Constitutional forum constitutionnel

Centre for Constitutional Studies
Centre d'études constitutionnelles

Volume 16, Number 2, 2007

Constitutional Forum constitutionnel

Subscriptions
Canadian Orders:
$44.10 CDN (includes 5% GST) per volume (3 issues)

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$42.00 USD per volume (3 issues)

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Constitutional Forum constitutionnel is published three times per year by the Centre for Constitutional Studies/Centre d'études constitutionnelles with the generous support of the Alberta Law Foundation.

Alberta LAW FOUNDATION

Constitutional Forum constitutionnel is indexed in: **Index to Canadian Legal Periodical Literature, Index to Canadian Legal Literature,** and **Current Law Index.**

ISSN: 0847-3889
PUBLICATION MAIL AGREEMENT #4006449667

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The Constitution Act, 1982: the Foreseen and Unforeseen

Hon. Barry L. Strayer, Q.C.*

". . . not exactly what we had in mind."

Introduction

I started preparations for my first constitutional conference in an office overlooking Wascana Lake nearly forty-seven years ago. I was a young lawyer in the Department of the Attorney General of Saskatchewan. Prime Minister Diefenbaker had announced that there would be a Conference of Attorneys-General in early October 1960, chaired by Justice Minister Fulton, to seek agreement on "Repatriation of the Constitution." As I expressed interest in the conference to the Attorney General, and had recently taught constitutional law for a year at the University of Saskatchewan, I was made the secretary of the Saskatchewan delegation. This involved most of the work of research and writing position papers and speeches. But it also involved making hotel and travel reservations for which I claimed no particular skill! Of course, after four such meetings in 1960 and 1961 we reached no agreement on repatriation, but it gave me on the job training in constitutional reform.

A few years later, when I was teaching full time at the College of Law in Saskatoon and doing some writing in the constitutional field, I was invited to go to Ottawa to help develop a position for the Government of Canada on constitutional reform. My first period there was during the summer of 1967 when I was assigned to advise the new Minister of Justice, Pierre Elliott Trudeau. He asked me to develop a position paper on a constitutional bill of rights, initially for use by Cabinet, and then to be elaborated into a discussion paper in aid of negotiation with the provinces for the adoption of a Charter of Rights. The end product, with some modifications, was indeed published in a 1968 position paper.[1] In that year I went back to Ottawa on a full-time basis, eventually resigning my university post and joining the public service. First in the Privy Council Office, and later as Assistant Deputy Minister of Justice, I was heavily engaged in the constitutional discussions which went on intermittently for fourteen years, and which resulted in the *Constitution Act, 1982*.[2] I guess it is for this reason that I have been asked to address which of the developments under this Act in the last twenty-five years were foreseen and which were unforeseen.

I have chosen three areas which I regard as the most important elements of the 1982 constitutional amendments: namely patriation, the *Canadian Charter of Rights and Freedoms*,[3] and the constitutionalization of Aboriginal and treaty rights. In this article I adopt the analytical framework of that great philosopher Donald Rumsfeld, former Secretary of Defence in the Bush administration, who said of the war in Iraq: There are some things we know we know, some things we know we don't know, and some things we don't know we don't know.[4] This was indeed our position regarding our knowledge of the future in launching these constitutional reforms.

Patriation

The term "patriation" is shorthand for the process of transferring to Canada the legal control of its own Constitution. As is well known, when our Constitution was originally enacted by the British Parliament in 1867 as the *British North America Act, 1867*,[5] it made no provision for Canadians themselves to amend it in future: it was, like any other British statute, amendable by Westminster alone. This accorded with the colonial nature of our status as a country, albeit the 1867 Constitution gave us most of the elements of self-government. In our first few decades as a Dominion little thought was given to the fact that we had to rely on the British to pass laws for Canada in respect of our constitutional arrangements. Over time attitudes changed. When Australia was federated by Act of the British Parliament in 1900,[6] she was given the power to amend her Constitution; this accentuated the problem of our own continuing dependence on the Mother of Parliaments. More importantly, in the opening decades of the twentieth century, particularly after Canada's distinguished role in the First World War, there was in this country a growing sense of Canadian nationhood. Indeed, after the Great War Britain realized that her senior Dominions, including Canada, had to be recognised as fully autonomous states. This position was agreed to at the Imperial Conference of 1926. The result was the enactment of the *Statute of Westminster, 1931*,[7] which recognized this position and stated that the British Parliament would no longer legislate for the Dominions. However, an exception had to be made for Canada in respect of amendments to our Constitution. This was at Canada's request, and that request was made because we could not agree among ourselves as to how we would amend our Constitution if the British didn't do it for us. The federal government, eager to enhance national sovereignty, had been trying since 1920 to get agreement on a domestic amending formula. The basic issue was always the same: under an all-Canadian amending formula, how many provinces would have to agree with the federal government or Parliament before proceeding with an amendment to the Constitution?

This debate continued periodically for the next sixty years in numerous federal-provincial conferences at which agreement was never reached on an amending formula. The last of these meetings occurred in September 1980 and it too failed. At that point, the federal government, led by Pierre Trudeau, introduced a resolution in Parliament which requested the Queen to place before Westminster a request to adopt an amending formula for Canada and thus sign off on any future legislative power over Canada. This initiative was condemned ultimately by eight of the ten provinces, the so-called Gang of Eight, because they had not been consulted on the content of the resolution. Three of these eight provinces (Manitoba, Newfoundland and Quebec) initiated court proceedings in the form of reference questions in their respective courts of appeal, with the full knowledge that the questions would end up in the Supreme Court of Canada. The references asked if it was legally correct for the federal government to seek and obtain a constitutional amendment from Westminster in the fashion that it did. The Supreme Court ultimately said that it was legally correct in proceeding unilaterally. The three provinces also asked if such a procedure was in accordance with the conventions of the constitution: that is, was federal unilateralism consistent with accepted past practices? Seven provinces in the Gang of Eight contended that no such amendment could be made in accordance with constitutional convention without unanimous provincial consent. To this the Supreme Court replied that while unanimous consent was not required there must be, by convention or practice, a "sufficient measure of provincial consent," of which there was not here. Only Ontario and New Brunswick supported the federal initiative.[8] Not satisfied with this, Quebec initiated an additional reference question arguing that even if the agreement of every province was not required, by past practice and fundamental principle at least the consent of Quebec was always required. The Supreme Court heard and rejected this argument.[9]

After the *Patriation Reference,* in which the Supreme Court said that not unanimity but rather a "sufficient measure of provincial consent"[10] was necessary to bring about the constitutional

changes contained in the federal proposal, there was a further Federal-Provincial Conference in November 1981 to seek that sufficient measure of agreement on an amending formula, the adoption of a Charter of Rights, and a few other changes. Eventually all governments but Quebec came to agreement. The changes agreed upon by the ten governments were adopted in a Joint Resolution of Parliament which was forwarded to Westminster where it was adopted in March 1982, as the *Constitution Act, 1982*.

What the Government of Canada, as the national government with primary responsibility for national sovereignty, had sought for some sixty years was the completion of our legislative autonomy, a hallmark of a sovereign state. It sought to do this in a way which would be regarded as legitimate: in accordance with legal requirements, but also with politically accepted practices. What the federal government and the nine provinces which endorsed the 1981 Accord leading to the *Constitution Act, 1982* expected was that if they proceeded in accordance with the decision of the Supreme Court requiring not unanimity but rather a "sufficient measure of provincial consent" to change our Constitution, the resulting changes would be viewed as legitimate by all Canadians. They naturally believed that the support of nine of the ten provinces was "sufficient" if, as the Supreme Court had said, unanimity was not required. That is what was foreseen in respect of patriation. Yet things did not work out that way. Many residents of Quebec, and some of their supporters outside that province, continue to believe that Quebec was "humiliated" by this process whereby changes were made without her consent. They go even further and suggest that "Quebec is not in the Constitution" because the separatist government and a majority in the Quebec legislature opposed those changes in 1981.

It may first be observed that other voices of Quebec *did* support the *Constitution Act, 1982*. Of Quebec's seventy-five Members of Parliament, seventy-one voted for the Joint Resolution adopting the Act. And a public opinion poll taken in May 1982 showed that 49 percent of the people in Quebec approved of the Joint Resolution, with only 16 percent opposing it.[11] (In a recent poll, residents of Quebec proved to be the most supportive of the *Charter* after twenty-five years; in fact, 61 percent, a higher percentage than in any other province, rated the *Charter's* impact as positive or very positive.[12] This suggests that residents of Quebec believe that this part of the 1982 Constitution applies in Quebec, and that they harbour few feelings of "humiliation" about the process that brought it to fruition.) Second, and more importantly, patriation was effected by a procedure approved by the body to which Quebec had on two occasions willingly submitted questions as to whether her consent was essential for any such amendment. Twice the Supreme Court said no. It must be remembered that it was not the Government of Canada which chose that forum to determine the political legitimacy of its amendment proposal, that is to say, to determine the nature of any constitutional conventions governing the practice of achieving constitutional amendment. Indeed the Government of Canada in the *Patriation Reference* objected to the Supreme Court pronouncing on constitutional conventions on the basis that this really involved a political question — an issue of acceptable political conduct. Yet once the Supreme Court did so pronounce, at the insistence of Quebec, Ottawa and the other nine provinces followed these instructions as to the character of acceptable political practice. If Quebec was humiliated, it was on her own government's initiative.

That being said, it is one of the major disappointments following the adoption of the *Constitution Act, 1982* that it has not brought the stability and dignity to our national sovereignty that we expected, and were entitled to expect. Legally, of course, patriation worked. Westminster can no longer make our laws for us. All laws governing Canada are made in Canada. Should we ever, by some chance, happen to agree on a significant constitutional amendment we could make it ourselves. But the political legitimacy of the *Constitution Act, 1982* continues to be disputed by Quebec nationalists and their sympathizers, both within and outside that province, and we have gone through periodic disturbances such as the Meech Lake[13] and Charlottetown Accords,[14] the 1995 Quebec secession referendum, and most recently the resolution in the House

of Commons recognising the "Québécois" as a nation.[15] What we had foreseen as a major confirmation of our maturity as a sovereign state remains a source of disunity. We didn't know we didn't know this.

The Charter

I should begin by affirming my belief that the *Charter* has largely met the expectations of its framers and must be adjudged a success. I should also affirm that we recognized that the general language necessarily used in an enduring constitutional instrument to describe the protected rights and freedoms meant we knew we didn't know all of its potential applications. This has proven to be true, but for the most part I believe these interpretations have been beneficial and within the anticipated range of outcomes we expected. I will, however, now describe some outcomes which were not expected and which in my view go beyond the social consensus which brought about the *Charter.*

A consensus for a constitutional bill of rights, although advocated by Pierre Trudeau as Minister of Justice and pressed by him as Prime Minister, was slow to develop. From 1968 when it was first discussed at a Federal-Provincial Conference, down to 1980 when Ontario and New Brunswick got behind it, it had no provincial backing. The other eight provinces opposed its adoption until November 1981 when the federal and nine provincial governments reached agreement on an Accord to seek the amendments finally adopted in the *Constitution Act, 1982*.

Traditionally, Canadian politicians and officials were opposed to a constitutional bill of rights or any international commitment that would interfere with parliamentary supremacy. In particular they could not accept the idea of Parliament or the legislatures being ordered by a court to spend money. When Parliament studied the United Nations' *Universal Declaration of Human Rights*[16] of 1948 there was hesitation in endorsing it because it contained rights to social security, employment, education, and other economic rights — all things that would cost money and so were, in the eyes of legislators, matters to be provided by legislation in accordance with the judgment of elected representatives. Members of all political parties opposed the notion of legally vested rights to employment, social security, etc. Parliament approved the accession by Canada to the *Declaration* only on the assumption that we were merely accepting an obligation to promote such objectives.[17] The first head of any government to advocate a constitutional bill of rights was Premier T. C. Douglas of Saskatchewan who proposed the idea at a Federal-Provincial Conference in Quebec City in 1950. No other government supported the idea at that time. The federal Liberal Party only began to advocate a constitutional bill of rights in opposition to Mr. Diefenbaker's statutory *Canadian Bill of Rights*[18] when it was under debate in Parliament in 1960. The subject was not formally put on the agenda of any federal-provincial meeting until the Constitutional Conference of 1968. This is all to demonstrate that, historically, politicians were reluctant to give to the courts the power to make social policy.

Indeed, it is fair to say that the concept of a constitutional bill of rights was that of a protector of "negative rights" — that is, a protector of citizens' liberty and freedom of choice from the interference of government. Political, legal, mobility, and equality rights were to be guaranteed free of state restraint. What was not contemplated was that the *Charter* would become a road map for social entitlement programs designed and enforced by the courts.

Yet the courts, led by the Supreme Court, have found ways to dictate laws and determine social programs in ways partly foreseeable but mostly unforeseen. In at least one respect this has come about by changes made to the draft Charter in its latter stages of development during the work of the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada in its meetings of 1980-81. Mainly as the result of submissions by feminist groups, the original proposed formulation of the guarantee in section 15 of "equality before the law and equal protection of the law" was enlarged to equality "before and under the law and . . . the right to equal protection and equal *benefit* of the law . . ."[19] The addition of various prep-

ositions and nouns meant that the *Charter* did give the courts a potential power to pronounce on the adequacy of entitlements to social programs for certain deprived groups. What remedy they might give was not prescribed. I think we assumed that courts would, in the exercise of their powers under section 52 of the *Constitution Act, 1982*,[20] at most pronounce statutes invalid if found to be discriminatory because of a lack of equality in the benefits they provided, and leave it for Parliament or the legislatures to re-enact them in a form which, while providing for equal benefits, would correspond to the legislative bodies' priorities and spending capacity. Or, if the courts resorted to their powers under section 24,[21] they would not think it "appropriate and just in the circumstances" to go beyond a declaration that the offending action or inaction by government is invalid. Again, we assumed that courts would leave it to Parliament and the legislatures to correct unconstitutional statutes to the extent *they* thought possible and appropriate.

It didn't work out that way. In an early *Charter* case, *Schachter v. Canada*,[22] the Supreme Court held that where a statute gives benefits to certain persons but not to others similarly situated, it was open to the courts to find the law not only invalid as it stood under section 52, but also to "read in" to the statute the provision of similar benefits to the deprived class of persons. In effect, the Court said it could legislate for Parliament rather than simply declare that the law makes an invalid distinction, suspend the declaration, and then let Parliament take such remedial measures as it thought consistent with the parameters identified by the judiciary.[23] In *Eldridge v. British Columbia*,[24] however, it was not the validity of a statute that was at issue, but rather the adequacy of administrative action under section 15 of the *Charter*. The Court responded with a subsection 24(1) remedy to require that medical services provided under a provincial medical insurance program include sign language interpretation for deaf patients. Again, this was a problem of ensuring "equal benefit" of the medical insurance law and it was the Court which decided what services should be provided at public expense.

Admittedly, the Court has shown some reluctance in recent times to order the expenditure of money by legislatures to ensure "equal benefit" of the law, or for other purposes.[25] But I understand these cases to have turned on other principles and do not represent an abandonment of the Court's willingness to order the provision of specific services and hence the expenditure of public funds.

Not only have the courts amended legislation for the purpose of providing services and spending funds not voted upon by legislatures, but they have also amended laws to regulate matters which legislative bodies have preferred to leave unregulated. A salient example may be found in the Supreme Court's decision in *Vriend v. Alberta*.[26] There a homosexual teacher at a private college in Alberta was dismissed because of his sexual orientation. The provincial law prohibiting discriminatory employment practices did not include sexual orientation as a prohibited ground. The legislative history made clear that this had been a deliberate omission by the government and legislature. It was ultimately held by the Supreme Court that the failure of the legislature to prohibit discrimination on grounds of sexual orientation was itself discriminatory, and the Court read into the legislation the necessary prohibition which the legislature had chosen not to include. The Supreme Court simply could not contemplate the legislature being neutral on this issue. Not only must Alberta's legislature refrain from evil, it must also do good. One anomalous consequence of this is that, although we understood the *Charter* to be for the control of the state and not of individuals, the Court here used it to enact a prohibition on the actions of all private employers in Alberta.[27]

Those who drafted and agreed to the terms of the *Charter,* be it federal or provincial politicians or officials, had another major surprise in *Re B.C. Motor Vehicle Act*[28] where the Supreme Court interpreted section 7[29] to be a mandate for the courts to ignore laws which, though otherwise constitutional, they consider unjust. That section, of course, guarantees the right to "life, liberty and security of the person and the right not to be deprived thereof except in the

accordance with the principles of fundamental justice." In lieu of "principles of fundamental justice," earlier drafts had used the term "due process." The record is abundantly clear that no one wanted that term used in the *Charter* because it had been interpreted, in the United States, to include what is called "substantive" due process: that is, it was interpreted to allow the courts to second-guess legislatures by striking down a law, even if it were otherwise constitutionally unobjectionable, because it embraced a bad policy of which the courts did not approve.

