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Canada's Native Languages: The Right of First Nations to Educate Their Children in Their Own Languages

David Leitch*

Introduction

Canada used to consider itself not only a bilingual, but also a bicultural country.[1] Biculturalism was based on the idea that Canada had two founding cultures, the French-language culture dominant in Quebec and the English-language culture dominant everywhere else, with French and English minorities scattered across the country. This view of Canada obviously failed to recognize both the Aboriginal cultures that existed prior to European contact and the cultures of those immigrants who came to Canada with no knowledge of French or English or with knowledge of those languages but otherwise distinguishable cultures.

Prime Minister Pierre Trudeau appeared to announce the death of biculturalism in 1971 when his government introduced the policy of multiculturalism. He declared at that time that Canada no longer had any "official" cultures.[2] But this only replaced the old fiction with a new one. In the same term of office in which Mr. Trudeau denied the existence of official cultures, he passed a law recognizing French and English as Canada's official languages.[3]

Now, there is no more distinguishing feature of most cultures than their languages. Nor is there a more meaningful way for a country to recognize and preserve any of its constituent cultures than to constitutionalize the right to educate children in the language of that culture *at public expense*. That is precisely the right that Mr. Trudeau delivered to the English and French minorities of Canada through section 23 of the *Canadian Charter of Rights and Freedoms*.[4] Moreover, as will been seen, the Supreme Court of Canada has unequivocally affirmed that the main purpose of this right is to preserve and promote the cultures associated with those languages.

In other words, Canada's brand of multiculturalism does not place all cultures on an equal footing. The *Charter* may protect all cultures and languages from governmental interference,[5] but it only *explicitly* gives the right to publicly funded education to Canada's official language minorities, that is, the anglophone minority inside Quebec and the francophone minorities located in other provinces and territories.

Despite what is provided for in the *Charter*, this paper nevertheless asks whether Canada's First Nations also have the constitutional right to educate their children in their own languages

at public expense. It attempts to answer this question by examining the following sub-issues:

1. How has education in Aboriginal languages been governed since Confederation?
2. Even if it is not their constitutional right, can and should Canada's First Nations have the *legislated* right to educate their children in their own languages at public expense?
3. Does section 35 of the *Constitution Act, 1982* constitutionalize this right?
4. If so, what is the value of this constitutional right to First Nations?

The paper refers briefly to the international law implications of the question posed, but proposes an answer based entirely on Canadian constitutional law. That choice is deliberate: while the reader might disagree with the paper's interpretation of domestic law, there can be no dispute that, properly interpreted, that law applies in Canada and binds Canadian governments.[6]

How Has Education in Aboriginal Languages Been Governed Since Confederation?

Pre-confederation treaties between Aboriginal and non-Aboriginal peoples were for peace and friendship. Upon Confederation in 1867, the federal government acquired exclusive jurisdiction over "Indians, and Lands reserved for the Indians."[7] Between 1871 and 1923, the federal government entered into an additional thirteen treaties with First Nations, eleven numbered treaties and the two "Williams" treaties. The text of these historical treaties[8] dealt primarily with the creation of Indian reserves and the maintenance of Aboriginal hunting and fishing rights. Education for Aboriginal children was mentioned only in the numbered treaties, and then only in the vaguest of terms and never with any reference to the language of instruction. *Treaty No. 7* was typical:

> Further, Her Majesty agrees to pay the salary of such teachers to instruct the children of said Indians as to Her Government of Canada may seem advisable, when said Indians are settled on their Reserves and shall desire teachers.[9]

The vagueness of the historical treaties is explained by a comment found in the body of *Treaty No. 10*, signed in 1906:

> As to education, the Indians were assured that there was no need for special stipulation over and above the general provision in the treaty, as it was the policy of the government to provide in every part of the country as far as circumstances would permit, for the education of the Indian children, and that the law provided for schools for Indians maintained and assisted by the government.[10]

Despite the vagueness of the historical treaties, the federal government had very definite ideas about the kinds of schools it intended to provide. Under predecessors to the current *Indian Act*,[11] the government embarked upon a century-long attempt to assimilate native children by placing up to one third of them (approximately 100,000) in residential schools under the direct control of Anglican, Catholic, Presbyterian, and Methodist churches. Over 100 such schools were established in all but two provinces. Contrary to the treaties, these schools were not always located on reserves. Even if they were, Aboriginal children were isolated from their families and communities, were forbidden to speak their native languages, and were severely punished for doing so. The *Annual Report of the Department of Indian Affairs* in 1895 outlined the goal of residential schools: "If it were possible to gather in all the Indian Children and retain them for a certain period, there would be produced a generation of English-speaking Indians, accustomed to the ways of civilized life."[12]

Since the closing of the last residential schools in the early 1980s, the federal government has not passed any legislation recognizing the right of First Nations to educate their children in their own languages. It has, instead, allowed Indian school boards greater control over the 500 or more on-reserve schools. This increased autonomy has

been achieved through a combination of block funding arrangements[13] and bilateral transfer agreements between individual bands and the Department of Indian Affairs and Northern Development. Canadian Heritage, another branch of the federal government, also funds Aboriginal language initiatives undertaken by both local and national Indian organizations. These bureaucratically controlled measures have permitted some First Nations to educate their children in their own languages. They have not, however, given First Nations an enforceable right to educate their children in their own languages, and they have not imposed on the federal government an enforceable obligation to fund such education.

Since education is a matter of provincial or territorial jurisdiction in Canada,[14] it may be thought that any federal legislation establishing those kinds of rights and obligations would be unconstitutional. It would not. Aboriginal languages are incontrovertibly located at the core of "Indianness." Education of Aboriginal children in those languages has, therefore, always remained within the primary, if not the exclusive, authority of the federal government. Yet, the federal government has never asserted its full legislative authority in this area. On the contrary, the federal government has equipped itself with the power to effectively delegate this authority to the provinces and territories. Under section 88 of the federal *Indian Act*, the federal government can simply adopt, without any federal legislation, "all laws of general application in force from time to time in any province" and make those laws "applicable to and in respect of Indians in the province." According to the Supreme Court of Canada, this section authorizes the federal government to "incorporate by reference" provincial laws of general application even when the application of those laws to Indians alters or impairs their "Indianness."[15] Section 114 of the current *Indian* Act still permits the federal government to enter into agreements with provinces and territories for the education of Indian children.

It is true that section 88 does not permit provincial laws to override treaty rights but, as noted, the text of the historical treaties was silent on the language of education. Of course, since the Supreme Court of Canada's decision in *Marshall 1*,[16] the interpretation of treaties is no longer restricted to the written text. Extrinsic evidence of the historical and cultural context, as well as oral representations and understandings, may be also considered even in the absence of any ambiguity on the fact of the treaty. It would, therefore, be open to a First Nation to present oral evidence establishing that on its understanding of the agreement reached, the treaty included its right to educate its children in its own language.

However, it must be acknowledged that such evidence might not be available, might prove to be ambiguous, or might even suggest the opposite conclusion. In the *Thomas* case, the trial judge observed:

> In the present case, evidence was given by the Chief of the Peguis Band, that according to oral tradition, the purpose of the education clause in Treaty No. 1 was to provide educational services to the Indians to enable them to compete with non-Indians in the post-Treaty era.[17]

This type of evidence would, arguably, support a finding that the First Nation understood and accepted that its children would learn things that would "enable them to compete with non-Indians," including, presumably, non-Indian languages. Indeed, the historical context might also support a finding that, *at the time the treaty was entered into*, the First Nation was still unaware of both the potential threat to the survival of its own language and the potential need, generations later, to ensure the survival of the language by teaching it to children in schools established under the treaty. In any event, even if a court accepted that oral or other evidence supported a finding that an historical treaty included the First Nation's right to educate its children in its own language, that finding would be based on the evidence in that case and would not necessarily assist other First Nations. It would clearly not assist First Nations who never entered into treaties with Canada or the United Kingdom.

It is also true that recent education and self-government agreements in three provinces have recognized the right of First Nations to determine the language of education of their children. Here again, however, the implementation of that right is achieved through a combination of federal and provincial laws, which are limited to the Indian bands and the provinces in question. Not unexpectedly, the result is a patchwork of laws across the country that may be summarized as follows.

In seven of the ten provinces, English and French are the only languages of instruction in public schools. This is the case in Alberta, Manitoba, New Brunswick, Newfoundland and Labrador, Ontario, Saskatchewan, and Prince Edward Island. In these provinces, Aboriginal languages may be the subject of study in publicly funded schools attended by Aboriginal children, but First Nations have no *right* to educate their children in their own languages.

In three of the ten provinces — Nova Scotia, British Columbia, and Quebec — agreements on education or self-government give certain First Nations the right to determine the language of education of their children in publicly funded schools. In Nova Scotia, this is accomplished through a federal statute and a provincial statute, both called the *Mi'kmaq Education Act*.[18] In British Columbia, it is accomplished through a federal statute and a provincial statute, both called the *Nisga'a Final Agreement Act*,[19] and through the federal *Sechelt Indian Band Self-Government Act*[20] and the provincial *Sechelt Indian District Enabling Act*.[21] In Quebec, it is accomplished through the federal *Cree-Naskapi (of Quebec) Act*,[22] the provincial *Act Respecting Cree, Inuit and Naskapi Native Persons*,[23] and the provincial *Charter of the French Language*.[24] First Nations in these three provinces who are not covered by these laws have no right to educate their children in their own language in publicly funded schools.[25]

There are three territories in Canada: the Northwest Territories, Nunavut, and the Yukon. Under the education statutes of both the Northwest Territories and Nunavut,[26] the language(s) of instruction are determined by District Education Authorities, who may choose any one or more of the languages recognized under official languages statutes. There are ten official languages in the Northwest Territories: Cree, English, French, Gwich'in, Inuinnaqtun, Inuktitut, Inuvialuktun, North Slavey, South Slavey, and Taîchô. There are eight official languages of Nunavut: Chipewyan, Cree, Dogrib, English, French, Gwich'in, Inuktitut, and Slavey. In the Yukon, the Minister of Education may authorize an educational program or part of an educational program to be provided in an Aboriginal language after receiving a request to do so from a School Board, Council, school committee, Local Indian Education Authority or, if there is no Local Indian Education Authority, from one of the Yukon First Nations recognized under the federal *Yukon First Nations Self-Government Act*.[27]

Even If It Is Not Their Constitutional Right, Can and Should Canada's First Nations Have the Legislated Right to Educate Their Children in Their Own Languages at Public Expense?

First Nations are not properly regarded as "minorities" in Canada. They are instead peoples whose ancestors inhabited North America long before European contact. Indeed, this fact was accepted as the foundation of Aboriginal rights by the Chief Justice of the Supreme Court of Canada in 1996 the leading case of *R. v. Van der Peet*:

> In my view, the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples *were already here*, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status.[28]

This paper will presently turn to the question of whether section 35(1) of the *Constitution Act, 1982*[29] constitutionalizes the right of First Nations to educate their children in their own languages at public expense. However, it must first be emphasized that even if, contrary to the views expressed later in the paper, this right has *not* been constitutionalized, it still can and should be recognized through ordinary federal and provincial legislation.

In theory, this kind of legislation would be open to attack by minority languages groups on the ground that it violates their right to equality under the *Charter*.[30] In practice, section 25 of the *Charter* pre-empts such attacks by stipulating that the *Charter* cannot be used to "abrogate or derogate from any aboriginal, treaty or *other rights* . . . that pertain to the aboriginal peoples of Canada."[31] This means that even if the right of First Nations to educate their children in their own languages is not a constitutional right, it is still possible for that right to be created and implemented by ordinary federal and provincial legislation and, hence, included in the expression "*other rights* . . . that pertain to the aboriginal peoples of Canada."[32] As such, the legislated right would be sheltered from attack by other minority language groups seeking the same right.

As for the reasons why Canada's First Nations should have the legislated right to educate their children in their own languages at public expense, there are at least three. First, of Canada's fifty-three native languages, all but three – Cree, Inuktitut, and Obijway – are extinct or will soon cease to exist unless they are taught to the children and grandchildren of the dwindling numbers of people who still speak them. These languages may also be spoken in the United States, but are under equal, if not greater, threat of extinction. The near-death status of most Aboriginal languages makes their situation dramatically different from that of other languages in Canada, all of which are spoken elsewhere in the world.

Second, the precarious state of most Aboriginal languages is a direct result of residential schools. No other cultural group in Canada has been subject to a state-sponsored attempt to eradicate its language. English-speaking provincial governments have often refused to fund French-language schools and, in one province, prohibited instruction in French for a period of time.[33] Immigrant children have always been required to learn, if they did not already know it, the language of instruction of Canada's public schools. But residential schools were again dramatically different. They did more than teach Aboriginal children English or French; they isolated those children from their families and communities for the express purpose of destroying their knowledge of their own languages and cultures. In these circumstances, it is not enough that residential schools were eventually closed or that some residential school victims may eventually recover damage awards for their language losses.[34] First Nation communities should now be given the legislated right to educate their children in their own language at public expense.

There is a third reason to accord First Nations this right. By doing so, Canada would conform to the emerging international standards set by other countries with indigenous populations, such as the United States, Finland, and New Zealand.[35]

Does Section 35 of the *Constitution Act, 1982* Constitutionalize the Right of First Nations to Educate Their Children in Their Own Languages?

Our topic requires us to examine the import of the first three subsections of section 35 of the *Constitution Act, 1982*,[36] as set out below. The fourth and last subsection of section 35 reads as follows: "Notwithstanding any provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons."[37] While this provision is obviously important, it is not, in the present context, capable of generating serious legal debate.

(A) Section 35(1): "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

According to the Supreme Court of Canada's 1990 decision in *R. v. Sparrow*, this subsection constitutionalizes "existing aboriginal and treaty rights."[38] Given the potential difficulties and limitations of arguments based on treaty rights, as noted above, this paper focuses on whether First Nations still possess "existing aboriginal rights" to educate their children in their own languages. This question raises two issues: (1) Did First Nations ever have that "Aboriginal right"?; and (2) Did they still have it in 1982, when section 35(1) was adopted?

(i) Did First Nations ever have the "Aboriginal right" to educate their children in their own languages?

The leading case on the definition of "Aboriginal rights" is again the Supreme Court of Canada's 1996 decision in *R. v. Van der Peet*.[39] The Court there noted that Aboriginal rights were recognized by the common law prior to 1982. The Court stated that their further recognition under section 35(1) was "directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown."[40] For constitutional purposes, the Court adopted the following definition of Aboriginal rights: "the practices, traditions and customs central to the Aboriginal societies that existed in North America prior to contact with the Europeans."[41]

Beyond this basic definition, the Court held that in order to be "central" to the Aboriginal society in question, the activity had to be "integral" to its "distinctive culture":

> The court cannot look at those aspects of the aboriginal society that are true of every human society (e.g., eating to survive), nor can it look at those aspects of the aboriginal society that are only incidental or occasional to that society; the court must look instead to the defining and central attributes of the aboriginal society in question.[42]

The Court also required that the pre-contact practice, custom, and tradition "have continuity with" the present-day practice, custom, and tradition claimed as an Aboriginal right.[43]

Since every human society has created its own language, it might be argued that an Aboriginal society's need to communicate was equivalent to its need to "eat to survive," and that its language could not, therefore, be described as distinctive to its culture. However, in *Van der Peet*, the Court was careful to emphasize that Aboriginal rights are defined by their "distinctiveness," not their "distinctness." It gave the following example drawn from its previous decision in *Sparrow*:

> Certainly no aboriginal group in Canada could claim that its culture is "distinct" or unique in fishing for food; fishing for food is something done by many different cultures and societies around the world. What the Musqueam claimed in *Sparrow* . . . was rather that it was fishing for food which, in part, made Musqueam culture what it is; fishing for food was characteristic of Musqueam culture and, therefore, a *distinctive part* of that culture. Since it was so it constituted an aboriginal right under s. 35(1).[44]

It might also be argued that the education of children in schools was foreign to Aboriginal societies prior to contact with Europeans. This may well be true, particularly in relation to reading, writing, and other academic subjects. It is nonetheless certain that Aboriginal societies educated their children in their own languages in their own ways, successfully transmitting those languages from generation to generation prior to European contact. According to the *Van der Peet* decision, Aboriginal rights are not to be denied just because Aboriginal societies "adapted" their practices, customs, and traditions in response to the arrival of Europeans. It is only "where the practice, custom or tradition arose solely as a response to European influences" that it fails to meet the standard for recognition as an Aboriginal right.[45] Looked at from this perspective, Aboriginal societies are entitled to adapt their teaching methods without losing their Aboriginal right to continue teaching their children in their own languages. As the Court observed:

> The evolution of practices, customs and traditions into modern forms will not, provided that continuity with pre-contact practices, customs and traditions is demonstrated, prevent their protection as aboriginal rights.[46]

Moreover, when considering the effect of residential schools, it is important to note the Court's willingness to overlook certain breaks in "continuity" between pre-contact and present-day practices, customs, and traditions. The Court rejected the need for proof of "an unbroken chain of continuity," stating:

> It may be that for a period of time an aboriginal group, for some reason, ceased to engage in a practice, custom or tradition which existed prior to contact, but then resumed the practice, custom or tradition at a later date. Such an interruption will not preclude the establishment of an aboriginal right.[47]

Finally, the *Van der Peet* decision makes it impossible to argue that Aboriginal rights can only be asserted in relation to physical resources such as land, game, or fish, and not in relation to intellectual resources such as languages. The Court wrote:

> Aboriginal rights arise from the prior occupation of land, but they also arise from the prior social organization and distinctive cultures of aboriginal peoples on that land. In considering whether a claim to an aboriginal right has been made out, courts must look at both the relationship of an aboriginal claimant to the land *and* at the practices, customs and traditions arising from the claimant's distinctive culture and society. Courts must not focus so entirely on the relationship of aboriginal peoples with the land that they lose sight of the other factors relevant to the identification and definition of aboriginal rights.[48]

It must be acknowledged that the Supreme Court of Canada has yet to comment on the status of Aboriginal languages under section 35(1). It has, however, decided numerous cases involving section 23 of the *Charter*. As will be recalled, this is the section of the *Charter* that gives official language minorities the constitutional right to educate their children in their own language at public expense. The Court's decisions in this area have always emphasized the link between the right to educate children in a particular language and the maintenance of the distinctive culture associated with that language. The most eloquent description of that link is found in the 1990 decision of *Mahe v. Alberta*,[49] in which Dickson Chief Justice wrote and quoted as follows:

> The general purpose of s. 23 is clear: it is to preserve and promote the two official languages of Canada, and their respective cultures, by ensuring that each language flourishes, as far as possible, in provinces where it is not spoken by the majority of the population. The section aims at achieving this goal by granting minority language educational rights to minority language parents throughout Canada.
>
> My reference to cultures is significant: it is based on the fact that any broad guarantee of language rights, especially in the context of education, cannot be separated from a concern for the culture associated with the language. Language is more than a mere means of communication, it is part and parcel of the identity and culture of the people speaking it. It is the means by which individuals understand themselves and the world around them. The cultural importance of language was recognized by this Court in *Ford v. Quebec (Attorney General)*:
>
> > Language is not merely a means or medium of expression; it colours the content and meaning of expression. It is, as the preamble of the *Charter of the French Language* itself indicates, *a means by which a people may express its cultural identity.*[50]

There is no reason to believe that the Supreme Court of Canada would regard education in Aboriginal languages as less important for the distinctive cultures of First Nations than education in English and French for the distinctive cultures of Canada's official language minorities.

