community as a whole. 

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\* This paper appeared in *Policy Options*, April 1999, 19, and is reproduced with the permission of the Institute for Research on Public Policy, which is the publisher of *Policy Options*. A much longer version of the paper has been published under the bylines of Peter W. Hogg and Allison Bushell (now Thornton) in (1997), 35 *Osgoode Hall Law Journal* 75.

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court) to use his or her power of judicial review to overrule the policy choices of governments. Judicial activism is the opposite of judicial self-restraint: the propensity of a judge, when there are two or more equally plausible interpretations, to choose the one that upholds government policy. Since judicial activism is an empirical concept—it seeks to describe the deci-

sions of a judge or a court—it can be tested against the historical record. By this standard, there can be no disputing that since the adoption of the Charter in 1982 our Supreme Court has embarked on a decidedly more activist exercise of judicial review. Under the 1960 *Bill of Rights*, the court struck down only one statute in 22 years. Since 1982, the court has struck down

58 statutes (31 federal and 27 provincial) in just 16 years. Surely, this qualifies as a significant increase in judicial activism, and has been duly noted by many other than myself—including the recently retired Chief Justice Lamer and Professor Monahan.<sup>1</sup>

Using a more sophisticated definition of judicial activism yields a similar verdict. Judicial activism can be defined

around three related but distinct axes: policy impact (discussed above), institutional design, and interpretive discretion. Institutional design denotes the collection of judicial rules governing access to and jurisdiction of the court: mootness, standing, third-party interventions, state-action versus in-action, political questions, etc. It also encompasses the related issue of remedies.

In a series of landmark rulings, the Supreme Court has boldly swept aside old precedents and practices.<sup>2</sup> Cumulatively these decisions have dramatically increased the scope and frequency of the court's scrutiny of government policy choices. While these changes coincide with the Charter, none of them were in any legal sense required by the Charter. In effect, the court has "retooled" itself from an adjudicatory institution into a policy review board. With respect to remedies, the court has armed itself with the quasi-legislative power of "reading in"—the direct amending of legislative meaning from the bench.<sup>3</sup> Indeed, these changes in the functional design of the court are likely to be more enduring—and thus more significant—than its year-to-year policy impact.

Indeed, these changes have made the court a de facto third branch of the legislative process. The results are reflected in the court's docket. In 22 years the court heard only 35 challenges based on the 1960 *Bill of Rights*. In the first 16 years under the Charter it heard 373. Approximately one-fifth of the hundred plus cases the Supreme Court hears annually are now Charter cases.

There are now certain policy fields—bilingualism, aboriginal issues, feminist and gay issues, criminal law, immigration—where a Charter challenge is all but guaranteed if the affected Charter constituency does not get all of what it wants from the responsible legislature. (Consider EGALE's characterization of Ontario's Bill 5—extending legal rights to same-sex couples—as a "slap in the face" because it did not redefine spouse to include same-sex couples.<sup>4</sup>) Indeed, I am sometimes tempted to ask if there is anything on LEAF's or EGALE's list of

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policy demands that *is not* required by the Charter?

Interpretive discretion is the third dimension of judicial activism: the freedom of a judge to change the original meaning or add new meaning to constitutional rules. Notwithstanding the recent vintage of the Charter and the clear historical record on a number of specific sections, the court quickly demoted judicial fidelity to "framers' intent" to optional status. Instead, the court embraced an approach to interpreting Charter rights that it alternately describes as "living tree . . . purposive . . . contextual . . . large and liberal." Suffice it to say that this approach allows judges to stretch the definitional boundaries of rights as broadly as suits their purpose.<sup>5</sup>

The result has been the production of astonishing new "constitutional rules." Thanks to the court's ingenuity, s. 7 now requires substantive as well as procedural fairness.<sup>6</sup> For some like Justice Wilson, this would include the constitutional right to an abortion.<sup>7</sup> As a result of *Sparrow*, s. 35 is no longer effectively limited to protecting "existing" aboriginal rights. Similarly, in *Mahé*, the court rewrote s. 23 to include a right to "control and administration" by minority language school boards.

Sometimes this form of judicial activism occurs within a context of apparent judicial self-restraint. In *Butler*, for example, the court rejected the s. 2(b) challenge to censorship of pornogra-

phy, but did so on a completely novel feminist theory of censorship. For this reason, *Butler* was hailed at the time as a great victory for feminists. Similarly, in its 1995 *Egan* decision, the court upheld the challenged legislation even as it added sexual orientation to the s. 15 list of prohibited types of discrimination. Despite the "loss" for the plaintiffs, *Egan* was a tremendous victory for the gay rights movement because it laid the groundwork for the court's subsequent activism on behalf of gay rights in *Vriend* and *M v. H*.<sup>8</sup>

In theory, the s. 1 "reasonable limitations" clause might have placed some limits on this discretion. As operationalized by *Oakes*, however, any s. 1 limitations on judges are self-imposed, which is to say, not very limiting. There is "strict" *Oakes*, "minimal" *Oakes*, and "middle-tier" *Oakes*. While there is no shortage of advice to the judges as to which causes or groups are entitled to which level of scrutiny, judges are free to pick. It is not by accident that s. 1 disagreements among the judges are the second highest source of dissenting opinions in the court's Charter decisions. "Reasonableness" per *Oakes* is little more than a subjective judgment masquerading as a "rule."

In sum, when we take account of dimensions of judicial activism other than policy impact, the court still appears even more activist.

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## THE DEFENCES OF JUDICIAL ACTIVISM

The claim advanced by myself and others that the Supreme Court has been excessively activist in its exercise of Charter review can be challenged on two related but distinct grounds. The first line of defence consists of “legal” arguments claiming that the court’s decisions are all “required” by the Charter.<sup>9</sup> The second line of defence consists of arguments that are more “political” in nature.<sup>10</sup> That is, they tend to not so much defend the court’s activism, as impugn the motives of the critics or claim that critics exaggerate the extent of judicial activism. The Hogg-Bushell (now Thornton) “Charter dialogue” theory falls into the latter, and I will restrict my comments to it.

Hogg argues that the charge of undue judicial activism is overstated.<sup>11</sup> Courts rarely have the last word in Charter disputes. The s. 33 notwithstanding clause gives that power to any government with the political will to use it. More typically, when the courts have struck down a law, they have objected not to its purpose but to the means used to achieve it. The “means-oriented” character of Charter decisions leaves the door open for the government to redraft and re-enact the impugned statute in a manner that still achieves its original objectives.

Hogg then tests this theory against 66 court rulings (mostly Supreme Court) striking down statutes, and discovers that in 46 of them, there was indeed a “legislative sequel.” That is, in two-thirds of these cases, the government was still able “to accomplish the same general objective” through new legislation. He concludes, the Charter has not created a “judicial veto over the politics of the nation,” but rather instituted a dialogue between judges and legislatures. Within months, the Hogg dialogue theory had soared off the pages of the *Osgoode Hall Law Review* and into the *obiter dicta* of the Supreme Court—in, of all cases, the

*Vriend* decision—then the court’s most activist decision to date.<sup>12</sup>

## CRITIQUE OF THE “CHARTER DIALOGUE” DEFENCE

I have made three principal criticisms of the “dialogue” argument in another forum, and only summarize them here.<sup>13</sup> Similarly, I draw on Manfredi and Kelly’s more sophisticated methodological critique of the Hogg study.<sup>14</sup>

Hogg uses a self-serving definition of “dialogue.” Hogg counts as dialogue any legislative response to the judicial nullification of a statute. If a government repeals the offending legislation or amends it according to specifications laid out by the court, this counts as “dialogue.” No wonder Professor Hogg found a two-thirds incidence of dialogue! His choice of methodology virtually ensured the result.

Obeying orders is not exactly what most of us consider a dialogue. Dialogue is a two-way street. If I go to a restaurant, order a sandwich, and the waiter brings me the sandwich I ordered, I would not count this as a “dialogue.” Nor do I think this is how Premier Harris saw it, when he explained the introduction of Bill 5 as “simply obeying the Supreme Court of Canada. . . . The courts have told us we must deal with this . . . and we’ll comply.”<sup>15</sup> Yet, according to Hogg’s methodology, this is “dialogue” pure and simple.

Manfredi and Kelly have made a similar objection to Hogg’s methodology. Dialogue, they correctly assert, implies an equality of the discussants. They re-analyzed Hogg’s cases distinguishing between “positive” and “negative” legislative sequels, and found that only one-third qualified as “dialogue” in a meaningful sense, not the two-thirds reported by Hogg.<sup>16</sup> I would argue that even this figure is misleadingly high, since most of the legislative amendments were simply what the court said must be done to pass Charter (that is, the court’s) scrutiny. Would anyone seriously contend that in en-

acting Bill 5 in response to *M v. H*—an example of a “positive legislative sequel”—the Ontario government was still able “to accomplish [its] same general objective”?

Manfredi’s findings also contradicted a second of Hogg’s claims—that most sequels only involved minor changes to the impugned legislation. In his re-analysis of the same cases, Manfredi found that a majority involved major changes, such as repealing the whole section or replacing entire acts.

The second problem with the dialogue theory is its means/ends distinction. The means/ends distinction sounds fine in theory but breaks down in practice. Politics is as much about means as ends. Everyone wants equal employment opportunities for women and racial minorities, but not everyone favours preferential treatment or quotas as the way to achieve this goal. No respectable person is willing to defend child pornography, but many will argue that restrictions on it must be balanced with our respect for freedom of expression and privacy.

In addition, apparent disagreement about means sometimes turns out to be disagreement about ends. Everything depends on the purpose(s) a judge attributes to the statute. The broader the purpose(s), the easier it is to find that the legislation passes the “least restrictive means” test. In fact, any half-clever judge can use procedural objections as a colourable device to strike down legislation that he or she opposes for more substantive reasons. This occurred in some of the very cases used by Hogg—that is, those involving voluntary religious instruction in Ontario schools and the federal prisoner voting cases.<sup>17</sup>

Perhaps the best example of this instrumental use of procedural objections comes from the recently retired Chief Justice of Canada. In the 1988 *Morgentaler* case, Justice Lamer joined Justice Dickson in an opinion striking down the abortion provisions of the *Criminal Code* because it violated s. 7 of the Charter. The procedures required to at-

tain a legal abortion were deemed too restrictive and ambiguous. However, speaking on the tenth anniversary of the *Morgentaler* decision, Lamer told law students at the University of Toronto in 1998 that he voted to strike down the abortion law for a very different reason: because a majority of Canadians were against making it a criminal offence. Does this mean that his 1988 s. 7 objections were simply after-the-fact rationalizations to justify striking down a law that he opposed for other reasons?

Thirdly, Hogg's assertion that the availability of s. 33 counters criticisms of judicial usurpation is again more true in theory than in practice, which is to say that it is not a very accurate theory. According to Hogg, "If there is a democratic will, there will be a legislative way." If a government fails to use the tools at its disposal, that's the government's fault, not the court's. This account fails to recognize the staying power of a new, judicially created policy status quo (PSQ), especially when the issue cuts across the normal lines of partisan cleavage and divides a government caucus.

Contrary to the rhetoric of majority rule and minority rights, on most contemporary rights issues there is an unstable and unorganized majority or plurality opinion, bracketed by two opposing activist minorities. While the issue is salient for the activists on both sides, it typically is not a priority for the majority. Charter challenges are typically brought by one of the two activist minorities. Abortion is the classic example.

In terms of political process, the effect of a Supreme Court Charter ruling declaring a policy unconstitutional is to create a new PSQ that is more in line with one of the two groups of minority activists. The ruling shifts the burden of mobilizing a new majority coalition (within voters, within a government caucus, and within a legislature) from the winning minority to the losing minority.

This turns out to be difficult. The issue typically is not a priority for the government, the opposition parties, or the public. Indeed, the priority for most governments on such "moral issues" is to avoid

To re-establish the old policy status quo, Mr. Klein would be portrayed as "taking away rights" from gays, and he had no stomach for that scenario. So he did what he had done before—nothing. The staying power of the PSQ—this one judicially created—was demonstrated once again.

them as much as possible. Such issues cross-cut normal partisan cleavages and thus fracture party solidarity. Nor are they likely to win any new supporters among the (uninterested) majority.

Describing the Alberta government's decision to "live with" the *Vriend* ruling, Hogg writes: "But because 'notwithstanding' was an option, it is clear that this outcome was not forced on the government, but was the government's own choice." Hogg is only half right in this assertion. He ignores the fact that the court's decision decisively changed the government's options. The government's preferred choice was not to act at all—to simply leave the old PSQ in place. The court destroyed this and—with the clever use of the "reading in" technique—created a new PSQ.

The judicial ruling significantly raised the cost of saying "no" to the winning minority. Before the ruling, the Klein government could (and did) say that it was simply treating homosexuals the same as heterosexuals. Neither was singled out for different treatment. After the ruling, however, invoking s. 33 could and would be construed as an attack on gays; taking away rights they already had. Other things being equal, Klein would have preferred the status quo ante. But the government's pre- and post-ruling situations were not equal. To re-establish the old policy status quo, Mr. Klein would be portrayed as "taking away rights" from gays, and he had no stomach for that scenario. So he did what he had done

before—nothing. The staying power of the PSQ—this one judicially created—was demonstrated once again.

Hogg writes that judicial nullification of a statute "rarely raises an absolute barrier to the wishes of democratic institutions." He is right in his observation, but wrong in his conclusion. It does not have to be an absolute barrier. Depending on the circumstances, a small barrier may suffice to permanently alter public policy—typically displacing a "muddy middle" compromise policy with one favoured by one of two competing sets of activists.

There is a fourth and final problem with the dialogue theory: it is simultaneously apolitical and very political. It is apolitical in the sense that it ignores the central political issue of "who wins." It lumps together very different kinds of legislative sequels: "following orders" (*Hunter v. Southam*); substantial resistance (*Daviault*); and outright non-compliance through the use of s. 33 (*Ford*). Apparently, it does not matter whether the legislative or judicial view prevails. All are counted equally as "dialogue." Fair enough.

But do the legions of judges, rights activists, and academics who now instinctively invoke the "dialogue" mantra the moment they hear the word "judicial activism" show the same equanimity as Professor Hogg when it comes to equating "following orders" with the use of s. 33? Or does the popularity of the "dialogue" theory stem from the fact

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that governments have been so passive in the face of judicial activism that “following orders” is the norm? If cases like *Ford* were the norm, not the exception, would we find the same enthusiasm for “Charter dialogue”?

When Premier Klein mused publicly about invoking s. 33 in the week following *Vriend*, did the court’s defenders cheer “Dialogue, Ralph, Dialogue!” No. They described s. 33 as the “atom bomb of rights” and likened its use to the practice of “banana dictatorships.” When Ontario responded to *M. v. H.* by extending equivalent legal rights to gay couples, did gay activists cheer this as “dialogue”? No. To the contrary, Martha McCarthy said that she intends to take the Ontario government back to court for stopping short of redefining “spouse” to include same-sex partners.

Experiences like these lead me to conclude that not only is the dialogue theory inaccurate as an empirical theory, its invocation is opportunistic—when it supports the policy outcome that the court’s partisans like.

Indeed, as these two examples illustrate, the very purpose of claiming that a particular policy is a “right protected by the Charter” is to put that issue *beyond* the reach of everyday politics—that is, to force people to *stop* talking about it. This is the purpose of a “written” (as opposed to our old tradition of an “unwritten”) constitution: to stipulate that there are certain activities that are so fundamental to our conception of justice that they are placed beyond the reach of ordinary political majorities—that is, they require the supermajorities stipulated by the amending formulas. The moral premium that attaches to a successful “rights claim” is intended to terminate dialogue on that issue rather than to stimulate it. It is for this very reason that I (and others) have criticized the ascendancy of “rights talk” as a threat to the democratic tradition of public debate and consensus building.<sup>18</sup>

In the final analysis, I suggest that the legal community’s embrace of the dialogue theory is disingenuous. They

value the “dialogue theory” more for its political utility than for its empirical accuracy. It soothes the conscience of the judges and arms the court’s defenders with a ready-made defence for its next foray into the political thicket. ❁

- 1 For a detailed version of this argument, see chapter 1 of F.L. Morton and Rainer Knopff, *The Charter Revolution and the Court Party* (Toronto: Broadview Press, 2000).
- 2 See, generally, Lorne Sossin, *The Boundaries of Judicial Review: The Law of Justiciability in Canada* (Toronto: Carswell, 1999).
- 3 See, generally, Kent Roach, *Constitutional Remedies in Canada* (Aurora, Ont.: Canada Law Book, 1994).
- 4 James McCarten, “Ontario extends legal rights to same sex couples,” *National Post*, October 26, 1999, A5.
- 5 See Morton and Knopff, note 1 above, chapter 2.
- 6 *Reference Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486.
- 7 See Wilson J.’s opinion in *Morgenstaler v. the Queen*, [1988] 1 S.C.R. 3.
- 8 For details, see Morton and Knopff, above note 1, chapter 1.
- 9 These include Weinrib’s “activist constitution” theory; the “living tree” theory; the “we didn’t ask for it” defence; the “necessarily counter-majoritarian” defence; the “rule of law”/“rights are trump” defence; and “the political disadvantage” theory of the Charter. For examples of these, see the essays by Bertha Wilson, Beverley McLachlin, and Lorraine Weinrib in *Policy Options* (April and May 1999). (These are available on-line at the Web site of the Institute for Research on Public Policy: [www.irpp.org.ca](http://www.irpp.org.ca).)
- 10 In addition to the “Charter dialogue” theory, these include the “nothing new” argument; the “decisions are ultimately accepted” argument; and

the “sore losers/sour grapes” charge. For examples, see the essays referred to in note 9.