At one time, socially progressive legislation had been struck down by the U.S. Supreme Court as contrary to substantive due process. The Canadian framers did not want such a result here. We therefore employed the words "principles of fundamental justice" which were found in the *Canadian Bill of Rights* and which had been interpreted by the Supreme Court in 1972 to refer to procedural requirements only.[30] Admittedly the context was different in that statute, and had we enjoyed the luxury of more time we probably would have employed more precise language. In fact, we did consider the suggested alternative of "natural justice" at that time, but rejected that traditional term because its use was still restricted to judicial and quasi-judicial proceedings. If there were an ambiguity in the term "principles of fundamental justice," it would not have taken much effort on the part of the Court, which, we are frequently told, is always in pursuit of "purposive" interpretations of our constitutional instruments, to learn from the public record what was the purpose of the elected representatives who conferred on courts the mandate to apply the *Charter,* but who also determined the language to which the judiciary was expected to give its intended effect. If, as we are told by the Court, this phrase gives the judiciary the mandate to apply the "basic tenets of our legal system" in determining whether a law complies with "fundamental justice" in a substantive sense, a superficial examination of that legal system would have revealed that it has never been part of our constitutional or common law heritage that judges be free to refuse to apply plainly worded statutes not otherwise in conflict with the Constitution, just because they didn't approve of the policy implemented by that statute.

One would, I think, have to go back to Lord Coke's pronouncement in *Dr. Bonham's Case*[31] in the seventeenth century to find in English or Canadian law such a judicial claim to exercise legislative power, and Coke's notion, never widely received (certainly not in Canada), barely survived that century.[32] In 1985, however, only three years after the adoption of the *Charter* "by the elected representatives of the people of Canada" (as the Supreme Court piously reminded us in *Motor Vehicle*[33]), the Court found those representatives to have intended the adoption of the test of substantive due process by their use of the phrase "principles of fundamental justice." While I believe in the "living tree doctrine"[34] by which the meaning of the Constitution may change over time with the changing society which it must serve, just three years growth of that living tree could hardly produce such fecundity! Had our society evolved so profoundly between 1982 and 1985 that we had already come, and for the first time, to accept the supremacy of the courts in determining, not just the constitutionality, but the policy of statutes?

While the impact of this holding has so far been somewhat limited, we have recently been reminded of its potential use as authority for the courts actively to manage social policy. In the case of *Chaouilli v. Quebec*,[35] decided by the Supreme Court of Canada in 2005, a majority of the panel held that the policy of a provincial law to prohibit the purchase or sale of private medical insurance was wrong, and therefore unconstitutional. Three of the majority of four judges based their decision on "the principles of fundamental justice" in section 7 of the *Charter.* All four of that majority also invoked section 1 of the *Quebec Charter of Human Rights and Freedoms*,[36] which is believed to have magic qualities similar to those of section 7 of the *Charter.* Thus, the Court settled a long and highly contested issue in Canadian public policy as to whether it is fair and just to deny certain fortunate people, who can afford private insurance and who do not suffer from disabilities that would make them uninsurable, the right to have the faster and arguably better care that would

be provided through private insurance. So far, through many elections and changes of parties in power, elected representatives have not been prepared to allow this, mainly on the basis that it is contrary to egalitarian principles (arguably even against section 15 of the *Charter*), but also because it would have the effect of weakening the public insurance system by drawing away resources to give better and faster service to the more fortunate privately insured. Is it right that in spite of all this, the courts are in a better position than elected governments to determine what is a just distribution of medical services?

I will not belabour the point or get further into the minutiae of *Charter* interpretation. These are some of the most important unforeseen and I think unforeseeable of its interpretations.

Aboriginal Rights

The other change of great importance effected by the *Constitution Act, 1982* was the addition of section 35.[37] As ultimately enacted it includes the following subsections:

> 35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.
>
> (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.

There was no such provision in the draft resolution tabled by the federal government in Parliament in October 1980 as its constitutional proposal. I can recall no discussion of this within the government prior to that time, nor during the previous twelve years of intermittent federal-provincial discussions on constitutional reform. However, once a text of patriation legislation was up for discussion in the Joint Parliamentary Committee, representations were received from many quarters: 104 groups and individuals appeared as witnesses and some 1,200 written representations were received by the Committee. Among those appearing and making forceful presentations were several representatives of Aboriginal peoples. They pressed for constitutional recognition and protection of the type effected in section 35. Their proposals received particularly strong support from members of the federal New Democratic Party (NDP) caucus. Prime Minister Trudeau, given the many forces of opposition to the federal proposals then abroad in the land (including the governments of eight provinces), was anxious to have the support in Parliament of the NDP to complete patriation. I and some other federal advisers were closeted from time to time with Ed Broadbent, the then NDP leader, and his advisers to try to work out a suitable text. The one agreed upon was similar to the text which was finally adopted, and seemed to me to be a very strong endorsement of, and protection for, Aboriginal rights. Indeed, I had to advise federal ministers that, if they were to entrench in the Constitution something along the lines being discussed, we could not give much meaningful advice as to how it would be interpreted by the courts. I will return in a moment to the causes of our uncertainty.

The text, essentially as mentioned above in subsections 35(1) and (2) (the word "existing" was not then included in subsection 35(1)), was approved by the Committee on 13 February 1981 and was transmitted to Parliament where it was approved by both Houses without change on 23-24 April 1981. There then followed a hiatus during which we argued before the Supreme Court in the hearing of the *Patriation Reference*,[38] and awaited the results. When the Court pronounced, in effect, that we had not achieved "a sufficient measure" of provincial support, a further First Ministers Conference was held in early November 1981. There the Accord was reached whereby nine premiers (all but Quebec's) and the prime minister agreed on a text of constitutional changes. As a result of the objections, at that time, of several premiers to the inclusion of section 35, it was not included as part of the Accord. But once the Accord was made public, this omission attracted much criticism, and not just from Aboriginal peoples. Eventually, the reluctant premiers agreed to its

restoration, mainly on condition of the addition of the word "existing" to subsection 35(1). As I recall it, subsection (3) was added at the urging of Aboriginal leaders to ensure that recently negotiated and future land claims agreement would have the same entrenched protection as the traditional treaties referred to in subsection 35(1). With these changes, and some others, the package was endorsed by Parliament and sent to Westminster where it was enacted as the *Constitution Act, 1982*.

I return then to my focus on the foreseen and unforeseen. Speaking, I think, for many participants in the framing process, I have to say that we considered the outcome of section 35 to be largely unforeseeable. This was one area where we knew we didn't know. For this reason I would characterise its interpretation to date as unforeseen. This is not to denigrate the generally good job which I think the courts have done in putting meat on these bare bones. To appreciate the value of what has been done, I need to go back to the sources of our uncertainty — to show just what a difficult task was left to the courts. Following are major areas of uncertainty apparent to us in 1982.

1. What rights would be protected? We were fairly certain as to what "treaty rights" and rights under "land claims agreements" were, as these are, by definition, reduced to writing. Even there, the language of some of the old treaties is full of ambiguities and generalities. But what did "existing aboriginal rights" embrace? In 1982, we thought we understood Aboriginal title to land, one form of Aboriginal rights. Indeed, by this time the dissenting reasons of Justices Hall, Spence, and Laskin in *Calder v. British Columbia*[39] had been accepted, at least in Ottawa, as the correct view of Aboriginal title. This was a view of title based on occupancy and use by an identifiable group of Indians prior to the Crown asserting sovereignty over the lands. So established, title entitled a group to exclusive continuing occupancy unless it had been extinguished by the agreement of the relevant group, or by a deliberate act of the competent government. This view was confirmed by *Delgamuukw v. British Columbia*,[40] the leading 1997 Supreme Court decision under section 35. There were, perhaps, at least two surprises in that decision. One was that, as Aboriginal title is not based on the practices, customs, and traditions of the claimants (as are other Aboriginal rights), title is not confined to traditional uses of the land. Thus, Aboriginal title includes mineral rights even if their ancestors never exploited them.[41] (This I found surprising as, in my understanding, the claim to Aboriginal title depended on traditional occupation of the land and this occupation was essentially surface occupation.) Another doubtful matter, clarified in that case, was the weight to be given to evidence proffered by claimants in the form of oral history.

2. As I say, while we knew the likely parameters of Aboriginal title, we were quite uncertain as to the identification of other forms of Aboriginal rights. Indeed, the Supreme Court has developed criteria for this purpose. Such a right must be based on a practice or custom of the claimants' ancestors, employed before the time of first contact with Europeans. It must have involved a use of land, but not necessarily land for which the claimants could assert Aboriginal title. The practice or custom must be shown to be distinctive of their culture, one which makes the culture what it is.[42] Thus, some important markers have been established for defining the scope of the guarantee of "aboriginal rights" other than Aboriginal title, matters heretofore not given much attention in the jurisprudence.

3. We were not completely certain what the legal effect of the "recognition" and "affirmation" of Aboriginal rights would be since this section was not part of the *Charter*, section 1 of which "guarantees"[43] the rights set out in it. But the courts soon confirmed that, provided such rights were still "existing" as of 17 April 1982, they could no longer be extinguished or severely impaired by governmental action. This stands in contrast to the situation before 1982 when Aboriginal land rights, at least, could be extinguished by federal executive or legislative acts as

long as a clear intention was shown to effect such extinguishment. Of course, both before and after 1982, such rights could be extinguished with the agreement of the Aboriginal community: this was normally a key element of the treaties, and was usually an element in lands claims agreements.

4. Also, because section 35 is not part of the *Charter,* the rights entrenched in it are not subject to the provisions of section 1, which permits "reasonable limits" to *Charter* rights if such limits are "prescribed by law [and] can be demonstrably justified in a free and democratic society." Nevertheless the courts have recognized, in effect, that Aboriginal rights can be similarly limited if there is a valid legislative object for the limitation, if it involves only as much infringement as is necessary, and if in the nature of an expropriation it provides for compensation and is the subject of consultation with the rights-holder group. Further, such control must be consistent with the federal Crown's fiduciary duties to the holders of the rights.[44] An obvious example of permissible limits is a conservation law applied to the exercise of Aboriginal fishing rights.[45]

5. In 1982, we could only speculate as to whether section 35 would guarantee an Aboriginal right of self-government, a right which had been often asserted but not clearly recognized. In *Delgamuukw*[46] the Supreme Court drew back from deciding that issue, it being thought unnecessary to dispose of the case. As far as I am aware, it has otherwise been given only limited recognition.[47]

6. We also had to admit in 1982 that we could not provide any meaningful definition of the term "Métis" as used in section 35. Section 91(24) of the *Constitution Act, 1867*[48] assigns to Parliament jurisdiction over "Indians and lands reserved for the Indians." An elaborate legislative scheme identifies who are "Indians" for purposes of the exercise of this power. The Supreme Court assisted in the definition of the federal power years ago[49] by holding that Inuit are "Indians" — which may have been a surprise to both groups! But we had no legal guideposts as to who is a "Métis," a group designated in section 35 as having specially guaranteed rights. In various contexts in the past, governments had been content for persons of mixed Aboriginal and European blood to identify themselves as either Indian or Métis, usually dependent on which community accepted them as members. The Supreme Court tackled this difficult question in *R. v. Powley.*[50] There a group sought to establish a site-specific Aboriginal hunting right. The Court recognized them as Métis. The indicia adopted by the Court were that the claimants be of mixed ancestry, live in an identifiable Métis community, and have developed their own way of life distinct from both Indians and Europeans, with practices that were site-specific and with a sufficient degree of continuity. Such groups would have commenced to exist (obviously) after the arrival of Europeans but must have "evolved and flourished prior to the entrenchment of European control." The Court declined to go further in specifying criteria, and no doubt this is an area open to much more interpretation depending on the particular claimant groups. Nevertheless, the Court has provided important guidance as to the interpretation of a word we could not define in 1982.

These important strides in the jurisprudence since 1982 demonstrate what a bold initiative it was for governments to endorse section 35 because so much of the probable effect of this section was unknown. This was, in my view, one of the most important aspects of the 1982 Act because it gave formal constitutional recognition and protection to many Aboriginal rights, often asserted but seldom recognized without qualification. While governments were amply familiar with the legal means and consequences of patriation, and generally understood the nature and scope of the rights being entrenched in the *Charter* (most of these were already recognized in ordinary laws in one form or another), section 35 launched a novel exercise in the definition and protection of Aboriginal rights of which Euro-Canadian society, at least, had little understanding or acceptance. The fundamental purpose of section 35 was well stated by Chief

Justice Lamer, in *Van der Peet*[51]:

> More specifically, what s. 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the aboriginal rights recognised and affirmed by s. 35(1) must be directed towards the reconciliation of the preexistence of aboriginal societies with the sovereignty of the Crown.

The answer to the question of where this process would take Canada was undoubtedly the biggest unforeseeable we were to face in 1982.

Conclusion

By way of summary then of what was foreseen and unforeseen by the framers of the *Constitution Act, 1982*, I would first say that we correctly foresaw a patriated Constitution over which Canada would have complete legal control for purposes of amendment in the future. We correctly foresaw an effective *Charter* that would legally enhance the rights of Canadians, establish a human rights culture in Canada, and reinforce the growing pluralism of our society. We correctly saw important enhancements in, and new definitions of, Aboriginal rights which would contribute a new dimension to justice in our society.

Matters which we did not foresee included a continuing political controversy over patriation, and interpretations of the *Charter* which entailed greater judicial incursions into the legislative domain than were anticipated by the elected representatives of the people who agreed to the text of that document. As I have said, the framers could not foresee either the exact scope or effect of guaranteeing Aboriginal rights, but would not generally be surprised by the outcome.

I therefore remain convinced that the *Constitution Act, 1982* was a measure of immense importance in the maturing of our nation. I can only hope that time will bring a fuller consensus on the fact of patriation and the meaning of the rights it has entrenched.

Notes

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This article is based on a presentation delivered in Regina on 24 May 2007, at a "Living Tree" conference on the 25th anniversary of the *Constitution Act, 1982*, organised by the Saskatchewan Institute of Public Policy, University of Regina.

1 Pierre Elliot Trudeau, *A Canadian Charter of Human Rights* (Position Paper) (Ottawa: Queen's Printer, 1968).

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

3 Part I of the *Constitution Act, 1982 supra* note 2 [*Charter*].

4 Paraphrase of Secretary of Defence Donald H. Rumsfeld, News Transcript, United States Office of the Assistant Secretary of Defence (Public Affairs), 12 February, 2002. The actual quotation is as follows: "[T]here are known knowns; there are things we know we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns — the ones we don't know we don't know."

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

6 *Commonwealth of Australia Constitution Act, 1900* (U.K.) 63&64 Vict., c. 12, s. 128.

7 (U.K.), 22 & 23 Geo. V, c. 4, s. 2.

8 *Re: Resolution to Amend the Constitution* [1981] 1 S.C.R. 753 (CanLII) [*Patriation Reference*].

9 *Reference re Amendment of the Canadian Constitution* [1982] 2 S.C.R. 793.

10 *Supra* note 8 at 886.

11 "Close to one third of Canadians unsure if new constitution good" *Ottawa Citizen* (19 June 1982) 4.

12 Kirk Makin, "Two Thirds Back Electing Judges: Twenty-Five Years Later, poll show strong support for Charter" *Globe & Mail* (9 April 2007) A5.

13 (3 June 1987), online: The Canadian Encyclopedia <http://www.thecanadianencyclopedia.com/index.cfm?PgNm=TCE&Params=A1ARTA0010100>.