(ii) Did First Nations still have the "Aboriginal right" to educate their children in their own language in 1982, when section 35(1) was adopted?

Section 35(1) constitutionalizes only "*existing* aboriginal . . . rights." Since there were no relevant constitutional amendments prior to 1982, the Aboriginal rights of First Nations continued to exist thereafter unless they were extinguished prior to 1982 either by treaty or by federal legislation.

Dealing first with extinguishment by treaty, it is settled law that any ambiguities or doubtful expressions in the wording of treaties must be resolved in favour of the Indians. In its 1996 decision in *R. v. Badger*, the Court reiterated that "any limitations which restrict the rights of Indians under treaties must be narrowly construed."[51] The historical treaties contemplated the establishment of schools, but they placed no restrictions on the language of instruction and did not, therefore, extinguish the right of First Nations to educate their children in their own languages.

As for pre-1982 federal laws, the *Sparrow* decision held that such laws could extinguish Aboriginal rights only if they manifested a "clear and plain intention" to do so.[52] Just as there has never been a federal law recognizing the right of First Nations across Canada to educate their children in their own languages, neither has there ever been a federal law expressly extinguishing this right. The policies of residential schools were obviously inconsistent with the exercise of that right, but these were policies, not laws, and they did not affect all First Nations in the same way. Indeed, in *Sparrow*, the Court held that even valid federal laws *restricting* or *regulating* Aboriginal rights did not *extinguish* those rights. The Court observed that incorporating such laws into a section 35 analysis would freeze a "constitutional patchwork quilt" reflecting nothing more than the different ways the Aboriginal rights of different First Nations happened to be regulated in 1982 or before. The Court again declared: "The phrase 'existing aboriginal rights' must be interpreted flexibly so as to permit their evolution over time."[53]

Finally, in view of the importance of provincial laws as explained above, it must be emphasized that such laws are incapable of extinguishing Aboriginal rights. In the 1997 case of *Delgamuukw v. British Columbia*, the Supreme Court held that even when provincial laws are "adopted" by the federal government under section 88 of the *Indian Act*,[54] that section "does not evince the requisite clear and plain intent to extinguish aboriginal rights."[55]

(B) Section 35(2): "'[A]boriginal peoples of Canada' includes the Indian, Inuit and Métis peoples of Canada"

This subsection is of particular significance for the Métis, people of mixed Aboriginal and European ancestry. The *Van der Peet* decision anticipated that the Aboriginal rights of this group would have to be defined differently than those of the Indian and Inuit peoples. In its 2003 decision in *R. v. Powley*,[56] the Supreme Court confirmed that because the Métis people developed their own identity and ways of life after the European arrival, their Aboriginal rights could not be fairly defined using the pre-European contact test adopted in *Van der Peet*. Instead, the Court enunciated the following test for the definition of Métis Aboriginal rights:

> [Their] unique history can most appropriately be accommodated by a post-contact but pre-control test that identifies the time when Europeans effectively established political and legal control in a particular area. The focus should be on the period after a particular Métis community arose and before it came under the effective control of European laws and customs. This pre-control test enables us to identify those practices, customs and traditions that predate the imposition of European laws and customs on the Métis.[57]

The Métis language, Mitchif, a blend of French, Cree, Ojibway, and Dene is, therefore, an Aboriginal language for the purposes of the present inquiry.

(C) Section 35(3): "For greater certainty, in subsection (1) 'treaty rights' includes rights that now exist by way of land claims agreements or may be so acquired"

This subsection, added in 1983, anticipates the signing of "modern" treaties or "land claims agreements," and appears to recognize

their constitutional status. As noted above, the federal government has, in fact, signed various transfer, educational, and self-government agreements with First Nations since 1982 and has also passed enabling legislation in three provinces and one territory. However, the federal government has not been prepared to acknowledge the constitutional status of these arrangements without the participation and agreement of the province concerned, as was obtained in the *Nisga'a Final Agreement*.[58] The Federal Policy Guide on Aboriginal Self-Government states:

> As a general principle, existing self-government agreements will continue to operate according to their existing terms. If requested by the Aboriginal groups concerned, and with the full participation of the province or territory concerned, the federal government would be prepared to explore issues related to constitutional protection of aspects of the self-government arrangements set out in the *Sechelt Indian Band Self-Government Act* in British Columbia, the *Cree-Naskapi (of Quebec) Act*, and the *Yukon First Nations Self-Government Act*. Any changes or amendments to existing arrangements, however, would only be made with the full agreement of all parties concerned.[59]

It should be noted that in the same document, the federal government acknowledged that Aboriginal self-government should extend "to matters that are internal to the group, integral to its distinct Aboriginal culture"[60] and, in that regard, specifically mentioned Aboriginal languages and education.

Ironically, since self-government negotiations deal with all sorts of other matters beside language rights and tend to be very protracted, they have effectively prevented First Nations from establishing their constitutional right to educate their children in their own language. That is because while these negotiations have produced very few constitutionally recognized treaties including that right, they have discouraged First Nations from asserting that right in the courts. Let us nevertheless assume that the Supreme Court of Canada has just decided that section 35 does recognize and affirm the Aboriginal and, therefore, the constitutional right of First Nations to educate their children in their own languages. What value would that constitutional right have to First Nations?

What is the Value of This Constitutional Right to First Nations?

On one view of the matter, this Aboriginal/constitutional right would have little value to First Nations. True, the federal government could no longer legislate that right out of existence, but First Nations already have protection against that remote possibility through the *Charter*'s guarantee of freedom of expression.[61] Moreover, according to the Supreme Court's decision in *Sparrow*, the federal government would still be entitled to regulate or otherwise infringe upon the right so long as it could meet a standard of justification involving proof of the following: that the regulation was for a "compelling and substantial" objective, that it respected "the special relationship of trust" between the Crown and Aboriginal peoples, that it infringed as little as possible on the right, and that it was implemented in consultation with First Nations.[62] Provincial laws of general application would also be allowed to regulate or infringe upon the right under the authority of section 88 of the *Indian Act*,[63] subject to the same standard of justification. Finally, the Aboriginal/constitutional right recognized by section 35 would not include an explicit guarantee of public funding for Aboriginal language education; that kind of guarantee has only been given to Canada's official language minorities through section 23 of the *Charter*.

These observations may be legally accurate, but they do not provide a proper measure of the potential value of the Aboriginal/constitutional right at issue. Such an appraisal requires an analysis of the right from two additional perspectives: (1) the nature of the right, and (2) its relationship with the Royal Proclamation of 1763.

(A) Nature of the Right

Supreme Court jurisprudence to date has only analyzed Aboriginal/constitutional rights in the context of access to physical resources such as land, game, or fish. First Nations have asserted their rights in these cases in order to stop governments from authorizing activities that threatened to eliminate or reduce their access to those resources.

In constitutional law terms, this kind of right is often called a "negative" right. It operates to negate the authority of any government to extinguish or infringe upon Aboriginal/constitutional rights, though, as just noted, infringements are still possible on proof of justification. Most of the provisions contained in the *Charter* operate in the same way. They negate the authority of any government to deprive citizens of certain rights and liberties, such as equality, freedom of expression, or freedom of association, unless those violations can be justified under section 1 of the *Charter*.

Now, in the present context, freedom of expression is not just another right guaranteed by the *Charter*. On the contrary, it guarantees, among other things, the right of all citizens to educate their children in their own, non-official, languages *at their own expense*. It would, therefore, make little sense to regard the Aboriginal/constitutional right of First Nations to educate their children in their own languages as merely a reaffirmation of the "negative" right they already possess under the *Charter*. It makes more sense to regard that right as a "positive" right intended not to negate governmental authority, but rather to impose governmental responsibility.

This view, in fact, is concordant with the Supreme Court of Canada's views about the nature of language rights generally. In its 1999 decision in *R. v. Beaulac*, a majority of the Court wrote:

> Language rights are not negative rights or passive rights; they can only be enjoyed if the means are provided. This is consistent with the notion favoured in the area of international law that the freedom to choose is meaningless in the absence of a duty of the State to take positive steps to implement language guarantees.[64]

Addressing specifically the *Charter* right to educate children in the official languages of Canada, the Supreme Court's 1990 decision in *Mahe* stated:

> The provision provides for a novel form of legal right, quite different from the type of legal rights which courts have traditionally dealt with. Both its genesis and its form are evidence of the unusual nature of s. 23. Section 23 confers upon a group a right which places positive obligations on government to alter or develop major institutional structures.[65]

Moreover, there is no doubt that the provincial and federal governments of Canada already have positive obligations to provide funds for the education of all children, whether Aboriginal or not, and whether covered by treaties or not. Are those governments relieved of any duty to respect the Aboriginal/constitutional right of First Nations to educate their children in their own languages merely because that right, unlike the right given by section 23, is not accompanied by an explicit guarantee of public funding? Sections 16 to 20 of the *Charter* contain no explicit reference to public funding either, but there is nevertheless no doubt that the Governments of Canada and New Brunswick are constitutionally bound to provide the funding necessary to fulfill the positive language obligations imposed upon them by those provisions.

(B) The Royal Proclamation of 1763

As previously explained, the federal government could have asserted direct legislative authority over the education of Aboriginal children in Aboriginal languages across Canada, but has never done so. Again, on one view of the matter, government inaction of this kind was, and still is, constitutionally acceptable because no government is required to fully exercise its legislative authority. That authority is permissive, not mandatory. Where Aboriginal rights are concerned, however, there is a competing view, one that traces its origins back to the Royal Proclamation of 1763.

The British had just defeated the French for control over most of North America, but had inherited a new and urgent problem. To colonize this vast territory, they needed first to come to terms with the still-powerful Aboriginal nations who did not consider themselves bound by the British victory, but who were prepared to recognize the British Crown if that would help to stem the steady encroachment of settlers onto their lands. The solution adopted by the Royal Proclamation of 1763 offered something for everyone: it asserted British sovereignty over all lands not already "ceded" by Aboriginal nations, *i.e.*, most of the continent; it promised Aboriginal nations "who live under our Protection" undisturbed possession of these lands; and it created a process for further settlement, but only through future land surrenders to the Crown. This third feature forced local governments and settlers to acquire lawful title directly from the Crown, thus facilitating more peaceful colonial expansion. But it also created a monopoly over the terms on which Indians surrendered their lands, as they were specifically prohibited from transferring their lands to anyone but the Crown. On Confederation, control of this monopoly passed from the British Crown to the Government of Canada.

More than two hundred years after the Royal Proclamation, in the 1984 case of *Guerin v. Canada*, the Supreme Court of Canada held that the Crown-only surrender requirement "and the responsibility it entails" were "the source of a distinct fiduciary obligation owed by the Crown to the Indians."[66] The Supreme Court then expanded the scope of the fiduciary duty in *Sparrow* by agreeing with a lower court that the federal government has the "'responsibility . . . to protect the rights of Indians arising from the special trust relationship created by history, treaties and legislation.'"[67]

It can, therefore, be asserted that the federal government has, *and has always had*, a fiduciary duty to protect the Aboriginal right of First Nations to educate their children in their own languages. That right was clearly part and parcel of their Royal Proclamation right to undisturbed possession of unceded land. Any suggestion that subsequent land cessions somehow diminished this right can be characterized as contrary to both logic and law: logic, because the continued exercise of this right does not require the reversal of any land cessions, and law, because only the continued exercise of this right permits its "evolution over time."

Moreover, if this right was constitutionalized in 1982, it can be further asserted that the federal government has, since then, had a double fiduciary duty to act to protect Aboriginal languages hovering on the brink of extinction. The submission would be that since the federal government can no longer pass a law extinguishing an Aboriginal language right recognized under section 35 of the *Constitution Act, 1982*,[68] it can also no longer fail or refuse to pass a law designed to protect that right from imminent extinction.

No doubt, the federal government would still maintain that it *has* acted, both by funding Aboriginal language initiatives and by allowing many First Nations greater control over education generally. It might also dispute the need for federal legislation, alleging that such legislation could never accommodate the differing needs and attitudes of all First Nations.

However, where language education rights are concerned, a government can comply with its minimal constitutional obligation only by enacting laws turning that obligation into an enforceable right. This was made clear by the Supreme Court of Canada's decision in *Mahe*, regarding section 23 of the *Charter*. That section does not specifically require provincial legislatures to pass laws implementing the constitutional right. Yet, the Court described the constitutional obligation of those legislatures as follows:

> [T]he government should have the widest possible discretion in selecting the institutional means by which its s. 23 obligations are to be met; the courts should be loathe to interfere and impose what will be necessarily procrustean standards, unless that discretion is not exercised at all, or is exercised in such a way as to deny a constitutional right. Once the Court has declared what is required in Edmonton, then the government can and must do whatever is necessary to ensure that

these appellants, and other parents in their situation, receive what they are due under s. 23. *Section 23 of the* Charter *imposes on provincial legislatures the positive obligation of enacting precise legislative schemes providing for minority language instruction and educational facilities where numbers warrant.* To date, the legislature of Alberta has failed to discharge that obligation. It must delay no longer in putting into place the appropriate minority language education scheme.[69]

Conclusion

This paper has asked whether Canada's First Nations also have the constitutional right to educate their children in their own language at public expense. The word "also" acknowledges the fact that section 23 of the *Charter*[70] specifically gives that constitutional right to Canada's official language minorities. It is clear that First Nations do not have exactly the same right as official language minorities; the latter right is, for example, subject to the test of "where numbers warrant." The pedagogical challenges facing First Nations would also be very different than those facing official language minorities.

Still, this paper has proposed a positive answer to the question posed. It has done so by reading the Supreme Court of Canada's jurisprudence in relation to Aboriginal rights together with its jurisprudence in relation to section 23 of the *Charter*. The opinion expressed is that Parliament can be obliged to adopt legislation implementing the constitutional right of First Nations to educate their children in their own languages. Such legislation would give First Nations an enforceable right and would permit the courts to measure and evaluate that right against constitutional standards. The paper has also expressed the opinion that even if federal legislation implementing this right is not constitutionally required, it would still be within the joint legislative authority of the federal and provincial governments, it would be justified, and it would survive *Charter* scrutiny.

Notes

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1 In 1963, the government of Prime Minister Lester B. Pearson appointed a public enquiry known as the Royal Commission on Bilingualism and Biculturalism. Its mandate was to recommend ways to recognize the equality of Canada's "two founding peoples."

2 *House of Commons Debates* (8 October 1971) at 8545 (Right Hon. P.E. Trudeau).

3 The federal government he led introduced the first *Official Languages Act* in 1969. See *Official Languages Act*, R.S.C. 1985, c. 35 (4th Supp.).

4 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*]. Section 23 provides:

> (1) Citizens of Canada
>
> a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or
>
> b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province, have the right to have their children receive primary and secondary school instruction in that language in that province.
>
> (2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.
>
> (3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province
>
> a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and

> b) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

5 *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, 1988 CanLII 19.

6 On 29 June 2006, Canada voted against adoption of the *Draft Declaration on the Rights of Indigenous Peoples* at the inaugural session of the United Nations Human Rights Council. Article 14 of the *Draft Declaration* reads:

> 1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.
>
> 2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.
>
> 3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.

Report of the Human Rights Council, UN GA, 61st Sess., Annex, UN Doc. A/C.3/61/L.18/Rev.1 (2006), online UN High Commissioner for Human Rights <http://www.ohchr.org/english/issues/indigenous/docs/wgdd2006/18-rev1.doc>.

7 *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 91(24), reprinted in R.S.C. 1985, App. II, No. 5.

8 These historical treaties can be found on the Department of Indian Affairs and Northern Development (DIAND) web site, online: <http://www.ainc-inac.gc.ca/pr/trts/hti/site/trindex_e.html>.

9 Canada, *Copy of Treaty and Supplementary Treaty No. 7, Made 22nd Sept., and 4th Dec., 1877, Between Her Majesty the Queen and the Blackfeet and Other Indian Tribes, at the Blackfoot Crossing of Bow River and Fort McLeod* (Ottawa: Queen's Printer, 1966) [*Treaty No. 7*]. For an electronic version of *Treaty No. 7,* see online: DIAND <http://www.ainc-inac.gc.ca/pr/trts/trty7_e.html>.

10 Canada, *Treaty No. 10 and Report of Commissioners* (1907) (Ottawa: Queen's Printer, 1966) [*Treaty No. 10*]. For an electronic version of *Treaty No. 10,* see online: DIAND <http://www.ainc-inac.gc.ca/pr/trts/trty10_e.html>.

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

12 Canada, *Dominion of Canada Annual Report of the Department of Indian Affairs* (Ottawa: Queen's Printer, 1895) at xxiii, online: Library and Archives Canada <http://www.collectionscanada.ca/indianaffairs/020010-119.01-e.php?uidc=ID&uid=9777&sk=&query_string=>.

13 *Thomas v. Canada (Minister of Indian Affairs and Northern Development)*, [1991] 2 F.C. 433 (T.D.) [*Thomas*].