- 11 Peter Hogg and Allison Bushell (now Thornton), “The Charter Dialogue Between Courts and Legislatures: Or Perhaps the Charter Isn’t Such a Bad Thing After All” (1997), 35 *Osgoode Hall Law Journal* 75-124. A condensed version of the Hogg-Bushell (now Thornton) argument appears in this issue of *Canada Watch*.
- 12 See F.L. Morton, “Vriend v. Alberta: Judicial Power at the Crossroads?” (1999), 7 *Canada Watch* 77.
- 13 F.L. Morton, “Dialogue or Monologue?” (April, 1999), *Policy Options* 23-26. (Also available on-line at: [www.irpp.org.ca](http://www.irpp.org.ca).)
- 14 Christopher P. Manfredi and James B. Kelly, “Six Degrees of Dialogue: A Response to Hogg and Bushell,” (1999), 37 *Osgoode Hall Law Journal* 513-27.
- 15 McCarten, “Ontario extends legal rights to same-sex couples,” above note 4.
- 16 Manfredi and Kelly redefined the concept of dialogue to apply only to those cases in which the legislature responded to a nullification “positively”—by re-enacting the law with some amendments. There were 12 such cases. “Negative” responses—which did not qualify as “dialogue”—included section repealed (n=5); section amended prior to SCC decision (n=5); act repealed and replaced (n=6); judicial amendment of legislation (n=1); and no legislative sequel (n=7). Manfredi and Kelly also excluded the 23 trial and appellate court decisions included in the Hogg study, because there was no way of knowing if they were representative of non-SCC nullifications.
- 17 See Morton, “Dialogue or Monologue?” above note 13 for details.
- 18 This argument is the focus of chapter 7 of Morton and Knopff, above note 1.

# Defence under attack: A review of three important Supreme Court decisions in 1999

Three important Supreme Court of Canada decisions in the 1999 year display a disturbing trend and signal a change in the court's approach to finding a balance between the rights of the accused and the interests of society in criminal trials. The cases of *Mills*,<sup>1</sup> *Stone*,<sup>2</sup> and *Smith v. Jones*<sup>3</sup> introduced some significant changes in the criminal law, which all came at the expense of the accused. In *Mills*, the Supreme Court retreated substantially from its earlier statement of the constitutional parameters of the accused's right to make full answer and defence. In *Stone*, the court put a significant dent in the presumption of innocence, and in *Smith v. Jones*, the accused was left in a vulnerable and uncertain position after the court removed some of the protections afforded by the law of privilege.

The implications of these judgments are disturbing for those who believe that the measure of a just society is its treatment of those who are accused of the worst crimes. At a time when the voice of victim rights advocates is loud and shrill, and political pandering to fears for public safety is widespread, the court must be resolute in protecting the rights of the unpopular accused. Unfortunately, these cases demonstrate a weak response to the public outcry demanding protection against crime. A review of the cases indicates several features of the apparent shift in the court's approach to the rights of the accused. This article attempts a brief analysis of the shifting focus, and its implications.

## OVERVIEW OF THE CASES

### R. v. Mills

In *Mills*, the court revisited the topic of the constitutional parameters of the ac-

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At a time when  
the voice of victim  
rights advocates is  
loud and shrill, and  
political pandering  
to fears for public  
safety is widespread,  
the court must be  
resolute in protecting  
the rights of the  
unpopular accused.

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cused's right to make full answer and defence when seeking access to third-party records. In the 1995 case of *R. v. O'Connor*,<sup>4</sup> the majority of the court struck a constitutional balance between the accused's need to gain access to records in the hands of a third party in order to defend himself, and the need to respect the privacy rights of the complainant in a sexual assault case. Parliament clearly shifted the *O'Connor* balance in favour of the complainant when it enacted Bill C-46 (ss. 278.1 to 278.91 of the *Criminal Code*) in 1997. The preamble to the Bill devoted several paragraphs to Parliament's concern about

the incidence of sexual violence in Canadian society, the disadvantageous impact of sexual abuse on women and children, and the need to encourage reporting of sexual offences. The rights of the accused to make full answer and defence were barely mentioned. The legislation also gave greater control to the witness over records in the hands of the Crown,<sup>5</sup> enacted a list of factors that would *not* establish that the records were likely relevant in making full answer and defence,<sup>6</sup> and placed emphasis on factors relating to privacy and societal interests that were not in accordance with the majority ruling in *O'Connor*.<sup>7</sup> In light of the obvious differences struck in the balance between accused persons and complainants by the majority in *O'Connor* and Bill C-46, the question was, who was right—the court or Parliament?

The surprising answer from the court in *Mills* was that they were both right. According to the court, Bill C-46 could still strike a balance that was constitutional despite its marked differences from *O'Connor*. This finding required that the court give Parliament some remarkable leeway to disagree with the Supreme Court of the land on a constitutional issue. In an unprecedented display of deference, the court conceded that Parliament was entitled to differ in its opinion as to where privacy concerns entered into the analysis, and even that Parliament was entitled to give the Crown an advantage over the accused in possessing records that the accused did not have. The court allowed that some difference in approach was permissible. Essentially, the court held that there was a range of permissible

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options available to deal with access by an accused to third-party records. The fact that Bill C-46 was at the lowest end of the acceptable range did not render it unconstitutional.<sup>8</sup> Second best could still be constitutional.

## **R. v. Stone**

*Stone* was a case involving the complex defence of automatism. The accused claimed that he suffered a psychological blow that left him in a dissociative state after his wife berated him in a cruel and sadistic way about his children, his former wife, and his sexual performance. He then stabbed his wife 47 times. At his trial for murder, the accused relied on the defence of “non-insane automatism,” and called medical evidence that supported the fact that he was in a dissociative state. Accordingly, he sought an acquittal because his actions were not voluntary. In the alternative, he suggested that if the court insisted that his condition was a disease of the mind, the medical evidence entitled him to a finding of not guilty by reason of mental disorder (NCRMD). The judge refused to put non-insane automatism to the jury, but did leave open the defence of insane automatism. The accused was convicted of manslaughter.

In *Stone*, the court<sup>9</sup> reviewed its own jurisprudence on non-insane and insane automatism, and changed the law in three important ways. In the first instance, the majority imposed a legal burden on the defence to establish automatism on the balance of probabilities, in the absence of which the defence would not be left with the jury at all. Although recognizing that this shift in the burden to the accused violated section 11(d) of the Charter, the majority found that such a limitation was justified under s. 1.<sup>10</sup> In the second instance, the majority formulated a rule that judges must “start from the proposition” that automatism stems from a disease of the mind. The direction is akin to a presumption that automatism is linked to

insanity. The effect is of course important: the court must start from a proposition that leads to a verdict of NCRMD, and not from one that may lead to an acquittal. Finally, if the defence of non-insane automatism is left with the jury, the jury must be told about the “serious policy factors which surround automatism, including concerns about feignability and the repute of the administration of justice.” The jury will be instructed that the accused will be found guilty unless he proves that he was acting involuntarily on the balance of probabilities.

Although the court upheld an acquittal based on non-insane, involuntary conduct in a sleep-walking case in 1992,<sup>11</sup> it seems that the chances of a similar success after *Stone* are exceedingly slim. The defence of non-insane automatism appears to be dead.<sup>12</sup>

## **Smith v. Jones**

In *Smith*, the court was faced with achieving a balance between the need for public protection, and the rights of the individual accused. The facts were unusual and gave the court justifiable cause for alarm. The accused was charged with aggravated sexual assault of a prostitute, and was referred to a psychiatrist by his lawyer, under the umbrella of solicitor-client privilege. The accused provided the psychiatrist with detailed information about his plans to kidnap, rape, and murder prostitutes in the future. The psychiatrist concluded that the accused was dangerous and would likely commit further offences, and advised the lawyer of his concerns. The accused subsequently pled guilty to the charge. When the psychiatrist was advised that the sentencing judge would not be informed of his concerns with regard to the danger posed by the accused, he brought an application for a declaration that he was entitled to disclose the information he had received in the interests of public safety.

The court was unanimous in finding that the risk to public safety in this case

was sufficiently clear, serious, and imminent to justify setting aside the solicitor-client privilege. However, the court split on the level of disclosure that was required.<sup>13</sup> The majority held that the portion of the psychiatrist’s report that indicated there was a serious risk to public safety should be disclosed to the sentencing court and made public.<sup>14</sup> In future cases, they noted that it might be appropriate to warn the potential victim directly, or the police or a Crown prosecutor. The minority took more care to circumscribe the scope of the disclosure and its proposed use. They held that, although the psychiatrist’s opinion could be disclosed to the Crown and the sentencing judge, the details forming the basis of the opinion, including the accused’s own statements, should not be disclosed. Such a limitation was necessary in order to protect the accused’s right against self-incrimination, and to ensure that the chilling effect of disclosure would not make lawyers reticent to refer their mentally disturbed clients for assessment or treatment. The minority was also careful to indicate that disclosure of the opinion did not necessarily mean that it was admissible. Justice Major noted that sanctioning a breach of privilege too hastily erodes the workings of the system of law in exchange for an illusory gain in public safety.

## **THE COURT’S INCREASED EMPHASIS ON SOCIETAL INTERESTS**

In the early years of the *Constitution Act, 1982*, this “living tree” was said to be capable of growth and expansion. The Supreme Court described the Charter as a means of providing “unremitting protection [for] individual rights and liberties,” and held that it was to be given a “broad and purposive analysis.”<sup>15</sup> In one commentator’s description of the years that followed, the court enthusiastically embraced an expansive approach to review, and moved boldly into the Charter era.<sup>16</sup>



In these three cases, the court has retreated from previous statements of the scope of the rights of the accused. It has done so in the name of victims' rights and protection of the public, giving these broad societal interests increased emphasis in achieving a balance against individual rights. How did this come about?

### **R. v. Mills**

In *Mills*, the most obvious way in which the court bowed to broad societal concerns was by deferring to Parliament in an area where the court had already spoken on the constitutional content of the rights in question. The preamble to Bill C-46 made it abundantly clear that Parliament was speaking for societal concerns that had little to do with the individual rights of the accused. While the legislation was also directed to the individual rights of the complainant, those rights were addressed in a way that clearly skewed the balance struck in *O'Connor*. The legislation could be seen as a direct response to society's dislike of the court's ruling in *O'Connor*, and has been aptly described as "in your face" legislation.<sup>17</sup> Yet, in reviewing the legislation, the court bent over backward to attribute good intentions to Parliament, and to presume that Parliament intended to enact constitutional legislation. This position is perilously close to a presumption of constitutional validity, which the court had rejected in earlier Charter jurisprudence.<sup>18</sup> The case is discouraging in its excessive deference to Parliament—it may also signal that the days of expansive and bold review of legislation are receding into the past.

A more subtle but equally disturbing way in which the court shifted the balance in favour of societal interests in *Mills* was in its analysis of the relationship between s. 7 and s. 1 of the Charter. In balancing the rights of the accused, the complainant, and the interests of society at large, both s. 7 and s. 1 have an important role to play in the "contextual analysis" of rights.

This is where the delicate language of balancing begins to break down. It is

**When the psychiatrist was advised that the sentencing judge would not be informed of his concerns with regard to the danger posed by the accused, he brought an application for a declaration that he was entitled to disclose the information he had received in the interests of public safety.**

all very well to say that there is no hierarchy of rights, and that one right should not trump another. Yet at some point, the "definition" of one right will necessarily "limit" another. In *Mills*, the court "defined" and balanced the rights under s. 7, and found no violation of the accused's right to make full answer and defence, or to a fair trial. Implicitly, the court found that the accused did not discharge the onus upon him to show a violation. Even though this was a case where it was acknowledged that Parliament had changed the *O'Connor* rules, the state did not have to justify the shift in the balance. By balancing the rights under s. 7 and finding no violation, the court let the state off the hook from having to justify the limits that the legislation imposed under s. 1.

Finally, in *Mills*, the court permitted Parliament to factor societal concerns about sexual abuse into the actual decision-making process of the trial judge. According to ss. 278.5(f) and (g), before disclosing the records to the accused, the judge must consider "society's interest in encouraging the reporting of sexual offences" and "society's interest in encouraging the obtaining of treatment by complainants of sexual offences." Such considerations are not novel; indeed, they were accepted as appropriate in *O'Connor*. However, the difficulty inherent in this exercise should not be ignored—in a trial where sexual abuse is itself disputed, the trial judge must consider the need to report

and seek treatment for sexual abuse. By requiring the judge to consider societal factors relevant to sexual abuse before sexual abuse has been proven, Parliament undermines the presumption of innocence in a subtle but insidious way. It is as if the legitimacy of the complaint is conceded.

### **R. v. Stone**

The court in *Stone* also instructed trial judges to inform the jury of broad societal concerns in relation to non-insane automatism. Indeed, after *Stone*, the trial judge must *begin* the charge to the jury by thoroughly reviewing the serious policy factors that surround automatism, including concerns about feignability and the repute of the administration of justice. The precise format of the caution that is envisioned by the court is not clear; however, it is likely that the court was referring to the comments of Justice Dickson in *Rabey* when he stated that automatism as a defence is easily feigned.<sup>19</sup>

In *Rabey*, Dickson J.'s comments were made in the context of the judge's consideration of the categorization of automatism as a matter of law. An instruction of this kind to the trier of fact is highly unusual.<sup>20</sup> Again, the difficulty for the jury in these circumstances is very real—in a trial where they must determine if the claim of automatism is genuine, they are reminded that such claims are easily feigned, and acquit-

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tals based on bogus claims bring the system into disrepute. In effect, at the very time they must consider acquittal, the jury members are warned against acquittal. There is simply no precedent for this kind of bold warning that will have such a chilling effect on the deliberations of the jury.

## Smith v. Jones

The incursion into solicitor–client privilege in *Smith* was a necessary one in light of the clear, serious, and imminent danger posed by the accused. However, in resolving the tension between the interests of the accused and society in that case, it can be argued that the majority gave insufficient care to crafting a response that would adequately protect the rights of the accused. In the rush to protect the public, the very real concern about the effect of the decision on the rights of the accused was overlooked.

The majority in *Smith* did not seek to limit the disclosure of the psychiatrist's report to the opinion of dangerousness. As a result, the confidential and intensely private discussions of the accused with his psychiatrist became public, and became available for use against him at his sentencing. The minority was no doubt correct in its prediction that faced with this prospect in the future, defence counsel will be very reluctant to refer their clients for assessment or treatment. In addition, it will be extremely unlikely that accused persons will choose to air their innermost thoughts honestly with psychiatrists during the course of a criminal proceeding, even if they are genuinely motivated to seek treatment.

The decision is also disturbingly silent on the use that can be made of this intimate and self-incriminating disclosure. While the minority was clear that disclosure did not equate to admissibility, the majority in *Smith* appeared to sanction the use of the material at the accused's sentence hearing. However, the court did not discuss the manner in which the evidence could be used to

protect public safety. Could the Crown rely on the statements of the accused to increase his sentence or to commence a dangerous offender application? If the accused took the stand, could the Crown cross-examine the accused on his statements to the psychiatrist? If further offences were disclosed, could the Crown rely on the statements of the accused to prosecute him in other proceedings? Once concerns about privilege and about self-incrimination are put aside, these uses of the disclosed material are not farfetched. Without knowing the answer to those questions, the accused is left in a vulnerable and uncertain position.

The case has a further negative impact on the role of counsel in the solicitor–client relationship. Although the fact situation in *Smith* related to a doctor seeking to set aside privilege, the guidelines set out by the court apply to lawyers in a solicitor–client relationship as well. Despite the fact that the ability to warn the public of danger is permissive and not mandatory, defence counsel will now be placed in a position of divided loyalty whenever they are defending a client who presents a clear, serious and imminent danger to an identifiable person or persons. As a result of *Smith*, a lawyer may choose to warn the authorities about a dangerous client. In even considering whether there might be a moral imperative to warn the authorities, counsel will be in a position of conflict with the interests of the client and will be faced with a difficult ethical and professional dilemma that is bound to weaken the solicitor–client relationship. Frank discussions will be inhibited; the foundation of trust will be undermined. The rights of the accused to counsel, to make full answer and defence, and to a fair trial are thereby affected. It would have been preferable if the court had affirmed that in the normal course, it would not be expected that lawyers would warn the authorities against their own client. A moral duty to warn that is contrary to the best inter-

ests of the client should not be encouraged. This is of particular concern because *Smith* did not rule out the possibility of a legal duty to warn. In emphasizing that the court was not seeking to establish a tort duty on doctors to disclose confidential information when a public safety concern arises, Justice Cory did not dismiss this possibility. He merely stated, "That issue is not before the court and must not be decided without a factual background and the benefit of argument." Legal liability for a failure to warn is an appalling prospect for criminal lawyers, and an equally devastating one for their clients.

## THE COURT'S RESORT TO WEAK LEGAL ANALYSIS AND ITS FUTURE IMPLICATIONS

A shift in emphasis from the rights of the accused—even a retreat from a previous position—might be justified if it was based on sound legal reasoning and a clear application of fundamental principles. Unfortunately, the willingness of the court to retreat from its previous positions in both *Mills* and *Stone* is accompanied by a weak legal analysis in support of some of the changes. These weaknesses have been exposed in several important articles, and a detailed legal analysis will not be repeated here.<sup>21</sup> However, a brief review of the issues may help in understanding the somewhat obvious conclusion that is put forward here—that change based on a foundation of weak legal reasoning diminishes not only the rights of the individual accused, but also the integrity of the judicial system as a whole.

In *Mills*, the court relied on equality concerns as a necessary component of the "contextual analysis" of the rights in question. However, the court was vague in describing the nature of the equality right, referring variously to equality between men and women; equality between victims of sexual assault and victims of other crimes; and equality between women whose lives have been documented more extensively through

aboriginal status, disability, imprisonment, or involvement with child welfare and those who have not. The analysis was infused with the touchstones of political correctness, making reference to rape myths and to the prohibition on “whacking the complainant.” However, there was little guidance on the scope or effect of a s. 15 right. In his article, “*Mills*: Dialogue with Parliament and Equality by Assertion at What Cost?” Professor Stuart pointed to the lack of authority for the creation of an enforceable s. 15 claim for the complainant, and rightly criticized the analysis, calling it “equality by assertion.” He predicted that equality rhetoric would have important implications for future cases.

The prediction was alarmingly accurate. In *R. v. Shearing*,<sup>22</sup> the B.C. Court of Appeal seized upon the equality language in *Mills*, and translated it into a privacy right of the complainant to suppress cross-examination by the accused in relation to her diary on a charge of sexual assault. In this case, the complainant had kept a diary, and left it behind when she left a centre run by the accused. The accused came into possession of the diary, and sought to cross-examine the complainant on the fact that there were no entries relating to her allegations of sexual abuse during the relevant time period. The trial judge refused the cross-examination after balancing the probative value of the proposed cross-examination against the privacy interest of the complainant. In upholding this approach, the B.C. Court of Appeal referred to the “new direction in *Mills*,” and said that *Mills* has shifted the balance away from the primary emphasis on the rights of the accused.