14 Consensus Report on the Constitution (28 August 1992), online: The Canadian Encyclopedia

<http://www.thecanadianencyclopedia.com/index.cfm?PgNm=TCE&Params=A1ARTA0010099>.

15 *House of Commons Debates*, No. 086 (24 November 2006) at 5299 (Hon. Laurence Cannon).

16 G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948) [*Declaration*].

17 See Christopher MacLennan, *Toward the Charter: Canadians and the demand for a national bill of rights, 1929-1960* (Montreal: McGill-Queen's University, 2003) at 70-75; I have dealt with this history more extensively in Barry L. Strayer "In the Beginning . . . the Origins of Section 15 of the Charter" (2006) 5 Journal of Law & Equality 13 at 15-16.

18 S.C. 1960, c. 44, s. 2, reprinted in R.S.C. 1985, App. III.

19 *Charter, supra* note 3, s. 15 [emphasis added].

20 *Supra* note 2, s. 52.

21 *Supra* note 3, s. 24.

22 [1992] 2 S.C.R. 679 (CanLII) [*Schachter*].

23 In fact the Court found it unnecessary to "read in" to the impugned statute because Parliament had already amended the law consistently with the constitutional findings of the Trial Judge, who declared the existing structure contrary to s. 15 of the *Charter* but suspended judgment to allow Parliament to make the changes *it* thought fit to make the legislature conform. I was the Trial Judge: see *Schachter v. Canada* [1988] 3 F.C. 515.

24 [1997] 3 S.C.R. 624.

25 See for example *Auton v. Canada* [2004] 3 S.C.R. 657 (CanLII); *Canada v. Hislop* [2007] S.C.J. No. 10.

26 [1998] 1 S.C.R. 493.

27 See also *Haig v. Canada* (1992), 9 O.R. (3d) 495 (O.C.A.) (CanLII).

28 *Re B.C. Motor Vehicle Act* [1985] 2 S.C.R. 486 (CanLII) [*Motor Vehicle*].

29 *Supra* note 3, s. 7.

30 *Duke v. the Queen* [1972] S.C.R. 917 at 923.

31 (1610), 77 E.R. 646 at 652 (K.B.).

32 H.A.L. Fisher, ed., vol. 2 *The Collected Papers of Frederic William Maitland* (Cambridge: Cambridge University Press, 1911) at 481.

33 *Supra* note 28 at para. 16.

34 See the *dictum* of Viscount Sankey, L.C. in *Edwards v. Attorney-General of Canada* [1930] A.C. 124 at 136.

35 [2005] 1 S.C.R. 791.

36 R.S.Q. c. C-12.

37 *Supra* note 2, s. 35.

38 *Supra* note 8.

39 [1973] S.C.R. 313.

40 [1997] 3 S.C.R. 1010 at para. 117 (CanLII).

41 *Ibid*. at para. 117-24.

42 See *e.g. R. v. Van der Peet* [1996] 2 S.C.R. 507 at para. 69-74 (CanLII) [*Van der Peet*]. For an insightful comparison between aboriginal title and other aboriginal rights see Brian Burke, "Left out in the Cold: the Problem with Aboriginal Title under section 35(1) of the *Constitution Act, 1982* for Historical Nomadic Aboriginal Peoples" (2000) 38 Osgoode Hall Law Journal 1 at 1-17.

43 *Supra* note 3, s. 1.

44 See *e.g. R. v. Sparrow* [1990] 1 S.C.R. 1075 at para. 75-83 (CanLII) [*Sparrow*]; *R. v.* Gladstone [1996] 2 S.C.R. 723; *Delgamuukw supra* note 40 at para. 160-69.

45 *Sparrow*, *ibid*. at para. 73.

46 *Supra* note 40 at para. 170.

47 See for example *Campbell v. Attorney General (British Columbia)* 2000 B.C.S.C. 1123 at para. 81-82.

48 *Supra* note 5.

49 *Reference re Eskimos* [1939] S.C.R. 104. The very name of the case suggests a Eurocentric view of our aboriginal peoples: the northern dwellers called themselves the "Inuit."

50 [2003] 2 S.C.R. 207 (CanLII).

51 *Supra* note 42 at para. 31.

L'exil intérieur des Québécois dans le Canada de la Charte

Guy Laforest*

Introduction

Je vais commencer cet article par une note personnelle. Il y a vingt-cinq ans, au temps de l'entrée en vigueur de la *Charte canadienne des droits et libertés*[1], je vivais à Montréal et j'étudiais à l'Université McGill. Parmi mes professeurs, il y avait deux grands intellectuels qui étaient aussi deux grands idéalistes, Charles Taylor et James Tully[2]. J'ai beaucoup appris d'eux et avec le temps, ils sont devenus des amis. J'avais d'autres professeurs qui m'ont influencé, peut-être moins directement, mais tout aussi durablement, notamment les Blema Steinberg, Daniel Latouche, James Mallory et Harold Waller. Leur approche était teintée de réalisme, et elle contrebalançait à merveille celle que je trouvais chez Taylor et Tully. En philosophie, l'approche réaliste est celle du libéralisme sans illusions que l'on trouve chez les Judith Shklar, Raymond Aron, Isaiah Berlin et Karl Popper, selon laquelle en politique, il faut d'abord et avant tout éviter le pire. Il faut entendre par là la cruauté, l'effroi, la terreur, la violence, tout ce qui peut broyer la personne humaine, l'atteindre dans sa dignité et dans son intimité. A ce titre je partage le jugement d'Irvin Studin qui écrivait récemment que le Canada est un formidable succès à l'échelle de l'humanité, l'un des pays parmi les plus « pacifiques, justes et civilisés »[3]. Un pays où, pour ajouter ma propre voix, les forts comme les faibles peuvent dormir tranquilles dans un milieu social humain, décent, confortable, sans craindre le pire. Tout cela compte pour beaucoup dans l'histoire de l'humanité.

J'utilise ce ton pour montrer un certain sens des proportions dans les analyses que je vais développer sur l'exil intérieur des Québécois dans le Canada de la *Charte*. Comme pas mal d'autres personnes au Québec, sur les plans de l'identité politique et de l'appartenance, je ne suis pas un citoyen heureux dans le Canada de la *Charte*[4]. Au-delà de mes sentiments personnels, je crois que cela s'explique par le fait que le Québec n'est pas intégré correctement dans le nouveau Canada qui a surgi depuis la réforme constitutionnelle de 1982. Paradoxalement, cette réforme a vu le jour, pour une bonne part, à cause du dynamisme et des pressions exercées par le Québec sur le Canada dans la foulée de la Révolution tranquille. Au lieu d'améliorer la situation, la réforme de 1982 l'a aggravée. Telle est la thèse que je promouvrai dans cet article. L'expression « exil intérieur » décrit très bien le fondement de ma pensée. Car un exilé de l'intérieur, c'est quelqu'un qui se sent inconfortable, qui vit comme un étranger au sein de son propre pays.

Pierre Trudeau, l'exil des Québécois et la *Charte*

> Mais c'est encore une fois la tendance toujours accentuée, c'est le poids dans la balance du côté du provincialisme aux dépens d'une institution fédérale, ou d'une législation, qui, jusqu'à présent, donnait aux Canadiens un sens d'appartenance nationale, un peu comme la Charte des droits et libertés était impor-

> tante pour l'unité canadienne, un peu comme le rapatriement de la Constitution, un peu comme le drapeau canadien. Tout cela, c'est important en ce sens que ça fait comprendre aux Canadiens qu'ils partagent avec TOUS les Canadiens, de TOUT le pays, un MÊME ensemble de valeurs fondamentales[5].

La question de l'exil intérieur des Québécois est rendue immensément plus complexe si l'on y ajoute le rôle prépondérant qu'y a joué Pierre Elliott Trudeau, sans conteste l'une des plus grandes personnalités politiques du Québec et du Canada au XXe siècle. Sur les plans de l'appartenance et de l'identité, les Québécois ont été en quelque sorte mis en exil par l'un des leurs. Le fédéralisme a occupé une place importante dans la vie de M. Trudeau. Sauf qu'un examen de ses actions et de ses écrits dans les années quatre-vingt, replacé sur l'horizon d'ensemble de sa vie politico-intellectuelle, révèle en lui un nationaliste et un souverainiste canadien bien plus qu'un fédéraliste. C'est très clairement ce qui ressort du très important livre qu'André Burelle, philosophe et ancien rédacteur des discours de M. Trudeau, vient de consacrer à son œuvre[6]. J'y reviendrai dans un moment. Au soir de sa carrière, M. Trudeau rêvait d'établir une fois pour toutes la souveraineté de la nation canadienne et celle du gouvernement central. Dans le débat sur l'Accord du lac Meech[7], il se demanda souvent « comment peut-on rendre un pays plus fort en affaiblissant le seul gouvernement capable d'exprimer le point de vue de tous les Canadiens »[8]. Plutôt que de chercher à trouver dans le fédéralisme et ses institutions un équilibre entre un projet national canadien et un projet national québécois, il résolut après le référendum de 1980 à recourir au nationalisme canadien pour changer le pays et l'emporter définitivement contre les souverainistes québécois[9]. La *Charte* fut l'instrument d'un tel dessein, comme le politologue Alan Cairns l'a rappelé dans un entretien avec l'historien Robert Bothwell :

> The prime one, the obvious one, is what the Charter appears to be on its face, a way of protecting citizen rights against the state. From Trudeau's perspective, however, the much more important goal was the attempt to generate a national identity, and this really meant an attack on provincialism. It was a way of trying to get Canadians to think of themselves as possessors of a common body of rights independent of geographical location, which would constitute a lens through which they would then view what all governments were doing. So it was really a de-provincializing strategy, primarily aimed at Quebec nationalism, but also at the general centrifugal pressures that were developing across the federal system[10].

Dans son livre de 2005, André Burelle explique lucidement les péripéties politiques qui ont amené M. Trudeau en 1980 à rompre le délicat équilibre qui prévalait jusqu'alors dans son esprit entre le personnalisme communautaire de l'époque citélibriste - la pensée des Jacques Maritain et Emmanuel Mounier - réconciliable avec le fédéralisme de 1867 et une certaine acceptation de la différence nationale québécoise, et un libéralisme ultra-individualiste et symétrique faisant l'affaire du « nation-building » canadien[11]. Dans l'esprit de Burelle, le fédéralisme « one nation » de la *Loi constitutionnelle de 1982*[12] s'appuie sur l'unitarisme républicain et part des prémisses d'un libéralisme individualiste et anti-communautaire. Selon lui, cela s'opérationnalise de la manière suivante :

a) Tous les individus y sont fondus en une seule nation civique qui délègue au Parlement fédéral la totalité de sa souveraineté nationale;

b) Investi de cette souveraineté, le Parlement central confie aux provinces les pouvoirs fonctionnellement mieux exercés par elles[13].

Quelle sorte de fédéralisme découle d'une telle logique? Selon Burelle, c'est un fédéralisme qui ne respecte plus la différence québécoise, qui fait fi du principe de non-subordination entre deux ordres de gouvernement souverains dans leurs compétences respectives, qui s'éloigne autrement dit de ce que les fondateurs de la fédération canadienne avaient voulu faire en 1867. Selon Burelle, l'esprit de 1982 bafoue celui de 1867 par l'opération entrecroisée des principes suivants :

a) la pratique d'une subsidiarité dévoyée i.e. d'une dévolution de souveraineté descen-

dante (top down) qui part de l'État central;

b) l'existence d'un gouvernement senior « national » et de gouvernements juniors « provinciaux »;

c) l'attribution à Ottawa d'un droit d'ingérence pour garantir « l'intérêt national » dans les champs de compétence provinciale;

d) l'identité de droit et de traitement des individus et des provinces vu leur fusion au sein d'une seule et même nation républicaine[14].

Dans l'ensemble, l'interprétation de Burelle me semble assez juste. Il avait dit cela autrement dans son livre de 1994, en parlant d'un gouvernement par les juges via une « Charte nationale » et d'un gouvernement par le « peuple canadien » permettant à Ottawa de contourner le partage des compétences.[15] J'y apporterais toutefois une nuance : il faut faire une distinction entre la vision de la *Charte* promue par M. Trudeau lui-même et le contenu réel de celle-ci. Je pense que Burelle comprend bien Pierre Trudeau. Toutefois, comme la juge-en-chef de la Cour suprême, Beverley McLachlin, le fait bien ressortir dans un discours que je citerai plus loin dans cet article, les catégories de la *Charte* ne sont pas restreintes aux seuls droits individuels. Il y a de la place dans la *Charte* pour le patrimoine multiculturel des Canadiens et pour les droits collectifs des peuples autochtones. Toutefois, il n'y en a pas pour l'idée de la différence québécoise et pour le principe que devraient en découler des conséquences juridiques. Avant d'explorer dans la prochaine section des moyens qui pourraient mettre fin à l'exil intérieur des Québécois dans le Canada de la *Charte*, je vais parachever celle-ci avec deux analyses de l'esprit de 1982 que l'on doit à Eugénie Brouillet et José Woehrling, deux des meilleurs professeurs de droit public dans le Québec d'aujourd'hui :

> c'est précisément en raison du potentiel intégrateur de la charte canadienne que le gouvernement fédéral en a fait la pierre angulaire de la réforme constitutionnelle de 1982. Sur le plan politique, la reconnaissance de droits et libertés supralégislatifs à chacun des citoyens canadiens constituerait le fondement de leur identité commune et renforcerait ainsi l'unité de la nation canadienne. Sur le plan juridique, le transfert entre les mains des tribunaux du pouvoir de mise en œuvre de ces droits et libertés et le développement de normes nationales positives et négatives qui en découleraient joueraient dans un sens centralisateur[16].

> Dans la mesure où la protection des droits par un instrument constitutionnel est un dispositif antimajoritaire, elle vient limiter l'autonomie politique des minorités qui disposent d'une ou de plusieurs entités territoriales. La minorité qui contrôle une telle entité voit son pouvoir politique limité au profit de ses propres minorités et de ses propres membres… La majorité au niveau national peut alors céder à la tentation d'utiliser son pouvoir pour imposer à sa minorité le respect de garanties excessives au profit de « la minorité dans la minorité ». On a l'impression, parfois, que le groupe majoritaire au niveau national défend ses propres intérêts sous le prétexte des droits de la personne et des droits des minorités[17].

Pour mettre fin à l'exil

La situation politique est en flux au Canada et au Québec à l'automne 2007, avec la présence de deux gouvernements minoritaires, et tout porte à croire qu'elle continuera de l'être au cours des prochains mois. C'est ce que j'appelle une équation du deuxième degré à plusieurs inconnues, installant du brouillard dans la tête de la plupart des experts. Il faut par ailleurs clairement reconnaître plusieurs développements positifs des dernières années : l'entente asymétrique Canada-Québec sur la santé signée en 2004 par les gouvernements Martin et Charest[18], la formulation de la doctrine du fédéralisme d'ouverture par Stephen Harper lors de la campagne électorale qui a mené à l'élection d'un gouvernement conservateur à Ottawa en janvier 2006, l'entente Harper-Charest de mai 2006 acceptant le principe d'un rôle international particulier pour le Québec et intégrant un représentant du gouvernement du Québec dans la délégation canadienne à l'Unesco[19], la résolution de la Chambre des communes de novembre 2006 stipulant que les Québécois forment une nation au sein d'un Canada uni - malgré les ambiguïtés qui perdurent entre les versions française et anglaise du texte[20], enfin la prise en compte du problème du déséquilibre fiscal dans le budget fédéral en février 2007[21]. Par ailleurs, il se pourrait que

le gouvernement Harper bouge dans la direction d'un certain encadrement du pouvoir fédéral de dépenser dans le discours du Trône prévu pour le 16 octobre 2007[22]. Dans ma perspective, il est incontestable que ces développements contribuent à atténuer le malaise, à changer le climat dans lequel opère notre vie politique. Ils ne réussissent cependant pas à prendre en compte le problème de la place du Québec dans l'architecture constitutionnelle du Canada. Pour progresser dans cette direction, il faudra un jour amender la *Loi constitutionnelle de 1982* et la *Charte canadienne des droits et libertés*.