14 See *Constitution Act, 1867*, *supra* note 7, s. 93; *Yukon Act*, S.C. 2002, c. 7, s. 18(o); *Northwest Territories Act*, R.S.C., 1985, c. N-27, s. 16(n); and *Nunavat Act*, S.C. 1993, c. 28, s. 23(m).

15 *Dick v. The Queen*, [1985] 2 S.C.R. 309, 1985 CanLII 80 at paras. 38, 40-44. This decision has been consistently followed and applied, most recently in *R. v. Morris*, 2006 SCC 59 (CanLII).

16 *R. v. Marshall*, [1999] 3 S.C.R. 456, 1999 CanLII 665 [*Marshall 1*].

17 *Thomas*, *supra* note 13 at 446.

18 S.C. 1998, c. 24; S.N.S. 1998, c. 17.

19 S.C. 2000, c. 7; S.B.C. 1999, c. 2.

20 S.C. 1986, c. 27.

21 R.S.B.C. 1996, c. 416.

22 S.C. 1984, c. 18.

23 R.S.Q., c. A-33.1.

24 R.S.Q., c. C-11.

25 A federal statute, *First Nations Jurisdiction over Education in British Columbia Act*, S.C. 2006, c. 10, received Royal Assent at the end of 2006 but is not in force at the time of publication. If this law comes into force, it will give participating First Nations in British Columbia the right to educate their children in their own languages in publicly funded schools.

26 S.N.W.T. 1995, c. 28.

27 S.C. 1994, c. 35.

28 [1996] 2 S.C.R. 507, 1996 CanLII 216, at para. 30, Lamer C.J.C. [emphasis in original] [*Van der Peet*].

29 *Supra* note 4.

30 *Ibid*.

31 *Ibid.*, s. 25 [emphasis added].

32 *Corbiere v. Canada (Minister of Indian and Northern Affairs)* [1999] 2 S.C.R. 203, 1999 CanLII 687 at para. 52 [emphasis added] [*Corbiere*]. In *Corbiere*, four Supreme Court justices confirmed that "rights included in s. 25 are broader than those in s. 35, and may include statutory rights."

33 *Reference re Education Act of Ontario and Minority Language Education Rights* (1984), 47 O.R. (2d) 1 (C.A.).

34 *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401, 2004 CanLII 45444. The recent Indian Residential Schools Settlement Agreement of 8 May 2006 does not provide specific compensation for loss of language. It provides instead a "common experience payment" for all losses resulting from attendance at residential schools except sexual and serious physical abuse for which losses are assessed individually. See Official Court Notice, online: <http://www.residentialschoolsettlement.ca/Settlement.pdf>.
35 F. De Varennes, "Les droits linguistiques dans une perspective internationale" in Sylvie Léger, ed., *Les droits linguistiques au Canada: Collusions ou collisions?* (Ottawa: Centre canadien des droits linguistiques, 1995) c. 4.
36 *Supra* note 4.
37 *Ibid.*, s. 35(4).
38 [1990] 1 S.C.R. 1075, 1990 CanLII 104 [*Sparrow*].
39 *Supra* note 28.
40 *Ibid.* at para. 31.
41 *Ibid.* at para. 44.
42 *Ibid.* at para. 56.
43 *Ibid.* at paras. 60-67.
44 *Ibid.* at para. 72 [emphasis in original].
45 *Ibid.* at para. 73.
46 *Ibid.* at para. 64.
47 *Ibid.* at para. 65.
48 *Ibid.* at para. 74 [emphasis in original].
49 [1990] 1 S.C.R. 342, 1990 CanLII 133 [*Mahe*].
50 Ibid. at 362 [emphasis in original].
51 [1996] 1 S.C.R. 771, 1996 CanLII 236 at para. 41.
52 *Sparrow*, *supra* note 38 at 1099.
53 *Ibid.* at 1093.
54 *Supra* note 11.
55 [1997] 3 S.C.R. 1010, 1997 CanLII 302 at para. 183 [*Delgamuukw*].
56 [2003] 2 S.C.R. 207, 2003 SCC 43 (CanLII).
57 *Ibid.* at para. 37.
58 (27 April 1999), online: DIAND <http://www.ainc-inac.gc.ca/pr/agr/nsga/nisdex12_e.pdf>.
59 Canada, Federal Policy Guide, "Aboriginal Self-Government: The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government" (1995), online: DIAND <http://www.ainc-inac.gc.ca/pr/pub/sg/plcy_e.html>.
60 *Ibid.*
61 *Supra* note 4, s. 2(b).
62 *Sparrow*, *supra* note 38.
63 *Supra* note 11.
64 [1999] 1 S.C.R. 768, 1999 CanLII 684 at para. 20.
65 *Supra* note 49 at 365.
66 [1984] 2 S.C.R. 335 at 376, 1984 CanLII 25.
67 *Supra* note 38 at 1107, quoting *R. v. Agawa* (1988), 28 O.A.C. 201 at para. 44 (C.A.), Blair J.A.
68 *Supra* note 4.
69 *Supra* note 49 at 393 [emphasis added].
70 *Supra* note 4.

An Opportune Moment: The Judicial Appointment Reforms and the Judicial Credentials Demanded by the Charter

Daniel Nadler*

In 2005, Minister of Justice Irwin Cotler proposed and tabled in Parliament a number of reforms to the federal judicial appointment process. These reforms were designed to increase the transparency and enhance the accountability of the procedures by which judges are appointed to federally operated Canadian courts, including the Supreme Court of Canada. Included in the reform package was a Code of Ethics for members of the judicial appointment committees, as well as a directive to publish on an annual basis the identity of the members of the judicial appointment committees, the number of total applications for judicial office, and the number of that total that have been recommended or highly recommended by the committee. Crucially, a set of guidelines for the operation of the judicial appointment committees was provided, which outlined the overriding principles that committee members were to consider during the appointment advisory process. These principles included:

- Merit as the terminal objective. "The overriding objective of the appointments process is to ensure that the best candidates are appointed, based on merit."[1]
- Diversity within the framework of merit. "[T]he Supreme Court of Canada bench should to the extent possible reflect the diversity of Canadian society."[2]
- Accountability and nonpartisanship through two-pronged transparency. "First, ensuring the process is publicly engaged, known and understood. Second, structuring the process to bolster public confidence that decisions are made for legitimate reasons that are not linked to political favouritism or other improper motives." [3]

While speaking with the Honourable Irwin Cotler at a mid-2006 conference,[4] I asked him about the future of those reforms, given the federal election of the Conservative Party several months earlier. Though he remained confident that the reforms could improve public understanding of and confidence in the appointment process by increasing transparency and accountability, whether the reforms would be adopted, implemented, and entrenched by the current government and successive administrations remained an open question for him.

His uncertainty was not surprising. In the winter of 2006 the "Cotler procedure" was given its first — albeit partial — application after Supreme Court Justice John C. Major retired from the bench. Justice Minister Cotler and the outgoing Liberal government had formed a nomination committee prior to their departure from power. From the "long list" provided by Mr. Cotler, that committee had produced a "short list" of three candidates for the replacement of the retiring justice. During my conversation with Mr. Cotler, he stressed that the three "short list" candidates who were forwarded to Stephen Harper, the new Prime Minister, were to the greatest extent possible selected by a committee formed in accordance with, and operating through, the procedures and guidelines advocated by the Cotler proposals tabled in Parliament in 2005.

Initially, the Harper government showed encouraging signs of their willingness to validate, entrench, and give continuity to the Cotler procedure by incorporating it into the practices of their own government, thereby taking the first necessary steps of "institutionalizing" it as a procedural tradition and, eventually, as a constitutional convention. Harper ultimately selected Federal Court of Appeal Justice Marshall Rothstein, one of the three "short list" candidates advanced by the nomination committee that had been guided by the "Cotler procedure." Following up on election promises to "reform" a "unilateral" appointment procedure that he and the Conservative party had long been critical of, Harper created an Ad Hoc Committee to Review a Nominee for the Supreme Court of Canada — the first of its kind in Canadian history — which placed the Prime Minister's nominee before members of Parliament, and their putatively searching, American-style judicial hearing questioning, though the system was never presented or generally perceived as an American import.

Although Prime Minister Harper boasted that "'[t]he way in which Justice Rothstein was appointed marks an historic change in how we appoint judges in this country,'" bringing "'unprecedented openness and accountability to the process,'"[5] the parliamentary judicial hearing, which was not part of the original Cotler proposal, was in the end conducted like a Soviet arraignment — intentionally theatrical and inconsequential. Before the first questions were even asked, Harper emphasized that the *ad hoc* committee would have absolutely no veto power over the Prime Minister's nomination, and the committee members were asked to refrain from asking the nominee to discuss his personal views on particular moral controversies or his stances on subject areas that were, or could become, areas of Supreme Court jurisprudence (*i.e.*, "To what extent would the nominee give further effect to the rights and guarantees contained within the *Charter*?"[6]). Canadian representatives in Parliament learned little about Harper's nominee other than that when it came to judicial appointments, the Prime Minister's "man" was still untouchable. Though the tenor and tempo of the new appointment procedure harmonized well with the byzantine movements of Canada's high court appointment history, it stood in jarring juxtaposition to the Conservative rhetoric of "transparency" and "accountability" in the judicial appointment process. And as if to add insult to injury, the Prime Minister's Office released a statement cautioning momentarily heartened reformers: "The hearing by the Ad Hoc Committee to Review a Nominee for the Supreme Court of Canada was an interim process designed to fill the specific vacancy left by Justice Major. Full details of a process to fill future vacancies will be announced at a future date."[7] The first performance of the Cotler procedure was botched, and the audience told that they might never see a second attempt.

The Conservative government now has a unique, but temporal opportunity to declare that judicial appointment reform is not just the limited initiative of one former justice minister and a motley crew of special interest groups and legal academics, but a nonpartisan national priority. In the immediate term, the best way for the current government to achieve this is to openly and avowedly appropriate Mr. Cotler's reforms, with the declared intention of institutionalizing their practice as a binding constitutional convention that could only be ignored at a steep political price. Examined

below is the exigent need for the entrenchment of these and even greater reforms — including, I argue, making an applicant's predisposition to give full force and effect to the *Charter* and the rights contained therein an important barometer in the consideration of his or her "merit." This aspect and goal of Canadian judicial appointment reform has been conspicuously absent from the recent literature. Existing studies and proposals for reform of the judicial appointment process have been deficient in that they fail to connect:

- the primary role and activity of a federally-appointed justice,
- the new institutional role and mandate of the Canadian courts in the *Charter* era, and
- the relevant criteria to be considered during the judicial appointment process.

Parts of the subsequent discussion will thus reiterate and develop upon Lorraine Weinrib's lonely dissenting voice,[8] in an attempt to focus debates about judicial appointment reform on the new considerations, needs, and realities of our *Charter* era.

Over the last decade, public confidence in the Canadian federal court system — and the appointment process in particular — has been tenuous. Indicators such as the 2001 Ipsos-Reid poll that showed 84 percent of Canadians believed that the Supreme Court was "influenced by partisan politics"[9] are familiar to academic and media circles. This cynicism is not limited to the general public; members of Parliament, including those who sat on the House of Commons Subcommittee on the Process for Appointment to the Federal Judiciary, have called for ways to "ensure that merit is the only consideration when people are appointed to the bench."[10] One member of that committee stated in the House: "'We need the best minds, the best individuals and the most qualified persons comprising the bench at all levels.'"[11] He was not endorsing the existing reality. In recognition of these public and professional sentiments, Mr. Cotler acknowledged, before the House of Commons, that "[w]e would agree that yet another shared objective is increased transparency and accountability."[12] Mr. Cotler also explained to the House what was at stake in the success or failure of creating a judicial appointment process in which the Canadian nation had confidence:

> [T]he review of the appointments process is a task of great importance to our country, given that the Supreme Court is at the pinnacle of our court system and that our court system is a fundamental pillar of our constitutional democracy. It is the court of last resort for all legal disputes in Canada, most notably those involving questions of federal and provincial jurisdiction under the Constitution as well as those concerning rights violations under the Charter . . . .[13]

For Mr. Cotler, the strength or weakness of the appoint system is the strength or weakness of "a pillar of our constitutional democracy."[14] This is likely: the growing judicialization of politics, and the transfer into the judicial sphere of national-status questions, restorative justice formulae, and — with the advent of the *Charter*, the fundamental dilemmas of a political community, have empowered what critics like Ran Hirschl deride as an unelected "juristocracy" that plays a growingly decisive role in determining, defining, and resolving the workings of the Canadian polity.[15] These criticisms must not remain unanswered. Determining how we get who we get on the federally operated courts influences no less than the final character of our democracy. I have thus sought to identify three broad criteria for evaluating a high court appointment process:

- politicization of the process,
- transparency of the process, and
- representational-effectiveness of the process and result.

Subsequently, I define and delineate these criteria using normative, theoretical, and jurisprudential frameworks, using these categories to evaluate the current appointment process. This exercise reveals low to moderate performance across all three indicators. I

then look to the potential for reform. While "import" mechanisms such as judicial elections and inquisitorial review offer means of "democratizing" the judicial appointment process, the Canadian political system is an environment more conducive to moderated reforms that have some historical precedent or grounding in our legal and political traditions. The most viable and sensible of such reforms would be the creation of *potent* nominating commissions, a goal towards which Mr. Cotler's reforms are a crucial first step.

The Necessity of Democratizing the Third Branch of Government

In one of the seminal works of the literature, constitutional scholar Peter Russell called the Supreme Court of Canada the "third branch of government."[16] The public desire to "democratize" the federal judicial selection process became salient following the adoption of the *Charter*, and is now reaching a *crescendo* with the growing understanding and awareness of the seemingly limitless opportunities that the *Charter* provides for the expansion of the high court's dominion of justiciabilty. This awareness is made palpable by the conspicuous transfer of national status questions and seminal moral and political controversies such as *Reference re Secession of Quebec*[17] and *Reference re Same-Sex Marriage*[18] to the judicial sphere, and ultimately to the Supreme Court. Russell connected judicialization with the demand for democratization of judicial appointments as early as 1987: "[A]s the power and discretion of judges comes to be more broadly recognized, a deeper democratic urge for more openness and accountability in their selection arises."[19] On the twentieth anniversary of the *Charter*, former Supreme Court Justice Frank Iacobucci observed, "Alongside the increased public interest in the judiciary and *Charter* there has been much commentary and numerous proposals regarding the appointment of judges. The debate is based upon the argument that since the judiciary has been greatly empowered under the *Charter*, the appointment of judges should be more transparent and democratically controlled."[20]

Hirschl[21] argues that there has been a gradual yet veritable structural shift in Canadian and other Westminster-style democracies away from the principle of parliamentary supremacy and towards the reality of constitutional and judicial supremacy — a movement that, coupled with highly arbitrary, discretionary, and politicized appointment systems, grates at the democratic character of these polities. Hirschl sees the elected Canadian political sphere transferring "the most pertinent and polemical moral dilemmas and political controversies a democratic polity can contemplate"[22] to the purview of unelected judges, a process he calls judicialization, and which is derivative of political "self-interested hegemonic preservation."[23] As conniving as it sounds, hegemonic preservation involves threatened, yet power-wielding, political elites attempting to maintain and develop their political hegemony by insulating their policy making from the "vicissitudes" of majoritarianism and democratic politics. They do this by initiating the establishment of institutions that promote judicial intrusion into the prerogatives of executives and legislatures, resulting in elite-favoured and often immutable outcomes. For Hirschl, these seemingly sinister and certainly undemocratic motivations "are important reasons for the expansion of judicial power in Canada during the last two decades."[24] The problem, however, with a judicial-constitutional tower built on odiously undemocratic foundations is the prospect of consistent countermajoritarian norm-creation and the maintenance of a cultural "metanarrative" that advances and protects the agenda of ruling political elites and that, unlike traditional legislative, ministerial, and bureaucratic decision-making, leaves behind an almost indelible political-ideological framework under the constraints of which the Canadian polity must operate. This danger is why Hirschl and other scholars argue that while the Canadian Supreme Court *is* making "substantive political choices"[25] such as *Reference re Secession of Quebec*,[26] "[d]emocracy requires

that the choice of substantive political values be made by elected representatives rather than by unelected judges."[27]

If one accepts that with the *Charter* era now roaring, the prospects for narrowing the scope of justiciability in the Supreme Court of Canada look both untenable and undesirable, then answering the devastating critiques of skeptical democratic libertarians like Hirschl requires a judicial appointment system that, to every extent possible, minimizes arbitrariness, unchecked elite discretion, and crass politicization. This is still fanciful in Canada. Yet there are scarcely few other ways to intelligently respond to the questioning of critics like Hirschl, who ask how an appointment process that advances "unelected, unaccountable judges"[28] with "questionable democratic credentials"[29] who are "not likely to hold policy preferences that are substantially at odds with those held by the rest of the political elite"[30] (since they were appointed by an "explicitly political nomination process")[31] can be reconcilable with our traditional democratic commitment to the openness, transparency, and accountability of the most powerful governmental institutions. This call for democratization of the judicial appointment process is not just appealing to civil libertarians, it also resounds forcefully with those on the "left" who feel that the courts — whose appointees have always been emblems of the center of the Canadian politico-ideological spectrum — have not gone far enough in imbuing the *Charter* with force, weight, and meaning.[32]

It is thus not difficult to hear a concordant, bipartisan demand for the democratization of the judicial appointment process, which Greene calls "'a front-end mechanism of accountability.'"[33] Put another way, neither the interests of *Charter* Canadians nor the interests of *Charter* skeptics — no interests, save the institutional demands of nepotism, cronyism, and corruption — are advanced by maintaining the current system of judicial appointment.

That the relevant jurisprudence also demands a *transparent* and *accountable* process is neither tangential nor trivial. In *Valente v. The Queen,*[34] the Supreme Court elaborated an indirect constitutional guarantee of "judicial independence" and specified "institutional independence" as its necessary corollary. Four years later in *Edmonton Journal v. Alberta (Attorney General),*[35] the Court fettered "institutional transparency" to the concept of "judicial independence." Taken together, these rulings began a jurisprudential framework for the liberation of the federal judicial appointment process from the at-her-Majesty's-pleasure-and-prerogative system of unchecked and highly politicized executive discretion that essentially characterized the twentieth century Canadian system.