The result means that in British Columbia, at least, the rules governing the limits of cross-examination and the admissibility of defence evidence will be governed by balancing probative value against prejudice to the complainant. This is a radical restatement of the law set out in *Seaboyer*, which focused on a balancing of probative value versus prejudice to the trial process not simply to the complainant. The previous need

## The legislation could be seen as a direct response to society’s dislike of the court’s ruling in *O’Connor*, and has been aptly described as “in your face” legislation.

for extreme caution in restricting the accused’s ability to defend himself appears to have been forgotten.

The case of *Stone* has also changed the law of automatism without due regard for established legal principles and procedure. The most important and far reaching of the changes is undoubtedly the reversal of the onus of proof for this defence. Disturbingly, this issue was not directly raised by any of the parties on the appeal. Instead, Justice Bastarache concluded that, in reviewing the proper evidentiary foundation for automatism, the court should reassess the burden of proof for automatism as well. This circumvented the appropriate procedure of giving constitutional notice of the issue to all interested parties, who may have intervened based on the important implications for defences generally.<sup>23</sup> It may also have deprived the court of valuable legal submissions that directly addressed the constitutional significance of the issue.<sup>24</sup> Moreover, it appears to have contributed to the lack of evidence before the court to discharge the state burden to justify the reversal of the onus of proof. In a sloppy approach to s. 1 of the Charter in this case, the majority seemed undeterred by a lack of evidence and relied on previous case law in the context of mental disorder and drunkenness to discharge the burden on the court’s own initiative. In his case comment, “*Stone*: Judicial Activism Gone Awry to Presume Guilt,” Professor Delisle noted the weakness of the majority’s reasoning that because automatism is easily feigned and all knowledge of its occurrence rests with the accused, putting the legal burden on the defence is justi-

fied. Professor Delisle went on to point out that based on such a rationale, the onus with respect to the defences of lack of intent, duress, provocation, and necessity could all be reversed as well.

The suggestion is not farfetched. Indeed, in an upcoming case in the Supreme Court, the Crown has raised a similar rationale for a proposed reversal of the onus of proof in relation to the defence of duress.<sup>25</sup> Based on *Stone*, the Crown asserts that it is time to revisit the burden of proof for duress, in part because claims of duress are easily raised by those who seek to evade criminal sanction, and in part because full knowledge of the duress always rests with the accused. If the court accepts this argument, it would appear that a full-scale erosion of the presumption of innocence may be underway.

### CONCLUSIONS

In the cases of *Mills*, *Stone*, and *Smith v. Jones*, the individual rights of the accused fared badly in a balancing of rights involving broad societal interests. The court appears to be placing increasing emphasis on the rights of victims of sexual assaults and public safety at the expense of the accused. Although there is no presumption that the rights of the accused are paramount in a criminal trial, it is obvious that the trial process will have the most direct impact on the accused. At the end of the day, it is the accused who will face the prospect of jail if he or she is found guilty.

As guardian of the individual rights and liberties enshrined in the Charter, the court must not be unduly swayed by

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# Shifting ground: New approaches to Charter analysis in the criminal context

Over the last few years, the Supreme Court of Canada has released various decisions dealing with the scope and protection of Charter rights in the criminal context. The topics considered include the right to silence<sup>2</sup>; the principle against self-incrimination<sup>3</sup>; the right to full answer and defence at trial<sup>4</sup>; and the right to be secure against unreasonable search and seizure.<sup>5</sup> These judgments answer specific legal questions, but some have a broader significance. Certain decisions disclose subtle, yet discernible, shifts in the court's more general approach to the analytical framework governing the assessment of Charter claims.

At first blush, some of the developments may appear inconsequential—the axis has turned ever so slightly. Yet, a shift in the foundation, however slight, can effect dramatic change. The court has revisited and, to some extent, redefined the relationship between s. 7 and other provisions of the Charter. It has further entrenched the role of third-party rights—including equality rights—in the constitutional equation. It has recognized a discrete and freestanding power to exclude evidence under s. 24(1) of the Charter. Each of these trends has the potential to influence and alter the course of future litigation. The following will explore these developments primarily as they arise in two recent cases: *R. v. Mills*<sup>6</sup> and *R. v. White*.<sup>7</sup>

## R. v. MILLS: SECTION 7 AND THE BALANCING OF INTERESTS

In *R. v. Mills*,<sup>8</sup> the Supreme Court of Canada upheld the constitutional validity of ss. 278.1 to 278.9 of the *Criminal Code*. These provisions, enacted under Bill C-46, govern defence applications to access private records of complainants

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in sexual offence prosecutions. This has long been a contentious area of litigation. In the earlier case of *R. v. O'Connor*,<sup>9</sup> the Supreme Court of Canada had set out a number of principles that were to govern defence access to sensitive records, including therapeutic records. The court was divided on the approach to be taken, with a 5:4 majority represented by Lamer C.J. and Sopinka J. It was not long before Parliament waded into the debate, conducting consultations and ultimately enacting Bill C-46. The statutory regime attracted controversy from the outset. Critics attacked the legislation on the basis that it reflected the dissenting, as opposed to the majority, voice in *O'Connor*. Indeed, the

scheme enacted by Parliament was closely aligned with the dissenting judgment of Madam Justice L'Heureux Dubé. For a time, the fate of the scheme was unclear. Lower courts were divided on whether the provisions could survive Charter scrutiny. This debate was resolved when the issue came back before the Supreme Court of Canada in *R. v. Mills*. In *Mills*, the court acknowledged that the legislation deviated from the majority ruling in *O'Connor*.<sup>10</sup> Nonetheless, the court found that the *O'Connor* regime was not the only route to a fair trial. The court observed that there may be a range of permissible options that can satisfy constitutional standards. Ultimately, it held that the records production regime, enacted by Parliament, struck a constitutional balance between the competing interests at stake in this context.

*Mills* derives its most obvious significance from its resolution of the "records debate," or, at least, certain aspects of it. Yet, other features of *Mills* extend beyond this particular battleground. The court's comments concerning the scope of s. 7 of the Charter; its interrelationship with other Charter rights; and the role of third-party rights in the constitutional equation, all have ramifications for a broad range of constitutional disputes. Accordingly, while the following will discuss *Mills*, it will endeavour to say relatively little about the terms and operation of Bill C-46.

## The relationship between ss. 7 and 1 of the Charter

The majority of the court in *Mills* affirmed that s. 7 of the Charter envisages a balancing of both individual and societal interests. It is well-settled that the ultimate question under s. 7 is

whether the impugned deprivation of life, liberty, or security of the person is in accordance with the principles of fundamental justice. The notion that societal interests have a role to play in the s. 7 analysis is not, itself, a startling proposition. The Supreme Court of Canada has, on various occasions, held that the principles of fundamental justice encompass not only the rights of the accused, but also the broader community interests represented by the state. However, *Mills* has modified this principle. Suddenly, and apparently for the first time, the court has distinguished between different types of societal interests. Some are relevant to the s. 7 inquiry; others are reserved for consideration under s. 1. Of further significance is the court's express assertion that the balancing of interests under s. 7 of the Charter is quite different from the balancing of interests under s. 1. The implication of this is potentially profound. If the balancing is substantially different under the two provisions, it is now at least conceivable that a law that offends s. 7 may be saved under s. 1. If this is so, *Mills* may have resurrected s. 1 of the Charter as a viable haven for Crown litigants who have failed to defend against a s. 7 challenge.

The Supreme Court of Canada has not always been consistent in defining the phrase "the principles of fundamental justice." In earlier years, the court was ambivalent over the extent to which societal interests could properly be imported into the s. 7 analysis.<sup>11</sup> For example, in *R. v. Swain*,<sup>12</sup> Chief Justice Lamer, writing for the majority, stated: "It is not appropriate for the state to thwart the exercise of the accused's right by attempting to bring societal interests into the principles of fundamental justice and to thereby limit an accused's s. 7 rights." On the authority of *Swain*, societal interests were open for consideration only under s. 1. Over time, this position evolved. More recent judgments have espoused the contrary view—the principles of fundamental justice encompass the interests of society as much as they do the interests of the

**It is particularly difficult to draw clear and meaningful distinctions between the basic tenets of our legal system and the basic tenets of our democracy. There is, at the very least, a substantial convergence of the two.**

individual. For example, in *R. v. Seaboyer*,<sup>13</sup> McLachlin J., writing for the majority, stated: "The principles of fundamental justice reflect a spectrum of interests from the rights of the accused to broader societal concerns." In the later case of *Cunningham v. Canada*,<sup>14</sup> McLachlin J., writing for the court, observed, "The principles of fundamental justice are concerned not only with the interest of the person who claims his liberty has been limited, but with the protection of society. Fundamental justice requires that a fair balance be struck between these interests, both substantively and procedurally." Other cases reflect a similar approach.<sup>15</sup>

The inclusion of societal interests in s. 7 had implications for s. 1. The respective provisions employed different tests. However, for all intents and purposes, the analyses were the same. Both provisions envisaged a balancing of the individual and state interests—usually the *same* individual and state interests. While Crown litigants paid token heed to s. 1 in defending legislation, the practical reality was that the argument advanced under s. 1 was often no different from the argument under s. 7. It was merely cloaked in different language. Certainly, it was difficult to imagine that the balancing exercises could yield different conclusions. The Supreme Court of Canada had often observed that a violation of s. 7 could rarely, if ever, be saved under s. 1. In *R. v. Heywood*,<sup>16</sup> Cory J. affirmed, "This Court has expressed doubt about whether a violation of the right to life, liberty, or security of the person which is not in accord-

ance with the principles of fundamental justice can ever be justified, except perhaps in times of war or national emergencies." If societal interests were already weighed under s. 7, the effect was to neuter s. 1.

In *Mills*, the court revisited the dynamic between ss. 7 and 1 of the Charter, and appeared to strike a middle ground between the stark alternatives of the past. On the approach in *Mills*, societal interests *can* be considered under s. 7; but societal interests *are not entirely spent* under s. 7. This approach, while interesting, is of uncertain application. The court identified "several important differences between the balancing exercises under ss. 1 and 7."<sup>17</sup> However, it is difficult to gauge just how these differences will manifest in practice. For example, the court noted as one difference that the claimant must establish a violation under s. 7, whereas it falls to the state to establish justification under s. 1. It is true that the sections impose different burdens. But, where Charter litigation is concerned, few cases are so close as to turn on the placement of the burden of proof. This is particularly so where the issue in question is the validity of a legislative scheme or a settled common law rule.

Other distinctions seem even more illusory. For example, the majority ruled that the *type* of balancing contemplated under s. 7 is different from that under s. 1. The court stated: "Unlike s. 1 balancing, where societal interests are sometimes allowed to override Charter rights, under s. 7, rights must be defined so that they

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do not conflict with each other.” In another passage, the court noted, “The most important difference is that the issue under s. 7 is the delineation of the boundaries of the rights in question, whereas under s. 1 the question is whether the violation of these boundaries may be justified.” Does this mean that s. 7 is designed to reconcile conflicting rights, while s. 1 is driven by a more combative or hierarchical approach? If so, this conflicts with the tenor and spirit of *Re Dagenais et al. and Canadian Broadcasting Corp. et al.*,<sup>18</sup> in which the court generally rejected the “clashing titans” model, even as it related to s. 1. Moreover, as a practical matter, this distinction is largely semantic. One can construe a right narrowly because of a conflicting interest, or one can construe the right broadly and then override it. Either way, the scope of the right is limited and the end result is the same.

In any given case, context is an important factor, both in defining the principles of fundamental justice and in applying s. 1 justification. But the fundamental question remains: Where does s. 7 end and s. 1 begin?

Part of the difficulty is that it is somewhat artificial to partition societal interests. It is particularly difficult to draw clear and meaningful distinctions between the basic tenets of our legal system and the basic tenets of our democracy. There is, at the very least, a substantial convergence of the two. In identifying a discrete ambit for s. 1, the court in *Mills* relied upon *dicta* from *Oakes* and *Keegstra*. Yet, these cases must be viewed in context. In *Oakes*, the court was concerned with the presumption of innocence under s. 11(d) of the Charter. *Keegstra* dealt with freedom of expression under s. 2(b) of the Charter. These rights are, on their terms, very different from s. 7. Neither the presumption of innocence nor the freedom of expression guarantee are structured so as to permit an internal balancing of individual and societal interests. Any balancing must, by necessity, occur under

s. 1. The situation is quite different where the language defining the right contains its own internal modifier, such as “the principles of fundamental justice.”<sup>19</sup> For this reason, neither *Oakes* nor *Keegstra* is particularly instructive in determining the distinction between s. 7 and s. 1. The more pertinent authority may be *Re B.C. Motor Vehicle Act*,<sup>20</sup> wherein Lamer J. (as he then was) pointed out that s. 7 is concerned with “principles which have been recognized by the common law, the international conventions, and by the very fact of entrenchment in the Charter, as essential elements of a system for the administration of justice which is founded upon a belief in the dignity and worth of the human person and the rule of law.” Framed in this way, the principles of fundamental justice are very closely linked to the values underlying a free and democratic society.

This leads to the final point. Even if the societal interests covered by ss. 7 and 1 are not identical, it is nonetheless difficult to imagine that a law that operates in contravention of s. 7 could be rescued by s. 1. If a law offends fundamental justice, it is unlikely to be justified on democratic grounds. Stated differently, democratic values, however important, are unlikely to be capable of supporting practices that are fundamentally unjust. Accordingly, while the Supreme Court of Canada has altered the framework of analysis governing the s. 7–s. 1 relationship, it remains to be seen what, if anything, flows from this aspect of *Mills*. It may generate little impact. However, it does represent a departure from earlier analytical models, and it may invigorate s. 1 advocacy on the part of the prosecution. If nothing else, the approach of the court in *Mills* will likely renew litigation on the relationship between ss. 7 and 1, an issue that had previously been settled. It is curious that the court chose to reopen this issue, all the more so in a case that did not require actual resort to s. 1 in order to uphold the legislation in issue.

## The relationship between sections 7 and 8 of the Charter

Another aspect of *Mills* that merits some mention concerns the court’s clarification of the relationship between ss. 7 and 8 of the Charter. Simply put, the court affirmed that, where s. 8 is engaged—in the sense that there is a search or seizure—s. 7 adds nothing further to the constitutional analysis. This point flows quite naturally from the settled principle that ss. 8 through 14 of the Charter are merely illustrations of the s. 7 right.<sup>21</sup> Section 8 addresses one specific component of the right not to be deprived of life, liberty, or security of the person except in accordance with the principles of fundamental justice.

Although the above principle was asserted in the *B.C. Motor Vehicle Reference*, there has been some uncertainty over the role of s. 7 in search and seizure cases. Some of this uncertainty stemmed from *R. v. Stillman*.<sup>22</sup> The issue in *Stillman* was whether police seizure of hair samples and dental impressions had infringed the accused’s Charter rights. The collection of the biological samples clearly constituted a seizure for the purposes of s. 8, and the issue was analyzed on this basis. However, having concluded that the police actions violated s. 8, the court nonetheless went on to conduct an independent analysis under s. 7. In a separate, albeit brief, portion of the judgment, Cory J., for the majority, held: “The taking of the dental impressions, hair samples and buccal swabs from the accused also contravened the appellant’s s. 7 Charter right to security of the person.” *Stillman* suggested that there was a need to conduct both a s. 7 and a s. 8 analysis in cases involving seizure of physical evidence.

This suggestion has effectively been countered by the reasoning in *Mills*. If anything, *Mills* indicates that the s. 7 analysis conducted in *Stillman* was superfluous. First, in *Mills*, the court affirmed the breadth of the protections afforded by s. 8. While s. 8 is fundamentally concerned with the protection of

## The constitutional rights of third parties —be they complainants, witnesses, or the media—must be given proper consideration within the constitutional equation.

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“privacy,” this concept has, itself, been given a broad and purposive interpretation. Privacy has been held to encompass a global constellation of interests that might be affected by police search or seizure.<sup>23</sup> In *Mills*, the court considered, at some length, the varied factors that are included in the ambit of s. 8. Significantly, these factors included *security of the person*, the very interest that had been given separate treatment in *Stillman*. To the extent that disclosure of therapy records threatened to interfere with security of the person, the court in *Mills* saw this as a matter for consideration under s. 8, as opposed to s. 7, of the Charter.

Furthermore, the court in *Mills* pointed out that, given the parallel nature of the analyses, compliance with s. 8 will invariably denote compliance with s. 7. This statement was recently relied upon by the court of Appeal for Ontario in *R. v. F.(S.)*.<sup>24</sup> In *F.(S.)*, the appellant challenged the constitutional validity of the DNA warrant scheme—ss. 487.04 to 487.09 of the *Criminal Code*—arguing that the legislation violated the principle against self-incrimination under s. 7 of the Charter. On the basis of *Mills*, Finlayson J.A. found that the appellant’s reliance on s. 7 was misconceived. He stated that “our analysis of whether the legislation relating to DNA warrants is constitutional begins and ends with s. 8.” Self-incrimination is often considered under the ambit of s. 7, but this is generally in cases where s. 8 has not been triggered.<sup>25</sup> *Mills* and *F.(S.)* indicate that, where there has been a search or seizure, s. 8 of the Charter will serve as the proper and, arguably, exclusive tool for assessing whether the state action comports with Charter standards.