L'article premier de la *Charte* stipule que les droits inclus dans le texte « ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans une société libre et démocratique »[23]. Dans la mesure où, comme la Cour suprême l'a d'ailleurs reconnu en en faisant le premier des piliers normatifs de notre édifice constitutionnel dans le Renvoi sur la sécession du Québec, le fédéralisme est un principe structurant de la communauté politique canadienne, l'article premier de la *Charte* devrait référer à une « fédération libre et démocratique » plutôt qu'à une « société libre et démocratique ». Ce tout petit changement aurait deux effets majeurs : tout d'abord, il instruirait les juges de la nécessité de prendre en compte le caractère névralgique du principe fédéral dans leur compréhension des règles juridiques de notre régime; ensuite, cela aurait une valeur pédagogique, dans la mesure où on inviterait les citoyens à mieux comprendre l'importance du fédéralisme dans l'identité politique canadienne. En prime, comme conséquence, les Québécois se sentiraient moins seuls à prendre au sérieux le fédéralisme dans la compréhension du Canada!

Le deuxième changement que j'ai en tête découle logiquement du débat qui a marqué la vie publique canadienne à l'automne 2006 à propos de l'opportunité de reconnaître le fait national québécois. Lancé par Michael Ignatieff lors de la course à la direction du Parti libéral du Canada, le débat s'est achevé par la motion de reconnaissance présentée par le Premier Ministre Harper à la Chambre des Communes. Pour mettre fin à l'exil intérieur des Québécois, il faut placer leur manière de se définir dans un texte qui compte vraiment pour les Canadiens. Et ce texte, c'est la *Charte canadienne des droits et libertés*. On pourrait ainsi ajouter la sous-section I.A à la *Charte*, reconnaissant que le Québec forme au Canada une société nationale distincte, stipulant aussi que le gouvernement et l'Assemblée Nationale du Québec ont l'obligation de protéger et promouvoir une telle société. C'était l'expression préférée par Claude Ryan et par André Laurendeau il y a quarante ans, au temps de la Commission royale d'enquête sur le bilinguisme et le biculturalisme. Certains y devineront le fantôme de la clause de la société distincte au temps de l'Accord du lac Meech. Ils ne s'y tromperont pas. Beaucoup de Québécois ont vu dans la réforme constitutionnelle de 1982, non sans raisons sur la base de la section précédente de ce texte, une tentative pour créer une seule et grande nation canadienne subsumant toutes les autres appartenances et en particulier celle découlant du nationalisme québécois moderne. L'adoption de l'Accord du lac Meech aurait corrigé le tir à cet égard. Un jour ou l'autre, cette question va resurgir et elle fera partie de la doctrine constitutionnelle d'un parti politique gouvernant le Québec. Il est intéressant de rappeler, sur cette question, les propos de l'actuel chef du Parti libéral du Canada, M. Stéphane Dion, revenant alors qu'il était ministre dans le gouvernement Chrétien en 1996 sur l'enjeu de la société distincte et de sa reconnaissance :

> Quelle est l'essence de la disposition sur la société distincte ? Cette disposition serait un article d'interprétation, semblable à l'article 27 de la Charte des droits et libertés, qui reconnaît le multiculturalisme. Elle garantit que, dans les zones grises de la Constitution, dans les domaines où il faut interpréter les règles, la Cour suprême tiendra compte du caractère distinct du Québec dans des domaines comme la langue, la culture et le droit civil. Ce sera une clarification utile, mais qui ne modifiera en rien le partage des pouvoirs prévu par la Constitution. Il ne s'agit pas d'une demande de statut spécial ni de privilèges particuliers[24].

Dès l'époque du régime britannique, à la fin du XVIIIe siècle, on s'est refusé à appliquer la politique d'assimilation et d'homogénéisation qui a dominé assez généralement la période de la consolidation de l'État-nation moderne en Eu-

rope. L'Acte de Québec de 1774 garantissait aux nouveaux sujets d'origine française de sa Majesté des libertés religieuses et le maintien de leur droit civil[25]. Quand le Canada est devenu un Dominion fédéral en 1867, un tel esprit d'ouverture, de reconnaissance de la diversité et de respect des droits des minorités s'est exprimé dans l'attribution aux provinces (c'était clairement une revendication du Canada-Est, l'ancienne appellation du Québec, mais pas uniquement de lui) de la juridiction sur la propriété et les droits civils, ainsi que dans les dispositions protégeant les minorités religieuses. On peut d'ailleurs retrouver les origines historiques et juridiques du fédéralisme asymétrique au Canada dans la formulation de l'article 94 de la *Loi constitutionnelle de 1867*[26], lequel omet le Québec du périmètre de validité des pratiques d'homogénéisation en matière de propriété et de droits civils entre le gouvernement fédéral et les provinces de common law[27]. Cette originalité canadienne dans l'histoire de l'Etat-nation moderne s'est notamment exprimée en 1982 dans la rédaction de l'article 27 de la *Charte*, lequel stipule que « Toute interprétation de la présente charte doit concorder avec l'objectif de promouvoir le maintien et la valorisation du patrimoine multiculturel des Canadiens ». Le troisième changement que j'estime nécessaire pour mettre un terme à l'exil intérieur des Québécois dans le Canada de la *Charte* porte sur cet article.

Si le débat sur la nation québécoise a soulevé pas mal d'intérêt dans les médias aussi bien anglophones que francophones du pays en 2006, on peut en dire autant, dans le Québec de l'automne 2007, pour les travaux de la Commission de consultation sur les pratiques d'accommodement reliées aux différences culturelles (Commission co-dirigée par Gérard Bouchard et Charles Taylor). Bien que l'on ne puisse préjuger de l'orientation générale du rapport, le document préliminaire de consultation publié par la Commission laisse clairement entendre que celle-ci a choisi de donner une interprétation large à son mandat, acceptant donc de se pencher sur la question des rapports entre majorité et minorités[28]. Le Canada et le Québec sont des terres d'immigration. Cette histoire s'est accélérée dans la deuxième moitié du vingtième siècle et cela ne va pas changer. J'estime que ce phénomène social est un bien et que cela honore tous les gens qui vivent au Canada et qui ont à confronter ce monde tourmenté qui est le nôtre. Mais j'estime aussi que dans son portrait des droits et obligations qui découlent de son article 27 sur le patrimoine multiculturel des Canadiens, la *Charte* omet de préciser une réalité fondamentale : ce patrimoine s'incarne au Canada dans les réseaux institutionnels de deux sociétés d'accueil, dont l'une au Québec décline sa vie sociale dans le respect du principe de la prépondérance de la langue française. Une telle précision m'apparaît essentielle pour l'intégration à la fois juste et stable du Québec dans le Canada d'aujourd'hui.

Le Canada est une fédération libre et démocratique intégrant la société nationale distincte du Québec et un patrimoine multiculturel incarné dans deux sociétés d'accueil, dont l'une vit la modernité principalement en français. C'est ce qui manque à la *Charte* canadienne des droits et

libertés, si je comprends bien la situation, pour aller au-delà de l'aliénation politique des Québécois. De telles transformations ne mettraient pas fin pour toujours aux conflits politiques dans le régime fédéral canadien, y compris entre le Québec et ses partenaires. Celles et ceux qui veulent mettre fin une fois pour toutes aux « chicanes politico-constitutionnelles » négligent le fait que la vie politique sera toujours affaire de dialogues et de débats pouvant déboucher sur des affrontements. Toutefois, ces changements auraient pour effet de guérir une blessure et de redonner confiance dans le droit et dans les institutions canadiennes. Par ailleurs, l'angle d'analyse choisi dans cet article est bien loin d'épuiser la totalité du réel, je l'admets bien volontiers. Comme les Catalans et comme plusieurs États fédérés dans le monde, les Québécois pourraient faire preuve aussi d'audace et d'imagination en se dotant, d'une manière autonome, d'une constitution interne renforçant l'épine dorsale des institutions de leur société.[29] Enfin, des Québécois plus confiants dans leur avenir et mieux intégrés devraient se montrer plus ouverts aux propres désirs de changement des autres Canadiens, lesquels sont certainement aussi légitimes que les leurs. Des Québécois qui ne seraient plus des exilés de l'intérieur devraient être capables de proclamer, à leur manière, leur allégeance envers le Canada, et de s'engager dans des projets communs pour le XXIe siècle.

Conclusion

Dans le contexte de la commémoration du 25e anniversaire de l'adoption de la *Charte canadienne des droits et libertés*, je chercherai une dernière fois à faire comprendre cette notion d'exil intérieur des Québécois en rappelant un autre événement ramené à notre mémoire en 2007, le célèbre cri du général Charles de Gaulle au balcon de l'hôtel-de-ville de Montréal en juillet 1967 « Vive le Québec libre! ». Il y a lieu d'être un peu nostalgique lorsque l'on se remémore l'année 1967. C'était l'ère du Centenaire de la Confédération canadienne et celle de l'Exposition universelle de Montréal, une époque où les gens d'ici et d'ailleurs étaient invités à vivre d'espoir et d'idéalisme à la hauteur du lyrisme de la « Terre des Hommes » de St-Exupéry. Il me semble que, si le discours du général de Gaulle a eu un tel retentissement à Montréal en 1967, c'est qu'il répondait à trois aspirations profondes de la société québécoise : il affirmait solennellement le droit à la différence du Québec au Canada et en Amérique, il donnait fortement le goût d'une liberté politique qui peut prendre plusieurs formes dans la modernité, et enfin, il répondait à une soif d'universel, à un immense désir de reconnaissance. En 1967, Charles de Gaulle a donné une dimension planétaire à la question du Québec. Quand on se met à cerner la signification profonde de la *Charte* des droits et libertés pour le Canada, on s'aperçoit qu'elle a conforté des aspirations semblables pour le nationalisme majoritaire des Canadiens vivant à l'extérieur du Québec, de même que pour une minorité importante à l'intérieur du Québec. En proposant un équilibre intelligent entre des droits individuels, des droits collectifs et des droits pour des personnes rattachées à des communautés minoritaires, et en faisant cela de manière originale par rapport au modèle du Bill of Rights américain, la *Charte* a représenté une forte affirmation de la différence canadienne parmi les démocraties libérales occidentales. Deuxièmement, la *Charte* a contribué à parachever sur l'axe de la liberté politique l'indépendance complète de l'État-nation canadien. Finalement, la *Charte* et son rayonnement dans le monde ont nourri le désir de reconnaissance des Canadiens, en faisant de leur pays l'avant-garde d'une civilisation de la différence pour le XXIe siècle. C'est ce que l'on peut deviner en lisant la prose des meilleurs penseurs de l'école idéaliste canadienne, de Charles Taylor à James Tully, en passant par Will Kymlicka, John Ralston Saul et Michael Ignatieff. La juge-en-chef de la Cour suprême du Canada, Beverley Mclachlin, s'inscrivait dans cette tradition dans un discours prononcé le 17 avril 2002, à l'occasion du 20e anniversaire de l'entrée en vigueur de la *Charte* :

> Nous avons une Charte qui reflète nos valeurs les plus fondamentales et nous dit qui nous sommes comme peuple et ce à quoi nous tenons. Nous avons une Charte qui suscite l'admiration du monde entier. Enfin, fait plus important encore, nous avons une Charte que les Canadiens et les Canadiennes ont fait leur au cours des deux dernières décennies. La Charte, c'est à nous. La Charte : c'est nous[30].

On peut comprendre alors que la *Charte* soit un motif de grande fierté au Canada, que beaucoup de gens aient le goût de dire, comme la juge-en-chef en 2002, la *Charte* c'est à nous et la *Charte* c'est nous. Sauf que, vu du Québec, cette *Charte* a été adoptée de façon antidémocratique sans notre consentement, au mépris de l'opposition de notre gouvernement et de l'Assemblée Nationale, atteignant ainsi le peuple du Québec lui-même pour reprendre les paroles de Claude Ryan à l'époque[31]. L'autonomie législative du Québec en matières linguistiques a été réduite, le principe fédéral a été affaibli dans nos institutions et dans notre culture politique, le droit à la différence du Québec n'a pas été intégré à la *Charte*. Plus précisément, le Canada de 1982 et de la *Charte* ne reconnaît explicitement ni la différence québécoise, ni le fait que cette différence devrait entraîner des conséquences politiques et juridiques. L'idéalisme canadien, qui voit dans notre système politique et surtout dans la *Charte* un exemple porteur pour l'humanité dans son ensemble, me semble condamné à rester profondément inauthentique tant que l'on n'aura pas trouvé une façon juste et raisonnable de reconnaître la différence québécoise, dans le droit aussi bien que dans les symboles[32]. Sans pouvoir traiter ici de tous les aspects de cette question, il me semble évident que les Québécois ont choisi de vivre leur quête d'identité et de liberté dans le Canada. Le Québec est dans le Canada pour y rester, sauf qu'il s'y reconnaît trop imparfaitement dans ses institutions.

Un grand esprit de McGill et du Québec, Charles Taylor, soulignait naguère, dans une réflexion sur le nationalisme québécois, qu'il faut être impitoyable envers nos mythes essentialistes. Le nationalisme majoritaire canadien s'enferme dans un mythe essentialiste semblable lorsqu'il s'imagine que l'on peut en ce pays occulter la profonde aliénation politique, l'exil intérieur des Québécois. Un autre grand esprit de l'humanisme occidental, Paul Ricoeur, a écrit que la mémoire historique des peuples doit être juste et heureuse. L'exil intérieur des Québécois est un obstacle fondamental au développement d'une mémoire historique juste et heureuse au Canada.

Notes

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1 *Charte canadienne des droits et libertés*, partie I de la *Loi constitutionelle de 1982*, constituant l'annexe B de la *Loi de 1982 sur le Canada* (R.-U.), 1982, c.11 (LLJCan).

2 On trouvera des analyses de la situation canadienne actuelle inspirées par les travaux de Taylor et Tully dans Alain-G. Gagnon, *Au-delà de la nation unificatrice : plaidoyer pour le fédéralisme multinational*, Barcelone et Montréal, Institut d'estudis autonomics et Boréal, 2007; voir aussi Guy Laforest, *Pour la liberté d'une société distincte*, Québec, Presses de l'Université Laval, 2004.

3 Irvin Studin, ed., *What is a Canadian? Forty-Three Thought-Provoking Responses*, Toronto, McClelland & Stewart, 2006 à la p. 184.

4 Ma thèse est aussi celle d'André Burelle, *Le mal canadien*, Montréal, Fides, 1994; voir aussi Christian Dufour, *Lettre aux souverainistes québécois et aux fédéralistes canadiens qui sont restés fidèles au Québec*, Montréal, Stanké, 2000.

5 Pierre-Elliott Trudeau, « Où est notre patriotisme national? » dans Donald Johnston, dir., *Lac Meech : Trudeau parle*, Montréal, Hurtubise HMH, 1988 à la p. 41.

6 André Burelle, *Pierre-Elliott Trudeau : l'intellectuel et le politique*, Montréal, Fides, 2005.

7 (3 juin 1987) Consulté en ligne le 27 novembre 2007 à l'adresse suivante en ligne : L'Encyclopédie canadienne <http://www.thecanadianencyclopedia.com/index.cfm?PgNm=TCE&Params=f1SEC861644>.

8 Pierre-Elliott Trudeau, « Nous, le peuple du Canada », dans Donald Johnston, dir., *Lac Meech : Trudeau parle*, Montréal, Hurtubise HMH, 1988 à la p. 104.

9 J'ai beaucoup écrit sur ces questions. Voir notamment Guy Laforest, *Trudeau et la fin d'un rêve canadien*, Québec, Septentrion, 1992; voir aussi un chapitre intitulé « La vraie nature de la souveraineté : réponse à mes critiques à propos de Trudeau et la fin d'un rêve canadien », dans Guy Laforest, *Pour la liberté d'une société distincte*, Québec, Presses de l'Université Laval, 2004 aux pp. 219-36.

10 Robert Bothwell, Canada and Quebec : One Country, Two Histories, Vancouver, UBC Press, 1995 à la p. 180.

11 *Supra* note 6 aux pp. 68-70.

12 Constituant l'annexe B de la *Loi de 1982 sur le Canada* (R.-U.), 1982, c.11 (LLJCan).

13 *Supra* note 6 à la p. 459.

14 *Ibid.* à la p. 459.

15 André Burelle, *Le mal canadien*, Montréal, Fides, 1994 à la p. 64.

16 Eugénie Brouillet, *La négation de la nation : l'identité culturelle québécoise et le fédéralisme canadien*, Québec, Septentrion, 2005 à la p. 325.