Evaluation of System-Specific Deficiencies

Having established the normative and public demand for the reformation of an appointment process that is roundly perceived as undemocratic, we can return to exploring the specific weakness and issue areas most in need of attention and reform: transparency, representational effectiveness, and politicization.

Representational effectiveness

Representational effectiveness is broadly defined as the extent to which the selection process incorporates and reflects the multifarious demographic, ethnic, religious, racial, gender, and regional diversity of the Canadian nation. The nomination and appointment process for Canada's highest court should be construed as a vehicle for recognition by the Canadian nation of its cornucopian demography and, moreover, as an opportunity to extend a declaratory — normatively prescriptive — imprimatur to it.

Regional and gender equality at the Supreme Court level are the only areas of representational success. Completely representative provincially, the Court has also progressed from a male-only institution, prior to Justice Bertha Wilson's appointment in 1983, to near-gender equality

by 2004, with a four-to-five ratio of female-to-male justices (including a female Chief Justice). This process of gender equalization has also transcended the declaratory level of Canadian Supreme Court appointments: in fact, between 1989 and 1994, female applicants to federal courts more than doubled, from 12 to 26 percent.[36] However, effective representation ends there. Not a single member of Canada's over one million Aboriginals, 700,000 African-Canadians, or three million Asian-Canadians has ever been appointed to the Supreme Court, leaving over 17 percent of Canada's population without ever having been "represented" at this "third branch of government." Later, I discuss whether attempts to ameliorate this failure of representativeness can be balanced against the demands of a merit-based appointment system.

Transparency

We can understand transparency as the extent to which the selection process is open to public scrutiny and accountability. In *Edmonton Journal*, the Supreme Court firmly articulated the necessity of transparency, stating that "the courts must be open to public scrutiny and to public criticism of their operation . . . ."[37] Logically this openness should also extend to the process that in the first place decides who will sit on the bench. However, according to Russell, "[W]e know so little about what lies behind the [Canadian Bar Association] committee's verdicts" on judicial candidates that "it is difficult to judge the fairness or appropriateness of its assessments."[38] Indeed, according to their own report, the Canadian Bar Association's review process is enveloped in a "mystique of secrecy."[39]

Politicization

Politicization can be understood as the extent to which the selection process is influenced by factors other than the aptitude, experience, and merit of the candidates. As early as 1922, a Canadian Bar Association report observed "'that the vicious system of making judicial nominations rather as rewards for political services than for the professional qualifications of candidates shows no sign of disappearing from our customs . . . .'"[40] The federal track record of successive politicized appointments at the provincial level inspires little confidence in their handling of the Supreme Court appointment process; between 1905 and 1970, "94.8 percent of the former politicians appointed by Liberal governments to Ontario courts were Liberals."[41] In what Russell called "the orgy of patronage appointments"[42] that took place in 1984, the Liberals appointed six professional politicians to judicial posts, of whom "one or two could be defended on their merits . . . , [though] it is doubtful that anyone would say that each . . . meets Lang's standard of the 'best possible choice.'"[43] According to Weinrib, "while the appointees have of late possessed much better credentials, many still have had professional, governmental and personal ties to leading figures in the government."[44] Russell and Ziegel have noted that party politics also heavily influenced the appointment process of the Mulroney Government.[45] In 1973, Prime Minister Trudeau abrogated a constitutional convention and appointed Bora Laskin to the position of Chief Justice, although he was not the most senior sitting justice and had only three years experience on the Supreme Court. Unmistakably, he was elevated because of his national unity, pro-federalist ideology, and his decade-long chief justiceship was instrumental in centralizing the Canadian nation through the assignment of ever-broader powers to the federal government. The argument that the cabinet has taken a "neutrality" approach to potential Supreme Court appointees' stances on federalism is not aided by the fact that between 1997 and 2002, "the federal government won seventeen significant victories and lost only three substantive appeals to provincial governments,"[46] or by the fact that the Supreme Court has expressed an "explicit anti-secessionist impulse"[47] in every Quebec-related ruling. Moreover, according to Russell, "Partisanship in recruiting the federal judiciary has, to be sure, systematically excluded supporters of third parties."[48] Indeed, "Behind the closed door of a cabinet meeting, the considered recommendation of the Minister of Justice or Attorney General may go for nought in the face of . . . partisan, personal or other considerations."[49] According to a Manitoba

Law Commission report in 1994, the effect of this extreme politicization on public confidence in the legal system "could be corrosive,"[50] and the report argued that the politicization of the appointment process "may precipitate the belief among the public and the legal profession that . . . judges, having attained their position as a result of the governments favor, are therefore obligated to the government . . . . "[51] Indeed, by 2001, 70 percent of Canadians surveyed believed that partisan politics influenced the decisions of the Supreme Court, which, according to respondents, would probably "line up on the side of the federal government because the judges were appointed by it."[52] Weinrib concurs that the present system is "at times heavily influenced, to its detriment, by partisan political considerations."[53] She holds the "partisan use" of the appointment power responsible for the "damage to the public perception of the impartiality of the bench and the mixed quality of judicial appointments."[54] From the classical institutional and structural perspectives on divided, checked, and balanced government, one must also immediately deplore as inappropriate politicized intrusion a federal cabinet being given *carte blanche* in appointing members of a high court that is entrusted with a solemn responsibility to invalidate, when necessary, legislation advanced by that very cabinet.

Apologies for such egregious deficiencies are as uncommon as they are politically contrived. Nevertheless, increasing performance across all three indicators — representational effectiveness, politicization, and effectiveness — is by no means a complementary, self-reinforcing process. Often these areas of needed reform make demands at cross-purposes with one another. The decision to redress the gender imbalance of the courts at times resulted in a 50 percent reduction in the size of the candidate pool[55] — a bargain that when made regularly and over time (in any direction, whether privileging males or females) probabilistically comes at the expense of merit when merit means selecting the best of the qualified candidates. Further pressure to make the Court a vehicle for declaratory representation — whether racial, ethnic, linguistic, or religious — will pose no less of a threat to merit than did historical decisions that at times reduced the selection pool to white, Anglican males. Conversely, decreasing the politicization of the appointment process could involve a commensurate deterioration in the representational effectiveness of the appointments. Decisions made on the basis of "apolitical," merit-based criteria might diminish the competitiveness of disadvantaged ethnic, regional, racial or socio-economic groups *vis-à-vis* the established, well-educated and predominantly white, urban intellectual elite. Likewise, greater transparency might increase politicization as prime ministers and cabinets begin to see the new appointment process as a vehicle for demonstrating to constituents that they are selecting candidates with the "right values" — pandering showmanship that is of slightly less concern in an opaque and unaccountable selection process. Thus a holistic construction of "democratization" must be applied to any appointment reform proposal, since meaningful and progressive change of a court appointment system necessitates a nuanced balancing of:

- increased transparency,
- increased representational-effectiveness,
- decreased politicization, and
- sensitivity to the unique dynamism of the Canadian nation.

The Cotler proposal to Parliament in 2005, discussed earlier in this article, constitutes an excellent first step to sensibly balancing these criteria and considerations. One reason is that any reform package that successfully balances and incorporates the four above-mentioned criteria would likely feature at its core the adoption of a vitalized nominating commission containing representatives from both levels of government, empowered to actively seek out suitable candidates and make ranked recommendations that could only be ignored at a steep political cost. Lederman, the Canadian Bar Association and the Canadian Law Teachers,[56] as well as many other reports and findings (*e.g.*, those

made by Friedland and Russell) have been proposing some variation of such a system for at least the past two decades. According to these proposals, a specially constituted council, staffed by the sitting Chief Justice of the court to which the appointment is being made, representatives of the Canadian Judicial Council, the federal Minister of Justice, the Canadian Bar Association, the general public, and, crucially, the attorneys general of the concerned provinces, would hold primary responsibility for federal court nominations.[57] Under such a system, the general public, provincial bars and governments, and members of the opposition could all submit names for consideration. Although pursuant to section 96 of the *Constitution Act, 1867*,[58] and the *Supreme Court Act*,[59] Cabinet would still make the final Supreme Court appointment, a political convention would presumably develop whereby the political costs of ignoring the commission's recommendations would be prohibitive.[60] This system has three distinct advantages:

- broadening participation in the selection process to include both levels of government and a greater diversity of interests, backgrounds, and political agendas, which would likely broaden the demographic representation and ideological spectrum of the nominees;
- increasing the transparency of the selection process by producing nominees that are ranked according to a publicly known schema; and
- decreasing the arbitrary and patronage-based aspects of the current politicized process, and decreasing *to some degree* the hegemonic preservation of the governing elite's ideological agenda[61] through their partisan selection of amenable judicial ears and voices.

The decrease in politicization that an empowered nomination commission would produce would also further the expansion of the *Charter*. The current ideological-brokerage model of judicial appointments — appointing candidates who represent a narrow, centrist sliver of the full Canadian legal-ideological spectrum — operates at the expense of what should now be the *raison d'être* of the Supreme Court of Canada: giving fuller force and effect to the *Charter* and the revolution it inspired. This task would require unfurling the *Charter*'s concise and limited language and transfiguring the result into a rich panoply of legal norms, and a case-law discourse of nuanced jurisprudential distinctions. Doing this will not just take judicial leadership — it will require jurisprudential prescience and an almost preternatural socio-political sensitivity. How an appointment process can discover and select justices with these qualities — the qualities required of a *Charter* justice — demands consideration.

Judicial Appointment for the *Charter* Era

The last decade has shown that neither culture wars fought on constitutional battlegrounds nor the related decline of merit as *the* criterion to be considered in an appointment to the nation's highest court are endemic to the United States. The Canadian federal judicial appointment system has, to date, categorically declined the opportunity to establish, as a norm, the incomparable importance of raw *skill* to the act of adjudicating the meaning of the *Constitution Act* and the *Charter*. Instead of using the appointing power as a symbol of the association between merit and the demands of judging, the pre-2006 system of federal judicial appointments in Canada — up to and including Supreme Court appointments — became complicit in the denigration of the national status of public law by leaving out individual *faculty* and *ability* from the list of traits and qualifications most immediately considered in the judicial appointment process. It failed to comprehend that seemingly obvious — even platitudinous — imperative to look for *the best of the best* when making appointments to the national court system. *Individual faculty* and *ability* must become the primary considerations of an empowered nominating commission, which understands the strong association

between those character traits and success as a *Charter*-entrenching Canadian justice. What does it imply about the seriousness with which the Canadian nation pursues the rule of law and the aspiration to a categorical commitment to constitutionally protected rights when past affiliation with the federal Liberal Party[62] is a more reliable historical predictor of appointment to the federally operated court system — including the Supreme Court — than is proven experience in solving complex legal problems, and the documented ability to harmonize innovatively the competition between conventional precedents and rights claims putatively undergirded by layered textual guarantees? The high court in any nation sets the standard for the entire judicial system, and indubitably, making merit the most important criterion for appointment to the Supreme Court of Canada — and all other federally operated courts — as Mr. Cotler's reform package prescribed, would elevate the performance standard at every level of the judicial system.

Justice Rosalie Abella, who currently sits on the Supreme Court, once noted that "'every decision-maker who walks into a court room to hear a case is armed not only with the relevant legal text, but with a set of values, experiences, and assumptions that are thoroughly embedded.'"[63] During the late twentieth century, successive Canadian federal governments, in their failure to avowedly associate a candidate's predisposition to advance the *Charter*'s "set of values" with the "meritoriousness" of that candidate, declined the opportunity to seriously take up the *Charter* on its own premise.

The Credentials Demanded by the *Charter*

The polemic over the relevant credentials to be considered during the judicial appointment and selection process has been fecklessly defined and hopelessly obfuscated by the mythology of the Supreme Court Justice as objective arbitrator. In this view, the Court Justice is merely the flesh embodiment of Lady Justice, blindly and disinterestedly weighing scales, or an erudite soccer referee who has not thought even fleetingly about which teams he wants to win. But the role of a Supreme Court justice in a constitutional order- and rights-based polity — and the various roles of a Canadian *Charter* justice in particular, must be demythologized. The role of the justice is not situational "objectivity," and the putative attainability of this epistemically phantasmal position — not to speak of its desirability — must be met with the same ruthless skepticism in legal theory that its metaphysical counterpart encounters in all post-Nietzschean philosophical discourse. The justice is only "disinterested" in the narrowest and most procedural sense; normatively, the *Charter* justice should want one team to win. He or she represents a value system and a moral order, attempts to advance it and to empower it, and stands as its guardian. The justice understands that constitutions,[64] in general, and bills of rights — including the *Charter* — in particular, were on the one hand enacted against the grain of majoritarianism — in order to mitigate and preempt its excesses — and on the other, crafted as guarantees that the democratic character of our most important political institutions would not become diluted. A Canadian *Charter* justice thus has an acute historical sense and is at every moment reminding him or herself of the fragility and vulnerability of democracy, and of the mystique and allure of intolerance, hate, and fanaticism. The justice understands that she or he must spend every waking hour standing sentry against the first movements of tyranny and oppression, and that the justice's only instrument is the mind — the ability to reason, compellingly and convincingly. The justice knows he or she must never be seduced by optimistic views of human progress, knows not to naively place faith in the unaided success of truth in the market place of ideas, knows a descent into barbarism is not just possible — it is called for and demanded on a daily basis, in every dark corner of every nation. He or she invests no hope in "inherent human goodness," for the justice knows that there will always exist the inveterately malicious, rapacious, and ignorant — and those who want nothing more than to denigrate and debase the dignity of other human beings. This is the Canadian *Charter* justice, and this is whom any and every nomination process must seek out in earnest: a tireless sentry whose singular and unending

devotion to a value system, to a *moral order*, makes a falcon of a human — one who perceives at a mile's range, the first scurrying movements of tyranny in the valley of the nation.

The Timely Untimeliness of a Rights-Era Jurist: Opportune Moments and the Historical Sense

As President of the Supreme Court of Israel, Aharon Barak took a meager and timid parliamentary allotment of Basic Laws, in a country without a written constitution, and developed them into the most elaborate jurisprudential framework for civil and human rights in the entire Middle East. He has described the rights-based, socially transformative balancing act that high courts attempt in the following way:

> In many cases, the job of a supreme court is to reflect a deep public consensus. But sometimes a court must crusade for a new consensus. *Brown v. Board of Education*, in which the U.S. Supreme Court outlawed segregation in public schools, is a good example. A supreme court would not survive public misgivings if it announced a new *Brown* every week. But a supreme court will also not survive misgivings if it fails to seize the opportunity to decide a *Brown*.[65]

So a justice is a tightrope walker and a tumbler, one who achieves balance, moderation, and stability while still moving forward — like that falcon over a valley — through his or her ability to *see* and *perceive*. What does this mean precisely?

The rights-era jurist, like the constitution-entrenching jurists who came before, breathes at the pace of John Marshall, for he or she is timely in untimeliness. Timely untimeliness is a sensitivity to opportune moments for the introduction of something largely unprecedented at or near the critical moment when the precedent is almost indiscernibly — but veritably — weakest or most vulnerable. The person who is sensitive to opportune moments, who is timely in his or her untimeliness, is necessarily one of the few who can discern this *almost* or *initially* imperceptible "tipping point,"[68] which to the many is obscured or occluded by the perspective that any particular historical moment affords. The person who is timely in his or her untimeliness thus has a *historical sense* that is in fact "transhistorical." Thus, great statesmen and revolutionaries — such as Napoleon and Bismarck, Bolivar and the American Founders — by necessity possess an acute historical sense. Avant-garde artists, whether visual, musical, or literary, as well as philosophers and theorists who deal in the historically contingent, all, almost by definition, possess a historical sense — though their historical medium may be predominantly aesthetic and only concomitantly political (but often reverse is often true). And as Thomas Kuhn argued in his enormously influential *The Structure of Scientific Revolutions*,[67] "paradigm shifts" in the sciences — movements away from or against the previously dominant and accepted theory or scientific worldview — do not occur as a direct, immediate, or inevitable result of new experimental evidence (new or old). Rather, they happen through the appearance of a new, more cogent contextualization of the evidence that more seamlessly accounts for and integrates past, present, and future occurrences in that field of understanding. The individuals most responsible for major paradigm shifts have a deep historical sense.

The greatest jurists are no different. They are timely in their untimeliness, and can be so because of their acute historical sense. The judicial greatness of John Marshall and Earl Warren was located in their historical sensitivity — in their ability to perceive the critical moment when the undesired precedent was weakest or most vulnerable, and to act in response — introducing something unprecedented and "untimely" at a time when it stood the greatest chance of being received, accepted, and followed.

The realization that legal sensibility requires extralegal senses goes at least as far back as Oliver Wendell Holmes' *The Common Law*.[68] Holmes argued that every time a judge decides a major constitutional question (especially in the area of rights) he necessarily chooses between contending legal theories and legal-

philosophical outlooks. Thus the *true* decisive considerations in such a decision are very often drawn form outside the law — from what we now might call the *political* realm. The example of *Brown,* the greatest American civil rights case of the twentieth century, is particularly illustrative. Robert G. McCloskey, in his influential classic *The American Supreme Court* writes:

> [O]ne should note that Southern segregation was an international embarrassment in the cold war being entered into with the Soviet Union and its allies, who pointed up the unjust treatment of African-Americans whenever Western anticommunists criticized what was happening in Eastern Europe. In its brief to the Court in *Brown,* the United States explicitly brought up "the problem of racial discrimination . . . . in the context of the present world struggle between freedom and tyranny" and noted segregation's "adverse effect" on America's winning that struggle.[69]

A new *Brown* or *R. v. Big M Drug Mart*[70] cannot be announced every week, and a Supreme Court justice's ability to pick the right week — or year, or decade — and not miss the moment or get it wrong and set back the effort, depends on his or her extralegal, *political* sensitivity and awareness. As Charles Epp argues in *The Rights Revolution*, the American rights revolution developed out of a broader "support structure for legal mobilization," which was what ultimately "propelled new rights issues onto the Supreme Court's agenda," and "although judicial policies undoubtedly contributed to the development of that support structure, changes in the support structure have typically resulted from forces that are broader than the Court's policies alone."[72] In the 1950s - 60s in the United States, the Warren Court not only wrote *Brown*, it orchestrated a simultaneous metamorphosis across multiple areas of constitutional rights (including due process, freedom of the press, freedom of speech, civil rights, and the right to privacy), and thus transformed the place and program of the American constitution in American political life. It succeeded because of its justices' acute political-historical sensitivity to those broader forces — because of their timely untimeliness. Fulfilling the promise of the *Charter* will require the appointment of men and women with these same qualities.