### The role of third-party rights

Since the case of *Re Dagenais et al. and Canadian Broadcasting Corp. et al.*,<sup>26</sup> it has been accepted that Charter analysis must accommodate the rights of persons and entities who, while participants in the criminal process, are not traditional parties to criminal litigation. The constitutional rights of third par-

ties—be they complainants, witnesses, or the media—must be given proper consideration within the constitutional equation. *Dagenais* also established that, where conflict ensues, the rights of third parties are not automatically subservient to those of the accused. The “clash model” was rejected in favour of an approach that seeks to reconcile and accommodate competing interests. This accommodation model was applied by the Supreme Court of Canada in *R. v. O’Connor*,<sup>27</sup> and it has now been further entrenched as a result of *R. v. Mills*.<sup>28</sup> Indeed, it was the central and defining feature of *Mills*. The majority introduced the case by noting: “The resolution of this appeal requires understanding how to define competing rights, avoiding the hierarchical approach rejected by this court in *Dagenais v. C.B.C.*”

In *Mills*, there were various rights at stake: the accused’s right to full answer and defence under s. 7; the complainant’s right to privacy under s. 8; and equality rights as reflected in ss. 15 and 28 of the Charter. On the issue of privacy, *Mills* recognized the acutely sensitive nature of therapeutic records, and other private records arising out of confidential trust-based relationships. The majority stated: “The values protected by privacy rights will be most directly at stake where the confidential information contained in a record concerns aspects of one’s individual identity or where the maintenance of confidentiality is crucial to a therapeutic, or other trust-like relationship.” This statement is consistent with prior case law dealing with the informational privacy under s. 8 of the Charter. Section 8 protects a “biographical core of personal informa-

tion” that “tends to reveal intimate details of the lifestyle and personal choices of the individual.”<sup>29</sup>

Few could dispute that there is an aura of privacy surrounding therapy records, given the highly intimate disclosures that tend to be made in this context. Nor is it surprising that these privacy interests were accorded constitutional status. Section 8 of the Charter would be triggered were the police to obtain access to this material. Privacy is equally threatened where access is sought by a private party—the accused—who is the subject of a prosecution, and who seeks a court order to this end. It is accordingly fitting and appropriate that complainants’ privacy interests be given full weight in the constitutional equation. That said, this trend—which commenced some years ago—reflects a gradual drifting away from the strict requirement of state action in s. 32 of the Charter. A discretionary order made by a court does not qualify as state action on the terms of s. 32.<sup>30</sup> But even where Charter rights are not directly triggered through this mechanism, the concept of Charter values has been used to ensure that discretionary court orders can be reviewed on constitutional grounds.<sup>31</sup> This approach is now so firmly entrenched as to be unquestioned. It was simply a given in *Mills* that the complainant’s privacy rights would be assessed on an equal footing with the accused’s right to full answer and defence.

One wonders how far this trend will extend. Consider the case of *R. v. Godoy*.<sup>32</sup> In *Godoy*, the Supreme Court of Canada held that the police were entitled to enter a dwelling house, without warrant, in order to investigate a discon-

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nected 911 call. The entry led to an arrest of the accused for a domestic assault. In concluding that the police entry was justified, the court affirmed the common law duty of the police to protect life and safety. Given the public safety concerns in *Godoy*, the outcome was not surprising. But in the course of his reasons, Lamer C.J. made certain comments of curious import regarding the extent to which *the accused's crime* affected the complainant's Charter rights of privacy. Moreover, the court appeared to undertake a comparative analysis. Entry was justified, in part, because the police interference with the accused's privacy rights was less egregious than the accused's interference with the complainant's privacy rights. Yet, this is not the type of comparison that has traditionally been permitted under the Charter. The actions of the police and the accused cannot be placed on the same footing. One group is bound by the Charter; the other is not. Moreover, the gravity of the crime has never determined whether there has been a breach,<sup>33</sup> though it is a relevant factor under s. 24(2).

It is unlikely that the court intended, in these passing remarks, to effect dramatic change. *Godoy* was, first and foremost, a case about public safety concerns. Nonetheless, the language chosen by the court is interesting, and may suggest an increasing willingness to give effect to the constitutional rights of persons who are not in direct conflict with the state.

What about equality rights? The court in *Mills* has been criticized for introducing complainants' equality rights into the balancing equation.<sup>34</sup> Professor Don Stuart has pointed out that the court merely asserted equality rights on the part of complainants, without conducting any type of proper analysis in accordance with the s. 15 case law.<sup>35</sup> A review of the judgment confirms this to be the case. However, it is important not to overestimate the true purport of the equality component in *Mills*. While the court chose to invoke s. 15 of the Charter, the

points advanced in the name of equality were hardly controversial.<sup>36</sup> The court reiterated the need to eradicate pernicious myths and stereotypes from criminal trials involving sexual offences. This observation has been made in prior cases,<sup>37</sup> and is as much concerned with the integrity of the trial process as it is with equality issues. Similarly, the court admonished that records applications should not be used to intimidate or "whack"<sup>38</sup> the complainant. The point here was simply that complainants are entitled to be treated with dignity and respect. Even if s. 15 had not been introduced, it would be difficult to quarrel with the logic of these propositions.

On the other hand, the introduction of equality concerns may raise other issues. For one thing, a complainant or witness may claim only the heightened protections of Bill C-46 if the trial involves a sexual offence enumerated in s. 278.2. Absent a sexual offence, the legislation has no application and the process defaults to the *O'Connor* model. As was acknowledged in *Mills*, the *O'Connor* model does not offer the same degree of protection to complainants' privacy interests as does Bill C-46. This disparity is a by-product of policy choices made by Parliament. The preamble to Bill C-46 leaves little doubt that, in enacting this scheme, Parliament was primarily concerned with sexual crimes against women and children.<sup>39</sup> As a practical matter, these are the types of cases in which records applications tended to be brought by the defence. But the issue here is privacy. Presumably, a complainant who has been traumatized by a violent home invasion, or an aggravated domestic assault, has just as much privacy in therapy records as does a person traumatized by sexual violence. Yet, in these non-sexual cases, complainants are left to resist production under a less-protective regime. This is not to say that the victim of a non-sexual assault would necessarily have a claim under s. 15 of the Charter. It is only to say that, if the overarching goal

is equality, the records production scheme may, in some respects, fall short of achieving that objective.

The concept of equality may also work to the benefit of the defence. *Mills* was concerned with the effect of the legislation on the accused's right to full answer and defence. But the decision also has implications for suspects' privacy rights, particularly where the police or prosecution seek to obtain therapy records as evidence of crime under search warrant. There are definite parallels between the *Mills/O'Connor* regime and the search warrant process.

Where s. 8 of the Charter is concerned, an accused is arguably entitled to the same privacy protections as is a complainant. By virtue of ss. 15 and 28 of the Charter, Charter rights—including privacy rights—are guaranteed equally to male and female persons. The nature and degree of privacy attaching to intimate records cannot logically depend on gender; nor can it depend on the identity of the party seeking access. The expectation of privacy flows from the nature of the record, and the circumstances under which it was created. It ought not to matter whether the subject of the record is a suspect or a victim of crime. If anything, the Charter is even more directly engaged where the party seeking access to sensitive records is a police officer who wishes to use the evidence against the person in a criminal prosecution.

What flows from this? The defence might argue that the search warrant process is less protective of privacy than is Bill C-46. Defence advocates might argue that the requirement of reasonable and probable grounds—the standard of issuance for most search warrants—is akin to the "likely relevance" test and does not reflect the additional factors that are required to be balanced under Bill C-46. Section 278.5(1) of the Code governs the first stage of production under Bill C-46. It provides that the accused must demonstrate not only likely relevance, but also that production "is necessary in the inter-



ests of justice.” Section 278.5(2) sets out a broad range of rights and interests to be considered in applying this legal standard. Moreover, defence counsel challenging search warrants might point out that, under Bill C-46, records are initially disclosed to the judge for review; whereas under the search warrant regime, sensitive records are immediately accessible to police officers. In at least one case, *R. v. J.O.*,<sup>40</sup> it was held that a search warrant to seize medical records ought to contain special terms and conditions—including a sealing requirement—in order to protect the heightened expectations of privacy in this area. In reaching this conclusion, the court specifically considered and applied the principles set out in *R. v. O'Connor*.

On the other hand, Crown advocates can point out that the search warrant process *does* require a careful balancing of competing interests in a process similar to that contemplated under Bill C-46. In *Baron v. Canada*,<sup>41</sup> the Supreme Court of Canada held that a justice asked to issue a search warrant has a residual discretion to decline to issue a search warrant, even where all of the statutory requirements have been made out. In exercising this discretion, the justice must carefully balance all of the relevant factors bearing on the invasion of individual privacy and the interests of law enforcement.<sup>42</sup> Moreover, some, though not all, warrant provisions contain language similar to that employed in Bill C-46. For example, general warrants under s. 487.01 of the Code and DNA warrants under s. 487.05 of the Code require that the judge consider whether issuance of the warrant “is in the best interests of the administration of justice.”

It is difficult to make categorical comparisons between Bill C-46 and search warrants, given the myriad of circumstances in which search warrants are issued. A justice may, in his or her discretion, choose to impose a sealing requirement on a warrant to seize a suspect’s psychiatric records. However, this is less likely to occur where the medical records disclose nothing more than the suspect’s blood alcohol concentration.

## While different rules may apply in the regulatory context, *White* confirms that the state cannot compel a statement under a regulatory scheme, only to then use that very utterance to prove guilt in a criminal proceeding.

In other cases, public safety concerns may require that the police obtain immediate access to the evidence in issue.<sup>43</sup> Ultimately, these issues will have to be canvassed on a case-by-case basis.

### **R. v. WHITE: EXCLUSION OF EVIDENCE UNDER SECTION 24(1)**

In *R. v. White*,<sup>44</sup> the Supreme Court of Canada considered the principle against self-incrimination under s. 7 of the Charter. The accused was involved in a motor vehicle accident and, pursuant to s. 61 of the B.C. *Motor Vehicle Act*, was statutorily compelled to provide an accident report. She provided three such statements to the police. The central issue was whether these statements could be introduced as evidence against the accused at her criminal trial on a charge of failing to remain at an accident. The majority of the Supreme Court of Canada ruled that the admission of the compelled statements at the criminal trial would violate the principle against self-incrimination. It was held that the police are entitled to gather information under s. 61 of the *Motor Vehicle Act*. However, this information is subject to a use immunity, and cannot be used to incriminate the declarant in the commission of a criminal offence. The Supreme Court of Canada has often observed that, within the criminal context, it is fundamentally unfair to compel an accused to *create* evidence—such as a statement—that will then be used against him or her in a criminal trial.<sup>45</sup> While different rules may apply in the regulatory context,<sup>46</sup> *White* confirms that the state cannot compel a

statement under a regulatory scheme, only to then use that very utterance to prove guilt in a criminal proceeding.

The conclusion reached by the court under s. 7 was not entirely surprising, given earlier jurisprudence. The more interesting feature of the decision in *White* is the court’s exclusionary ruling, and the basis on which it purported to find the statements inadmissible. Simply put, the court in *White* found that the statements should be excluded under s. 24(1), as opposed to s. 24(2) of the Charter. The court expressly ruled that “s. 24(1) may be employed as a discrete source of a court’s power to exclude such evidence.”<sup>47</sup> The recognition of a discrete and freestanding exclusionary power in s. 24(1) flies in the face of earlier case law, most notably *R. v. Therens*.<sup>48</sup> In *Therens*, Le Dain J. had firmly rejected this suggestion, holding that “s. 24(2) was intended to be the sole basis for exclusion of evidence because of an infringement or denial of a right or freedom guaranteed by the Charter.” The court in *White* endeavoured to distinguish *Therens* and, in so doing, created a two-tiered scheme for the exclusion of evidence in Charter cases.

The distinction seems to be as follows. In some cases, the way the evidence was obtained will breach the Charter. For example, the police may obtain a statement or breath sample in violation of s. 10(b) of the Charter. The police may seize evidence in a manner that violates s. 8 of the Charter. In such cases, the rule in *Therens* will apply, and

the admissibility of the evidence will fall to be determined under s. 24(2). The second category operates differently. In these cases, the Charter is not violated by the *obtaining* of the evidence; rather, it is violated by the *use* of the evidence. Thus, for example, in *White*, the taking of the compelled statements, under statutory authority, did not itself result in a constitutional infringement. The Charter *was*, however, infringed when the Crown sought to admit the statements in a criminal prosecution. Using the statements in this manner infringed the accused's right to a fair trial. *White* indicates that, in this second category of cases, admissibility is to be assessed under s. 24(1), as opposed to s. 24(2).

This aspect of *White* is troubling. Earlier judgments had hinted at this approach but, as was noted by Iacobucci J., the court had "never affirmatively decided that s. 24(1) of the Charter may serve as the mechanism for the exclusion of evidence whose admission at trial would violate the Charter." It was further noted by Iacobucci J. that none of the parties in *White* had actually argued this point. Why, then, did the court find it necessary to create a discrete exclusionary doctrine? It was certainly not necessary in order to achieve the desired result in *White*. Exclusion of the statements in *White* was compelled on any number of other grounds. For one thing, the whole point of the case was to recognize a use immunity for the statutorily compelled statements made by Ms. White. A finding of use immunity, by its very nature, prohibits the Crown from using the statements against the accused. In other words, the exclusion of the evidence at trial flowed inexorably from the conclusion reached under s. 7 of the Charter.

Even beyond s. 7, various other mechanisms could have justified exclusion. The courts have consistently recognized that, at common law, trial judges have the power and discretion to exclude evidence that would render the trial unfair. In *R. v. Harrer*,<sup>49</sup> LaForest J.

recognized this common law authority and noted that it has been constitutionalized by virtue of s. 11(d) of the Charter. Thus, a trial judge can exclude evidence without resorting to s. 24 of the Charter at all.<sup>50</sup> Finally, if s. 24 was to be invoked, it is puzzling that the court did not content itself with the time-honoured and well-settled framework for exclusion under s. 24(2). Section 24(2) is certainly capable of accommodating fair trial concerns; this is the central and defining issue under the first set of factors. Whether the breach flows from the obtaining or the admission of the evidence, s. 24(2) is well-equipped to ensure that evidence affecting the fairness of trial will be excluded. It is true that s. 24(2) refers to evidence "obtained in a manner" that breached the Charter. However, this phrase has been given a broad interpretation. Section 24(2) is triggered whenever there is a sufficient tactical, temporal, or causal nexus between the evidence and the breach.<sup>51</sup>

The problem is this. The introduction of a new exclusionary power under s. 24(1) has the potential to generate vast uncertainty. After years and years of litigation—and countless Supreme Court of Canada judgments—Canadian law finally achieved some degree of clarity in applying the principles under s. 24(2).<sup>52</sup> What is one to do with this body of established law? Are s. 24(2) principles to be simply grafted onto s. 24(1), or do different rules apply? Is there any balancing of factors under s. 24(1)? Does "fairness of trial" mean the same thing under both subsections? Under s. 24(2), the first set of factors is exclusively concerned with conscriptive evidence. Is this the case with s. 24(1), or does it encompass a broader range of considerations bearing on the fairness of trial?<sup>53</sup> Does s. 24(1) have any application to non-conscriptive evidence? Under s. 24(2), if conscriptive evidence was otherwise discoverable, its admission would not affect the fairness of trial. How does discoverability fit into the s. 24(1) framework? Would it have mat-

tered if Ms. White would have spoken to the police even absent the statutory compulsion? These are but a few of the questions that might be asked in this context. Given our experience with the incremental and piecemeal evolution of the law under s. 24(2), it might be some considerable time before the questions under s. 24(1) are given definite answers.

## CONCLUSION

The Charter continues to have a significant impact on criminal litigation and the definition of legal rights. One can expect that these issues will continue to evolve. What is perhaps more surprising is the malleability of the overarching framework in which these analyses are to take place. Certain defining principles governing the relationship between Charter provisions have been called into question. Charter litigation is, by its nature, a fluid process and change is inevitable. But there is also some value in certainty, particularly when one is delineating the very contours of the dispute. It remains to be seen what, if any, impact will flow from the changes wrought in *Mills* and *White*. If nothing else, the cases signal a willingness on the part of the Supreme Court of Canada to shift ground, even on basic and apparently settled issues. Counsel arguing Charter cases should not feel unduly constrained by the prevailing model of constitutional analysis. Creative argument may well oil the hinges on doors that, by virtue of earlier case law, appeared to be nailed shut. ❁

- 1 The opinions are those of the author only, and do not necessarily reflect the views of the Ministry of the Attorney General.
- 2 See, e.g., *R. v. Liew*, [1997] S.C.J. no. 51.
- 3 See, e.g., *R. v. White*, [1999] 2 S.C.R. 417.
- 4 See, e.g., *R. v. Mills*, [1999] S.C.J. no. 68; *R. v. Rose*, [1998] 3 S.C.R. 262.
- 5 See, e.g., *R. v. Mills*, *ibid.*; *R. v. Godoy*, [1999] 1 S.C.R. 311; *R. v.*

*Schreiber*, [1998] 1 S.C.R. 841; *R. v. Cook*, [1998] 2 S.C.R. 597.

- 6 Above note 4.
- 7 Above note 3.
- 8 Above note 4.
- 9 [1995] 4 S.C.R. 411.
- 10 The court observed at para. 22 that “there are several important respects in which Bill C-46 differs from the regime set out in *O’Connor ...*”
- 11 For a review of the court’s approach to this issue, see Thomas J. Singleton, “The Principles of Fundamental Justice, Societal Interests, and Section 1 of the Charter” (Sept. 1995), 74 *Can. Bar. Rev.* 446-73.
- 12 [1991] 1 S.C.R. 933.
- 13 (1991), 66 C.C.C. (3d) 321 (S.C.C.).
- 14 (1993), 80 C.C.C. (3d) 492 (S.C.C.).
- 15 See, e.g., *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844, at 898 and 900; *R. v. Rodriguez*, [1993] 3 S.C.R. 519.
- 16 [1994] 3 S.C.R. 761.
- 17 *R. v. Mills*, above note 4, at para. 66.
- 18 (1994), 94 C.C.C. (3d) 289 (S.C.C.).
- 19 Other modifiers include the reference to “unreasonable search or seizure” in s. 8 and “fair trial” in s. 11(d).
- 20 (1985), 23 C.C.C. (3d) 289 (S.C.C.).
- 21 *Ibid.*
- 22 [1997] 1 S.C.R. 607.
- 23 See, e.g., *R. v. Dymont* (1988), 45 C.C.C. (3d) 244 (S.C.C.); *Schreiber v. Canada (A.G.)* (1998), 124 C.C.C. (3d) 129 (S.C.C.), at 141; and *R. v. Plant* (1993), 84 C.C.C. (3d) 203 (S.C.C.).
- 24 [2000] O.J. no. 60 (C.A.).
- 25 See, e.g., *R. v. Fitzpatrick*, [1995] 4 S.C.R. 154; *R. v. White*, above note 3.
- 26 Above note 18.
- 27 Above note 9.
- 28 Above note 4.
- 29 *R. v. Plant* (1993), 84 C.C.C. (3d) 203 (S.C.C.), at 213.
- 30 *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573.