17 José Woehrling, « La Charte canadienne des droits et libertés et ses répercussions sur la vie politique », dans Réjean Pelletier et Manon Tremblay, dirs., *Le parlementarisme canadien, troisième édition revue et augmentée*, Québec, Presses de l'Université Laval, 2005 à la p. 115.

18 (2004) Entente Canada-Québec sur la santé : Fédéralisme asymétrique qui respecte les compétences du Québec.

19 (2006) Accord Canada-Québec relatif à l'organisation des Nations Unies pour l'éducation, la science et la culture (UNESCO).

20 *Débats de la Chambre des communes*, 086 (24 novembre 2006).

21 Guy Laforest et Eric Montigny, dirs., « Le fédéralisme exécutif : problèmes et actualité », dans Réjean Pelletier et Manon Tremblay, *Le parlementarisme canadien, troisième édition revue et augmentée*, Québec, Presses de l'Université Laval, 2005 aux pp. 364-68; voir aussi Keith Banting et al., *Open Federalism : Interpretations, Significance*, Kingston, Institute of Intergovernmental Relations, Queen's University, 2006 (voir en particulier le chapitre signé par Alain Noël, « Il suffisait de presque rien : promises and pitfalls of open federalism, aux pp. 25-37); pour un portrait global voir Michael Murphy, dir., Canada : The State of the Federation 2005. Québec and Canada

in the New Century : New Dynamics, New Opportunities, Montréal et Kingston, McGill-Queen's University Press, 2007; et enfin voir Alain-G. Gagnon, dir., *Le fédéralisme canadien contemporain : fondements, traditions, institutions*, Montréal, Presses de l'Université de Montréal, 2006.

22 *Débats de la Sénats*, 1 (16 octobre 2007) aux pp. 1-7 (Son Excellence la Gouverneure générale).

23 *Charte supra* note 1, art. 1.

24 Stéphane Dion, « Notre pays est en danger », La Presse [de Montréal] (8 mars 1996) B7.

25 Pour une interprétation philosophique de cela, voir James Tully, *Une étrange multiplicité : le constitutionnalisme à une époque de diversité*, Québec, Presses de l'Université Laval, 1999 aux pp. 142-45.

26 (R.-U.), 30 & 31 Vict., c. 3, reproduite dans L.R.C. 1985, app. II, nº 5 (LLJCan).

27 Voir Janet Ajzenstat et al, *Débats sur la fondation du Canada*, trad. par Stéphane Kelly et Guy Laforest, Québec, Presses de l'Université Laval, 2004 aux pp. 336-37 et 378. On y trouve les discours de deux députés à l'Assemblée législative du Canada-Uni, M.C. Cameron et Christopher Dunkin, établissant clairement un lien entre l'article 94 et un statut asymétrique fort pour le Québec, tout cela ayant été négligé par plusieurs générations de constitutionnalistes québécois!

28 Commission de consultation sur les pratiques d'accommodement reliées aux différences culturelles, *Accommodements et différences : vers un terrain d'entente, la parole aux citoyens; Document de consultation*, Gouvernement du Québec, 2007 à la p. v.

29 Guy Laforest, *Pour la liberté d'une société distincte*, Québec, Presses de L'Université Laval à la p. 256.

30 Beverley McLachlin, « En pleine maturité : l'identité nationale canadienne et la Charte des droits », discours prononcé lors d'un colloque à Ottawa sur Les droits et les libertés au Canada, vingt ans après l'adoption de la Charte. Consulté en ligne le 27 novembre 2007 à l'adresse suivante : Cœur suprême du Canada < http://www.scc-csc.gc.ca/aboutcourt/judges/speeches/charter_f.asp >.

31 « Nous devons conclure avec beaucoup de fermeté que chaque fois que l'Assemblée nationale est atteinte dans ses prérogatives essentielles, c'est le peuple du Québec lui-même qui est atteint. Être indifférent à une atteinte faite aux pouvoirs de l'Assemblée nationale, c'est être indifférent ou traiter à la légère les aspirations et la réalité fondamentale du peuple québécois lui-même ». Paroles d'un discours de Claude Ryan lors d'un débat à l'Assemblée nationale le 30 septembre 1981 dans : Réal Bélanger, Richard Jones et Marc Vallières, *Les grands débats parlementaires 1792-1992*, Québec, Presses de l'Université Laval, 1994 à la p. 39.

32 Christian Dufour, *Lettre aux souverainistes québécois et aux fédéralistes qui sont restés fidèles au Québec*, Montréal, Stanké, 2000 à la p. 114.

Charter Checks and Parliamentary Balances

Dennis Baker & Rainer Knopff*

Introduction

According to its most enthusiastic supporters, the Canadian *Charter of Rights and Freedoms*[1] fulfills two major functions in Canada's democratic regime: 1) it shields minorities from the excesses of majoritarian decision-making, in effect guarding against the famous "tyranny of the majority"; and 2) it shields the majority from the excesses of power concentrated in the Canadian executive ("executive dictatorship"). While these two claims are in considerable tension with each other, there is an even more important conflict between each of them and the widely-accepted notion that most *Charter* cases arise from reasonable disagreements over correct policy. It is difficult to work through these overlapping tensions without questioning the orthodoxy that judicial power under the *Charter* compensates for the lack of moderating checks and balances within our parliamentary system of government. To question that orthodoxy is in turn to rediscover the merits of an older view, dating back to the founders, that did not consider the idea of parliamentary checks and balances to be an oxymoron. The rediscovery of parliamentary checks and balances does not imply the undesirability of additional judicial checks, but it does require a more nuanced understanding of those checks than the orthodoxy provides.

Tyranny of the Majority, Executive Dictatorship, or Reasonable Disagreement?

Does the *Charter* prevent the tyranny of the majority or does it help the majority prevail over executive dictatorship? "As elected institutions," says Kent Roach, legislatures "have an interest in maximizing the rights of more popular groups" at the expense of less popular ones.[2] This line of argument rightly maintains that our regime is not *simply* democratic in the sense of populist majoritarianism. Instead, ours is a *liberal* or *constitutional* democracy that seeks to forestall the tyranny of the majority through institutional checks and balances – in this case a *Charter*-empowered judiciary checking and balancing a democratically responsive legislature.

The alternative view sees the legislative process not as dangerously responsive to majority opinion, but rather as *un*responsive to the majority. For example, Joseph Fletcher & Paul Howe, and Lorne Sossin maintain that court rulings on gay rights issues often correspond more accurately to public opinion than do legislative measures.[3] For Sossin, judicial action in these instances merely "accelerates" desirable and virtually inevitable change. In this view, *Charter* challenges provide a means for the expression of popular will when a publicly unresponsive legislature stands in the way.[4]

Why are legislatures less responsive to the majority than courts in this second view? Because, rather than being truly representative, legislatures have become de facto executive dictatorships. "[M]uch public decision-making no

longer occurs in Parliament," Martha Jackman writes; "[m]any of the decisions which have the greatest impact on individual welfare are made by Cabinet and by other parliamentary delegates within government departments, administrative agencies, and quasi-governmental bodies," she continues.[5] In parliamentary systems, Trevor Allan suggests, "[i]t seems necessary . . . to match executive discretion with judicial discretion," so that judges can offer "genuine protection from abuse of executive power."[6] In a similar vein, Ian Greene et al. upbraid *Charter* skeptics for failing "to recognize the essentially corrective role of the courts in a system of parliamentary majority rule where the executive dominates the policy process,"[7] and Lorne Sossin maintains that "a robust and independent judiciary" is one of the few "external checks" on the "very small group of very powerful individuals [who] shape the policy and politics of the country."[8] Here again, we find a checks and balances perspective at work, only this time the judiciary is checking not the legislative tendency towards democratic tyranny but the executive dictatorship's flouting of public will.

Clearly, the view of Canada's founders that rights would be protected through checks and balances within the parliamentary system of government no longer prevails. Richard Cartwright expressed the founding perspective during the Confederation debates, maintaining that parliamentary government was replete "with safeguards – with latent checks of all kinds – checks established, many of them, more by custom and usage than by positive law – as to make it all but impossible for any majority, however strong, to perpetrate any gross act of injustice on a minority."[9] According to our contemporary orthodoxy, by contrast, the so-called "fusion" of legislative and executive branches under responsible government, together with the absence (provincially) or practical insignificance (federally) of bicameralism, means that the only serious checks and balances in our system are found in the interaction *between* the parliamentary and judicial branches of government, not *within* parliamentary institutions themselves. Both the tyranny of the majority and the executive dictatorship defences of *Charter*-based judicial power rest on this orthodoxy. The internally unchecked Parliament is feared in the one case as the vehicle of majority excess, and in the other as the vehicle of democratically unresponsive elites; in either case, a judiciary enforcing the *Charter* is viewed as the only realistic check on parliamentary excess.

Despite this common ground, there is an obvious tension between the tyranny-of-the majority and the executive-dictatorship justifications of a *Charter*-enhanced judicial check in our system of government: one argument seeks to restrain the majority, the other seeks to liberate it. Elsewhere, one of us has explored this tension at length;[10] here we set it aside – assuming for argument's sake that the *Charter* protects us against either or perhaps both majority tyranny and executive dictatorship – in order to focus on the tension between each of these views and a third widely accepted claim, namely, that *Charter* issues are generally matters of reasonable disagreement.

Peter Russell pioneered this third claim in Canada in his seminal article "The Political Purposes of the *Charter*," which maintained that most *Charter* cases deal not with the core of rights but rather with issues arising at their periphery.[11] At this periphery, there is room for legitimate disagreement where neither side has a monopoly on rationality and where both sides present positions at least plausibly consistent with the Constitution. Many, if not most, scholars have since followed Russell's lead. For example, in *The Supreme Court on Trial*, Kent Roach devotes an entire chapter to the "myth of right answers."[12] Ian Greene similarly maintains that there tend to be reasonable arguments on both sides of *Charter* issues.[13] And Janet Hiebert's work is thoroughly infused by the conviction that the basic normative ideals and values represented by the *Charter* "give rise to different, but nevertheless reasonable, interpretations."[14]

But here we encounter a puzzle: How is it that the legislative tyranny of the majority or our executive dictatorship generally produces policies within the realm of reasonable disagreement? In fact, if either or both of these images – tyranny of the majority and executive dictatorship – were accurate, we could not plausibly expect most policy to fall within the

bounds of "reasonable disagreement." Instead, we would expect to find a court knocking down egregious and immoderate laws on clearly mandated constitutional grounds. Simply put, if it is true that *Charter* issues *do* generally fall within the bounds of reasonable disagreement, both the tyranny of the majority and executive dictatorship claims must be crude oversimplifications of our legislative-executive complex. Put slightly differently, if the reasonable differences view holds, can it be because there are more non-judicial checks and balances at work in our parliamentary institutions than are generally acknowledged? Is the founding view expressed by Richard Cartwright perhaps not as outdated as our current orthodoxy assumes?

How else do we explain Canada's long history of policy moderation prior to the enactment of the *Charter*? Over the course of Canada's constitutional history, it has been legislatures, not courts, that have taken the leading role in securing civil rights and liberties. Prior to being "saved by the *Charter*" in 1982, Canadians were protected by progressive due process legislation (the *Canada Evidence Act*[15] and the *Young Offenders Act*[16] being two pre-*Charter* milestones), statutory human rights codes (the *Ontario Human Rights Code*,[17] for example, has been in force since 1962), and by a variety of ancillary legislation. As Peter Hogg points out, Canada's pre-1982 record on civil liberties "while far from perfect, seems to be much better than that of most of the countries in the world, although nearly all countries have bills of rights in their constitutions." [18] Hogg argues that "[t]he basic reason for this has very little to do with the contents of Canada's (or any other country's) constitutional law," but rather with "the democratic character of Canada's political institutions, supported by long traditions of free elections, opposition parties and a free press."[19] (One might have thought that Canada's political institutions would be part of the "content of Canada's constitutional law" but such is the state of modern Canadian constitutional thinking).

If, as Hogg contends, Canada's representative institutions were capable (though not "perfect") protectors of civil liberties before 1982, is there any reason to suppose that they do not continue to play a significant role in ensuring moderate policy outcomes in the *Charter* era? Ironically, according to some, the *Charter* itself may have caused the political process to become less moderate. "One of the unfortunate consequences of the *Charter*," argues Kent Roach, "is that Parliament has abdicated its proactive law reform role and increasingly relies on the Court to articulate and enforce minimum standards of fairness for the accused." [20] In other words, the *Charter* frees the legislative process to become more extreme than it might have been absent the *Charter*. Perhaps, but to the extent that the legislative process continues to pose questions of reasonable disagreement to the courts, might we not reasonably assume that moderating forces internal to that process are still at work? Unless, of course, it is the prospect of judicial invalidation itself that encourages moderation within the legislative process, but that view sits rather uneasily with the claim that the same prospect liberates legislatures from their restraint. And why, one might wonder, would either a tyrannical majority or an executive dictator (i.e., an executive prepared to ignore backbenchers) fear judges? No, the possibility that the institution that throws up questions of "reasonable disagreement" has sources of moderation *within itself* cannot be dismissed out of hand. Not that our parliamentary institutions could not be improved, we hasten to add. But improvement must be undertaken with full awareness of existing strengths as well as weaknesses. We need a better appreciation of how, even in our flawed system, legislative outcomes tend to be kept within the bounds of reasonable disagreement before any court has its say.

Parliamentary Checks and Balances

There is no better place to begin than with the often forgotten insight of a previous generation of institutional scholars, represented in R. MacGregor Dawson & Norman Ward's statement that first ministers – our executive dictators – will be "sufficiently wise and far-seeing to limit [their] demands … to those which will gain the general acceptance of [their parliamentary] followers."[21] Even trained seals, in other words, can be pushed too far. Does this

intra-parliamentary check explain the moderate policy outcomes which ground the "reasonable disagreement" view of *Charter* disputes? To address this question, imagine a prime minister with such truly extremist inclinations that his legislative agenda involved questions at the core rather than the periphery of our constitutional rights. Unless this prime minister has the courage to overthrow the constitution altogether, he can impose his policy preferences only by persuading Parliament to enact them (and, subsequently, the bureaucracy to execute them in the way he prefers). Dawson & Ward note that while "general acquiescence [to a prime minister's wishes] can within limits be assumed . . . this co-operation is usually given with some reserve, and the possibility of dissatisfaction and even revolt, though it may be remote, is never entirely absent."[22] As Scott Gordon argues in the British context, if the prime minister "is a dictator, he is a singularly curious one: unable to determine state policy unilaterally, required to endure unremitting and unrestrained public criticism, and subject to dismissal without a shot being fired."[23] A similar critique might be leveled at Jeffrey Simpson's description of the Canadian prime minister as a "friendly dictator"; "restrained" might be a better qualifier than "friendly."[24]

Evidence for this can be found even in Donald Savoie's *Governing from the Centre*, the book most often used to support the proposition that an all-powerful prime minister faces no serious check from Parliament.[25] Savoie's other major theme – the centre's lack of policy ambition in favour of management of the status quo – is rarely referenced. One might ask why Jean Chrétien, Savoie's most centralizing prime minister and the basis of Simpson's "friendly dictator," is also criticized by Savoie for being "the managerial prime minister." Savoie describes Chrétien's "managerial mindset" as notably eager to "avoid bold initiatives or attempts to lead the country in redefining itself."[26] With respect to its legislative agenda, it is difficult to argue that the Chrétien government took full advantage of its supposed power. Savoie himself, alert to this curiosity, argued that it was a function of external limitations, particularly the central bureaucracy's intense desire to avoid media gaffes. However, as Chrétien bemoaned, management of the caucus is itself a source of media interest: "If I impose a decision, you say I am a dictator, and if I listen to them, the caucus is split."[27] Given its internalization into prime ministerial thinking and planning, it is difficult to conclude that the formal power of the Commons over the prime minister plays no part in hemming in executive power.

One might note, in this regard, that although the formal power of Parliament to oppose the prime minister is rarely overtly manifested, prime ministers are occasionally reminded of its reality. In Chrétien's case, his final term (2000-2004) included two publicly visible examples of such challenges: the addition of sunset clauses to the anti-terrorism bill,[28] and the amendments to the species-at-risk legislation.[29] These successful challenges, made against a prime minister freshly elected (in November 2000) with a 106 seat advantage over the Official Opposition, demonstrate that the centre is not as hopelessly beyond any formal controls available to legislators as *Charter* enthusiasts might assume.