Judges who could anticipate or perceive opportune moments though an acute historical-political sense did far more for the advancement and entrenchment of civil liberties and basic human rights than those who could not. Those who understand that the Supreme Court of Canada is the engineer and builder of the architecture of the *Charter* must urgently ensure that timely political untimeliness, and an acute historical sense, become important criteria in the selection and appointment of judges.

One way to predict whether a candidate will excel in this domain might be to administer a "test" that gives the candidate an opportunity to demonstrate his or her historical-situational reasoning. Such a test might ask the candidate to select what they consider to be a presently amorphous or narrowly developed — or misguidedly developed — right (or aspect of a right) guaranteed by the *Charter*, and to provide an argument for why the present historical moment is opportune for the broad reception and implementation of a fuller — or differently directed — development of that right, as the United States was in the early 1960s, prior to the *Brown* decision. Requiring this additional argument in writing would not be a tremendous departure from the one criteria by which judicial candidates are already evaluated — their written legal rulings — but unlike lower-court written opinions, would showcase their ability to articulate and defend a judicial desire for an abstract social or political end. Following a "black market" principle — if something will continue to exist inevitably and inexorably, the best policy is to bring it into the daylight, regulate it, and gain some modicum of control over it — since the Court will go on making the kinds of distinctly political decisions mentioned herein, it is only sensible that the appointment process at least ensure that they are capable of making political decisions well. The written argument requirement would provide nomination and appointment commissions with a valuable insight into a candidate's political-historical sensitivity

and, *ipso facto*, their potential for giving the *Charter* a greater chance at effective, balanced, and exhaustive implementation.

In its attempt to increase the accountability and transparency — the democratic credentials — of the current judicial appointment process, Mr. Cotler's reform package is a crucial first step in realizing a judicial appointment system designed specifically for a democratic, *rights-based* polity, for a *Charter* Canada, and it would provide an excellent framework for allowing the candidate criteria discussed in this article to come before the consideration of prime ministers. Only once Canadians know how they get who they get on the Court can they really start debating how to get who they want and *need*. Thus Mr. Cotler's reforms should be adopted by the current government, which must take the next step in Canadian judicial appointment reform.

Notes

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1 The Honourable Irwin Cotler, "Proposal for the Reform of the Supreme Court of Canada Appointments Process" (7 April 2005), Speech given before the House of Commons, online: Department of Justice Canada Newsroom <http://www.canadajustice.ca/en/news/sp/2005/doc_31432.html>.

2 *Ibid*.

3 *Ibid*.

4 The 11th Biennial Jerusalem Conference in Canadian Studies, Hebrew University of Jerusalem, 2 - 6 July 2006.

5 Office of the Prime Minister, "Prime Minister Announces Appointment of Mr. Justice Marshall Rothstein to the Supreme Court" (1 March 2006), online: <http://www.pm.gc.ca/eng/media/asp?id=1041>.

6 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

7 *Ibid.*

8 Lorraine Weinrib, "Appointing Judges to the Supreme Court of Canada in the Charter Era: A Study of Institutional Function and Design" in *Appointing Judges: Philosophy, Politics and Practice*: *Papers Presented to the Ontario Law Reform Commission* (Toronto: Ontario Law Reform Commission, 1991)[Weinrib].

9 Neil Seeman, "Taking Judicial Activism Seriously" *Fraser Forum* (August 2003) 8.

10 Department of Justice Canada, "Speaking Notes for the Honourable Irwin Cotler, Reforms to the Judicial Appointments Process," online: Department of Justice Canada Newsroom <http://www.justice.gc.ca/en/news/sp/2005/doc_31694.html>.

11 *Ibid*. This is a quotation of Irwin Cotler quoting a translation of the remarks of the Chair of the subcommittee.

12 *Ibid*.

13 *Supra* note 1.

14 *Ibid.*

15 Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge: Harvard University Press, 2004) [*Towards Juristocracy*].

16 Peter H. Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987).

17 [1998] 2 S.C.R. 217, 1998 SCC 793 (CanLII).

18 [2004] 3 S.C.R. 698, 2004 SCC 79 (CanLII).

19 *Supra* note 16.

20 Frank Iacobucci, *The Charter [Canadian Charter of Rights and Freedoms]: Twenty Years Later*, Supreme Court Law Review (2003) 19 Supreme Court Law Review (2d) 402.

21 Hirschl, *Towards Juristocracy*, *supra* note 15; see also Ran Hirschl, "Beyond the American Experience: The Global Expansion of Judicial Review" in Mark Graber & Michael Perhac, eds., *Marbury versus Madison: Documents and Commentary* (Washington, D.C.: Congressional Quarterly, 2002) at 131.

22 Hirschl, "Beyond the American Experience," *ibid* at 148.

23 Hirschl, *Towards Juristocracy*, *supra* note 15 at 11.

24 *Ibid* at 20; Hirschl argues that judicialization has "transformed national high courts into major political decision-making bodies" at 221. Canada is only one of the many Western nations that have experienced the empowerment of the judiciary *vis-à-vis* other branches of the national government. However, the extent to which this redistribution of power grates at the democratic character of a particular polity is proportional to the "democratic character" of the newly empowered branch. Herein lies the importance of the judicial appointment process, and the questions of legitimacy raised by Canadian judicialization in particular.

25 *Ibid* at 189.

26 *Supra* note 17.

27 Hirschl, *Towards Juristocracy*, *supra* note 15 at

189.

28 *Ibid.* at 222.

29 *Ibid*.

30 *Ibid.* at 80.

31 *Ibid*.

32 See, for example, Allan C. Hutchinson, "Process to bring judicial politics into public view" *The Lawyers Weekly* (23 September 2002), online: http://www.lawyersweekly.ca/index.php?section=article&articleid=155.

33 Quoted in Martin Friedland, *A Place Apart: Judicial Independence and Accountability in Canada* (Ottawa: Canadian Judicial Council, 1995) at 233 [Friedland].

34 [1985] 2 S.C.R. 673, 1985 SCC 25 (CanLII).

35 [1989] 2 S.C.R. 1326, 1989 SCC 20 (CanLII) [*Edmonton Journal*].

36 Cheryl Thomas & Kate Malleson, "Judicial Appointments Commissions: The European and North American Experience and the Possible Implications for the United Kingdom" (1997) Discussion Papers, Lord Chancellor's Department, Research Secretariat, London, s. 5.

37 *Supra* note 37.

38 *Supra* note 16 at 119.

39 *Ibid.* at 132.

40 Quoted in Weinrib, s*upra* note 8.

41 *Supra* note 15 at 115.

42 *Ibid* at 116.

43 *Ibid* at 116, 120.

44 Weinrib, s*upra* note 8.

45 Peter H. Russell & Jacob S. Ziegel, "Federal Judicial Appointments: An Appraisal of the First Mulroney Government's Appointments and the New Judiciary Advisory Committees" (1991) 41 University of Toronto Law Journal 4.

46 *Ibid* at 81.

47 *Ibid*.

48 *Supra* note 16 at 117.

49 William Angus quoted in Russell, *ibid.* at 113.

50 Quoted in Friedland, s*upra* note 33 at 233.

51 *Ibid*.

52 Hirschl, *Towards Juristocracy*, *supra* note 15 at 82. Hirschl quotes from Kirk Makin, "Canadians feel Supreme Court tainted by partisan politics: poll." *Globe and Mail* (3 July 2001) A1 [Makin]. In that poll, however, "an overwhelming majority nonetheless strongly approve[d] of the top court."

53 Weinrib, s*upra* note 8.

54 *Ibid*.

55 It could be argued that the candidate pool is never reduced in any particular instance of an appointment, but rather, that the new willingness to give all demographics a "fair evaluation" will over time result in the gender balance of the court reflecting the gender balance of society. However, what actually occurs at the political level on all too many occasions is the felt need to replace a female vacancy with a female appointment — lest the Prime Minister be charged with deconstructing the gender balance of the Court. Once "restorative justice" becomes the appointment order of the day, all candidates, save the eligible members of the previously unrepresented demographic, will on particular occasions be all but excluded from serious consideration.

56 See Friedland, *supra* note 33; Russell, *supra* note 16; W.R. Lederman, *Continuing Canadian Constitutional Dilemmas: Essays on the Constitutional History, Public Law and Federal System of Canada* (Toronto: Butterworths, 1981); Canadian Bar Assocation, *Report of the Canadian Bar Association on the Appointment of Judges in Canada* (Ottawa: Canadian Bar Foundation, 1985); Canadian Association of Law Teachers (CALT), *Judicial Selection in Canada: Discussion Papers and Reports* (CALT Special Committee on the Appointment of Judges, 1987).

57 *Supra* note 15 at 132.

58 *Constitution Act*, 1867 (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

59 *Supreme Court Act,* R.S.C. 1985, c. S-26.

60 *Ibid* at 134.

61 It is an ideological agenda that tries, incoherently and inefficiently, to synthesize the social left with the economic right: *Reference re Same-Sex Marriage* and *R. v. Morgentaler* with *Dolphin Delivery Ltd. v. R.W.D.S.U., Local 580* and *Chaoulli v. Quebec (Attorney General)*. See *supra* note 18; [1993] 3 S.C.R. 463, 1993 SCC 158 (CanLII); [1986] 2 S.C.R. 573, 1986 SCC 5 (CanLII); and [2005] 1 S.C.R. 791, 2005 SCC 35 (CanLII), respectively.

62 And now the Conservative Party, which has wasted no time in making flagrant partisanship the salient qualification for appointment to federally operated provincial superior courts.

63 Quoted in "Convenient judges for Liberal aims" *Calgary Herald* (27 August 2004), reprinted in Fraser Institute, "Commentaries," online: <http://www.fraserinstitute.ca/shared/readmore1.asp?sNav=ed&id=298>.

64 *Supra* note 62.

65 Former President Barak made these remarks at a seminar on "Judges and Judging," University of Toronto Faculty of Law, September 2006. *Brown v. Board of Eduction*, 347 U.S. 483 (1954) (LII) [*Brown*].

66 This idea of a tipping point, well developed in sociology and economics (for example, Morton

Grodzins' work on demographics in the 1960s, and the 1970s economic work of Nobel laureate Thomas Schelling, and Mark Granovetter's threshold model of collective behavior) must be investigated and clarified in the realm of judicial decision making and the interplay between high court legal reasoning and public sphere politics.

67 Thomas S. Kuhn, *The Structure of Scientific Revolutions* (Chicago: University of Chicago Press, 1962).

68 Oliver Wendell Holmes, *The Common Law* (Boston: Little, Brown, 1881).

69 *The American Supreme Court* (Chicago: University of Chicago Press, 2000) at 149.

70 [1985] IS.C.R 295, 1985 SCC 69 (CanLII).

71 Charles Epp, *The Rights Revolution, Lawyers, Activists, and Supreme Courts in Comparative Perspective* (Chicago: University of Chicago Press, 1998) at 69.

Charter Rights and Public Policy Choices: The Supreme Court and Public Finance

Hugh Mellon*

Introduction

Over the past two decades there have been numerous highly charged court cases involving claims that government program offerings and public spending fail to satisfy guarantees entrenched in the *Canadian Charter of Rights and Freedoms*.[1] Calls for enhanced appeal mechanisms in refugee determination,[2] provincial health care coverage of hospital translation services for the deaf,[3] equal leave provisions[4] for both adoptive and birth parents, government coverage of autism treatment regimes,[5] and access to health care provision rather than access to a waiting list[6] all illustrate the intersection of the *Charter* with the allocation of the public purse. Government cries about fiscal limits and competing choices do not always prevail; judicial reasoning in these cases is often complicated and sometimes inconsistent. Re-examination of this jurisprudence is imperative in light of growing national debates over health care spending and program delivery as well as over judicial scrutiny of government.[7]

The judges of the Supreme Court of Canada addressed a case that was relevant to these issues in *Newfoundland (Treasury Board) v. N.A.P.E.*[8] They were called upon to assess the demands of governmental financial exigency relative to prior government commitments to equal treatment via payments designed to remedy gender-based pay differentials according to an agreed-upon timetable.

At issue were competing claims to primacy arising from an executive assertion of a public finance emergency and a union assertion of *Charter*-based demands for equal treatment of female public employees. In its decision the Court sided with the Newfoundland and Labrador government and its assertion that the public finance case must prevail. Justice Ian Binnie wrote the judgment on behalf of a unanimous Court. While that judgment resolved the case at hand, the judicial reasoning and commentary left room for significant future discussions. The Court's reasoning tolerates a surprising degree of discretion for a political executive to declare financial necessity and is vague about the guidelines for applying the relevant words "crisis" and "emergency." Given the perseverance of federal and provincial government debts, not to mention the possibilities of future serious recessions or depressions, it would be prudent to foster larger debate and examination of Justice Binnie's reasoning and its implications for balancing Charter rights with fundamental constraints.

Contemporary debates about the existence and nature of an institutional "dialogue" between courts and legislatures[9] reflect competing perspectives on the "dialogue" metaphor. However, a common theme is that the Supreme Court uses its decisions to alert the legislature to dangerous actions or decisions, and that the legislature may then respond. In the words of Kent Roach, "[T]he Court, assisted by the efforts of aggrieved litigants, starts the conversation by drawing

the attention of the legislature to fundamental values that are likely to be ignored or finessed in the legislative process."[10] In *Newfoundland v. N.A.P.E.*, the opposite scenario played out — the Government of Newfoundland persuaded the Court that its financial fundaments could not be "ignored or finessed." For a variety of reasons there must be more examination and analysis of instances where declarations of public finance needs prevail. First, the literature about such situations is lacking. Second, there are various commentators suggesting a judicial retreat from the judgments of Supreme Courts past that upheld the *Charter*. Sheila McIntyre, for example, has recently asserted "that some members of the Court, including the Chief Justice, are trying to appease critics of so-called judicial activism by retreating from the Dickson-Lamer legacy."[11] Further examination of the *N.A.P.E.* decision will assist in the broader discussions over dialogue and alleged judicial retreat.

It will be argued that the judgment, while clear on the disposition of the case before it, is vague in regard to several potentially important matters. These matters include the operational definition of "crisis" and "emergency," the extent of the governmental evidence required to prove a crisis or emergency, and the task of balancing rights with finances according to the wording of some related past decisions; all leave more room for speculation than might seem prudent in an important institutional dialogue. Attention should also turn to the significance of the financial amounts involved in a rights claim and delineating the principled basis for the Supreme Court's apparent favouring of less expensive claims. Questions persist about who should get to calculate, what is considered less expensive (and therefore more likely affordable), and how to establish the correct approach to this calculation.

In *Constitutional Odyssey,* Peter Russell suggests that Canada is returning to "constitutional normalcy" after several decades of absorption in a quest for grand constitutional agreements.[12] He declares that "Canadians have shifted gears and fallen back on older, quieter, less conflictual, and more piecemeal ways of adjusting and adapting their constitutional system."[13] In this quieter period of adjustment there exists an opportunity to review the deeper issues raised by the judicial reasoning in *N.A.P.E.* Better we think about these issues now than in a period of deep economic malaise.

The Case of *Newfoundland (Treasury Board) v. N.A.P.E.*

The central issue raised in *Newfoundland (Treasury Board) v. N.A.P.E.* is actions taken by the Government of Newfoundland in 1991 in responding to public finance challenges arising in part from an unexpected shortfall in federal fiscal transfers. This same government had several years earlier agreed to address incrementally, over a number of years, pay inequities endured by female health care employees. On 24 June 1988, an agreement was struck involving the provincial government and various public sector unions covering affected female employees. The assessment of the size of the inequity took longer than expected, and it was not completed until early 1991. At that time, the estimated cost of implementing the agreement was $24 million.

Coincident with the completion of these calculations was the already-noted major shortfall in provincial finances. The Newfoundland government responded by passing the *Public Sector Restraint Act*,[14] which contained a provision to delay implementation of the pay equity award. It cancelled payments for the period starting 1 April 1988 until 31 March 1991, thus negating the just-calculated $24 million in payments. The incremental salary adjustments were also altered so that the first adjustment would not be 1 April 1988, but rather 31 March 1991. Ultimately, affected employees were left without the anticipated reimbursement money for 1988 to 1991. Grievances emerged that led ultimately to the Supreme Court case discussed in this article. While the case edged its way through the courts, the provincial government and the Newfoundland and Labrador Association of

Public and Private Employees worked out a revised pay equity arrangement in accordance with the government restraint legislation.[15]

The union complaint went forth through various stages. The dispute was carried on through an Arbitration Board, the Newfoundland Supreme Court, Trial Division, and the Newfoundland Supreme Court, Court of Appeal before landing on the Supreme Court of Canada's doorstep.[16] The Chief Justice of the Supreme Court of Canada set out three constitutional questions arising from the case on 29 October 2003.[17] The first asked if the provision mandating the cancellation and adjustment of the pay equity benefits violated the equality rights in section 15(1) of the *Charter of Rights and Freedoms*.[18] This led to the second question — if an infringement was found to exist, would it constitute a reasonable limit meeting the conditions of section 1 of the *Charter*? The third question related to an element in the Newfoundland Court of Appeal judgment calling for courts to explicitly recognize the separation of governmental powers doctrine at each stage of section 1 analysis. This last point would, if accepted, have been an additional to the customary judicial assessment of section 1 set out in the Supreme Court's decision in *R. v. Oakes*.[19]

The following commentary will proceed through four sections. First, it will examine the judgment's treatment of the province's section 1 justification. Justice Binnie used charged terms like "crisis" and "emergency" without the imposition of a significant evidentiary burden on the Newfoundland government and without definitional rigour. Second, it will analyze Justice Binnie's comments on the amount of money involved in the legal dispute. Comparison will be made with the *Eldridge* case from British Columbia regarding services for deaf individuals, in order to draw out several apparent judicial assumptions.[20] Third, it expands the comparison to other widely noted cases wherein the balancing of expenditures and *Charter* and/or other constitutional claims was involved. Justice Binnie asserts a clear and consistent lineage, albeit through reference to loaded words like "prohibitive," "crisis," and "emergency." Finally, a concluding portion will highlight the perceived limits in Justice Binnie's analysis and set out the need for further study of several important points that require broader attention and debate.