## The introduction of a new exclusionary power under s. 24(1) has the potential to generate vast uncertainty. After years and years of litigation—and countless Supreme Court of Canada judgments—Canadian law finally achieved some degree of clarity in applying the principles under s. 24(2).

- 31 See, e.g., *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130; *A.M. v. Ryan*, [1997] 1 S.C.R. 157; *Re Dagenais*, above note 18.
- 32 [1991] 1 S.C.R. 311.
- 33 This point is amply illustrated by the cases of *R. v. Stillman*, above note 22 and *R. v. Feeney*, [1997] 2 S.C.R. 13.
- 34 See Don Stuart, “*Mills*: Dialogue with Parliament and Equality by Assertion at What Cost?” 28 *C.R.* (5th) 275; Anil Kapoor, “The Supreme Court Recants” *Kapoor’s Criminal Appeals Review*, Issue 8, January 17, 2000 (Q.L.).
- 35 See Don Stuart, above note 34. In particular, Professor Stuart is critical of the court’s failure to apply the 10-part test set out in *Law v. Canada (Minister of Employment & Immigration)*, [1999] 1 S.C.R. 497.
- 36 See *R. v. Mills*, above note 4, at paras. 90-92.
- 37 See *R. v. Osolin*, [1993] 4 S.C.R. 595; *R. v. Seaboyer*, [1991] 2 S.C.R. 577.
- 38 This term was used by McLachlin and Iacobucci, J.J.A. at para. 90.
- 39 The preamble expressly refers to a recital that indicates that Parliament is concerned about the incidence of sexual violence and abuse in Canadian society and, in particular, the prevalence of sexual violence against women and children.
- 40 [1996] O.J. no. 4799 (Gen. Div.).
- 41 [1993] 1 S.C.R. 146.

- 42 *Baron* was one of the cases cited by the court in *Mills* when discussing the judge’s discretion to consider the full range of rights and interests. See *Mills*, above note 4, at para. 133.
- 43 See, e.g., *Smith v. Jones*, [1999] 1 S.C.R. 455.
- 44 [1999] 2 S.C.R. 417.
- 45 See, e.g., *R. v. Jones*, [1994] 2 S.C.R. 229; *R. v. S.(R.J.)*, [1995] 1 S.C.R. 451; and *R. v. Stillman*, above note 22.
- 46 See, e.g., *R. v. Fitzpatrick*, [1995] 4 S.C.R. 154.
- 47 *R. v. White*, above note 44, at para. 89.
- 48 [1985] 1 S.C.R. 613.
- 49 (1995), 101 C.C.C. (3d) 193 (S.C.C.).
- 50 In this regard, reference may be made to *R. v. Milne* (1996), 107 C.C.C. (3d) 118 (Ont. C.A.); *R. v. Coutts* (1999), 136 C.C.C. (3d) 225 (Ont. C.A.).
- 51 See, e.g., *R. v. Goldhart* (1996), 107 C.C.C. (3d) 481 (S.C.C.).
- 52 See *R. v. Stillman*, above note 22; *R. v. Feeney*, above note 33; and *R. v. Belnavis* (1997), 118 C.C.C. (3d) 405.
- 53 In *R. v. Harrer* (1995), 101 C.C.C. (3d) 193 (S.C.C.), McLachlin J. (as she then was) defined a fair trial as one “which satisfies the public interest in getting at the truth, while preserving basic procedural fairness to the accused.” (See para. 45.)

# Treaty rights, the Indian Act, and the Canadian Constitution: The Supreme Court's 1999 decisions

In 1999 the Supreme Court's constitutional decisions involving Aboriginal peoples related to treaty rights and the validity and effect of certain provisions of the *Indian Act*.<sup>1</sup> Two substantive decisions were handed down in each of these areas. We will start by examining the treaty cases, and then analyze the cases involving the *Indian Act*.

## THE TREATY RIGHTS CASES

Both treaty cases involved the interpretation of treaty provisions relating to hunting and fishing rights. In *R. v. Sundown*,<sup>2</sup> John Sundown was charged with violating provisions of the Saskatchewan *Parks Regulations, 1991*,<sup>3</sup> because he had cut down white spruce trees and used them to build a cabin in Meadow Lake Provincial Park without provincial consent. His defence was that he had a treaty right to hunt and fish in the park, and that the cabin was necessary for shelter while he was on hunting and fishing expeditions, and for smoking fish and meat and preparing hides. He relied on the following provision of Treaty 6, entered into in 1876, and adhered to in 1913 by the Joseph Bighead First Nation of Cree Indians, of which Mr. Sundown is a member:

Her Majesty further agrees with Her said Indians that they, the said Indians, shall have right to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described, subject to such regulations as may from time to time be made by Her Government of Her Dominion of Canada, and saving and excepting such tracts as may from time to time be required or taken up for settlement, mining, lumbering or other purposes by Her

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The Crown accepted that Mr. Sundown had a treaty right to hunt for food in the park, but contended that the right did not include a right to build a cabin to facilitate hunting. The Supreme Court disagreed.

said Government of the Dominion of Canada, or by any of the subjects thereof duly authorized therefor by the said government.<sup>4</sup>

This provision was modified in 1930 by paragraph 12 of the Natural Resources Transfer Agreement,<sup>5</sup> which took away the treaty right to hunt *commercially* but expanded the geographical area in which the right to hunt *for food* could be exercised.<sup>6</sup> This modified treaty right was given additional constitutional protection by s. 35(1) of the *Constitution Act, 1982*,<sup>7</sup> which provides that “[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.”<sup>8</sup>

The Crown accepted that Mr. Sundown had a treaty right to hunt for food

in the park, but contended that the right did not include a right to build a cabin to facilitate hunting. The Supreme Court disagreed. Delivering the unanimous judgment, Cory J. held that building shelters was “reasonably incidental” to the right to hunt and fish, given that the Joseph Bighead First Nation’s traditional method of hunting was “expeditionary”—that is, the hunters would set up a base camp for up to two weeks, from which they would go out in various directions to hunt each day, returning to the camp to dress and preserve the game and fish they caught. This method of hunting requires a shelter, originally a moss-covered lean-to, later a tent, and today a small cabin. This evolution of the kind of shelter was, Cory held, consistent with the Supreme Court’s rejection of a “frozen-in-time” approach to Aboriginal and treaty rights.<sup>9</sup> Moreover, construction of a cabin would not give the First Nation a proprietary interest in park land. For one reason, if hunting became incompatible with the Crown’s use of the land then hunting would not be allowed, and so any rights in the hunting cabin would be lost, especially as the treaty itself limits the hunting right to lands not “required or taken up for settlement.” Furthermore, in accordance with the *Sparrow* test the treaty right to hunt would be subject to justifiable regulation for conservation, including restrictions on the building of cabins if required to preserve habitat.<sup>10</sup> However, Cory emphasized that, for the infringement to be justifiable, “both the purpose of the regulations and the accommodation of the treaty right in issue would have to be clear from the legislation.”<sup>11</sup> He continued:

The Crown would also have to demonstrate that the legislation does not

unduly impair treaty rights. The solemn promises of the treaty must be fairly interpreted and the honour of the Crown upheld. Treaty rights must not be lightly infringed. Clear evidence of justification would be required before that infringement could be accepted.

Cory J. acquitted Mr. Sundown because his treaty right to hunt and fish took precedence over provincial legislation due to s. 88 of the *Indian Act*.<sup>12</sup> That section makes provincial laws of general application apply to “Indians” (as defined in the Act), subject to, among other things, “the terms of any treaty.” As the provisions of the Saskatchewan *Parks Regulations* under which Mr. Sundown had been charged conflicted with his treaty right, s. 88 prevented them from applying to him when exercising that right. Cory therefore found it unnecessary to consider whether s. 35(1) of the *Constitution Act, 1982* would have made the provincial regulations constitutionally inapplicable in the circumstances.

At the end of his judgment, Cory observed that the Crown, in oral argument but not in its factum, had briefly contended that the justification test should apply to allow provincial infringements of treaty rights in the context of s. 88 of the *Indian Act*, as in the context of s. 35(1) of the *Constitution Act, 1982*. The matter had been raised, but left unresolved, by Lamer C.J. in *R. v. Côté*.<sup>13</sup> While considering the issue to be “important,” Cory also declined to decide it, as there had not been “any significant argument” on it.<sup>14</sup> What is puzzling about this aspect of Cory’s judgment is that, as we have seen, he did suggest that Mr. Sundown’s treaty right to hunt could be infringed by provincial legislation if the infringement could be justified. But given that he held the right to be protected against provincial laws by s. 88, how could infringement occur if there is no justification test implicit in s. 88?<sup>15</sup> This conundrum aside, my own view is that the Court should refrain from reading a justification test into

## Where Indian treaties are concerned, extrinsic evidence can be used, even if the written document purports to contain all the terms, to show the historical and cultural context so as to reveal the common intention of the parties.

s. 88, as, unlike s. 35(1), this is a mere statutory provision that can be amended by Parliament to include a justification test if that is thought to be desirable.<sup>16</sup> While from one perspective it may seem odd that a statute provides more protection to treaty rights than an express recognition and affirmation of those rights in the Canadian constitution, where constitutional rights are concerned the courts tend to balance constitutional protection against parliamentary sovereignty.<sup>17</sup> That balancing exercise is unnecessary in the case of statutory provisions that do not raise constitutional issues, as in that context the courts defer to the wisdom of the legislature.<sup>18</sup>

The *Sundown* decision also affirmed and applied principles for the interpretation of treaties that have been repeated by the Supreme Court on numerous occasions. Cory J. quoted the following summary of these principles from his own judgment in the *Badger* decision:

First, it must be remembered that a treaty represents an exchange of solemn promises between the Crown and the various Indian nations. It is an agreement whose nature is sacred. . . . Second, the honour of the Crown is always at stake in its dealing with Indian people. Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown. It is always assumed that the Crown intends to fulfil its promises.

No appearance of “sharp dealing” will be sanctioned. . . . Third, any ambiguities or doubtful expressions in the wording of the treaty or document must be resolved in favour of the Indians. A corollary to this principle is that any limitations which restrict the rights of Indians under treaties must be narrowly construed. . . . Fourth, the onus of proving that a treaty or aboriginal right has been extinguished lies upon the Crown. There must be “strict proof of the fact of extinguishment” and evidence of a clear and plain intention on the part of the government to extinguish treaty rights.<sup>19</sup>

These principles figured prominently in the second Supreme Court case in 1999 involving treaty rights, *R. v. Marshall*. The *Marshall* case actually resulted in two decisions, the first on the merits (hereinafter *Marshall No. 1*<sup>20</sup>) and the second on an application for a rehearing and a stay of judgment (hereinafter *Marshall No. 2*<sup>21</sup>). We will consider each of these decisions in turn.

The *Marshall* case arose out of charges laid against Donald Marshall Jr., a Mi’kmaq Indian, for using illegal nets to catch eels in Nova Scotia during the closed season and selling them without a licence, contrary to regulations made pursuant to the federal *Fisheries Act*.<sup>22</sup> His defence was based on a series of similar treaties entered into by the Crown and the Mi’kmaq villages in Nova Scotia in 1760-61, which contained

a commitment by the Mi'kmaq parties which was expressed in one of the treaties in this way:

And I do further engage that we will not traffick, barter or Exchange any Commodities in any manner but with such persons or the managers of such Truck houses as shall be appointed or Established by His Majesty's Governor at Lunenbourg or Elsewhere in Nova Scotia or Acadia.<sup>23</sup>

Mr. Marshall argued that this provision incorporated both a right to engage in traditional hunting, fishing, and gathering, and a right to trade the products of those activities.

Mr. Justice Binnie, delivering the judgment of the majority of the Supreme Court in *Marshall No. 1*,<sup>24</sup> accepted this argument, but limited the right to trade to a right to secure "necessaries," which he construed in today's world as "equivalent to a moderate livelihood."<sup>25</sup> Because Mr. Marshall had been "engaged in a small-scale commercial activity to help subsidize or support himself and his common-law spouse" (the price received for the eels was \$787.10), Binnie J. held that he had been exercising his treaty right.<sup>26</sup> As that right is protected by s. 35(1) of the *Constitution Act, 1982*,<sup>27</sup> and the Crown had made no attempt to justify infringement of the right by the fisheries regulations, Mr. Marshall was acquitted.

An important aspect of the *Marshall No. 1* decision was the court's use of extrinsic evidence to determine the terms of the treaties. Binnie J. rejected the suggestion made, but not applied, by Estey J. in *R. v. Horse*<sup>28</sup> that extrinsic evidence cannot be used where the written terms are unambiguous. As Binnie pointed out, the Supreme Court has distanced itself from Estey's views in a number of more recent decisions.<sup>29</sup> Moreover, extrinsic evidence can be used even in a modern commercial context to show that a written contract does not contain all the terms.<sup>30</sup> Where Indian treaties are concerned, extrinsic

evidence can be used, even if the written document purports to contain all the terms, to show the historical and cultural context so as to reveal the common intention of the parties.<sup>31</sup> Also, where a treaty was concluded verbally and then written down by the Crown's representatives, "it would be unconscionable," Binnie said, "for the Crown to ignore the oral terms while relying on the written terms."<sup>32</sup>

Binnie J. reached his conclusion that the treaties included a right to hunt, fish, and gather, and to trade the products of those activities for necessities, by examining the historical context and the record of negotiations of the treaties. Cape Breton Island and Quebec had been taken from the French by the British in 1759, and Montreal fell in June, 1760. The British were anxious to maintain peace with the Mi'kmaq, who had been allies of the French and who could be formidable opponents. The British also wanted the Mi'kmaq to continue their traditional economies so they would not become discontented and would not become a burden on the public purse. Moreover, when the treaties were entered into, the Aboriginal leaders asked for truckhouses (trading posts) where they could bring their goods to exchange for the European goods on which they had become dependent. As Binnie observed, "[i]t cannot be supposed that the Mi'kmaq raised the subject of trade concessions merely for the purpose of subjecting themselves to a trade restriction."<sup>33</sup> He concluded:

The trade clause would not have advanced British objectives (peaceful relations with a self-sufficient Mi'kmaq people) or Mi'kmaq objectives (access to the European "necessaries" on which they had come to rely) unless the Mi'kmaq were assured at the same time of continuing access, implicitly or explicitly, to wildlife to trade.<sup>34</sup>

Moreover, the honour of the Crown is always involved in its dealings with

the Aboriginal peoples. Binnie did not think that "an interpretation of events that turns a positive Mi'kmaq trade demand into a negative Mi'kmaq covenant is consistent with the honour and integrity of the Crown."<sup>35</sup>

Addressing the Crown's concern that "recognition of the existence of a constitutionally entrenched right with, as here, a trading aspect, would open the floodgates to uncontrollable and excessive exploitation of the natural resources," Binnie repeated that the right was limited to a right to trade for necessities, which in a modern context means for a moderate livelihood. Expanding on this, he said this:

A moderate livelihood includes such basics as "food, clothing and housing, supplemented by a few amenities," but not the accumulation of wealth. . . . It addresses day-to-day needs.

Government regulations limiting Mi'kmaq hunting and fishing to what is required for a moderate livelihood would not violate their treaty right, and so would not have to be justified. But regulations that went beyond that and infringed their right to derive a moderate livelihood from those activities would have to be justified in accordance with the *Sparrow* test.

As is well known, *Marshall No. 1* sparked not only controversy, but also turmoil in the Atlantic fisheries. Mi'kmaq fishers naturally interpreted the decision as affirming their treaty right to fish not just eels, but other species as well, for a moderate livelihood. They accordingly began to trap lobsters for that purpose without respecting federal regulations designed to control the lobster fishery. The federal government was apparently unprepared and did not seem to have any policy in place to deal with the situation. In the meantime, some non-Aboriginal fishers reacted angrily, resorting in some instances to property damage and other violent acts that the police apparently did little to prevent or stop. In my opinion, this

amounted to a disgraceful failure by both private citizens and government officials to respect the rule of law where the constitutional rights of Aboriginal peoples are concerned.

In the judicial forum, one of the intervenors in *Marshall No. 1*, the West Nova Fishermen's Coalition, applied to the Supreme Court for a rehearing of the case and an order staying the court's judgment in the meantime. The result was *Marshall No. 2*. In it the court, speaking unanimously, not only dismissed the application, but also provided clarification of its earlier judgment. While *Marshall No. 2* contains interesting comments on the status of an intervenor to bring such an application, we will limit our discussion to the court's clarification of *Marshall No. 1*.

In *Marshall No. 2*, the court specified that its earlier judgment dealt only with the treaty right to

fish, wildlife and traditionally gathered things such as fruits and berries. The word "gathering" in the September 17, 1999, majority judgment was used in connection with the types of resources traditionally "gathered" in an Aboriginal economy and which were thus reasonably in the contemplation of the parties to the 1760-61 treaties.

Accordingly, the earlier judgment did not decide whether the Mi'kmaq have any rights to "gather" other resources, such as timber, minerals, and oil and gas. The court nonetheless observed:

It is of course open to Native communities to assert broader treaty rights in that regard, but if so, the basis for such a claim will have to be established in proceedings where the issue is squarely raised on proper historical evidence, *as was done in this case in relation to fish and wildlife*.

The rest of the *Marshall No. 2* judgment relates mainly to legislative authority to regulate the Mi'kmaq's treaty right. After quoting several passages from its earlier judgment, the court concluded:

The Court was thus most explicit in confirming the regulatory authority of the federal and provincial govern-

## The problem with the court's reasoning in this respect is that the treaty rights of the Mi'kmaq to fish are constitutionally protected, whereas any rights non-Aboriginal Canadians may have to participate in the fishery are not. Since when can rights that are not constitutionally protected trump those that are?

ments within their respective legislative fields to regulate the exercise of the treaty right subject to the constitutional requirement that restraints on the exercise of the treaty right have to be justified on the basis of conservation or other compelling and substantial public objectives.