The first example – the amendments to the Chrétien government's anti-terrorism package – is a powerful one since it is reasonable to assume that the executive's hand might be stronger when there is a palpable sense of "emergency" as there was following 11 September 2001. The Government responded to the heightened threat of terrorism with two pieces of legislation: Bill C-36,[30] primarily addressing the need for additional police powers, and Bill C-42,[31] primarily addressing the need for additional public safety measures. The latter proved to be so poorly drafted and unpopular that the Government abandoned it in favour of new public safety legislation in the Spring of 2005.[32] The former, however, was strongly supported by Prime Minister Chrétien and Justice Minister Anne McLellan. In particular, Chrétien and McLellan insisted that, despite Bill C-36's constitutionally questionable changes to police procedure (such as the use of "preventative arrest"), it was unwise to attach a sunset clause, which would have extinguished the Act after a set period, thus requiring a reenactment by a future Parliament to remain in force. Prime Minister

Chrétien was particularly dismissive of this proposal, declaring that a sunset clause was inappropriate because "we don't know when terrorism will be over."[33] This position became increasingly untenable as academic criticism of Bill C-36 began to mount. A well-publicized conference at the Faculty of Law, University of Toronto, included a forceful critique of the legislation by Liberal backbencher and constitutional law professor Irwin Cotler.[34] Nevertheless, Chrétien continued to oppose a sunset clause; at a private caucus meeting in November 2001, he dressed down his backbench critics and firmly rejected their demand for such a clause. "I think he pretty well closed the door on the sunset clause," leaked one MP, but added that "I don't think MPs have given up."[35] If the executive dictatorship view were true, it should have been easy for Chrétien to follow through on his publicly stated commitment and resist the demands of his backbenchers. In reality, however, the centre of government could not simply impose its preference: "Bowing to intense public pressure and *forces within her own caucus*, Justice Minister Anne McClellan . . . presented a handful of amendments to Bill C-36 that eased most of the concerns of Liberal MPs and the Canadian Alliance . . ."[36] By leading the charge, one newspaper account suggested, Irwin Cotler "set a new benchmark on how far a backbencher can confront his own government and live to tell the tale."[37] It is telling that when the *Anti-Terrorism Act*'s[38] most controversial measures were removed from the statute, it was by parliamentary review and not by judicial intervention.

The Government's retreat on the sunset clause was echoed in its maneuvering over species-at-risk legislation in 2002. In that case, the Chrétien government introduced Bill C-5[39] to meet Canada's international obligations, promised in 1992, for the preservation of endangered species. Upon consideration of the bill, the House environment committee suggested over 100 amendments – mainly addressing the contentious issues of landowner compensation, aboriginal administration of the law, and mandatory wildlife preservation on federal lands – but the Cabinet reversed almost every one of the committee's recommendations.[40] The Government's strategy was simply to "ram it through the House of Commons" over the objections of the committee.[41] This approach alienated backbench Liberals, who generally fell into two camps within the caucus: an environmentalist camp, which argued that the legislation did not go far enough in protecting endangered species, and a camp of rural members concerned with the property rights of their constituents. In the months following the committee report, the Government attempted to assuage critics by establishing an Aboriginal commission to oversee the enforcement of the Act (as demanded by Liberal backbench MP Rick Laliberte), and by making a binding commitment that specific regulations for landowner compensation would be forthcoming (as demanded by the rural caucus, led by MP Murray Calder).[42] The Government was unsure that, even with these major concessions, it would have the unanimous support of the Liberal caucus or, indeed, that the Act would pass at all. Nevertheless, Environment Minister David Anderson publicly declared that there would be no more changes to the bill.[43] On the eve of the vote, the Government blinked and capitulated to the environmentalist members of the caucus by accepting two key amendments (the federal government would protect species on federal property and Cabinet would be given a nine-month deadline to determine whether a species warranted protection).[44] With these changes, the Act passed by a vote of 148-85. Chrétien suggested that his role in the process was less dominant than the friendly dictator characterization implies: "My caucus – they have views. They are there for that and sometimes one group doesn't agree with the other and it's the beauty of my job: I sit between them all the time and eventually we find a solution."[45] One thing is certain: in the case of the species-at-risk bill, Cabinet did not simply get its way, as the "fusion" model predicts. In a candid interview months later, Minister Anderson felt "he should have held firm on the endangered species bill" and even though he was "glad it passed" he would not check his "skepticism about some of the proposals… simply because they were ultimately accepted. It's not because I was persuaded they were all right."[46]

No one would suggest, of course, that the backbench influence over the anti-terrorism

legislation or the *Species at Risk Act*[47] is typical of the Canadian legislative process. These are exceptional cases that prove the rule of executive domination, but they also demonstrate that the formal power of legislators to reject executive demands sets outer limits to what the executive is likely to attempt or achieve. Without the power to check the executive's proposals before they become law, it is doubtful that backbenchers would have influenced the anti-terrorism and species-at-risk debates as much as they did. A significant number (approximately 30 percent in the last three majority Parliaments) of government bills introduced never receive Royal Assent.[48] Even though a presumably large (but unknown) number of these bills are voluntarily abandoned by the government (lost through prorogation, etc.), the burden of the legislative process is clear. Any government would surely prefer to govern without the formal requirement that it govern through legislation approved by Parliament. The fact that they cannot, and do not do so reflects the reality of parliamentary checks and balances and the internalization of their moderating demands.

Conclusion

One need not choose between legislative and judicial checks as moderating influences in our political system. Indeed, Canadians would be well served by multiple and overlapping checks and balances. It is the portrayal of *Charter*-based judicial power as the only effective moderating check (on either majority tyranny or executive dictatorship) that cannot be sustained. It may be true, as Chief Justice McLachlin of the Supreme Court of Canada says, that the *Charter* performs "a healthy function in allowing our differences to be aired and resolved in a peaceful way, rather than by oppression and violence,"[49] but it is difficult to believe that the courts' settlement of reasonable disagreements is all that stands between us and chaos. The politics of representative government offers a non-judicial (but still peaceful) way of resolving differences that similarly avoids "oppression and violence." Judicial power under the *Charter* may make an important contribution to our system of checks and balances, but treating it as the only (or even the main) barrier against the forces of majority tyranny or executive dictatorship is both nonsensical and counterproductive.

Notes

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

2 Kent Roach, "Constitutional and Common Law Dialogues between the Supreme Court and Canadian Legislatures" (2001) 80 Canadian Bar Review 481 at 529.

3 Joseph F. Fletcher & Paul Howe, "Supreme Court Cases and Court Support: the State of Canadian Public Opinion" (2000) 63 Choices 30 at 37-42; Lorne Sossin, "Courting the Right," Book Review of *The Charter Revolution & The Court Party* by F.L. Morton & Rainer Knopff, (2000) 38 Osgoode Hall Law Journal 531.

4 *Ibid*.

5 Martha Jackman, "The Cabinet and the Constitution: Participatory Rights and *Charter* Interests: *Manicom v. County of Oxford*" (1990) 35 McGill Law Journal 943 at 945.

6 T. R. S. Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (Oxford: Clarendon Press, 1993) at 8.

7 Ian Greene et al., *Final Appeal: Decision-Making in Canadian Courts of Appeal* (Toronto: James Lorimer & Company, 1998) at 6.

8 Lorne Sossin, "The Ambivalence of Executive Power in Canada" in P.P. Craig & Adam Tomkins, eds., *The Executive and Public Law: Power and Accountability in Comparative Perspective* (Oxford: Oxford University Press, 2006) at 52.

9 Janet Ajzenstat, ed., *Canada's Founding Debates* (Toronto: Stoddart, 1999) at 19.

10 Rainer Knopff, "How Democratic is the Charter? And Does it Matter?" in Joseph Eliot Magnet *et al.*, *The Charter of Rights and Freedoms: Reflections on the Charter After Twenty Years* (Markham, Ontario: Butterworths, 2003).

11 Peter H. Russell, "The Political Purposes of the Canadian Charter of Rights and Freedoms" (1983) 61 The Canadian Bar Review 30.

12 Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001).

13 Ian Greene, *The Courts* (Vancouver, B.C.: UBC

Press, 2006) at 146.

14 Janet L. Hiebert, *Charter Conflicts: What is Parliament's Role?* (Montréal: McGill-Queen's University Press, 2002) at 72.

15 *Canada Evidence Act*, R.S.C. 1985, c. C-5.

16 Bill C-61, *The Young Offenders Act*, was introduced on February 16, 1981 and was given Royal Assent in July of 1982. Therefore, the genesis and drafting of the Bill can be described accurately as "pre-Charter" even if its official enactment comes shortly after the *Charter* arrives. Young Offenders Act, 1980 81 82 83, (Can.), c. 110; Young Offenders Act, R.S.C., 1985, c. Y 1.

17 *Ontario Human Rights Code*, R.S.O. 1990, c. H-19.

18 Peter W. Hogg, *Constitutional Law of Canada*, 4th ed. (Scarborough, Ontario: Carswell, 1997) at 31-33.
John White disagrees and suggests that Canada's record is marred by too many instances of "political passion directed at conspicuous minorities," in John White, "Not Standing for Notwithstanding" in Mark William Charlton & Paul Frederick Barker, eds., *Crosscurrents 1: contemporary political issues* (Scarborough, Ontario: Nelson Canada, 1991) at 66. Janet Ajzenstat, "Reconciling Parliament and Rights: A. V. Dicey Reads the Canadian Charter of Rights and Freedoms" (1997) 30 Canadian Journal of Political Science 645 at 658.

19 Hogg, *ibid*. at 31-33.

20 Roach, *supra* note 2 at 182. Mark Tushnet makes a similar observation but argues that "judicial overhang" is an argument *against* judicial interpretive supremacy. See Mark V. Tushnet, *Taking the Constitution Away from The Courts* (Princeton: Princeton University Press, 1999); Mark V. Tushnet, "Legislative and Judicial Interpretation" in Richard W. Bauman and Tsvi Kahana, eds., *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (Cambridge; New York: Cambridge University Press, 2006) at 357.

21 Robert MacGregor Dawson, W. F. Dawson & Norman Ward, *Democratic Government in Canada*, 5th ed. (Toronto: University of Toronto Press, 1989) at 47.

22 *Ibid*.

23 Scott Gordon, *Controlling the State: Constitutionalism from Ancient Athens to Today* (Cambridge, Massachusetts: Harvard University Press, 1999) at 336.

24 Jeffrey Simpson, *The Friendly Dictatorship* (Toronto: McClelland & Stewart, 2001).

25 Donald J. Savoie, *Governing from the Centre: The Concentration of Power in Canadian Politics* (Toronto: University of Toronto Press, 1999). Cited by Robin Elliot, "'The Charter Revolution and the Court Party': Sound Critical Analysis or Blinkered Political Polemic?" (2002) 35 University of British Columbia Law Review 273 at 325, n. 185; James B. Kelly, *Governing with the Charter: Legislative and Judicial Activism and Framers' Intent* (Vancouver: UBC Press, 2005) at 225-26.

26 Donald J. Savoie, "The Managerial Prime Minister" *Policy Options* (November 2000) 10.

27 Steven Chase, "Endangered species bill trouble" *The Globe and Mail* (1 May 2002) A5.

28 Janice Tibbetts and Jim Bronskill, "Terror bill gets facelift: Minister offers a 5-year sunset clause on some provisions, refines wording" *The Gazette* (21 November 2001) A13.

29 Kate Jaimet, "Liberals demanded favours to pass bill" *The Ottawa Citizen* (27 December 2002) A1 [*Favours*].

30 Bill C-36, *An Act to amend the Criminal Code, the Official Secrets Act, the Canada Evidence Act, the Proceeds of Crime (Money Laundering) Act and other Acts, and to enact measure respecting the registration of charities in order to combat terrorism*, 1st sess. 37th Parl., 2001.

31 Bill C-42, *An Act to amend certain Acts of Canada, and to enact measures for implementing the Biological and Toxin Weapons convention, in order to ensure public safety*, 1st sess., 37th Parl., 2001.

32 Bill C-6, *An Act to establish the Department of Public Safety and Emergency Preparedness and to amend or repeal certain Acts*, 1st sess., 38th Parl., 2005.

33 Janice Tibbetts, "PM rejects 'sunset clause' in terror law" *The Ottawa Citizen* (22 October 2001) A5.

34 Held November 9th and 10th, 2001. The essays presented at this conference can be found in Ronald J. Daniels, Patrick Macklem & Kent Roach, eds., *The Security of Freedom: Essays on Canada's Anti-terrorism Bill* (Toronto: University of Toronto Press, 2001). Cotler's contribution to this volume is entitled "Thinking Outside the Box: Foundational Principles for a Counter-Terrorism Law and Policy."

35 Shawn McCarthy, "No sunset clause for antiterror bill, PM tells his caucus" *The Globe and Mail* (1 November 2001) A7.

36 Daniel Leblanc, "Ottawa softens terror bill" *The Globe and Mail* (21 November 2001) A1 [emphasis added].

37 Philip Authier, "The man in the middle: Civil-rights lawyer trod a fine line in debate" *The*

Gazette (8 December 2001) B4.

38 S.C. 2001, c. 41.

39 Bill C-5, *An Act respecting the protection of wildlife species at risk in Canada*, 2nd sess., 37th Parl, 2002.

40 Kate Jaimet, "Species at risk bill gets House's OK: Compromises calm Grit turmoil" *Calgary Herald* (12 June 2002) A5 [Jaimet, "Species at risk"].

41 Chase, *supra* note 27.

42 Jaimet, "Species at risk" *supra* note 40.

43 *Ibid*.

44 *Ibid*.

45 Chase, *supra* note 27.

46 Jaimet, "Favours," *supra* note 29.

47 S.C. 2002, c. 29.

48 Government of Canada, *Table of Legislation Introduced and Passed by Session*, online:< http://www2.parl.gc.ca/Parlinfo/compilations/HouseOfCommons/BillSummary.aspx?Language=E>. See also, Craig Forcese & Aaron Freeman, *The Laws of Government: The Legal Foundations of Canadian Democracy* (Toronto: Irwin Law, 2005) at 638.

49 Beverly McLachlin, "The *Charter* 25 Years Later: The Good, the Bad, and the Challenges" (2007) 45 Osgoode Hall Law Journal 365 at 370 (approvingly citing the work of Philip Pettit).

Sometimes Constitutions are Made in the Streets: the Future of the Charter's Notwithstanding Clause

John D. Whyte*

This article examines the future of section 33 of the *Charter of Rights and Freedoms* (the notwithstanding clause)[1] — specifically, its political future. It explores whether it is a constitutional instrument which is likely to be used in the future by legislatures or by Parliament.[2] The article is premised on the idea that popular political notions about political and constitutional legitimacy, while often formed by the constitutional text, sometimes evolve independently of the text. When this happens, these new conceptions of legitimacy will constrain the exercise of constitutional powers no matter how clearly the powers are conferred by the text. From this perspective, this article argues that in an apparent regime of entrenched rights, such as Canada's, the legislative suspension of rights will be regarded as less reflective of the constituted order — and, hence, less legitimate — than will having legislatures insist that their choices should prevail over constitutional rights in some circumstances.

This claim is made in full recognition that Canada's constitutional order includes only a weak version of entrenchment — it subjects some rights to suspension by the legislative order in full acknowledgement that the creation of competing structures for vindicating constitutional rights in the *Charter* can hardly be considered politically incoherent. But, in the great competition to establish a nation's constitutional essence — a competition that will always follow a period of constitutional enactment — it is the recognition of rights that will triumph over the legislative power contained in the notwithstanding clause. That legislative power is, after all, a form of constitutional declaratory power and, hence, is by definition an instrument which, while clearly within Canada's constitutional structure, will also be seen as one of constitutional suspension. This means that it is the capacity of the notwithstanding clause periodically to suspend the rights regime that will be seen as anomalous. In short, a constitution which protects rights, but only until a democratic majority decides that they should be suspended, will come to strike citizens as unintelligible.