What Constitutes a "Crisis"? Section 1 and Justice Binnie's Judgment

Section 1 analysis involves judicial assessment using the *Oakes* Test. It was the task of the Supreme Court in this case to review the challenged legislation and the history of the case, going back to the initial debates at the Arbitration Board.[21] There was the burden upon the government to make the case that their legislative objective was evident and pressing. Yet the government was not generous in providing supporting material. Justice Binnie himself acknowledges some difficulty with the government's case, describing their section 1 material as "casually introduced."[22] In his reasons, Justice Binnie upholds at length the provincial government's legislation but admits that its case had notable limitations. Furthermore, he appears to wish to judge the severity of the financial crisis and supplement the provincial justification. Taken together, Justice Binnie's concessions regarding the limitations of the province's presentation and the way in which he chose to characterize the state of provincial public finances undercut the clarity of the judgment and its usefulness as a precedent.

Complications begin with reference to the government's justification, the starting point of a section one analysis. Justice Binnie states:

> The only evidence before the Board consisted of an extract from *Hansard* and some budget documents. The government witnesses were not employed in the relevant policy group at the time.
>
> Ordinarily such a casually introduced s. 1 record would be a matter of serious concern. However the essential subject matter of the s.1 justification in this case consists of the public accounts of the Province that are filed with the House of Assembly, and comments by the Minister of Finance and the President of the

> Treasury Board as to what they thought the amounts disclosed and what they proposed to do about it, which are reported in *Hansard*. This is all material of which courts may take judicial notice . . . . [23]

Judicial notice is the principle that courts may accept matters that are obviously true and accurate — in *N.A.P.E.*, judicial notice was taken that there was a financial crisis in the province. Whether financial crisis should have been assumed to be the issue in this case is not at all clear. Justice Binnie himself goes on to "agree with the Board that the government ought to have called witnesses who were better placed to explain the governmental accounts and ministerial observations" regarding Newfoundland's situation.[24] However, the lack of clarity is manifested most dramatically in the various phrases chosen by Justice Binnie to describe the Newfoundland government's financial circumstances. This is especially important because the Court is not simply upholding a tribunal's or lower court's finding of a crisis. He instead asserts a crisis based on his own assessment of the situation.

There is a fundamental difference between accepting the accuracy of financial figures and accepting the alleged or presumed implications of those same figures. Justice Binnie, however, conflates these concepts in the course of his decision, despite his criticisms of the Newfoundland government's presentation of their evidence. He not only recognizes the figures offered by the Newfoundland government, but he also accepts, without expressing any doubt, that a public finance emergency situation existed that necessitated dramatic government action. The criteria for, or definition of, an emergency are neither stated nor established; rather, there is ready acceptance that one existed. Given the situation of affected workers and their loss of equity payments, it is striking that Justice Binnie required such a limited supporting case from the province.

Justice Binnie does make a distinction between so-called "normal" and "crisis" times:

> The spring of 1991 was not a "normal" time in the finances of the provincial government. At some point, a financial crisis can attain a dimension that elected governments must be accorded significant scope to take remedial measures, even if the measures have an adverse effect on a *Charter* right, subject, of course, to the measures being proportional both to the fiscal crisis and to their impact on the affected *Charter* interests. In this case, the fiscal crisis was severe and the cost of putting into effect pay equity according to the original timetable was a large expenditure ($24 million) relative even to the size of the fiscal crisis.[25]

Justice Binnie thus asserts the existence of a "crisis" on the basis of his interpretation of the provincial government's presentation of financial information. He suggests that the "crisis" will impact on the provincial credit rating, government borrowing, and expenditure choices.[26] His commentary suggests the Court is doing more than simply taking notice of a lower court finding of fact. He offers his own conclusion and sets out his train of thought.

The immediate questions for further debate are clearly evident. What are the legal prerequisites for something being called a "crisis," let alone an "emergency"? What are the other categories or economic labels? Is such a judgment within the purview of Justice Binnie's professional expertise in an instance where he himself admits that the government case is "casually" made? Delineating the definitional boundaries of a "crisis" is not attempted by the justice.

Over the course of the decision, Justice Binnie uses various phrases to set out his understanding of the condition of Newfoundland public finances in 1991. There is, in fact, reference to an even more charged phrase than "crisis" — namely, "financial emergencies." He cautions that "the courts cannot close their eyes to the periodic occurrence of financial emergencies when measures must be taken to juggle priorities to see a government through the crisis."[27] Justice Binnie reports that in reaching his assessment he considered potential job losses and the size of the financial amounts involved.[28] He also goes on to accept the Newfoundland government's reference to the province's financial hardship in

the 1930s and relegation to trusteeship[29] under a British Commission of Government until it joined confederation.[30]

Even if a lenient observer might accord the Court the opportunity to characterize something as a "crisis," it would be hard to make a similar case for "emergency." For most observers "emergency" would imply situations such as: a serious break-down in social order, loss of voting rights and the practice of self-government as carried out for decades, the impending resignation of a government, widespread and uncontrolled contagion, uncontrolled crime, and/or the near absence of vital government services. Newfoundland public finances in 1991 were in complicated straits, but whether they truly approached "emergency" condition is not demonstrated in any kind of serious and sustained way in the Court's ruling.

There is earlier Canadian jurisprudence about the assertion of emergencies, primarily in relation to the "Peace, Order, and Good Government" clause of the *Constitution Act, 1867*.[31] This jurisprudence addresses occasional federal government arguments that the clause gives it the right to act even in areas otherwise accepted as provincial jurisdiction. Perhaps the clearest case of such a disputed economic emergency relates to the *Anti-Inflation Reference*[32] in 1976. A majority of Supreme Court justices upheld the Trudeau government initiative to control prices and wages in order to stem inflationary pressures. Taken together, the judicial reasons on the questions raised by the case remain a source of legal controversy. Baier portrays it as "an ambivalent collage of reasons and dissents that offered no clear interpretation of POGG as a justification for the exercise of federal power in matters of national concern."[33] Russell, Knopff, and Morton offer the following pithy critique of the judgments centralizing tendencies: "[T]he Court's willingness to sustain the *Anti-Inflation Act* as emergency legislation had frightening implications for the provinces."[34] Justice Binnie's use of the charged words "crisis" and "emergency" without definitional rigour shows a persistent judicial reluctance to enunciate underlying assumptions or perspectives on economic situations, a tendency that is particularly troubling in a contemporary era of debate about resource allocation and government policy options in fields such as health care delivery and child care.

The Characterization of Costs: Comparison with *Eldridge*

Justice Binnie's endorsement of the Newfoundland government's "crisis/emergency" claim leads us to the question of the size of the financial amount at issue. At what financial point does a crisis start? How big do government expenditures have to be before they are contributing to a problem? What is the basis for evaluating possible expenditures at a time of crisis? These are all questions deserving of attention.

One element of the *Oakes* Test is that if a measure is justified in limiting a right under section 1, the right may only be impaired in a minimal way. Deference to government plans is considered acceptable if there is evidence that minimal impairment was a major concern and alternatives to impairment were examined (assuming, of course, that adherence to the other parts of the *Oakes* Test). Efforts to weigh the degree of impairment will obviously require the Court to weigh governmental budgetary decisions. Assessment and measurement questions abound.

One way to illustrate the existence of seemingly alternative ways to approach these methodological challenges is to compare the analysis of Justice LaForest in *Eldridge*[35] with that of Justice Binnie in *N.A.P.E.* Both cases involved government health and social service budgets, but they featured very different lines of reasoning. Whereas Justice Binnie first assessed the overall state of provincial finances, Justice LaForest considered the *Charter* guarantees of equality and the inequities that pervade society. Only then did Justice LaForest deal with the costs at issue, and he treated them as an isolated, separate group of expenses. These fundamentally

different strategies speak to a lack of clarity and offer alternative approaches rather than clear, generally applicable principles.

At issue in *Eldridge* was the denial of public funding for medical translation services for the hearing impaired. More specifically, the cases stemmed from a debate over provision of sign language interpreters for clients of the health care system. Without interpretation services, individuals without private access to interpreters encounter communication difficulties and may be vulnerable to serious misunderstandings. The severe difficulties experienced by people due to the lack of such services are obvious. Yet, the B.C. Court of Appeal found no requirement on the part of the provincial government to fund such translation services. Equality rights seen from this vantage point existed to ensure equal application of laws, rather than a more expansive understanding wherein government had a duty to act positively to make society more equal and just.

In the Supreme Court judgment, Justice LaForest wrote for a unanimous Court of the social challenges of deafness and the value of equality:

> The evidence clearly demonstrates that, as a class, deaf persons receive medical services that are inferior to those received by the hearing population. Given the central place of good health in the quality of life of all persons in our society, the provision of substandard medical services to the deaf necessarily diminishes the overall quality of their lives. The government has simply not demonstrated that this unpropitious state of affairs must be tolerated in order to achieve the objective of limiting health care expenditures.[36]

This judgment evidences a broad-minded sense of equality, linking the right to ready availability of translation services with good health, quality of life, and equality.[37]

The respondents in *Eldridge* were the British Columbia Attorney General and the provincial Medical Services Commission. Among their arguments were financial pressures and cost issues. Justice LaForest was not sympathetic. When the respondents queried how the courts were to distinguish between translation services for the deaf from services for those who speak non-official languages, Justice LaForest dismissed the point as "purely speculative."[38] When the issue was raised of a possible "ripple" effect caused by the recognition of this claim in a sea of claims, he countered by declaring: "These arguments miss the mark."[39] Justice LaForest found that "effective communication" for the hearing impaired was not only a vital precondition for enjoying guaranteed health services, it was also inexpensive,[40] suggesting that the provincial government could not justify failing to pay such a small cost.

The ultimate point for the justices in *Eldridge* was their perception that medical translation services for the hearing impaired had a small price tag:

> [T]he government has manifestly failed to demonstrate that it had a reasonable basis for concluding that a total denial of medical interpretation services for the deaf constituted a minimum impairment of their rights. As previously noted, the estimated cost of providing sign language interpretation for the whole of British Columbia was only $150,000 or approximately 0.0025 percent of the provincial health care budget at the time.[41]

The implication is that the government was too stingy to fork over the measly $150,000. While this may or may not be a correct interpretation of the government's recalcitrance to provide the translation funding, the estimated amount is indeed far smaller than the amount involved in the Newfoundland pay equity dispute. However, our questions about how judges approach the making of such an assessment and whether the absolute amount involved is the right foundation for this calculation persist.

We might be well advised to bear in mind the cautionary words offered by the Honourable Marshall Rothstein to the Faculty of Law at the University of Manitoba. Reflecting upon *Eldridge*, Justice Rothstein declares: "In assessing the financial implications, significant subjectivity often creeps into the court's minimum impairment analysis."[42] The treatment of the translation costs as an isolated, stand-alone budget item concerns

him. Troubling future possibilities might be put into play, as "*Charter* rights claimants may bring claims incrementally in order to avoid a significant comprehensive cost argument by the government."[43] Justice Rothstein also cited the added justification burden placed upon governments if this situation were to come to pass. Proving that rights are infringed in a minimal fashion presumably would require a context with generally agreed-upon assumptions about costs and their calculation.

In *N.A.P.E.*, Justice Binnie makes reference to the reasoning in *Eldridge* and the reliance upon the limited financial amount at issue.[44] What distinguishes the Newfoundland case from the *Eldridge* approach is Justice Binnie's acceptance of a crisis situation. Government calculations at crisis times are to be accorded "a large 'margin of appreciation' within which to make choices."[45] Working from his declaration of a crisis, Justice Binnie characterizes the government's response as "proportional."[46] Such a description is built on an uncertain foundation. Bear in mind two critical points not resolved clearly by either of the two cases considered here. One is that the boundaries of what constitutes a financial crisis are not made clear. Second, at what point do costs of desired social spending programs cease to be understood as independent stand-alone spending increments?

It is time now to expand the analysis and look at a broader cross-section of Supreme Court judgments involving claims of constitutional infringement and consideration of the associated costs. The opening paragraph of this article made reference to several of these kinds of cases. Those seeking clear guiding principles, let alone the foundations of an institutional dialogue between the judiciary and the executive, will likely be frustrated.

Further Comparisons

In relation to the general issue of the judicial approach to government budgetary prerogatives, there are various cases that could be reviewed here. The point of drawing upon *Eldridge* in the previous section was to point to the existence of alternative approaches to the assessment of program costs. Attention now turns to a larger matter — the complicated history of jurisprudence regarding competing claims that emanate from budgetary necessities and *Charter* rights. In the mid-1980s, Justice Bertha Wilson had an opportunity to relate *Charter* and budgetary claims in the case of *Singh v. Minister of Employment and Immigration*.[47] This case addressed a dispute over the requirements of justice in the context of immigration and refugee determinations. Government practices were challenged on the principle that the *Charter* should apply to people seeking entrance to Canada, and that it should be mandatory for hearings on this point to allow claimants to hear the case against them. Justice Wilson denounced the very idea that matters of cost and administrative convenience might triumph over rights:

> Certainly the guarantees of the *Charter* would be illusory if they could be ignored because it was administratively convenient to do so. No doubt considerable time and money can be saved by adopting administrative procedures which ignore the principles of fundamental justice but such an argument, in my view, misses the point of the exercise under s. 1.[48]

Justice Wilson's only real expression of interest in cost and administrative factors comes near the end of her opinion. Justice Binnie refers us to this brief section as he attempts to find room within which to move away from the spirit of the bulk of the commentary in *Singh*.[49] However, Justice Wilson's acknowledgement is grudging and the burden of proof is high: "Even if the cost of compliance with fundamental justice is a factor to which the courts would give considerable weight, I am not satisfied that the Minister has demonstrated that this cost would be so prohibitive as to constitute a justification with the meaning of s. 1."[50] She then says that it would be "unwise" to speculate upon what that kind of situation would amount to sufficient justification.[51]

It is difficult to conceive of an institutional dialogue when the judiciary can avoid committing itself on what legal status accord "compliance cost" considerations. Bear in mind the phrases "even if" and "prohibitive." Presumably, there

should be a benchmark for something that is not just onerous or demanding but, rather, "prohibitive." For the record, the *Singh* decision led not only to added administrative workload but also millions of dollars in added expenses. In the pithy words of Michael Mandel, "[W]hat Justice Wilson had contemptuously dismissed as mere 'administrative inconvenience' turned out to be an immense bureaucratic knot that would take millions of dollars and years of labour to untie."[52]

Here, reference should be made to the arguments of Jeremy Clarke on the Court's sensitivity to federal considerations in the judicial assessment of *N.A.P.E.* and other cases.[53] Newfoundland is not presented as simply any province enduring public finance concerns; Justice Binnie is aware that it is a province with a history of past problems and persistent fiscal weakness when compared to other provinces. Clarke points out "that if and when judges allow for a differential application of the Charter's national standards, they are responding to federalist interpretations of the Charter contained in provincial factums before the Court . . . . "[54] The implications of this response and the emerging federalist dialogue cited by Clarke bears watching, for if this emerging trend continues, the framing of pan-Canadian *Charter* arguments will need to be far more nuanced.

Clarke senses a judicial willingness to let provincial communities sort out particular issues in distinctive ways. There is recognition of "the need or desire of provincial communities to build or sustain themselves based on their own conceptions of rights."[55] This is an illuminating argument, but in the Newfoundland case the provincial government rationale is much less about a developed conception of rights and more about the combination of a distinctive provincial history of financial limits coupled with recurring weakness. Given Justice Binnie's reprimand of the provincial government for sloppy section 1 presentation, the possibility of a developed provincial conception of rights being at work might be approached cautiously in this particular case.

Caution aside and the limits of the section 1 case noted, the value of Clarke's insights are seen perhaps most vividly in paragraph seventy-five of Justice Binnie's judgment, where he asserts that the provincial government had a range of difficult choices before it as to priorities and public needs:

> The government in 1991 was not just debating rights versus dollars but rights versus hospital beds, rights versus layoffs, rights versus jobs, rights versus education and rights versus social welfare. The requirement to reduce expenditures, and the allocation of the necessary cuts, was undertaken to promote other values of a free and democratic society . . . .[56]

Those accustomed to portraying the courts as aloof from the complexities of administrative imperatives and tough political choices will draw comfort from these words. However, these trade-offs happen daily in the corridors of government. When are these governmental arguments compelling? What are the legal principles defining when deference to this governmental defence applies? Justice Binnie's judgment offers little in the way of a broader answer.

Apparent confusion about the proper approach toward financial factors and budget requirements is also seen in *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*[57] and *Figueroa v. Canada (Attorney General).*[58] In the former case, families pursuing Medicare coverage of emerging autism treatments found themselves unseated at the Supreme Court after victories at earlier court levels. The B.C. government's policy choices about what treatments to cover were deemed non-discriminatory.

The Chief Justice set out the Court's understanding of the central issue, that the services sought were beyond those covered by the provincial health care system. Autism treatment, unlike translation services, was not seen as a precondition for taking advantage of services covered by the system. Instead, the request was for service expansion, allegedly beneficial but not approved for coverage, within the province of British Columbia:

> The issue is rather whether the British Columbia Government's failure to fund these services under the health plan amounted to an unequal and discriminatory denial of benefits under that plan, contrary to s. 15 of the *Charter*. Despite their forceful argument, the petitioners fail to establish that the denial of benefits violated the *Charter*.[59]

Clearly, attention is paid to whether or not there exists the denial of a legislated benefit under the B.C. Medicare arrangements. Cost data and the benefits of treatment for purposes of potential "effective communication" are not the issue. The issue is not what care should be provided, but rather whether a benefit is being denied that is legislatively set out for others.