The court pointed out that the issue of what regulations might be justifiable was not dealt with in *Marshall No. 1* because the Crown made no attempt to justify the application to Mr. Marshall of the fisheries regulations under which he had been charged. Moreover, the issue of justification cannot be determined apart from a specific context. For example, even if the court were to determine that a closed season was justified for the eel fishery, that would not mean that a closed season for the lobster fishery would be justified.

The court nonetheless went on to reiterate that, as the treaty right in question is limited to providing a moderate livelihood, regulations restricting it to that purpose would not infringe it and so would not require justification. The court continued:

Other limitations apparent in the September 17, 1999, majority judgment include the local nature of treaties, the communal nature of a treaty right, and the fact it was only hunting and fishing resources to which access was affirmed, together

with traditionally gathered things like wild fruit and berries.

The rather cryptic reference to "the communal nature of a treaty right" in this passage is significant, as it appears to relate to an earlier observation in the judgment that "the treaty rights do not belong to the individual, but are exercised *by authority of the local community* to which the accused belongs." If the communal nature of a treaty right is a limitation on the right, then as the emphasized words reveal it is a limitation that is under the authority of the community in which the right is vested. This seems to mean that the community has the authority to determine, and if necessary to limit, how the right is exercised by its members. If this is correct, then a communal right of self-government with respect to the exercise of treaty rights appears to be implicit in the court's judgment.<sup>36</sup>

On the extent of the legislative authority to regulate the treaty right, the court referred to the general principles laid down in its earlier decisions, especially *R. v. Sparrow*,<sup>37</sup> *R. v. Badger*,<sup>38</sup> and *R. v. Gladstone*.<sup>39</sup> The court distinguished, however, between situations involving Aboriginal rights, which "by definition [were] exercised exclusively by Aboriginal people prior to contact with Europeans," and a treaty right like the one at issue, which was never exclu-

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sive because, at the time the treaty was entered into, non-Aboriginal people were already participating in the commercial and recreational fisheries.<sup>40</sup> Accordingly, the court said that infringement of the treaty right could be justified, not only for conservation, but also to take account of non-Aboriginal participation. In that context, the court observed that “[p]roportionality is an important factor.”<sup>41</sup> Moreover, as held in previous cases, consultation with the Aboriginal peoples whose constitutional rights are infringed is an important aspect of the justification test.<sup>42</sup>

In reaching its conclusion that the treaty right to catch and trade fish to obtain a moderate livelihood can be infringed to take account of other participants in the fishery, the court in fact went beyond *Gladstone*. In that case the Heiltsuk Nation in British Columbia proved an Aboriginal right to take herring spawn on kelp in commercial quantities. Lamer C.J., for the majority, held that valid legislative objectives for infringement of that right are not limited to conservation, and can include “the recognition of the historical reliance upon, and participation in, the fishery by non-Aboriginal groups.”<sup>43</sup> However, in *Gladstone* the Chief Justice explained that the reason why the Heiltsuks’ right to herring spawn does not have complete priority over non-Aboriginal fishing is that, unlike the right to fish for food in *Sparrow*,<sup>44</sup> the Heiltsuks’ right has no internal limit because it is commercial in nature. But *like* the right in *Sparrow*, the right to fish in the *Marshall* case *does* have an internal limit because only so many fish are required for a moderate livelihood. The court’s conclusion in *Marshall No. 2* that, given that non-Aboriginal people were participating in the fishery at the time the right was created, the Mi’kmaq’s treaty right to fish has never been exclusive, is not a convincing explanation for allowing infringement of the right today for the purpose of taking the participation of non-Aboriginal fishers into account. The problem with the court’s rea-

soning in this respect is that the treaty rights of the Mi’kmaq to fish are constitutionally protected, whereas any rights non-Aboriginal Canadians may have to participate in the fishery are not. Since when can rights that are not constitutionally protected trump those that are?<sup>45</sup>

## THE INDIAN ACT CASES

While the *Marshall* case obviously attracted the most attention last year, the Supreme Court’s decision in *Corbiere v. Canada (Minister of Indian and Northern Affairs)*<sup>46</sup> is probably much more important, in terms of both its practical and its constitutional significance.

*Corbiere* involved a direct challenge to a provision of the *Indian Act*<sup>47</sup> dealing with qualifications to vote for the chief and councillors of a band. Section 77(1) provides:

77.(1) A member of a band who has attained the age of eighteen years and is ordinarily resident on the reserve is qualified to vote for a person nominated to be chief of the band and, where the reserve for voting purposes consists of one section, to vote for persons nominated as councillors.

Certain members of the Batchewana Indian Band in Ontario brought the action, on behalf of themselves and all non-resident members, alleging that s. 77(1) violates s. 15(1) of the *Canadian Charter of Rights and Freedoms*,<sup>48</sup> cannot be justified under s. 1 of the Charter, and is therefore constitutionally invalid. The facts revealed that 67.2 percent of Batchewana Band members lived off reserve in 1991. Between 1985 and 1991 the numbers of non-resident members had risen dramatically, mainly as a result of Bill C-31,<sup>49</sup> which conferred Indian status on persons who had lost or were being denied it as a result of discriminatory provisions that were previously in the *Indian Act*.<sup>50</sup> This trend toward non-residency is continuing.<sup>51</sup>

Madam Justice L’Heureux-Dubé delivered a judgment that was concurred in by Gonthier, Iacobucci, and Binnie

JJ. McLachlin and Bastarache JJ., Lamer C.J., Cory and Major JJ. concurring, also delivered a judgment arriving at the same result, but with some differences in reasoning. As L’Heureux-Dubé’s judgment contains a more detailed analysis, and was concurred in on some points by McLachlin and Bastarache, we will look at it first.

L’Heureux-Dubé started by examining the preliminary issue of whether the s. 15(1) analysis should be limited to the application of s. 77(1) to the Batchewana Band, or deal more generally with the application of s. 77(1) to all bands affected by it. She decided that the proper approach was to determine first whether s. 77(1) is unconstitutional in its general application. Only if the answer to this question is no would it be necessary to consider whether the section’s application to the Batchewana Band specifically is unconstitutional, given their special circumstances.<sup>52</sup>

One of the intervenors, the Lesser Slave Lake Indian Regional Council, argued that s. 25 of the Charter shields s. 77(1) from s. 15(1). Section 25 provides:

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

(b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

L’Heureux-Dubé held that, while “rights or freedoms” in s. 25 is broader than “aboriginal and treaty rights” in s. 35,<sup>53</sup> and so may include statutory rights, it had not been shown that s. 77(1) provides rights or freedoms that come under the protection of s. 25. In



## The *Corbiere* decision also casts doubt on the constitutionality of other provisions of the *Indian Act* that make distinctions related to residency on reserves.

her words, “the fact that legislation relates to Aboriginal people cannot alone bring it within the scope of the ‘other rights and freedoms’ included in s. 25.”<sup>54</sup> Moreover, because s. 25 had not been shown to apply, she said that it would be inappropriate to articulate, in this case, a general approach to s. 25.

The *Corbiere* decision therefore left some very important issues in relation to s. 25 undecided.<sup>55</sup>

Turning to s. 15(1) of the Charter, L’Heureux-Dubé proceeded through the three-stage analysis set out by Iacobucci J. in *Law v. Canada (Minister of Employment and Immigration)*.<sup>56</sup> She had no difficulty concluding that the first requirement—namely, differential treatment—was present because s. 77(1) “draws a distinction between band members who live on-reserve and those who live off-reserve, by excluding the latter from the definition of ‘elector’ within the band.”<sup>57</sup> Although this distinction based on reserve residency is not an “enumerated ground” under s. 15(1), she found it to be a new “analogous ground,” thereby meeting the second stage of the *Law* analysis.

However, while concluding that “off-reserve band member status” is an analogous ground not only insofar as s. 77(1) is concerned, but also “in any future case involving this combination of traits,” L’Heureux-Dubé was careful not to make any “findings about ‘residence’ as an analogous ground in contexts other than as it affects band members who do not live on the reserve of the band to which they belong.”

Proceeding to the third stage of the *Law* analysis—namely, the requirement that the differential treatment be discriminatory—L’Heureux-Dubé found that it was in this case. After detailed examination of this issue, she summarized her reasons in a manner that drew on her analysis at the second stage:

The people affected by this distinction, in general, are vulnerable and disadvantaged. They experience stereotyping and disadvantage as Aboriginal people and band members living away from reserves.

They form part of a “discrete and insular minority” defined by race and residence, and it is more likely that further disadvantage will have a discriminatory impact upon them. Second, the distinction in question does not correspond with the characteristics or circumstances of the claimants and on-reserve band members in a manner which “respects and values their dignity and difference”: *Law, supra*, at para. 28. . . . Third, the nature of the interests affected is fundamental.

However, L’Heureux-Dubé added that her analysis at this third stage “does not suggest that *any* distinction between on-reserve and off-reserve band members would be stereotypical, interfere with off-reserve members’ dignity, or conflict with the purposes of s. 15(1).”<sup>58</sup> She pointed out that Parliament could legitimately treat on and off reserve members differently in situations where that is appropriate—for example, where matters of purely local concern such as taxation on reserve or regulation of traffic are concerned.

L’Heureux-Dubé accordingly concluded that s. 77(1) violates the right to equality in s. 15(1) of the Charter. Moreover, she held that this conclusion applies generally; it is not related to the specific circumstances of the Batchewana Band. She then considered whether the violation could be justified under s. 1 of the Charter. She found that the legislative objective behind s. 77(1)—namely, that “those with the most immediate and direct connection with the reserve have a special ability to control its future”—is pressing and substantial, as required by the first part of

the s. 1 analysis.<sup>59</sup> Turning to the second part of that analysis, she found a rational connection between that objective and restricting voting to reserve residents, as members living on reserve have a more direct interest in many of a band council’s functions than those living off reserve. However, the minimal impairment requirement in the s. 1 analysis was not met by s. 77(1), as it was not shown that “a *complete* exclusion of non-residents from the right to vote, which violates their equality rights,” was necessary to give effect to the valid legislative objective.<sup>60</sup>

As the violation of s. 15(1) had not been justified under s. 1, L’Heureux-Dubé found s. 77(1) to be unconstitutional insofar as it denies voting rights to non-resident band members.

She then turned to the matter of the appropriate remedy. She decided first of all that a constitutional exemption that would exempt only the Batchewana Band from application of the unconstitutional portion of s. 77(1) was not appropriate, given that the invalidity applied generally to all bands. Nor would it be appropriate for the court to “read in” voting rights for non-residents, as that would require a detailed scheme that would allow them to be voters for some purposes but not others. Instead, L’Heureux-Dubé concluded that “the appropriate remedy is a declaration that the words ‘and is ordinarily resident on the reserve’ in s. 77(1) are invalid, and that the effect of this declaration of invalidity be suspended for 18 months.” The suspension was to give the Canadian government time to consult with the people affected and to respond to their needs in a way that respects equality

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rights, and to give Parliament an opportunity to modify s. 77(2) as well, which, L'Heureux-Dubé suggested, suffers from the same constitutional defect.<sup>61</sup>

McLachlin and Bastarache JJ., in their judgment in *Corbiere*, agreed with L'Heureux-Dubé that s. 77(1) violates s. 15(1) of the Charter because it “makes a distinction that denies equal benefit or imposes an unequal burden” in a way that discriminates on an analogous ground.<sup>62</sup> However, they emphasized that once accepted by the court, an analogous ground, like an enumerated ground, will always be a marker of discrimination, though legislation that distinguishes on that ground will not necessarily be discriminatory—that depends on the context.

Accordingly, they said, “if ‘Aboriginality-residence’ is to be an analogous ground (and we agree with L'Heureux-Dubé J. that it should), then it must always stand as a constant marker of potential legislative discrimination, whether the challenge is to a governmental tax credit, a voting right, or a pension scheme.”<sup>63</sup> However, one still has to determine “whether the distinction amounts, in purpose or effect, to discrimination on the facts of the case.” Like L'Heureux-Dubé, McLachlin and Bastarache concluded that s. 77(1) discriminates against non-resident band members generally.

Having concluded that the residency requirement in s. 77(1) violates s. 15(1) of the Charter, McLachlin and Bastarache considered the application of s. 1. Like L'Heureux-Dubé, they found a rational connection between the objective of the legislation and residency, but like her concluded that the requirement of minimal impairment had not been met. “Even if it is accepted that some distinction may be justified in order to protect legitimate interests of band members living on the reserve,” they said, “it has not been demonstrated that a complete denial of the right of band members living off-reserve to participate in the affairs of the band through

## If resident band members can avoid taxation while non-resident band members cannot, this situation would seem to fall within the new analogous ground the court created in *Corbiere*.

the democratic process of elections is necessary.” Accordingly, they found that the violation of s. 15(1) equality rights had not been justified. They agreed that the appropriate remedy was to declare the words “and is ordinarily resident on the reserve” in s. 77(1) to be constitutionally invalid, but suspended the implementation of that declaration for 18 months.

The *Corbiere* decision will have a dramatic effect on band council governments under the *Indian Act*. In First Nations like the Batchewana Indian Band, where a majority of band members live off reserve, the extension of even limited voting rights to those non-resident members will have a significant impact on the politics and the power structure in those communities. Whether the decision will affect Aboriginal governments established outside the confines of the *Indian Act* remains to be seen. In both judgments in the Supreme Court, the justices suggested that it would be open to individual First Nations to present evidence that they have an existing Aboriginal right to restrict voting rights. While these observations were made in the context of the *Indian Act* electoral provisions, they indicate that the Court is of the opinion that there may be Aboriginal rights in relation to governance that can take precedence over the statutory regime in the Act.<sup>64</sup> This may be an indication, like the references to communal rights and Aboriginal decision-making authority in *Marshall No. 2* and *Delgamuukw v. British Columbia*,<sup>65</sup> that the Court will

be open to claims to Aboriginal governance rights in the future.<sup>66</sup>

The *Corbiere* decision also casts doubt on the constitutionality of other provisions of the *Indian Act* that make distinctions related to residency on reserves. For example, s. 87(1) exempts reserve lands and personal property of Indians and Indian bands situated on reserves from taxation. Given that the Supreme Court has held that reserve residency is an analogous ground under s. 15(1) of the Charter, this provision is now open to question, as the imposition of some taxes, like sales tax, can depend on residency in this context. If resident band members can avoid taxation while non-resident band members cannot, this situation would seem to fall within the new analogous ground the court created in *Corbiere*. If so, it would be up to a court to decide if this differential treatment is discriminatory in the circumstances.

Finally, there is the issue of services, such as health care, provided by the federal government to band members who reside on reserves, but generally denied by that government to non-resident band members. In a federal government “Backgrounder” on the *Corbiere* decision, this statement appears:

The Court was very clear that its decision relates only to the constitutionality of voting distinctions. It does not address any other issues, such as the extension of entitlements to off-reserve Band members or issues of federal or provincial jurisdiction.<sup>67</sup>

However, while the court did not address matters like the constitutionality of differential provision of services, it did hold that reserve residency is now an analogous ground for all purposes. Thus, the question whether provision of services on the basis of reserve residency is constitutional should depend, like the voting rights in *Corbiere*, on whether that is discriminatory. If I were advising the federal government, I do not think I would be overly confident about the answer. ❁

1 R.S.C. 1985, c. I-5.

2 [1999] 2 C.N.L.R. 289.

3 R.R.S., c. P-1.1, reg. 6.

4 Treaty 6, in Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (Toronto: Belfords, Clarke & Co., 1880), 351, at 353.

5 Entered into by the Saskatchewan and Canadian governments, and given constitutional force by the *Constitution Act, 1930*, R.S.C. 1985, app. II, no. 26. Paragraph 12 provides:

12. In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.

6 *R. v. Sundown*, above note 2, at para. 8, following *R. v. Horseman*, [1990] 1 S.C.R. 901.

7 Being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11.

8 See *R. v. Badger*, [1996] 2 C.N.L.R. 77 (S.C.C.).

9 *R. v. Sundown*, above note 2, at paras. 27-33.

10 *Ibid.*, at paras. 34-39. In *R. v. Sparrow*, [1990] 1 S.C.R. 1075, the Supreme Court decided that the Aboriginal rights recognized and affirmed by s. 35(1) of the *Constitution Act, 1982* can be infringed by legislation if the Crown can prove a valid legislative objective such as conservation, and can show that the Crown's fiduciary obligations to the Aboriginal people in question have been respected. The *Sparrow* test was applied to a treaty right to hunt in the context of the Alberta Natural Resources Transfer Agreement, which contains a provision identical to para. 12 of the Saskatchewan Agreement (see above note 5), in *R. v. Badger*, above note 8.

11 *R. v. Sundown*, above note 2, at para. 46.

12 Above note 1.

13 [1996] 4 C.N.L.R. 26 (S.C.C.), at para. 87.

14 *R. v. Sundown*, above note 2, at para. 48.

15 Perhaps Cory J. meant that provincial laws relating to conservation of game could infringe treaty rights through the operation of para. 12 of the Natural Resources Transfer Agreement, without reference to s. 88, as he had held in *R. v. Badger*, above note 8. That case involved provisions of the Alberta *Wildlife Act*, S.A. 1984, c. W-9.1, which were clearly game laws within the meaning of para. 12, whereas the regulations under which the accused had been charged in *Sundown* were not game laws as such. However, Cory suggested in *Sundown*, above note 2, at para. 45, that the regulations could relate to conservation of game, and it was in this context that he said that infringement might be justified.

16 Lamer C.J. suggested in *R. v. Côté*, above note 13, at para. 87, that this is an appropriate matter for Parliament to consider.

17 See *R. v. Sparrow*, above note 10, and commentary thereon in Kent McNeil, "Envisaging Constitutional

Space for Aboriginal Governments" (1993) 19 *Queen's L.J.* 95.

18 See *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285, at 303.

19 *R. v. Badger*, above note 8, at para. 41, as quoted in *R. v. Sundown*, above note 2, at para. 24.

20 *R. v. Marshall*, [1999] 4 C.N.L.R. 161.

21 *R. v. Marshall*, [1999] 4 C.N.L.R. 301.

22 R.S.C. 1985, c. F-14.

23 Treaty of Peace and Friendship entered into by Governor Charles Lawrence on March 10, 1760, which the trial judge accepted as applicable to the case.