In exploring the political legitimacy of overriding rights in some circumstances, Jeremy Waldron has made the useful distinction between conflicts over the determination of what conduct is actually protected by a right and the claim that, in a specific context, it is inappropriate to entertain rights claims at all.[3] The former he labels rights disagreements: all authorities of the state — the executive, the legislature and the courts — accept that in the particular circumstance a rights claim can legitimately be made, but they do not agree on whether the exercise of governmental power abridges the right that has been claimed. The latter class he labels rights misgivings: the executive or the legislature believes that in a particular situation rights claims are simply not as important as achieving governmental policy and, therefore, should not be

allowed.[4]

Waldron's distinction bears on the question of the intent behind the enactment of the *Charter*'s notwithstanding clause and, possibly, on the question of its political legitimacy. That clause grants Parliament and provincial legislatures the power to enact that some element of their legislation will be treated as valid, and be allowed to operate, in spite of any legal claims that may be made based on the constitutional recognition of fundamental liberties, due process, and equality. Legislative action taken under the notwithstanding clause is simply a declaration of the inapplicability of some of the rights provisions found in the Constitution. As a matter of form, although not always as a matter of legislative motive, an exercise of the notwithstanding clause is a suspension of the rights listed in a named section of the *Charter* and is not a legislative act taken to correct a rights determination made by a court. Neither is it legislative preemption of a future court's rights determination, prompted by the fear that there will be mistaken or imprudent judicial protection of a right affected by legislation.

Of course, there is nothing to suggest that the notwithstanding clause cannot serve double duty, acting sometimes as a grant of power used to sidestep rights analysis of some state actions by a court, and acting sometimes as an expression of the view that, in certain circumstances, preference should be given to a legislature's understanding of what is properly protected by a designated right. The language of the notwithstanding clause, however, unmistakably confers legislative power to suspend rights claims. This being the form of the notwithstanding clause, it will tend to be seen as a suspensive power and its use will tend to be characterized as the suspension of rights almost regardless of actual legislative motive. Legislative suspension of rights (even legislative suspension specifically permitted by the Constitution) is very likely to attract greater popular suspicion and opposition than is the resort to the notwithstanding clause to correct (or to preempt) a specific and quite possibly unpopular court decision with respect to a rights claim. In other words, the language of the notwithstanding clause, granting the broadest power to exclude certain *Charter* protections, conduces to a skeptical view of the legitimacy of exercises of the power it grants.

On the other hand, it may be mistaken to overstate the significance of this distinction between rights disagreements and rights misgivings. Possibly, in the modern liberal democratic state, the principle of separation of powers, in its more recent developments, recognizes that many governmental functions should properly be assigned to specific agencies that enjoy a degree of immunity from political interference (for example, electoral commissions, central banks, information and privacy commissions and, as always, courts). This principle, which is thought to enhance democracy by altering structures of political accountability, may have become, in the wider political community, as strong a principle of constitutional ordering as is the protection of rights. If this is indeed the case, overriding a judicial decision that has already been made by a legislature — an agency that can hardly be considered to be well suited to assess norms designed to protect individuals from injury through state action — might also be seen as defying constitutionalism even when, according to the constitutional text, it clearly is not.[5]

As has been stated, to describe the notwithstanding clause as a legislative instrument for suspending rights, and not just particular rights decisions, is to demonstrate neither statecraft anomaly nor statecraft pathology. It is, however, valuable to get the right description of the notwishstanding clause's structure and its function in order to explore its likely future in Canadian constitutionalism. Having characterized the notwithstanding clause as suspensive, two questions seem pertinent. First, what kind of rights regime did the framers of this constitutional text actually want and, second, what kind of rights regime do those of us who stand here, now, in our own place and time, actually want?[6]

Perhaps a word needs to be said about the appropriateness of the second question. It suggests a degree of malleability in our constitutional arrangements that may not fit our idea of constitutional constancy based on acceptance

of the constitutional text as the central reference point for government acting legitimately under law. However, one of the things that we know about constitutional application and interpretation is that, in spite of the significant legitimacy dividend that some will claim for sticking to original understandings of what is permitted and what is restrained by our constitutional framework,[7] constitutional powers acquire new salience as political contexts and values change, and as new political imperatives shape the content of our constitutional order.[8] For instance, within thirty years of Confederation in 1867, judicial interpretation of the *British North America Act* had turned the constitutional text upside down in response to the adamantine refusal of two provinces in particular to be drawn into the spirit, or the machinery, of a strong and dominant national government.[9] The 1867 constitutional text offered the prospect of every sort of federal pre-emptive and supervisory power over provinces, from the power to appoint to provincial agencies, to the disallowance of provincial legislation, to the promotion of federal legislative uniformity, to the power to declare provincially regulated enterprises to fall under federal jurisdiction, to the federal review of provincial administration of sectarian education, and to the overarching general power of the federal government to provide peace, order and good government.

Within a few decades, the tower of provincial power based on its authority over legal relations between private persons (then a chief function of the state), was affirmed as the centerpiece of the 1867 constitutional arrangement. At the same time, the prime source of national capacity — the Constitution's Peace, Order and Good Government clause — was reduced to a contingent and largely temporary power, no longer serving as the foundation of federal authority. Likewise, almost every one of the federal declaratory and supervisory powers fell into disuse as inappropriate instruments for a mature federal state. Relationships between the elements of a state change (including their relationship with the state's most basic element — the people), and with these changes clearly expressed constitutional powers wither or, in some cases, find a new vitality. In light of this experience of informal constitutional change, we can well ask whether the *Charter's* notwithstanding clause has remained an accepted feature of our Constitution which lives on as a true reflection of the constitutional order we want. Or have we, on the other hand, come to regard it as we have other special constitutional powers, as an exigent and temporary device, politically necessary when created but now detached from the real and vibrant world of the lived constitution.

Through our political choices and the reshaping of our political morality we have "rewritten" many of our constitutional arrangements. We have overcome the perpetuation of some constitutional beliefs we find hard to remain committed to through an informal normativization of the political order, shaped by our self-conscious practices.[10] From this perspective, it is sensible to ask whether the notwithstanding clause, too, has ceased to be a part of Canada's current political and constitutional culture.

Let us return to the first question. What kind of rights regime did the framers want? We normally speak only tentatively of the framers of the *Constitution Act, 1982*,[11] since we lack a clear sense of their identity. But, with respect to the notwithstanding clause, we know exactly whom we are speaking of. The section's presence in the Constitution is the consequence of an initiative taken by the premiers who led the Anglophone members of the Gang of Eight — that group of provinces which opposed Prime Minister Trudeau's plan for virtually unilateral constitutional patriation. During the constitutional negotiations of the summer of 1980, provinces generally strenuously resisted entrenching rights. This resistance took the form, first, of some premiers simply arguing against constitutionally entrenched rights altogether. Then, they urged weak expression of the rights to be recognized, particularly the right to due process, and the rights of accused persons and persons under criminal investigation. Finally, premiers proposed a broad and sweeping clause for limiting rights. A notwithstanding clause, however, did not form part of those intergovernmental constitutional negotiations. That

clause first entered into political currency during the final days of the First Ministers' meeting of September 1980 when Quebec tried to develop a "common stand of the provinces."[12] Quebec suggested that fundamental and legal rights be entrenched, but that some legal and equality rights be subject to a notwithstanding clause. Although other provinces did not endorse this proposal, it did form part of the "Chateau consensus" presented to Prime Minister Trudeau, who quickly rejected it. Quebec did not advance this proposal again.

In October 1981, when the Gang of Eight met in Toronto, it faced two important political circumstances. First, it seemed clear that the people of Canada now wanted provinces to negotiate with Mr. Trudeau to achieve constitutional resolution and, second, that substantial alteration of the text of the Charter of Rights, which had been developed and refined between October 1980 and February 1981 in the Joint Parliamentary Committee, was no longer an available choice. Since the idea of a notwithstanding clause was not necessarily inconsistent with these conditions, the provinces in the Gang of Eight put that proposal in its bag of options to take to Ottawa for the meetings with the prime minister to be held in early November.

That provinces seized on the notwithstanding clause is not remarkable. It is, in essence, a form of declaratory power and, as we have seen, in constitution making such powers are not unusual. They are used to give power to interrupt the ordinary course of constitutional relations between the branches and orders of government. Such powers permit a rebalancing of relationships which may have been altered through new constitutional recognitions and empowerments, and they are especially attractive when the effects of constitutional changes are uncertain and, hence, worrying. This is precisely the situation created by the 1982 Constitution. Judicial review of governmental action was accorded a significantly broader scope through the extensive new constitutional norms of the *Charter*, and the impact of this change on government was not at all clear. There was a compelling case to be made for a legislative trumping power that could be used to ameliorate the potentially unfortunate effects of the new Constitution. However, such special powers, especially when they are prompted by anxiety over, or resistance to, constitutional change will often become otiose as experience with the newly created powers unfolds and the fear that there will be intolerable outcomes weakens. It is for this reason that special powers allowing usurpation of the basic constitutional order have proven to be a less durable form of constitutional arrangement than provisions which establish basic relationships.

Also, as was to be expected in connection with the creation of a power that permits alteration of a basic constitutional arrangement, the decision was made to make exercises of the notwithstanding clause subject to two restraining features. The first was to require that exercises of the clause be politically visible in terms of their rights-restricting effect. The second was that exercises of the notwithsanding clause be time-limited. What the premiers gained, then, was suspension of the rights-recognition regime and the return of legislative supremacy, but only when a legislature believes that this visible choice will be politically attractive, or at least bearably unattractive. As for the time limit on uses of the notwithstanding clause, this feature underscores the idea that this override power interrupts normal constitutional relations, and it confirms the idea that it is to be used only as long as circumstances warrant the removal of normal constitutional processes and norms.[13]

Beyond these structural and strategic explanations for the clause, there were principled bases for the premiers wanting to find an instrument to blunt the effect on legislative action of introducing constitutionalized rights. In brief, the premiers believed in the inherent superiority of political judgment over judicial judgment in accommodating competing interests, including interests that bear on the characterization of rights claims. Their campaign against the Charter of Rights, as it was reflected in the federal patriation package, was driven by their faith in the virtues of the legislative process.

The premiers' case was based on five claims. First, regardless of the nature of a claim, representative democracy is superior to judicial deci-

sion-making because it requires consideration of the long-term interests of the whole political community: it is not one-time adjudication between state and citizen in a specific circumstance. Legislative accommodations are made in recognition of a broad range of political considerations and with the knowledge that there have been, and there will in future be, other accommodations to be made.[14] Second, although courts, under the *Charter*, would in one sense be engaged in making rights determinations, in another sense they would also be engaged in resolving political disputes; important public interests would be frustrated — or vindicated — in this process. But judges are not accountable to electors for the choices they make and electors would have no opportunity to express their approval or disapproval of these outcomes. Third, judicial mediation of these politically important issues relating to every kind of public interest would deteriorate political engagement through the increased irrelevance of channels of political input and response. Fourth, judges are too often ignorant of, or oblivious to, the social and economic conditions that legislators devote so much of their energy to understanding, and to which they are accustomed to responding. As a class, judges are not suited to the essential task of measuring the value of social and economic policies — a task that is likely to determine general wellbeing far more significantly than does the protection of rights, and a task to which rights protection should sometimes bow. Finally, the language of entrenched rights is highly indeterminate and the claim that judges, in applying rights, are engaged in the constrained and principled exercise of applying pre-established norms and rules is simply not convincing. Entrenching rights, the premiers felt, represents the inappropriate delegation of a largely discretionary power to resolve social disputes.

Although these concerns represented a case against the general entrenchment of rights more coherently than they represented a case for including a notwithstanding clause, the premiers seized whatever instrument at hand to preserve an ascendant role for legislative action, at least with respect to some legislative programs. What this examination of the premiers' case for limiting the *Charter*'s operation tells us is that they were not, at heart, motivated by the desire for the power to correct judicial determinations of rights questions. They were motivated more by their sense of the need for a device to let legislatures alone respond to issues of such great political importance, or of such high political risk, that the political community would be better served if the normal legislative function of mediating interests for the public good were not interfered with by the courts. The record, however, also shows that some premiers wanted only to create a power to correct bad judicial outcomes.[15] Possibly, those premiers, realizing that gaining legislative capacity to suspend the *Charter* when rights claims seemed too costly was not a real option, sought the more limited power to correct bad judicial decisions out of a sense of political realism. The language of the notwithstanding clause does not support this sense of their purpose. Neither was it seen as compelling from the point of view of constitutional design since, in constitution making, we tend to believe that review of governmental actions for the purpose of ensuring constitutionality is never appropriately performed by the agency that is responsible for initiating the action under review. On balance, then, it seems that the premiers' interest was probably not simply to acquire the power to correct mistaken and dangerous rights decisions of the courts, but rather to gain the ability to suspend rights determinations so that, in some instances, public interests could be pursued without the uncertainty and attenuation of public policies brought about by successful rights claims.

We now come back to the second question: what kind of rights regime does the nation here and now expect? The analysis that follows is purely speculative and, perhaps, abstract and so may be discounted on that basis. However, statecraft, or constitutional design, will always be speculative in that it draws on ideas of how historical structure have worked, and it requires imagining how the imperatives and incentives created by new configurations of power will actually play out. But there is no rigid channel of future political action; in fact, the disruption of patterns, and the upending of expectations, is as much a part of constitutional history as is the predicted unfolding of the national narra-

tive according to current plans for, and understandings of, institutional behaviour. All of this is to acknowledge that the bravado of political prediction, as useful as it can sometimes be in gaining a sense of our actual condition, is properly treated with skepticism and subjected to doubt.

A constitutional rights regime is based on the recognition that democratic majorities might choose policies that injure interests the constitution makers have identified as ones that majorities should not be allowed to harm. There are two bases for identifying such interests. First, is the potential harm to some interests (those identified as rights), which creates what is considered to be an intolerable risk for every person — at least, every person who does not know what her or his future condition or needs will be, or who does not know what the democratic majority's future interests and priorities will be. That is to say, constitution makers recognize the possibility of acts of state coercion that, for many, will be intolerable and they seek to forestall the state from reaching that point. Second, constitution makers conclude that if there are some interests that cannot be harmed by the state, we shall likely have a healthier, safer, and more stable state. This belief is really just a matter of faith and prediction — it could be wrong. We could possibly have a state that could serve most needs better if it were, in fact, more tyrannical. Nevertheless, the constitutional calculation is that the security of the state and the well-being of its people are best realized through the placing of limits on the exercise of ordinary, or non-constitutional, politics. While constitution makers can also decide that the best, most stable of all states are the ones in which the limits placed on state authority can be removed (in extraordinary circumstances), they should not expect citizens to consider this consistent with the other statecraft calculation that there must be limits on state action to achieve the goals of protection against majority tyranny, and preservation of a stable society.

If it is concluded that it is better to protect some interests from majority driven curtailment because we wish to avoid the general risk of intolerable injury, and if it is concluded that we shall have a stronger and more stable state if we protect some interests from majority power, then we cannot also sensibly conclude that it is tolerable to subject citizens to injury to their interests some of the time, or that we shall have a stronger state if we were to abridge those interests some of the time. What is being claimed when we permit legislative suspension of rights is that what is best for people is to protect their key interests until we decide not to, and what best builds the stable state is to protect key interests until we decide it is better that we not recognize key interests. As I have said, these may be plausible calculations of statecraft but they are not compelling, and they are certainly not easy to grasp. The result is that politicians have been given a power the use of which will not, from the perspective of constitutional design, appear to be principled or logical. It is exactly this sort of constitutional power that over time will stop being exercised because it is based on inconsistency.

Even if the sole justification for the use of the notwithstanding clause were that it permits substitutions of judicial decisions about the scope of a right with the legislature's calculations about the scope of a right, even if citizens could see that all branches of government were equally committed to the same concepts of individual and minority rights (so that there was no longer a serious problem with the intelligibility of the constitutional plan), there would still be three reasons why such exercises of the notwithstanding clause are likely to fall outside our sense of legitimate constitutional ordering.