The Court distanced itself from the ruling in *Eldridge* by asserting that "this case is concerned with access to a benefit that the law has not conferred."[60] Translation services, on the other hand, were understood as prerequisites for consultations with physicians and other already publicly insured health benefits. Whereas the ruling in *Eldridge* spoke of health and the quality of life, the decision in *Auton* narrowed in on legislative purpose and the complexities of defining a comparison group for analysis.[61] While laws which gave a specific group inferior treatment were wrong, "a legislative choice not to accord a particular benefit absent demonstration of discriminatory purpose, policy or effect does not offend this principle and does not give rise to s. 15(1) review."[62] Further, the Court pointed out that few provinces ensured the particular new treatments at issue at the time of the legal action, and that the case for the parents had not sufficiently acknowledged the "recent and emergent" nature of the treatment.[63] Those seeking some consistency with the expansiveness of *Eldridge* are disappointed by the more circumscribed judicial outlook in *Auton*. Expectations of emphasis on the quality of life of autistic children under new treatment regimes are unsatisfied.

Meanwhile, in *Figueroa* a common issue was raised in very different circumstances. Governmental rules required political parties to field candidates in at least fifty electoral constituencies to retain the status of political party and the privileges that went with it. Reasons for the rule were to protect the integrity of the tax system (given that contributions to political parties and candidates were at the time given favourable tax advantages), and the efficiency of electoral administration. The common issue is the balance of financial and budgetary measures with constitutional and/or *Charter* concerns. At issue were measures that had applied over several elections and that had, up to the time of the court case, never been seriously challenged. Here again the lower court decision was overturned at the Supreme Court level. In this instance, the Supreme Court advocated an expanded notion of democratic rights. They went on to indicate that they were not persuaded by the arguments about protecting the tax system and budgetary necessities.

The cases discussed in this section vary from the *N.A.P.E.* case in a number of ways. What the cases have in common is how the Supreme Court balances financial imperatives and executive budget authority (taxes and spending) with claims of rights and/or constitutional requirements. The high court seems to apply a diverse set of approaches to this balancing task. As a result, it is difficult to understand the judicial message about how much autonomy government budgetary restraint may have in instances of budgetary matters or in making choices between *Charter*/constitutional requirements and budgetary trade-offs. Those searching for judicial direction in the form of a judicial-parliamentary dialogue face a judicial record open to a variety of interpretations; not so much a dialogue as a wait for the next instalment of a long-running serial.

Concluding Observations

In the *N.A.P.E.* case the Supreme Court found for the provincial government based on assumptions of "crisis" and "emergency." These labels were affixed despite a weak section 1 presentation by the government and the lack of definitional or measurement qualification. Concern over this uncritical acceptance of the government's position led in other cases to an examination of judicial reasoning where rights or constitutional requirements ran counter

to budgetary and financial decisions of the executive. Reference to a number of these cases revealed the apparent co-existence of different ways of assessing the costs involved, as well as different ways of balancing out the financial and the constitutional and rights concerns. This raises questions about uncertain judicial guidance and the need for further national policy discussion. Given the prevailing rights-consciousness that exists in Canada, and given the likelihood of continued tough government budgetary choices, more attention needs to be paid to the various elements of this judicial record. Most governments may now be in a period of increasing surpluses, but this should not lull us into avoiding the need to grapple with the Supreme Court's rulings and shifting approaches.

Notes

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1 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

2 *Singh v. Minister of Employment and Immigration,* [1985] 1 S.C.R. 177, 1985 CanLII 65 [Singh].

3 *Eldridge v. British Columbia (Attorney General),* [1997] 3 S.C.R. 624, 1999 CanLII 327 [*Eldridge*].

4 *Schachter v. Canada,* [1992] 2 S.C.R. 679, 1992 CanLII 74.

5 *Auton (Guardian ad litem of) v. British Columbia (Attorney General),* 2004 SCC 78, [2004] 3 S.C.R. 657, (CanLII) [*Auton*].

6 *Chaoulli v. Quebec (Attorney General),* 2005 SCC 35, [2005] 1 S.C.R. 791 (CanLII).

7 Canadian students of public finance and government administration have paid increasing attention in recent years to the political challenge of deficit reduction and debt management, but have often given only limited attention to the administrative implications of judicial decisions. An exception is Leslie A. Pal, *Beyond Policy Analysis: Public Issue Management in Turbulent Times* (Scarborough: ITP Nelson, 1997), which offers helpful insights. See, *e.g.*, at 48-54. More scrutiny of how contemporary courts assess public finance limitations within their overall weighing of rights and duties is needed.

8 2004 SCC 66, [2004] 3 S.C.R. 381 (CanLII) [*N.A.P.E.*].

9 See Kent Roach, "Constitutional and Common Law Dialogues Between the Supreme Court and Canadian Legislatures" (2001) 80:1 & 2 Canadian Bar Review 481.

10 *Ibid*. at 530-31.

11 "The Supreme Court and Section 15: A Thin and Impoverished Notion of Judicial Review" (2006) 31:2 Queen's Law Journal 731 at 767. Also see n. 114 at 767.

12 Peter H. Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?*, 3d. ed. (Toronto: University of Toronto Press, 2004) at 272.

13 *Ibid.* at 272.

14 *Public Sector Restraint Act*, S.N. 1991, c. 3, s. 9, as rep. by *Public Sector Restraint Act, 1992*, S.N. 1992, c. P-41.1.

15 *N.A.P.E., supra* note 8 at para. 10.

16 *Newfoundland (Treasury Board) v. Newfoundland Association of Public Employees*, 162 Nfld. & P.E.I.R. 1 (Nfld. T.D.), aff'd 2002 NLCA 72, 220 Nfld. & P.E.I.R. 1 (N.L. C.A.), online: CanLII <http://www.canlii.ca/nl/cas/nlca/2002/2002nlca72.html>, leave to appeal to S.C.C. granted, [2003] 1 S.C.R. xiv.

17 *Supra* note 8 at para. 29.

18 *Supra* note 1.

19 [1986] 1 S.C.R. 103, 1986 CanLII 46. In *N.A.P.E.*, the Supreme Court judgment is unsympathetic to the Court of Appeal arguments over the addition of a separation of powers element to their section 1 analysis. The "*Oakes* Test" refers to the approach suggested by former Chief Justice Dickson to the assessment of governmental recourse to section 1. Basically, they assume that infringements of Charter rights must relate to the actual achievement of serious governmental objectives, and that the limits on rights be carefully considered, minimal, and proportional to the significance of the governmental objective. Reference might be made to the commentary offered by Peter H. Russell, Rainer Knopff & Ted Morton, *Federalism and the Charter: Leading Constitutional Decisions*, new ed. (Ottawa: Carleton University Press, 1989) at 452-53 [Russell, Knopff & Morton].

20 *Supra* note 3.

21 *N.A.P.E.*, *supra* note 8 at para. 58.

22 *Ibid.* at para. 56.

23 *Ibid.* at paras. 55-56.
24 *Ibid.* at para. 58.
25 *Ibid.* at para. 64.
26 *Ibid.* at paras. 60, 75.
27 *Ibid.* at para. 72.
28 *Ibid.* at paras. 72, 75
29 *Ibid.* at para. 75.
30 See Melvin Baker, "The Tenth Province: Newfoundland Joins Canada" (1987) 10:111 *Horizon* 2641.
31 *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5, s. 91 [POGG].
32 *Re: Anti-Inflation Act,* [1976] 2 S.C.R. 373, 1976 CanLII 16.
33 Gerald Baier, "Judicial Review and Canadian Federalism" in Herman Bakvis & Grace Skogstad, eds., *Canadian Federalism: Performance, Effectiveness, and Legitimacy* (Don Mills: Oxford University Press, 2002) 24 at 26.
34 Russell, Knopff & Morton, *supra* note 19 at 163.
35 *Eldridge*, *supra* note 3.
36 *Ibid.* at para. 94.
37 For elaboration, see Bruce Porter, "Beyond *Andrews*: Substantive Equality and Positive Obligations After *Eldridge* and *Vriend*" (1998) 9:3 Constitutional Forum Constitutionnel 71.
38 *Eldridge*, *supra* note 2 at para. 89.
39 *Ibid.* at para. 92.
40 *Ibid*. at para. 92.
41 *Ibid.* at para. 87.
42 "Section 1: Justifying Breaches of Charter Rights and Freedoms," (2000) 27:2 Manitoba Law Journal 179.
43 *Ibid.* at 181.
44 *Supra* note 8 at paras. 83, 84, 87.
45 *Ibid.* at para. 84.
46 *Ibid.* at para. 85.
47 *Supra* note 1.
48 *Ibid.* at 218-19.
49 *N.A.P.E.*, *supra* note 8 at para. 66.
50 *Singh*, *supra* note 2 at para. 73.
51 *Ibid.*
52 Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada*, rev. ed. (Toronto: Thompson Educational Publishing, 1994) at 243.
53 "Beyond the Democratic Dialogue, and Towards a Federalist One: Provincial Arguments and Supreme Court Responses in Charter Litigation" (2006) 39:2 Canadian Journal of Political Science 293.
54 *Ibid*. at 296.
55 *Ibid*. at 311.
56 *N.A.P.E.*, *supra* note 8 at para. 75.
57 *Supra* note 5.
58 2003 SCC 37, [2003] 1 S.C.R. 912 (CanLII).
59 *Auton*, *supra* note 5 at para. 2.
60 *Ibid.* at para. 38.
61 *Ibid.* at paras 48-56.
62 *Ibid.* at para 41.
63 *Ibid.* at para 56.

Invalidity and Retrospectivity under the Irish and Canadian Constitutions

Ailbhe O'Neill*

Introduction

The question of the temporal effect of a finding that a statute is unconstitutional has arisen in a number of common law jurisdictions. In any legal system that allows its superior courts to strike down legislation, certain practical problems will inevitably emerge. This article explains this aspect of Irish constitutional interpretation and compares the manner in which these difficulties have been addressed under the Canadian and Irish constitutions. It notes that the Supreme Court of Canada was required to address these practical problems directly at an early stage and thus developed a more doctrinally coherent approach to findings of constitutional invalidity than the Irish Supreme Court. The article goes on to analyze a recent decision of the Irish Supreme Court that has highlighted the difficulties with the approach adopted in that legal system and concludes with some reflections on the relative merits of the Canadian approach to findings of invalidity.

The Canadian and Irish Constitutional Provisions

The Canadian and Irish constitutions have broadly similar provisions requiring laws to be compatible with the provisions thereof. In Canada, the *Constitution Act, 1982* provides that:

> The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.[1]

The provision upon which judges rely in the context of pre-1937 statutes in Ireland is article 50.1 of the 1937 Irish Constitution, which provides as follows:

> Subject to this Constitution and to the extent to which they are not inconsistent therewith, the laws in force in Saorstát Éireann [Irish Free State] immediately prior to the date of the coming into operation of this Constitution shall continue to be of full force and effect until the same or any of them shall have been repealed or amended by enactment of the Oireachtas [National Parliament].[2]

While the provisions of both constitutions are similar, they have been interpreted quite differently as far as the effect of a finding of unconstitutionality is concerned. The Supreme Court of Canada decided early on that it had the jurisdiction to suspend the effect of a finding of unconstitutionality. The Irish Supreme Court adopted a more absolutist approach to this issue, adopting and adhering to the "void *ab initio* doctrine." The next section explores some of the early Irish cases in which this approach was taken. It will be seen that it was clear from the outset that certain potentially chaotic consequences could arise from this approach.

Irish Cases on Invalidity: The "Void *ab initio* Doctrine"

The superior courts in Ireland[3] have taken the view that the meaning of article 50.1 is that any law found by a court to be inconsistent with the 1937 Constitution is deemed to be void from the enactment of the Constitution. This doctrine — the "void *ab initio* doctrine" — creates some obvious practical problems. In particular, it raises a question mark over the validity of acts carried out in reliance on a statute that is later declared to be unconstitutional.

This problem was identified by the dissenting judge in the 1972 case of *McMahon v. Attorney General*.[4] In that case, a majority of the Irish Supreme Court found that the legislation governing ballot papers — which had been used in Dáil elections since 1923 — was unconstitutional.[5] Justice Fitzgerald, in dissent, pointed out that the finding of the majority "raises or could raise the issue as to whether all elections and by-elections since 1923 were unconstitutional."[6] No litigant sought to pursue this issue, and the Irish Supreme Court has never had to rule on it.

The question again arose in the 1976 case of *de Burca v. Attorney General*.[7] Here, parts of the *Juries Act, 1927*,[8] which excluded from jury service persons other than ratepayers who held land above a minimum rateable valuation and exempted all women other than those who made a specific application to be considered for jury service, were found to be unconstitutional. Striking down these provisions of the *Act*, Chief Justice O'Higgins noted in passing that the possible impact of the decision on the thousands of criminal trials that had taken place in front of juries selected under the *Act*, had caused him "some concern."[9] He went on to make the *obiter* comment that any argument that criminal trials concluded in front of juries selected under the *Act* would be invalidated by "[t]he overriding considerations of an ordered society."[10]

The judgment in *de Burca* was followed by a case involving a litigant trying to rely on the invalidity of the legislation. In that case, *The State (Byrne) v. Frawley*,[11] the applicant had been tried and convicted by a jury selected in accordance with the *Juries Act, 1927* in December 1975. The Supreme Court had handed down its judgment in *de Burca* during the course of his trial, but the applicant had not raised the issue at that stage. The trial resulted in his conviction and he took an appeal to the Court of Criminal Appeal. Again, he failed to raise any issue in respect of the jury. It was only after this appeal failed that he instituted *habeas corpus* proceedings under article 40.4.2° of the 1937 Constitution on the grounds that his detention was not in accordance with law. The Supreme Court refused him relief on the basis of "*preclusion or estoppel*," or the lack of permission to relitigate an issue. The Court went on to point out that it was unnecessary to determine the position of a convicted person not in similar circumstances to Frawley who might have raised the issue after conviction.

Justice Henchy delivered the majority judgment in *Frawley*. He pointed out that two years had passed since *de Burca*, and concluded:

> Such retrospective acquiescence in the mode of trial and in the conviction and its legal consequences would appear to raise an insuperable barrier against a successful challenge at this stage to the validity of such a conviction or sentence.[12]

In these early cases, the Supreme Court was thus able to avoid the potentially chaotic sequelae of its interpretation of article 50.1. A number of members of the bench, however, adverted to the difficulty the Court was storing up by adopting the void *ab initio* doctrine. In a later case, *Murphy v. Attorney General*,[13] a minority of the Irish Supreme Court voiced their concerns about the void *ab initio* doctrine, preferring a doctrine of prospective rather than retrospective invalidity.[14]

As will be seen in the next section, the Court in *Murphy* placed some temporal limitations on the remedies available to litigants in the wake of a finding of invalidity.

Murphy: The Temporal Imitation of Redress

The *Murphy* case gave rise to the striking down of certain taxation legislation, a decision with potentially wide-ranging disruptive results. Rather than suspend the effect of the ruling, the Supreme Court chose to focus on the issue of redress. A majority of the Supreme Court endorsed the void *ab initio* doctrine, but they limited the redress available to the plaintiffs to the recovery of tax paid since the commencement of the constitutional action. The Court also indicated that only those third parties who had raised the issue of the constitutionality of the legislation before the statute was struck down could recover. Justice Henchy stated that while the general rule must be to allow corrective legal proceedings,[15] "the law has to recognize that there may be transcendent considerations which make such a course undesirable, impractical, or impossible."[16]

The minority, as noted above, stated a preference of abandoning the void *ab initio* doctrine in favour of a prospective ruling of invalidity. As can be seen from the next section, this is very close to the approach developed by the Supreme Court of Canada in its jurisprudence.

The Canadian Approach and "Temporary Validity"

Unlike the Irish Supreme Court, the Supreme Court of Canada was forced to consider the practical problems with findings of invalidity in an early constitutional case that raised the issue quite starkly. In the well-known case of *Reference re Manitoba Language Rights*,[17] the Supreme Court of Canada found that all statutes and regulations of the Province of Manitoba that were not printed and published in both English and French were constitutionally invalid. Recognizing the catastrophic results that the immediate striking down of these laws would have, the Court made a novel ruling that gave "deemed temporary validity" to all of the laws affected by the decision. The Court justified this action on the basis of the need to preserve the rule of law.[18]

Similar cases involving the statute books of Saskatchewan[19] and Alberta[20] followed, and the Court again used this mechanism to prevent the creation of a legal vacuum in those provinces.[21]

The Court used the "deemed temporal validity" approach in a number of subsequent cases concerning violations of *Charter*[22] rights. Most of these cases arose in the context of the criminal justice system. In *R. v. Brydges*,[23] the Court provided for a thirty-day transitional period during which police cautions that breached *Charter* rights could continue to be given.[24] In *R. v. Bain*,[25] the majority struck down provisions of the *Criminal Code*[26] that allowed the Crown but not the accused to "stand by" prospective jurors on the basis that it was contrary to section 11(d) of the *Charter*.[27] In this case, the Court allowed for a six-month period of validity to provide an opportunity for Parliament to remedy the situation if it considered it appropriate to do so.[28] In *R. v. Swain*,[29] the Supreme Court struck down certain provisions of the *Criminal Code* that required a person acquitted on the grounds of insanity to be detained in a psychiatric institution. These provisions were found to violate sections 7 and 9 of the *Charter*.[30] The Court held that there should be a six-month "period of temporary validity" to prevent the release of all such detainees.[31]

Apart from the cases concerning the criminal justice system, the Canadian courts also faced the issue in the context of the electoral system. In 1989, in *Dixon v. British Columbia (Attorney General)*,[32] Supreme Court of British Columbia Chief Justice McLachlin found that provincial legislation prescribing electoral districts for the province of British Columbia was unconstitutional. The statute violated section 3 of the *Charter* because of the disparity of the voting populations of various districts. She noted that nullification of the legislation would leave the province without any means of holding elections, and took the view that in any system of responsible government it was possible for elections to be held at any time. Chief Justice McLachlin also compared the emergency in the case at hand to the situation in the *Manitoba* case and held that the unconstitutional laws

would "stay provisionally in place to avoid the constitutional crisis which would occur should a precipitate election be required."[33]

The legislation was to remain in place for as long as "may reasonably be required to remedy" it with the actual time limit to be fixed by a subsequent court order.[34] In later proceedings,[35] such an order was sought but rejected on the basis that the legislature ought to be left "to do what is right in its own time."[36]

Consolidating the Canadian Position: *Schachter v. Canada*

In *Schachter v. Canada*,[37] the Supreme Court of Canada found that a provision of the federal *Unemployment Insurance Act*[38] violated the guarantee of equality in section 15(1) of the *Charter* by giving more generous child care benefits to adoptive than to natural parents.[39] Chief Justice Lamer pointed out that striking down the statute would simply deprive everyone of the benefits, and found that "[t]he logical remedy is to strike down but suspend the declaration of invalidity to allow the government to determine whether to cancel or extend the benefits."[40]

Chief Justice Lamer emphasized that such an order should only be resorted to where less extreme solutions such as severance or reading down were found to be inappropriate.[41] He also explored some of reasons why "deemed temporal validity" ought to be a remedy of last resort. He pointed out that such a ruling maintains in force an unconstitutional statute and that it involves a "serious interference" with the legislative process because it "forces the matter back onto the legislative agenda at a time not of the choosing of the legislature, and within time limits under which the legislature would not normally be forced to act."[42]

The decision in *Schachter* revisited the earlier Canadian case law on this issue and set a number of limitations on the circumstances in which rulings of temporary validity would be made. Such rulings were only to be made where the striking down of a law with immediate effect would pose a danger to public, threaten the rule of law, or result in the deprivation of benefits from deserving persons.