24 Lamer C.J. and L'Heureux-Dubé, Cory, and Iacobucci J.J. concurred. McLachlin J., Gonthier J. concurring, dissented.

25 *Marshall No. 1*, above note 20, at para. 7.

26 *Ibid.*, at para. 8.

27 See above notes 7 and 8 and accompanying text.

28 [1988] 2 C.N.L.R. 112, at 124-26.

29 *Marshall No. 1*, above note 20, at paras. 13-14, citing *R. v. Sioui*, [1990] 1 S.C.R. 1025, *R. v. Badger*, above note 8, and *R. v. Sundown*, above note 2, among other cases.

30 *Marshall No. 1*, above note 20, at paras. 10 and 43.

31 *Ibid.*, at para. 11.

32 *Ibid.*, at para. 12, relying on Dickson J.'s judgment in *Guerin v. The Queen*, [1984] 2 S.C.R. 335, at 388.

33 *Marshall No. 1*, above note 20, at para. 19.

34 *Ibid.*, at para. 35. At para. 44, Binnie relied on *R. v. Sundown*, above note 2, as well as *Simon v. The Queen*, [1985] 2 S.C.R. 387, as authority that to make an express treaty right to hunt effective other rights can be implied (in *Sundown*, the right to build shelters; in *Simon*, the right to carry a gun and ammunition).

35 *Marshall No. 1*, above note 20, at para. 52.

- 36 For a similar expression of communal decision-making authority with respect to Aboriginal title to land, see *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, per Lamer C.J. at para. 115, commented on in Kent McNeil, "Aboriginal Rights in Canada: From Title to Land to Territorial Sovereignty" (1998), 5 *Tulsa J. Comp. & Int'l L.* 253, at 285-91.
- 37 Above note 10.
- 38 Above note 8.
- 39 [1996] 4 C.N.L.R. 65.
- 40 *Marshall No. 2*, above note 21, at paras. 38 and 41.
- 41 *Ibid.*, at para. 42.
- 42 *Ibid.*, at para. 43.
- 43 *R. v. Gladstone*, above note 39, at para. 75. For critical commentary, see Kent McNeil, "How Can Infringements of the Constitutional Rights of Aboriginal Peoples Be Justified?" (1997) 8:2 *Constitutional Forum* 33.
- 44 Above note 10. In *Sparrow* the court held that the Musqueams' right to fish for food has to be given priority over commercial and sports fishing, so if there are only enough fish for their food fishery in a given year after the requirements of conservation have been taken into account, they are entitled to the entire allowable catch.
- 45 See McLachlin J.'s dissenting judgment in *R. v. Van der Peet*, [1996] 4 C.N.L.R. 177 (S.C.C.), especially at paras. 306-316, where she questioned Lamer C.J.'s majority judgment in *R. v. Gladstone*, above note 39, in similar fashion.
- 46 [1999] 3 C.N.L.R. 19.
- 47 Above note 1.
- 48 Part I of the *Constitution Act, 1982*, above note 7.
- 49 *An Act to Amend the Indian Act*, S.C. 1985, c. 27.
- 50 For example, status was restored to Indian women who had lost it because they married non-Indian men, and the children of those women received status: for discussion, see Canada, *Report of the Royal Commission on Aboriginal Peoples*, vol. 4, *Perspectives and Realities* (Ottawa: Minister of Supply and Services Canada, 1996), 24-53.
- 51 *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, above note 46, per L'Heureux-Dubé J. at para. 30.
- 52 *Ibid.*, at para. 46. L'Heureux-Dubé pointed out that, if the court held s. 77(1) to be unconstitutional with respect to the Batchewana Band rather than generally, the appropriate remedy would be a constitutional exemption from the application of the section to them.
- 53 See above notes 7 and 8 and accompanying text.
- 54 *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, above note 46, at para. 52.
- 55 For analyses of s. 25, see Bruce Wildsmith, *Aboriginal Peoples and Section 25 of the Canadian Charter of Rights and Freedoms* (Saskatoon: University of Saskatchewan Native Law Centre, 1988); William Pentney, "The Rights and Freedoms of the Aboriginal Peoples of Canada and the Constitution Act, 1982. Part I: The Interpretive Prism of Section 25" (1988), 22 *U.B.C. L. Rev.* 21.
- 56 [1999] 1 S.C.R. 497, at para. 88.
- 57 *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, above note 46, at para. 57.
- 58 *Ibid.*, at para. 94 (emphasis in original).
- 59 *Ibid.*, at para. 99. She relied on the approach to s. 1 established in *R. v. Oakes*, [1986] 1 S.C.R. 103, and refined and applied in *Egan v. Canada*, [1995] 2 S.C.R. 513; *Eldridge v. British Columbia (Attorney-General)*, [1997] 3 S.C.R. 624; *Vriend v. Alberta*, [1998] 1 S.C.R. 493; *M. v. H.*, [1999] 2 S.C.R. 3.
- 60 *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, above note 46, at para. 103 (emphasis in original).
- 61 Section 77(2) provides: "A member of a band who is of the full age of eighteen years and is ordinarily resident in a section that has been established for voting purposes is qualified to vote for a person nominated to be councillor to represent that section." On the meaning of "section" in this provision, see s. 74(4) of the Act, providing that reserves can be divided into electoral sections for voting purposes.
- 62 *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, above note 46, at paras. 4-6.
- 63 *Ibid.*, at para. 10. However, McLachlin and Bastarache were careful to point out at para. 15 that the situation of Aboriginal people with respect to reserve residence is unique, given the profound importance and effect of what they called "reserve status"; "[t]hus no new water is charted, in the sense of finding residence, in the generalized abstract, to be an analogous ground."
- 64 L'Heureux-Dubé J. said a band could challenge the application of the Act's electoral rules to it by demonstrating an Aboriginal or treaty right to restrict voting rights: *ibid.*, at para. 112. McLachlin and Bastarache said that, "[i]f another band could establish an Aboriginal right to restrict voting, . . . that right would simply have precedence over the terms of the *Indian Act*": *ibid.*, at para. 22.
- 65 See above note 36 and accompanying text.
- 66 See also *R. v. Pamajewon*, [1996] 4 C.N.L.R. 164 (S.C.C.), and discussion of that decision in McNeil, above note 36, at 281-85.
- 67 Canada, "First Nation Voting Regulations to be Amended After Consultations," *Backgrounders*, December 17, 1999 (QL).

# The Marshall decision as seen by an “expert witness”

BY STEPHEN PATTERSON

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[O]ur constitution requires that questions involving aboriginal and treaty rights be resolved with reference to both history and law. There is no longer a choice in the matter.

We in Canada may not yet have come to grips with the full import and meaning of s. 35(1) of our constitution. It guarantees to aboriginal people their existing aboriginal and treaty rights, and that short clause carries in it much more than words of legal import. It is packed with the stuff of history. It cannot be understood in its particulars without reference to history. The customs and traditions that define the rights of aboriginal people have a historical dimension requiring study and analysis according to recognized disciplinary standards. Treaties, written and verbal, are historical artifacts. And importantly, the customs and treaties that are protected by this section are as numerous as the hundreds of First Nations found in Canada today. There is enormous diversity, none of which can be comprehended outside of the historical dimensions of time and place.

The truth of this observation has been well recognized by Canada's courts. The Supreme Court in *Simon*, *Sioui*, *Sparrow*, *Van der Peet*, and *Delgamuukw*—to name only some of the better known cases—has confirmed the importance of history in determining the nature and extent of aboriginal and treaty rights. Determining the date of first contact or the time of the assertion of British sovereignty requires historical knowledge. Ascertaining what customs or traditions are integral to the culture of an aboriginal people can be done only with reference to history. Analyzing a treaty to determine the intent of the parties requires an examination of historical context, and perhaps even the reconstruction of a substantial chunk of history reaching well beyond the treaty itself. When the court calls upon us to consider what it calls “extrinsic evidence,” it is, in fact, requiring a broader examination of historical con-

text. When, as Mr. Justice LaForest says in *Delgamuukw*, the understanding of certain issues is “highly contextual,” he is telling us that a most detailed consideration of historical information is needed to solve the problem.

In a word, our constitution requires that questions involving aboriginal and treaty rights be resolved with reference to both history and law. There is no longer a choice in the matter. As I read the constitution, this clause uniquely constrains the courts, and forces on them a constitutional requirement that they devise a proper method for collecting historical evidence, reading it and interpreting it in a fashion that does justice both to the facts and their full historical context, while at the same time affording a fair hearing of conflicting views of that evidence, and a full con-

sideration of the many ways in which historical truth can be transmitted or communicated.

Although the Supreme Court is well aware of the constitutional requirement to consult history, I suggest that the process by which it carries out this constitutional requirement is still a work in progress. The rules are vague, and with all respect, I would suggest that the rules are inconsistently applied. In 1985, in the *Simon* case involving a Mi'kmaq from Nova Scotia, the court accepted Mr. Simon's reliance on the *Treaty of 1752* because the Crown had produced no evidence to support its claim that the treaty had been extinguished by hostilities. The court had been presented piles of historical documents but no expert testimony. The decision said that it was impossible for the court to determine what was going on along the east coast of Nova Scotia in 1753. If I may interpret this, the court found that the historical record did not speak for itself. As I read *Simon*, it warns that raw historical data must be rendered intelligible by someone capable of interpreting it, and that the court itself will not undertake to do this on its own. To me, the *Simon* decision is a wise acknowledgment by the court that, when it comes to interpreting history, the court has limits. Yet the recent *Marshall* decision raises questions about such limits, and makes me believe that the court needs to decide how it will handle historical questions when the evidence provided by and through the lower courts is inadequate or deficient in some respect.

Let me outline very briefly some aspects of the *Marshall* case to illustrate what I think are some difficulties the courts have in using history to resolve questions of aboriginal and treaty rights. The focus in the case was on treaties

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signed by the Mi'kmaq in 1760 and 1761. All of the natives in the region—Mi'kmaq, Maliseet, and Passamaquoddy—had been fighting against British colonizers for years, and had been particularly active in colonial wars as allies of France. After 1758, when France lost its foothold in the region, all of the native peoples gradually came in to treat with the British. The Maliseet of the St. John River valley were the first to do so, and their treaty was finalized in February of 1760. The Mi'kmaq, a distinctly different people, lived along the east coast of present-day New Brunswick, and throughout present Nova Scotia. They had no central government or common chief, but were organized in about a dozen separate communities or bands, each centred on a river system or bay that defined its hunting and fishing territory. Recognizing this decentralized structure, the British decided to treat with each community separately, and that is the reason we have a series of Mi'kmaq treaties, made over a period of months beginning in March 1760.

The written texts of all the Mi'kmaq treaties were identical. They began with what the British called a “submission.” The Mi'kmaq acknowledged the sovereignty and authority of the British Crown in Nova Scotia and submitted to that authority. They promised not to interfere with British settlers and, where there were misunderstandings, to “apply for redress according to the laws established in his said Majesty’s Dominions.” They also promised not to trade with the French but rather to confine their trade to British truckhouses to be established for that purpose.

But, in addition to the written documents, we also have minutes of discussions that took place at the time some of the treaties were made. The most extensive record is of the treaty ceremony of June 25, 1761, at which four Mi'kmaq bands, including the Cape Breton community, made their treaty with the British. It seemed fortunate that, in this case involving Donald Marshall Jr., we had

**[B]ad history cannot make good law.  
The Marshall case represents both  
an honest attempt to blend history and law,  
and an illustration of some of the problems  
yet to be resolved in doing so.**

such full evidence for the treaty with the Cape Breton Mi'kmaq because Mr. Marshall is a member of the Membertou Reserve on Cape Breton Island. This is his treaty, so to speak, and the minutes of the treaty ceremony form what the Supreme Court calls “extrinsic” evidence, or in other words, the historical context that might help us better understand the intent of the parties. Because it seemed to be most relevant to the question of Mr. Marshall’s treaty rights, it became an important aspect of my testimony. I was struck, for example, that the Cape Breton chief, speaking for all of the others, said: “our intentions were to yield ourselves up to you without requiring any terms on our part.” They made no demands and set no conditions. In his lengthy speech, carefully translated by someone who spoke the Mi'kmaq language, he made not a single reference to trade. He concluded thus: “As long as the Sun and Moon shall endure . . . so long will I be your friend and ally, submitting myself to the Laws of your Government, faithful and obedient to the Crown.”

Nova Scotia’s Chief Justice, Jonathan Belcher, spoke for the Crown on this occasion. He said “the Laws will be like a great Hedge about your Rights and properties.” My interpretation of this was that the Mi'kmaq would be treated like all other subjects of the British Crown. Aboriginals would enjoy the freedoms all British subjects enjoy, and the laws would protect them. Importantly, moreover, Belcher put the essential point into clear language. He re-

ferred to the British in Nova Scotia as “your fellow subjects.” In future, he said, natives and non-natives would fight on the same side, as brethren, “that your cause of war and peace may be the same as ours under one mighty Chief and King, under the Same Laws and for the same Rights and Liberties.”

As I read the document, Belcher’s words and those of the Cape Breton chief provide written evidence of the intention of the two parties to the treaty that was signed on June 25, 1761. They seemed to have a meeting of minds. As additional proof of this, much more evidence was presented at trial to show that in the years thereafter, the two parties behaved in a manner consistent with the notion of a common understanding. The treaty partners agreed that the Mi'kmaq were British subjects and, as such, the Mi'kmaq were to be governed and also protected by the prevailing laws of Nova Scotia. A Mi'kmaq chief petitioning in 1825 pointed out that, despite all of the problems confronting him and his people, he had always been “unwilling to contend against the laws which he had pledged himself by treaty to obey.”

My interpretation of this evidence did not go unchallenged at trial. Defence witnesses presented a differing view, as they should. The process requires that courts see the evidence from as many angles as possible. But my point here is that the evidence was extensive, it was well canvassed at trial, the arguments were heard, and on this basis the trial judge made important find-

ings of fact. And because he also largely accepted my interpretation, it is worth my summarizing it here. My interpretation is that the treaties of 1760-61, unlike earlier treaties, did not contain British promises to the Mi'kmaq nor specifically guarantee rights. There is not a word about hunting, fishing, or trading as a right. All of these may be implied, but they need not be the implications of the treaty itself. Rather they are the logical implications of the rule of British law, the common rights of all British subjects that, in the context of the time, were permissive rights rather than constitutionally entrenched rights. They were, for everyone, rights limited by whatever laws and regulations were in place to maintain order, peace, harmony, security of the person and of property, and the greatest good for the greatest number. In my reading of the historical evidence, there is not a hint in any of these treaty negotiations in 1760 and 1761 that the Mi'kmaq, while being welcomed as British subjects, were at the same time granted an exemption from British law.

Let us turn now to the case as heard by the Supreme Court. To my great surprise, both the hearing and the majority decision revolved not around Mr. Marshall's treaty, the treaty of June 25, 1761, and its substantial extrinsic evidence, but rather around the first treaty signed in February 1760, the Maliseet treaty. I was surprised because it appeared to me that the Supreme Court's highly focused attention on the events of February 1760 had no parallel in the lower courts. The Maliseet, after all, are a distinctly different people from the Mi'kmaq, and Mr. Marshall is a Mi'kmaq.

Nevertheless, Mr. Marshall now argued, through his counsel, that his treaty right to trade was derived from a British promise to the Maliseet. Because the Maliseet treaty became the model for treaties with the Mi'kmaq, presumably anything promised the Maliseet was equally promised to the Mi'kmaq. The majority of the Court essentially accepted this reasoning and determined that, while the native right to trade was

## The full evidence would have included reports from British soldiers describing their initial contacts with the Maliseet at the mouth of the St. John River in the fall of 1759. Here the Maliseet took an oath of allegiance to the British Crown, effectively settling the issue of peace and submission, long before they went to Halifax to sign a formal treaty.

not explicitly stated in any of the treaties, it was implicit in them. The proof, said the majority, was to be found in the extrinsic evidence related to the Maliseet negotiations, specifically the minutes of their meetings with the governor and council in February 1760. In these negotiations, says the majority, the Maliseet demanded a trading right as a condition of their signing the treaty. The British, allegedly fearing the power of the aboriginals and eager to bring about an immediate peace, promised such a right in exchange for the treaty.

It is my observation that the Supreme Court's ultimate decision focused on an episode in the treaty process that was not a central aspect of testimony at the original trial in provincial court, and it was certainly not part of Mr. Marshall's original defence. He originally cast his net widely, claiming rights under many treaties, especially on the liberal promises of hunting, fishing, and trade in the treaty of 1752, the treaty relied upon by Mr. Simon several years ago. The Crown had to respond equally broadly in order to respond to any and all possibilities in what appeared to be a very unspecific defence. The Crown's case was designed to illustrate the rather extensive history of over a dozen treaties signed between 1725 and 1779, with special emphasis on the treaty of 1752, which seemed to

be most in contention, and the treaties of 1760 and 1761. Interestingly, the two expert historians who testified in Mr. Marshall's defence carried the context even further. Far from narrowing the focus of discussion to February 1760, they argued that New England treaties going back to the 1690s provided important clues to our understanding of both British policy and native experience in dealing with Europeans. It was weeks into the trial before Mr. Marshall focused his defence on the treaties of 1760 and 1761. Even then, the Maliseet treaty was given no special attention.

It is my observation that Mr. Marshall's reliance on the Maliseet negotiations of February 1760, as the crux of his defence, was advanced first at the Supreme Court level. This was done by argument. The evidentiary base for examining the question was limited. It had not been extensively canvassed at trial. The majority of the Supreme Court panel decided that the trial judge had erred in law for not examining the extrinsic evidence related to the Maliseet treaty. It is not my place to defend the trial judge, but my observation is that he dealt with the evidence that was placed before him, and that a full examination of the extrinsic or contextual evidence related to the Maliseet treaty was not led by either the defence or the Crown.

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That evidence was not before the court, perhaps because no one had at that time determined that it was the crux of the issue. At least no one openly said that it was.