The *Schachter* decision was cited by the Irish Supreme Court in its most recent decision on the effect of finding legislation unconstitutional, but the judges, with one (qualified) exception,[43] rejected the Canadian approach and endorsed once again the void *ab initio* doctrine. This decision is set out in more detail in the next section.

Introduction to the *A.* Case: The Irish Courts Revisit the Issue of Invalidity

The Irish Supreme Court recently revisited the question of the effect of a finding of unconstitutionality in *A. v. The Governor of Arbour Hill Prison*.[44] This case arose out of a *habeas corpus* application by a man who had pleaded guilty to an offence of unlawful carnal knowledge of a girl under fifteen contrary to section 1(1) of the *Criminal Law Amendment Act, 1935*,[45] and who received a three-year custodial sentence. An unrelated individual, C.C., charged with the same offence, challenged the constitutionality of section 1(1) in a case taken approximately eighteen months after Mr. A began serving his sentence. In its judgment in the *C.C.* case,[46] the Irish Supreme Court declared the offence to which Mr. A had pleaded guilty to be inconsistent with the 1937 Constitution on the basis that it precluded a defence of honest and reasonable mistake. The Court made a declaration to that effect under article 50.1 of the 1937 Constitution, effectively striking down section 1(1) of the *Criminal Law Amendment Act, 1935*.

After the judgment in *C.C.* was handed down, Mr. A made an application to the High Court under Article 40.4.2° of the 1937 Constitution, seeking his release from custody on the grounds that there was no lawful basis for his detention.[47] His argument was that the application of this approach to findings of invalidity meant that the offence for which he was convicted had never actually existed.

In the High Court,[48] Justice Laffoy delivered a short judgment ordering the immediate release of the respondent from custody. The judgment relied heavily on the void *ab initio* doctrine, and noted that the offence "ceased to have legislative existence in 1937" when the 1937 Constitution came into force.[49]

Retrospectivity and Continuing Detention

One of the curious aspects of the *A.* case is the fact that so much emphasis was placed on the troubled question of the effect of a finding of invalidity on the conviction and sentencing of the applicant at the time these occurred. This focus on the question of "retrospectivity," as it was framed by the Court, was arguably misguided. Article 40.4.2° of the 1937 Constitution requires the state to justify the continuing detention of a *habeas corpus* applicant. The resolution of this issue does not necessitate finding that the original conviction and sentence were constitutionally frail, only that their continuation in force cannot be justified so as to allow for an existing and future deprivation of liberty. Despite this, the Supreme Court unanimously assumed that a finding in favour of the applicant would involve some element of retrospectivity and approached the case on that basis.

The Judgments in the Supreme Court

One of the key aspects of the judgments in the *A.* case was the parsing of the question "what is the effect of striking down a statute?" into two issues: (1) the time from which the statute is ineffective, and (2) the issue of redress. This approach had also been taken in *Murphy*.[50] Whatever the validity of the approach in that case — and it is arguably inconsistent with a strict void *ab initio* approach — the situation in the two cases as regards redress were not comparable. In *Murphy*, the approach operated so as to prevent litigants claiming restitution of invalidly paid tax. The applicant in the *A.* case was in a different position — he was not claiming damages for unlawful detention in the *past* (which would be analogous to *Murphy*). Rather, he was claiming that the state could not justify continuing to deprive him of his liberty *after* that deprivation had been found to be constitutionally infirm. Despite the findings of the High Court on this point, each member of the Supreme Court adopted this two-step test in *A.*

There was, however, some variation in the way that each Supreme Court judge explored the second issue. The Chief Justice took the view that the doctrine of *res judicata* precluded the reopening of the applicant's conviction. This is a novel approach to Irish constitutional interpretation, as the doctrine of *res judicata* is a common law doctrine that had never before been relied upon in the context of *constitutional* precedent, and no justification is offered in the judgment for this sudden transplantation.

The Irish courts, as with many of their common law counterparts, tend to rely on a variety of interpretive tools[51] when analyzing the 1937 Constitution.[52] One of the prevalent approaches in recent constitutional jurisprudence is the "harmonious approach."[53] In *A.*, Chief Justice Murray relied on this interpretive method in his judgment, where he emphasized the importance of interpreting article 50.1 in light of the constitution as a whole. He referred in his judgment to the competing constitutional considerations. Interestingly, Chief Justice Murray identified these considerations as being comprised of the rights of the applicant and the interests of justice, including the rights of the victim. What is striking about this interpretation is that there is little emphasis placed on the constitutional right to liberty, which is one of the fundamental rights in the Irish constitutional order.[54] Justice Hardiman, who also took a harmonious approach, also avoided reference to this competing value. In his judgment, he made reference to the Preamble of the 1937 Constitution, which refers to the promotion of the "common good" and the attainment of "true social order." The same paragraph of the Preamble also refers to the

assurance of "the dignity and freedom of the individual," but again no emphasis is placed on this value.

Apart from this interpretive tool, Chief Justice Murray and Justice Hardiman also made reference to "transcendent considerations"[55] that rendered complete or absolute retrospectivity inappropriate. The source and content of these "transcendent considerations" was not articulated, but the phrase was used by the Chief Justice to refer to public policy considerations and the fact that "many things of great public or private significance may have taken place by virtue of an impugned measure."[56] Justice Hardiman's judgment took a similar approach in this regard. Both judges referred to earlier case law such as *McMahon*,[57] in support of the limitations of retrospectivity. In fact, the question of redress did not arise for judgment in those cases so that any conclusions drawn in the judgments in that regard were *obiter*.

A Comparative Excursus

The Chief Justice was the only member of the Court to engage in an extensive comparative survey of other legal systems, referring to the jurisprudence of the European Court of Human Rights,[58] the Supreme Court of India,[59] the United States Supreme Court,[60] and the Supreme Court of Canada[61] in passing. As far as the latter jurisdiction was concerned, the *Schachter* case[62] was not referred to in his judgment, but reference was made to *Bain*.

In fact, the jurisdiction on which the most analysis focused was the European Court of Justice (ECJ) rulings on the interpretation of the European Community Treaties.[63] Chief Justice Murray's comparative survey started with the European Union.[64] He noted that the jurisprudence on requests for preliminary ruling under article 235 of the EC Treaty reveal that the ECJ sometimes limits the retroactive effect of its ruling and sometimes allows those who have brought proceedings prior to the ruling to maintain them. Article 231 of the EC Treaty provides that the ECJ, in declaring a measure void, may state which of the effects of the regulation that it found void are to be definitive. The Chief Justice referred to the ECJ's practice (similar to that of the Supreme Court of Canada) of maintaining the impugned provision in effect until a new valid measure was adopted.[65]

Finally, Justice Denham also made some reference to the Canadian case law[66] and the jurisdiction of the Supreme Court of Canada to suspend findings of invalidity, but ultimately did not approve of the adoption of that approach in Ireland.

Reflections on the Canadian and Irish Approaches

The approach taken by the Irish Supreme Court in the *A.* case can be criticized for its arguable lack of consistency with earlier case law and its overreliance on *obiter dicta* from such case law. It can also be criticized for insisting on the continued adoption of the void *ab initio* doctrine while compounding the incoherence in the doctrine arguably first exposed in *Murphy*. While it has been argued here that the *A.* case did not require the Court to adopt a position on retrospectivity and limitation of relief, the Court nonetheless ruled on these issues and some reflections on the alternative Canadian approach merit discussion.

The Canadian approach is not uncontroversial, and has even been described as "radical,"[67] but one of the advantages of the Canadian approach is that it has a consistency to it that is arguably lacking in the Irish jurisprudence. The consolidation of the case law in the *Schachter*[68] decision refined the situations in which the Court would exercise this tool of "deemed temporal validity," and confined it to discrete categories of cases.

Indeed, some of the Irish case law on invalidity pre-*A.* involved situations that could usefully have been dealt with under the Canadian approach post-*Schachter* by the suspension of a finding of invalidity. For example, electoral cases such as *McMahon*[69] would clearly fall under the rule of law category. On the other hand,

the *Schachter* criteria are themselves malleable and their precise extent can vary from case to case. Thus, what constitutes a "threat to the public" may not always be clear. Depending on the breadth of meaning given to that concept, the application of *Schachter* in *C.C.*[70] might not necessarily have put Mr. A in any better a position.

One of the criticisms that can be made of the Canadian approach is that it involves the Court in a counterintuitive and unpalatable exercise of positively retaining in force an unconstitutional law. However, the approach does have the advantage of requiring the Court to articulate the reasons justifying that decision in a categorical way, and avoids vague language such as "transcendent considerations." For its transparency alone, the Canadian approach is perhaps to be preferred in any constitutional order where an unelected judiciary is the primary guardian of the constitution.

Prior to the *A.* case, it had been suggested in Ireland that "the interesting Canadian case law might prompt the Supreme Court to reassess some of the more rigid and uncompromising aspects of the *Murphy* decision."[71] The opportunity to consider the merits of that approach arose in the *A.* case, where Justice Denham's judgment alone offered some specific support for the *Schachter* approach. She noted that "such a suspended declaration is in aid of organised society as it enables the legislature address the issue" and "enables dialogue in the community as to the best way to proceed."[72] Her approval of the approach was cautious, however, and she went on to note that the Canadian "case law may not be referable or persuasive to our Constitution."[73]

The reasons why this is so are not made clear, but may be due, in part at least, to the strict view of the "separation of powers" that has been espoused by the current Irish Supreme Court.[74] Even discounting the dogged adherence of the Court to the void *ab initio* doctrine, the idea of a doctrine that would involve the Court in a dialogue with the legislature is unlikely to find favour with the current Irish Supreme Court.

Notes

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1 *Constitution Act, 1982*, s. 52(1), being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

2 *Constitution of Ireland*, art. 50.1, online: Department of the Taoiseach <http://www.taoiseach.gov.ie/attached_files/Pdf%20files/Constitution%20of%20IrelandNov2004.pdf> [1937 Constitution].

3 There are two superior courts of record in Ireland — the High Court and the Supreme Court. These are the only courts with jurisdiction in constitutional matters.

4 [1972] I.R. 69, Fitzgerald J. [*McMahon*].

5 The Court found that the legislation did not provide for the complete secrecy of the ballot as required by art. 16.1.4° of the 1937 Constitution, *supra* note 2.

6 *Supra* note 4 at 113.

7 [1976] I.R. 38 [*de Burca*].

8 (Ire.), No. 23/1927.

9 *Supra* note 7 at 63.

10 *Ibid.*

11 [1978] I.R. 326 [*Frawley*].

12 *Ibid.* at 349.

13 [1982] I.R. 241 [*Murphy*].

14 See O'Higgins C.J. in the minority in *Murphy*, *ibid.* at 301. See also the dissenting judgments in the earlier Supreme Court case of *McMahon*, *supra* note 4.

15 See *Muckley v. Ireland*, [1985] I.R. 472, where the Supreme Court held that the restriction of redress did not apply to taxes that were assessed, but uncollected.

16 *Supra* note 13 at 314.

17 [1985] 1 S.C.R. 721, 1985 CanLII 33 [*Manitoba*].

18 See discussion of the decision in Peter W. Hogg, *Constitutional Law of Canada*, 4th ed. (Scarborough, ON: Carswell, 1997) at 922, where the author states that "'necessity' would have been the more conventional rubric" for the decision.

19 *R. v. Mercure*, [1988] 1 S.C.R. 234, 1988 CanLII 107.

20 *R. v. Paquette*, [1990] 2 S.C.R. 1103, 1990 CanLII 37.

21 See also *Sinclair v. Quebec (Attorney General)*, [1992] 1 S.C.R. 579, 1992 CanLII 126, where the Court used the approach to maintain in force bylaws and other acts of a Quebec municipality that had been invalidly incorporated but functioning for six years.

22 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, *supra* note 1

[*Charter*].

23 [1990] 1 S.C.R. 190, 1990 CanLII 123.

24 See also *R. v. Askov*, [1990] 2 S.C.R. 1199, 1990 CanLII 45.

25 [1992] 1 S.C.R. 91, 1992 CanLII 111 [*Bain*].

26 R.S.C. 1985, c. C-46.

27 Section 11(d) provides that "[a]ny person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal."

28 *Supra* note 25 at 165.

29 [1991] 1 S.C.R. 933, 1991 CanLII 104.

30 Section 7 provides that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Section 9 provides that "[e]veryone has the right not to be arbitrarily detained or imprisoned."

31 *Supra* note 29 at 1021 and 1037.

32 (1989), 59 D.L.R. (4th) 247, 1989 CanLII 248 (B.C.S.C.).

33 *Ibid.* at 284.

34 *Ibid.*

35 *Dixon v. British Columbia (A.G.)* (1989), 60 D.L.R. (4th) 445 (B.C.S.C.).

36 *Ibid.* at 448.

37 [1992] 2 S.C.R. 679, 1992 CanLII 74 [*Schachter*].

38 Currently the *Employment Insurance Act*, S.C. 1996, c. 23.

39 Section 15(1) of the *Charter*, *supra* note 22 provides that "[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

40 *Supra* note 37 at 716.

41 In Ireland, "reading down" is the preferred approach to statutes that post-date the 1937 Constitution, *supra* note 2, as these enjoy a strong presumption of constitutionality. See *East Donegal Co-Operative Livestock Mart Ltd. v. Attorney General*, [1970] I.R. 317.

42 *Supra* note 37 at 716-17.

43 Justice Denham alone advocated prospective overruling. See discussion below.

44 [2006] IESC 45 (BAILII) [*A.*].

45 (Ire.), No. 6/1935.

46 *C.C. v. Ireland*, [2006] IESC 33 (BAILII) [*C.C.*].

47 Article 40.4.2° of the 1937 Constitution, *supra* note 2, specifically provides for *habeas corpus* applications to the High Court as follows:

> Upon complaint being made by or on behalf of any person to the High Court or any judge thereof alleging that such person is being unlawfully detained, the High Court and any and every judge thereof to whom such complaint is made shall forthwith enquire into the said complaint and may order the person in whose custody such person is detained to produce the body of such person before the High Court on a named day and to certify in writing the grounds of his detention, and High Court shall, upon the body of such person being produced before that Court and after giving the person in whose custody he is detained an opportunity of justifying the detention, order the release of such person from detention unless satisfied that he is being detained in accordance with the law.

48 *A. v. The Governor of Arbour Hill Prison*, [2006] IEHC 169 (BAILII), Laffoy J.

49 *Ibid.*

50 *Supra* note 13.

51 The Irish courts have evolved a number of techniques of interpretation since the Constitution was promulgated in 1937. These include the literal approach, the historical approach, the broad or purposive approach, and the natural law approach. For an excellent summary of the case law relating to Irish constitutional interpretation, see Gerard Hogan & Gerry Whyte, eds., *J.M. Kelly: The Irish Constitution*, 4th ed. (Markham, ON: LexisNexis Butterworths, 2003) at 3-38.

52 *Supra* note 2.

53 *Dillane v. Ireland*, [1980] I.L.R.M. 167 is the earliest example of the application of this method of interpretation.

54 Personal liberty is protected under Article 40.4.1° of the 1937 Constitution and provides that "[n]o citizen shall be deprived of his personal liberty save in accordance with law."

55 The phrase is borrowed from the judgment of Henchy J. in *Murphy*, *supra* note 13. See also the judgment of Hardiman J. in *A.*, *supra* note 44.

56 *A.*, *ibid*.

57 *Supra* note 4.

58 *Marckx v. Belgium* (1979), 2 E.H.R.R. 330, [1979] E.C.H.R. 2 (BAILII).

59 *India Orissa Cement Ltd. v. State of Orissa* [1991] Supp. (1.) SCC 4330.

60 The U.S. Supreme Court decision of *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371 (1940) (FindLaw) had already been referred to by Henchy J. in *Murphy*, and Murray C.J. referred to this decision and three later decisions in *A.*: *Linkletter v. Walker, Warden*, 381 U.S. 618 (1965) (FindLaw); *Tehan, Sheriff v. United States (Ex. Rel. Shott)*, 382 U.S. 406 (1966)

(FindLaw); and *Stovall v. Denno, Warden*, 388 U.S. 293 (1967) (FindLaw).

61 *Bain*, *supra* note 25; and *R. v. Wigman*, [1987] 1 S.C.R. 246, 1987 CanLII 1.

62 *Supra* note 37.

63 See European Union, *Consolidated Version of the Treaty on European Union and of the Treaty Establishing the European Community*, [2006] O.J.C 321/1.

64 In *Murphy*, *supra* note 13, reference was made to the ECJ's decision in *Defrenne v. Sabena*, [1976] 2 CMLR 98.

65 C-178/03 *Commission v Parliament* [2006] ECR 1-0.

66 *Bain*, *supra* note 25; *Schachter*, *supra* note 37; and *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, 1999 CanLII 687.

67 See Hogg, *supra* note 18.

68 *Supra* note 37.

69 *Supra* note 4.

70 *Supra* note 46.

71 Hogan & Whyte, *supra* note 51 at 906.

72 *Supra* note 44.

73 *Ibid*.

74 See *Sinnott v. Minister for Education,* [2001] 2 I.R. 545, [2001] IESC 63 (BAILII) for an example of the separation of powers doctrine in its most rigid guise.