What is most alarming is that there is more historical evidence on the background of the Maliseet treaty than was led at trial. The full evidence would have included reports from British soldiers describing their initial contacts with the Maliseet at the mouth of the St. John River in the fall of 1759. Here the Maliseet took an oath of allegiance to the British Crown, effectively settling the issue of peace and submission, long before they went to Halifax to sign a formal treaty. The evidence would also have included the orders that went out from Halifax in reply: along with the instruction to bring native chiefs back to Halifax to sign a formal treaty went a proposal from British officials to set up a truckhouse at the mouth of the St. John River to facilitate trade with the natives.

This came several weeks before the treaty discussions in Halifax. The available evidence shows that when Maliseet delegates arrived in Halifax, they confirmed that they wished an opportunity to trade, effectively taking the British up on their offer of a truckhouse. This evidence suggests that trade was not a demand of the Maliseet nor a condition of their treating with the British, but simply a request for an opportunity to trade. But this evidence was not led at trial, or at least was not presented in detail, and it was not available to the Supreme Court, perhaps for the very reason that Mr. Marshall is a Mi'kmaq and details about a treaty the British made with a distinctly different people seemed, at trial, to be somewhat peripheral.

What should the Supreme Court do in a matter such as this? The majority in Marshall decided that the evidence before it was sufficient to resolve the issue. They found that the Maliseet demanded a right to trade as a condition of the treaty. By paragraph 52 of the decision,

Faced with contrary views from a minority of the court, the majority argued . . . that it was the Indians who “first requested truckhouses. The limitation to government trade came as a response to the request for truckhouses, not the other way around.”

this Maliseet demand is presented as “a positive Mi'kmaq trade demand,” although there is not a piece of evidence to suggest that the Mi'kmaq ever made such a demand. According to the majority of the court, it was aboriginals who first raised the matter of special truckhouses as the place where the trade should take place, not the British who sought to confine trade to truckhouses as a means of preventing aboriginal trade with the French. It therefore was a condition of peace, and the British response was effectively a promise that the honour of the Crown demands must be upheld.

These assertions placed the majority of the Supreme Court in the position of answering important historical questions on the basis of very limited evidence before it. Faced with contrary views from a minority of the court, the majority argued in paragraph 30 that it was the Indians who “first requested truckhouses. The limitation to government trade came as a response to the request for truckhouses, not the other way around.”

My response to these findings is that the court needs to rethink what it means by “extrinsic evidence.” From a historian's viewpoint, it means the broad context of an event, and it should include all the available historical information that is germane to the topic. In this instance, there is historical information that was not led at trial, or at least not examined and explained at trial, because neither

side pursued it. Rather than fill in the gaps itself, the court might well have phrased unresolved issues as historical questions. Did the Maliseet first raise the idea of truckhouses? Did the Maliseet demand trading rights as a condition of their making peace? Did the Mi'kmaq likewise demand trading rights? Were the unwritten promises to the Maliseet, as identified by the majority, communicated to the Mi'kmaq and did they therefore become unwritten promises to the Mi'kmaq?

All of these are historical questions for which evidence is available. Having identified the crucial questions, it seems to me that the Supreme Court might have ordered the matter back to the trial court where expert historical evidence might have been called in order to answer these questions. Justice did not demand that the Supreme Court itself grope with inadequate findings of fact, nor that it compensate for those deficiencies by attempting to reconstruct a complex history.

But such comments deal with the *Marshall* decision on the narrow grounds on which it turned—the meaning and significance of the Maliseet treaty. A full critique of the decision would go much further, as the following brief comments might indicate. For example, the court determined that the Mi'kmaq treaties of 1760-61 were local treaties of local application. Presumably each protects the rights of successor

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# The importance of the Marshall decision

BY TOM FLANAGAN

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The courts in the last decade have repeatedly looked at historical sources in interpreting the meaning of treaties, even where the treaty text seemed plain enough on its face.

Anyone who reads newspapers or watches television knows that the Supreme Court's decision in the *Marshall* case has touched off heated quarrels over the allocation of Atlantic fish stocks, leading to problems that are far from being resolved. In the longer run, *Marshall* also has implications that are equally far-reaching for the interpretation of treaties all across Canada.

Both the majority and minority opinions in *Marshall* agreed in explicitly repudiating the rule of interpretation for treaties proposed by Justice Estey in the *Horse* case (1988), where he wrote that "extrinsic evidence is not to be used in the absence of ambiguity" in the wording of a treaty. It is not surprising that Estey's rule of interpretation has been overturned; it was always unpopular with aboriginal advocates, and it has never been consistently followed, not even in the case in which it was promulgated. The courts in the last decade have repeatedly looked at historical sources in interpreting the meaning of treaties, even where the treaty text seemed plain enough on its face. In that sense, *Marshall* was only a more adventurous application of the current judicial approach to the interpretation of treaties.

*Marshall*, however, did not deal with aboriginal oral traditions. The Supreme Court used conventional historical sources to support the proposition that the parties had an oral understanding of the treaty not expressed in the written text. The true importance of *Marshall* for the future does not emerge until it is "read together" (as lawyers like to say) with the Supreme Court's *dicta* about aboriginal oral traditions in *Delgamuukw* (1997). In that case, Chief Justice Antonio Lamer laid down the following principle:

Notwithstanding the challenges created by the use of oral histories

as proof of historical facts, the laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents.

The chief justice was concerned that, in cases like *Delgamuukw*, involving facts from a time when no written records existed, it might be impossible for native plaintiffs to make out much of a case if oral traditions were not given independent weight.

There are, to be sure, some important differences between *Delgamuukw* and treaty litigation. In *Delgamuukw*, there was no text to interpret because there was no treaty; the plaintiffs were offering their oral traditions as evi-

dence about their occupancy of land before the time when white settlers were present to write down their observations. In contrast, treaty cases focus on the interpretation of a text, and aboriginal oral traditions recount events that are also recorded in conventional documents. Indeed, aboriginal peoples had already become at least partially literate when the later treaties were signed. Be that as it may, there is little doubt that the courts will read *Delgamuukw* and *Marshall* together and will begin to make more extensive use of aboriginal oral traditions in interpreting treaties.

The confluence of *Delgamuukw* and *Marshall* will pose novel challenges both to the judicial process and to the understanding of treaty rights. Aboriginal oral traditions about the meaning of treaties are often startlingly different from what the written text appears to say. Let me give three examples from current treaty litigation in Alberta—cases with which I am familiar because of my work as a historical consultant. I am sure that hundreds of similar instances could be adduced wherever treaties have been signed in Canada.

## BENOIT

No treaty mentions the topic of taxation. However, the commissioners sent by the federal government to negotiate Treaty 8 (1899) found many aboriginal people "impressed with the notion that the treaty would lead to taxation." They therefore reassured the crowd assembled at Lesser Slave Lake that Treaty 8 "did not open the way to the imposition of any tax." At the same time, they emphasized that "whether treaty was made or not, they were subject to the law." The government of Canada has

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always interpreted these reassurances as meaning that Treaty 8 in itself did not impose any taxes but that Canada retained legislative power to levy taxes upon status Indians or to grant tax exemptions, as has been done under the *Indian Act*. Now the plaintiffs in the *Benoit* case are arguing that the commissioners' promises are an enforceable part of the treaty, and that those promises must be interpreted in the light of aboriginal oral traditions that say, in the words of one informant, that "tax was prepaid."

## RIOALTO

According to Treaty 8 (and all the other numbered treaties), "the said Indians do HEREBY CEDE, RELEASE, SURRENDER AND YIELD UP TO THE government of the Dominion of Canada, and for Her Majesty the Queen and Her successors for ever, all their rights, titles and privileges whatsoever" to the lands described in the treaty, although "they shall have the right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered . . . saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes." Alberta has always interpreted these words to mean that, because aboriginal title has been surrendered, the province has the unfettered ability to grant tenures upon Crown lands, even though aboriginal people may still hunt, fish, and trap there. Plaintiffs in the *RioAlto* case now say their approval must be obtained before the province can allow the cutting of seismic lines on so-called traditional lands where band members hunt and trap, even though these are not reserve lands. According to the plaintiffs' oral tradition, "our people have always naturally understood [the treaty] to mean that the Crown would respect our traditional ways and not undertake or approve any activity which would adversely affect our abil-

[T]here is little doubt that the courts will read *Delgamuukw* and *Marshall* together and will begin to make more extensive use of aboriginal oral traditions in interpreting treaties.

ity to hunt, trap, fish and carry out our traditional practices."

## SAMSON

The *Samson* case has been widely publicized because the plaintiffs, the Samson Cree Nation of Hobbema, allege that the government has mismanaged their natural resource revenues for decades, and they are claiming over a billion dollars in compensation. There is also an important treaty-interpretation aspect to the case. Treaty 6 has a land-surrender clause similar to the one just cited from Treaty 8. Plaintiffs, however, say they only surrendered the surface of the land, which would seem to make them still owners of huge amounts of oil and natural gas beyond the boundaries of their reserve.

Elders of Treaty No. 6 will testify that a fundamental basis of the treaty was that the Plains Cree would share the land with agricultural or farming settlers. However, Treaty No. 6 did not provide for a surrender of any right in the land beyond an ability to enjoy a plough's depth to permit white settlers to till the surface of the soil in order to be able to farm and feed themselves. The Cree belief is that the land, in the sense of the whole country or island of Canada, belongs to the Creator. The Cree understanding was that the Europeans or white settlers who pursued their different way of life on lands where crops could be grown would be sharing them with Plains Cree who were following the traditional way of

life. The mountains, the lakes and the other areas of the land which the Plains Cree considered to be unsuited to agriculture would be left as their territory. The ploughshare or plough blade metaphor is used by Cree speakers to describe this understanding of sharing by which the whites could use only what was necessary to sustain themselves.

These three cases, and many others like them, were all underway before the Supreme Court handed down its decision in *Marshall*. Now, however, counsel for plaintiffs in these cases will argue that *Marshall*, together with *Delgamuukw*, raises the credibility of aboriginal oral traditions. It seems that for a long time to come, the litigation community—judges, lawyers, expert witnesses, as well as the parties themselves—will be grappling with questions to which at present there are no clear answers. To mention only a few:

- Who is a credible oral informant? Any band member? Any elder? Someone whose ancestors were present at treaty negotiations?
- How does one assess the credibility of oral traditions passed down over several generations? How much error can be expected to creep in through the process of intergenerational transmission?
- How does one decide between oral traditions that conflict with one another, as when two different aboriginal communities both claim to have used and lived upon a certain territory? Oral tradition is not a

monolithic concept. There is no single oral tradition; rather, there are many oral traditions, which sometimes contradict one another.

- What weight should be given to oral traditions that do not just pro-

vide information to resolve ambiguity but rather directly contradict the wording of treaties and statutes?

As these questions are gradually dealt with, the importance of *Marshall* for

struggles over control of land and natural resources everywhere in Canada will come to outweigh greatly the value of Donald Marshall's 463 pounds of eels, or even the tons of crab and lobster now at stake in the Atlantic fishery. ❁

## The Marshall decision continued from page 56

communities in territories approximating the territories of the original signing group. (This at least is the conclusion drawn by government agencies who are attempting to implement the decision.) Yet the anomaly of the majority decision is that it was not based on an examination of the Cape Breton treaty that presumably would protect Mr. Marshall's rights, but rather on a Maliseet treaty and the first of the Mi'kmaq treaties, both signed months before the Cape Breton treaty. Moreover, Pomquet Harbour, the location of Mr. Marshall's eel fishing, is not on Cape Breton Island, but rather on the Nova Scotia mainland at least 50 kilometers from Cape Breton. Effectively, the Court did not examine either the local treaty or the relevant territory of Donald Marshall Jr.'s community, the Membertou Reserve on Cape Breton Island.

Second, if the court agrees that these are local treaties, yet in wording they are identical, it would be logical to assume that what makes each a distinctive treaty is its context, including whatever extrinsic evidence there is of oral agreements. There was such an oral agreement in the Cape Breton treaty negotiation: a British promise that the Mi'kmaq present on this occasion could practise their Roman Catholicism and that the British would help acquire a suitable priest for them. This is what was most important to the Cape Breton chief. The British willingness to listen to such a request and to make a promise in reply suggests that they recognized the decentralized polity of the Mi'kmaq and the distinctive voices of each group. If oral agreements are equally part of a treaty, then one must interpret each in its own context and reject the notion that all of the

[I]f the court agrees that these are local treaties, yet in wording they are identical, it would be logical to assume that what makes each a distinctive treaty is its context, including whatever extrinsic evidence there is of oral agreements. There was such an oral agreement in the Cape Breton treaty negotiation.

Mi'kmaq treaties were identical simply because of their written form. Does this not equally suggest that the extrinsic evidence surrounding the Maliseet treaty has no relevance to the Mi'kmaq treaties unless it can be demonstrated that the Mi'kmaq raised similar concerns? If each was in fact a good faith negotiation, does each not have to be examined in its full context to determine what made it a local treaty of local application?

There is a constitutional requirement that aboriginal and treaty rights cases draw on history as well as law. My argument is that the two are equal, and meeting the constitutional test requires the application of the highest professional standards of both disciplines. In a word, bad history cannot make good law. The Marshall case represents both an honest attempt to blend history and law, and an illustration of some of the problems yet to be resolved in doing so. At trial, both the Crown and the defence, drawing on the lesson of the *Simon* decision, presented hundreds of documents through historians serving

as expert witnesses. The historians did far more than recite facts; they provided their professional skill in interpreting difficult material, and they explained the methods they employed in coming to the conclusions they made. Both sides, perhaps, provided far more than the courts either needed or wanted, and it may well have been reasonable for the Supreme Court to narrow the focus as it did in its final decision. But in doing so, the court could have asked for more evidence in its fullest historical context, and sent questions back to a trial court if the evidence at hand was insufficient. *Marshall* suggests that the process by which history is incorporated into aboriginal and treaty rights decisions still requires some attention. Among other matters, the court especially needs to rethink what it means by "extrinsic evidence." And it needs to provide clearer links between centuries-old treaties and their native beneficiaries in the present. The object, surely, is to ensure that the highest standards of legal and historical interpretation are afforded Canadians who rely on s. 35(1) for protection. ❁

# Defence under attack continued from page 35

political correctness, or by the hue and cry of the public for protection from violent crime. Weak legal reasoning will diminish the rights not only of the unpopular accused but also those of all accused, including the innocent. ❁

- 1 (1999), 139 C.C.C. (3d) 321 (S.C.C.).
- 2 (1999), 134 C.C.C. (3d) 353 (S.C.C.).
- 3 (1999), 132 C.C.C. (3d) 225 (S.C.C.).
- 4 (1995), 103 C.C.C. (3d) 1 (S.C.C.).
- 5 Sections 278.2(2) and (3)
- 6 Section 278.4(3). The “insufficient grounds” section was upheld by the court based on an interpretation that permitted the trial judge to make a finding of likely relevance where *any one* of the listed assertions was made and supported by the required evidentiary or informational foundation. However, see the disappointing decision of the Ontario Court of Appeal, *R. v. P.E.*, [2000] O.J. no. 574 (C.A.), where the court held that statements to a therapist touching on the issues in the case, close in time to the decision to press charges, did not meet the threshold of likely relevance without more.
- 7 Section 278.5(2).
- 8 Chief Justice Lamer (as he then was), was the sole dissenter in *Mills*. However, even he found only one as-

pect of the legislation to fall below a constitutionally acceptable level. This was in relation to third-party records in the possession of the Crown.

- 9 Justice Bastarache wrote for the majority, including Justices L’Heureux-Dubé, Gonthier, Cory, and McLachlin. A spirited dissent was written by Justice Binnie on behalf of himself, Lamer, Iacobucci, and Major.
- 10 *Stone*, paras. 173-81.
- 11 *R. v. Parks* (1992), 75 C.C.C. (3d) 287 (S.C.C.).
- 12 See David Paciocco’s excellent article, “Death by *Stone*-ing: The Demise of Simple Automatism,” 26 C.R. (5th) 273. See also *R. v. Balenko*, [2000] Q.J. 717.
- 13 Justice Cory wrote for the majority, joined by Justices L’Heureux-Dubé, Gonthier, McLachlin, Iacobucci, and Bastarache. Justice Major expressed the minority view, shared by Chief Justice Lamer (as he then was) and Justice Binnie.
- 14 *Smith*, para. 100.
- 15 *Hunter v. Southam* (1984), 14 C.C.C. (3d) 97 (S.C.C.), at 105-6.
- 16 Debra McAllister, *Taking the Charter to Court* (Toronto: Carswell, 1999), at 2-7.
- 17 Don Stuart, “*Mills*: Dialogue with Parliament and Equality by Asser-

tion at What Cost?” 28 C.R. (5th) 275, at 277-78.

- 18 *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110.
- 19 Cited at para. 176 of *Stone*.
- 20 The only analogy that comes to mind is in relation to identification, where the trier of fact is sometimes warned of the “inherent frailties” of identification evidence, or that identification evidence has on a number of occasions proven to be erroneous. However, the preferable view is to instruct the jury of the need for caution about identification evidence *in the circumstances of the particular case*. *R. v. Olbey*, [1971] 4 C.C.C. (2d) 103 (Ont. C.A.).
- 21 See notes 12 and 17 above, as well as R.J. Delisle, “*Stone*: Judicial Activism Gone Awry To Presume Guilt,” 24 C.R. (5th) 91.
- 22 [2000] B.C.J. no. 235 (C.A.).
- 23 See Editorial Note, “Rewriting Automatism” (1999), 4 *Can. Crim. L.R.* 119.
- 24 It is not clear from the judgment whether the court had the benefit of argument on the constitutionality of reversing the burden of proof.
- 25 *R. v. Ruzic*, [1998] S.C.C.A. no. 504. (The author is co-counsel on this appeal.)

## FROM THE EDITORS

The papers in this volume were originally presented at the 3rd Annual Canada Watch Constitutional Cases Conference, held at Osgoode Hall Law School of York University on April 7, 2000. The Conference was attended by 125 registrants from six provinces, along with a number of international participants, including six judges from the Russian Constitutional Court.

Planning is underway for the 4th Annual Canada Watch Constitutional Cases Conference, which will examine the Supreme Court of Canada’s constitutional decisions released in the 2000 calendar year. The conference will be held at Osgoode Hall Law School of York University on April 6, 2001. The keynote speaker will be Chief Justice Beverley McLachlin of the Supreme Court of Canada.

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