First, although citizens will hear and see legislators talking about citizens' rights, they will not believe that rights protection, as opposed to rights suspension, is going on. This is not because there is anything morally suspect in the legislators' motives or actions. The purity of legislative motive will be doubted simply because, as has already been noted, the Constitution describes the use of the notwithstanding clause as the suspension of rights not as the correction of rights determinations. More to the point, the interests of legislators are structurally determined to be driven by majoritarian interests, and this structural feature of representative

democracy will colour popular understandings of what a legislature is actually doing when it corrects what it merely considers to be judicial error. Even though we know that legislators can be fully committed — as committed as any constitution maker or any judge — to protecting individual and minority rights from the impact of legislative programs, this will not forestall the belief that the legislators have decided, in respect of this particular policy, that rights are less important than the broader political interests that will inevitably appear to have generated a rights-limiting policy.

The second basis for believing that the purpose of rights correction will not generate legitimacy, is that our firmly established understanding of the constitutional order is that it has taken the form and force of law. An equally established constitutional understanding[16] is that law application is the province of the courts. Naturally, one does not want to advance naïve conceptions about the nature of legal determinations — that they are the product of legal science, that they are devoid of discretionary judgment, that they do not reflect political preferences, that *Charter* language is not immensely indeterminate, or that policy review does not often lie at the heart of applying the *Charter*'s notwithstanding clause. However, the *Charter of Rights and Freedoms* is a legal text, and the general expectation is that the application of law gains legitimacy when performed by the specific state agency that has independence; is trained in legal reasoning; is politically neutral; is bound by processes that are open, considered, and even-handed; and is committed to fidelity to established legal norms. Structurally speaking, legislators are not seen as doing law, nor do they have any of the trappings that are associated with law-based adjudication. As a consequence, their decisions about what our constitutional law requires will be suspect, not as a matter of judging their good faith, but on the question of whether those decisions count as legal determinations. Of course, we could well prefer to construct our Constitution not on law-based rights application, but on purely political assessments of rights. Politically assessed rights claims may be exactly the right marriage of democratic process and constitutional objective. However, this view would represent a significant shift in general conceptions of Canadian constitutionalism, and, I think, is not very likely to emerge as an element of our political culture.

The third point relates to the impact of section 1 of the *Charter* on our understanding of when and how, and by what process, *Charter* determinations should be made. One might think that when the application of the tests enunciated by the Supreme Court of Canada in *R. v. Oakes*[17] has become the intellectual process by which, in many *Charter* applications, rights have been found to be violated (or not), there would not be a strong sense of the legalism of rights adjudication. However, there is another implication to be drawn from courts' engagement in something that looks very much like policy review. It is this: section 1 jurisprudence requires courts to review the purposes of legislative policies that are claimed to be rights restricting. This requires governments to present to courts clear evidence of the policy purposes behind a legislative program, as well as evidence of the likely remedial effects of the policy. In other words, the application of section 1 by the courts provides a government with ample opportunity to present a case for why rights may need to be compromised in the pursuit of a public policy, and to show that the policy was designed with as little negative impact on rights as possible.

Under section 1, governments are required to place their rights calculations before a court and to show how they have weighed the relative importance of rights and legislated social purposes. Section 1 determinations provide the exact opportunity for rights discourse from the government's perspective, that the rights-correction model of the notwithstanding clause recommends — except, of course, for the fact that the legislature does not have the final word on the question of whether the rights restriction is justified. The open and democratic debate over how best to restrict or protect rights, preferred by some defenders of the notwithstanding clause, is, in fact, a precondition to a government pleading a section 1 justification. The ultimate outcome of that debate is not determined by legislative votes, but by judicial application of constitutional text; however, the application of section

1 gives legislators the same incentive to engage in rights analysis as they would have were they to use the notwithstanding clause when they believe the courts have made a mistaken rights decision. Certainly it is theoretically significant, but it may not be not be as significant from the perspective of popular perceptions, that legislators do not have the final word under section 1. The reason that it will not be easy to convince the nation that the loss of that final word poses significant risks to constitutional government is that in constitutional design — as in the design of any structure for the exercise of complex and diverse powers — what really matters most is the presence of mediating structures. The legitimacy of governmental power is dependent on its being exercised with full consideration of each branch's interests and each order's goals. The combination of rights-trumping powers with governing powers provides a weak structural context for conducting the inevitable task of mediation required in complex democracies. In addition, this combination is the least stable of constitutional structures because it raises the greatest doubts about state legitimacy.

The premiers, in seeking to add the notwithstanding clause to the *Canadian Charter of Rights and Freedoms*, were driven by real and sensible concerns. But their concerns were, in the long run, not the ones that shape — or should shape — the way democratic constitutions work.

Notes

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An earlier version of this article was delivered at *The Charter @ 25*, a conference of The McGill Institute for the Study of Canada, Montreal, 14-16 February 2007.

1 *Canadian Charter of Rights and Freedoms,* s. 33, Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*]. Section 33(1) of the *Constitution Act, 1982* states: Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of the *Charter*.

2 Howard Leeson has asked the same question. See, Howard Leeson, "Section 33, the Notwithstanding Clause: A Paper Tiger?" (June 2000) 6 Choices 4. He suggests that the notwithstanding clause will fall into disuse, but does not believe that this will be due to popular opposition.

3 Jeremy Waldron, "Some Models of Dialogue Between Judges and Legislators" in Grant Huscroft and Ian Brodie, eds., *Constitutionalism in the Charter Era* (Markham, ON: LexisNexis Canada, 2004) 7 at 36.

4 *Ibid* at 37.

5 For examinations of prudent uses of the separation of powers idea, see Bruce Ackerman, "Meritocracy v. Democracy" (8 March 2007) 29 London Review of Books 5 and Bruce Ackerman, "New Separation of Powers" (2000) 113 Harvard Law Review 633.

6 Paraphrase of W. Whitman, Poem 6 of "Starting From Paumanok" in William Rossetti, ed., *Poems of Walt Whitman,* (London: John Camden Hotten, 1868) at 70-71. Whitman pays homage to the traditions, including constitutional traditions, that formed him and his nation, but claims for himself and his time the right to be self-determining.

7 See e.g., Antonin Scalia, "Common-Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws" in Amy Gutman, ed., *A Matter of Interpretation: Federal Courts and the Law* (Princeton: Princeton University Press, 1997) 3.

8 Clearly, this idea of constitutional change is not everybody's idea of a good idea. See, e.g., Antonin Scalia, "Romancing the Constitution: Interpretation as Invention" in Huscroft and Brodie, *supra* note 5 at 337. Justice Scalia writes at 344: "This is a terrible system . . . the Constitution it produces — a Constitution congenial to the majority — is hardly a Constitution worth having, since the whole purpose of constitutional guarantees is precisely to frustrate the wishes of the majority." But see Mark Tushnet, *The New Constitutional Order* (Princeton: Princeton University Press, 2003), in which the ongoing reconstruction and transformation of the constitutional order is described and defended, or consider the almost universal Canadian approbation of the "living tree" interpretative approach articulated by Lord Sankey in *Edwards v. Canada (Attorney General),* [1930] A.C. 124 at 136.

9 *Constitution Act, 1987* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5. More accurately, one might say that the early decisions of

the Judicial Committee of the Privy Council were a response to advocacy by counsel for the provinces, which were determined to preserve a large civil law jurisdiction for themselves, and which presented this capacity as the moral foundation of Confederation.

10 The notion of constitutional dynamism generated outside the process of formal constitutional amendment, through a dualist democracy consisting of constitutional moments effecting non-textual constitutional transformation, and normal politics, is explored in Bruce Ackerman, *We The People: Transformations* (Cambridge: Belknap Press, 1998). See Tushnet, *supra* note 8, for a similar treatment of constitutional reform. Tushnet finds Ackerman's sharp division between constitutional moments and the course of normal politics to be unconvincing (*supra* note 8 at 98-99).

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

12 See, Roy Romanow, John Whyte and Howard Leeson, *Canada . . . Notwithstanding: The Making of the Constitution 1976-1982* (Toronto: Carswell/Methuen, 1984) at 96-98. This history is also presented in David Johansen & Philip Rosen, "The Notwithstanding Clause of the Charter," Library of Parliament, Parliamentary Information and Research Service PRB 194E (May 2005), available at: <http://www.parl.gc.ca/information/library/PRBpubs/bp194-e.htm>.

13 One of the ideas of the Judicial Committee of the Privy Council, which Canadian constitutional commentators found distorting, was that the peace, order and good government power could support only federal emergency legislation, and that the condition of validity for emergency legislation was that it must be temporary. Implicit in this conception of peace, order and good government, and of the condition of temporariness is that exercises of the Peace, Order and Good Government clause are not considered part of the regular constitutional arrangement. The power was represented as an extraordinary and usurping power, perfectly appropriate when needed, but certainly not a regular feature of the federal plan.

14 These virtues and others are suggested in the writing of Jeremy Waldron. See, Jeremy Waldron, "The Integrity of Law: Legislating with Integrity" (2003) 72 Fordham Law Review 373. Waldron's views on legislative integrity are cited and discussed in Tsvi Kahana, "What Makes for a Good Use of the Notwithstanding Clause?" in Huscroft and Brodie, *supra* note 3, 191 at 206.

15 In truth, there seems to be no clear sense of the nature of the instrument that had been agreed on. At the November 1981 First Ministers' meeting, Premier Allan Blakeney said: "[The] Charter of Rights . . . allows Parliament and legislators to override a court decision which might affect the basic social institutions of a province or region . . . ." (quoted in Johansen & Rosen, *supra* note 12 at 5).

16 The role of courts in preserving the rule of law is not just a popular or political commitment. It is constitutionally expressed in Part VII ("Judicature") of the *Constitution Act, 1867*. See, William Lederman, "The Independence of the Judiciary" (1956) 34 Canadian Bar Review 769.

17 [1986] 1 S.C.R. 103 (CanLII).

The Unlikely Union of Same-Sex Marriage, Polygamy and the Charter in Court

Matthew Hennigar*

For several years now, I have been doing work on litigation surrounding same-sex marriage (SSM), and when I present my research (both at conferences and informally over drinks), I am almost invariably asked how court decisions legalizing SSM[1] will affect the laws against polygamy. As a recent article in the *Toronto Star* observed,[2] gay marriage is often seen as a "slippery slope" to polygamy; some argue that it opens the jurisprudential door to other fundamental challenges to the traditional, monogamous definition of marriage.[3] For example, it is true that the Supreme Court of Canada decisively rejected the government's argument in the SSM cases that the *Canadian Charter of Rights and Freedoms*[4] was not intended to revolutionize fundamental social institutions. Recent developments in British Columbia appear likely to put this contention to the test.

For over six decades, a fundamentalist sect of the Mormon Church has been practicing polygamy in the insular community of Bountiful, British Columbia, which now boasts a population of roughly 1,000. This practice has been permitted by successive provincial governments of all partisan stripes, despite the fact that section 293 of the *Criminal Code*[5] unequivocally prohibits polygamy. In recent years, the B.C. government has been advised by its own Ministry of Attorney General, and most recently by a special prosecutor assigned to the issue, that prosecution—and the ban on polygamy itself—would probably not survive a freedom of religion claim under the *Charter*. The special prosecutor, Richard Peck, recommended instead that the government seek legal guidance by referring the constitutionality of section 293 to the B.C. Court of Appeal (with an appeal to the Supreme Court likely). On 1 August 2007, B.C. Attorney General Wally Oppal—who has gone on record with the view that polygamy is demeaning to women and unacceptable—indicated that his government would follow Peck's advice and refer the matter to the B.C. Court of Appeal. While Oppal has subsequently requested yet another opinion from his ministry on whether charges could be laid under a "more aggressive approach," it seems increasingly likely that the constitutionality of Canada's anti-polygamy law will soon be before the courts.

The purpose of this article is to canvass the legal issues such a case will raise based on current *Charter* jurisprudence.[6] The analysis will reveal two key points: first, and contrary to some conservative commentary, the recent decisions legalizing SSM do not ultimately benefit polygamists; and second, despite this, the courts will have a difficult time upholding the ban unless they embrace feminist critiques of polygamy. In this article I quickly summarize the key decisions on SSM, provide a short backgrounder on Bountiful and the practice of polygamy, and then conclude with the analysis of *Charter* issues raised by polygamy, including equality rights, freedom of religion, and liberty. It should be stressed, however, that while the situation in Bountiful is the one most likely to bring the polygamy issue to the courts and is

my focus here, any ruling will have implications far beyond this small community in rural B.C. Polygamy is advocated (and quietly practiced in Canada) by some ultra-Orthodox Jews and Muslims, and the latter group is of particular relevance as Canada continues to accept more immigrants and refugees from Muslim countries where Islamic Sharia law accepts the practice. In short, in addition to raising the issues of religious freedom and the equality rights of religious minorities, polygamy may present a clash between multiculturalism—recognized in section 27 of the *Charter*—and Canadian criminal law, as well as sexual equality as enshrined in sections 15 and 28 of the *Charter*.

The Same-Sex Marriage Rulings

With their respective rulings in *EGALE* and *Halpern* in the spring of 2003, the Courts of Appeal in B.C. and Ontario became the highest-ranked courts in the country to conclude that gay and lesbian couples have a constitutional right to be married in law. Some churches, most notably the Metropolitan Community Church of Toronto, had already performed purely religious marriage ceremonies for members of its congregation. The courts' decisions meant that these would now be *legally* recognized, and that civil marriage ceremonies would now be open to same-sex couples. The cases turned primarily on the claim that gays and lesbians' equality rights in section 15 of the *Charter* were violated by the common-law definition of marriage. Although the institution of monogamous heterosexual marriage had existed for several centuries in the Anglo-American context, the common-law definition, as of Spring 2003, dated back to the 1866 British case *Hyde v. Hyde and Woodmansee*: "marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others."[7]

Following *Law v. Canada*,[8] a successful equality rights claim has to answer all of the following questions in the affirmative:

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

B. Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds?

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

Framed in these terms, the courts readily conceded that the common law-definition of marriage discriminated against gays and lesbians. The law clearly distinguished same-sex couples from heterosexual ones, and denied homosexual unions the legal benefits of marriage (and associated protections, when those unions dissolve). While the wording of section 15 does not specify protection for sexual orientation, the Supreme Court used the section's open wording to recognize it as an "analogous ground" deserving protection in the 1995 *Egan v. Canada* decision.[9] As recognized in *Egan*, gays and lesbians make up a historically disadvantaged group which has long suffered under deep-seated discriminatory attitudes in Canadian society. These attitudes were manifested in the criminal law (in particular in the prohibition on "sodomy"); in discriminatory treatment by employers and landlords; and, of course, in the body of family law relating to marriage, spousal support, custody, adoption and next-of-kin relations. On the question of whether barring same-sex marriage is based on discriminatory stereotypes of gays and lesbians, the courts were unequivocal:

> Same-sex couples are capable of forming

> "long, lasting, loving and intimate relationships." Denying same-sex couples the right to marry perpetuates the contrary view, namely, that same-sex couples are not capable of forming loving and lasting relationships, and thus same-sex relationships are not worthy of the same respect and recognition as opposite-sex relationships.[10]

Finally, the courts found the exclusion simply unnecessary, rejecting the federal government's argument that "The concept of marriage—across time, societies and legal cultures—is that of an institution to facilitate, shelter and nurture the unique union of a man and woman who, together, have the possibility to bear children from their relationship and shelter them within it."[11] As even the Attorney General of Canada acknowledged, procreation and child rearing are not the only purposes of marriage—others include intimacy, companionship, societal recognition, economic benefits, and the blending of two families—and both the Ontario and B.C. courts observed that same-sex couples can choose to have children through adoption, surrogacy, and donor insemination. Conversely, heterosexual married couples are not required to have children.

For essentially the same reasons, the courts ruled that the government failed to demonstrate that the violation was justified under section 1 of the *Charter*, which permits "reasonable limits" to be imposed on *Charter* rights:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Following the formulation laid down in *R. v. Oakes*,[12] the government must show that the violation of a right is for a "pressing and substantial objective" using "proportional" means, where the latter requires demonstrating that a "rational connection" exists between the objective and the means used, that the "reasonably least restrictive means" were used ("minimal impairment"), and that the collective benefit of the objective outweighs the cost to the individual whose rights have been violated. The courts found that the government failed to make its case on all counts. Even allowing the objectives of promoting procreation and child rearing, preventing same-sex marriage does nothing to encourage reproduction by heterosexual couples, and an increasing number of same-sex couples are having and raising children. Moreover, the law completely excluded same-sex couples from a fundamental societal institution, and "complete exclusion cannot constitute minimal impairment."[13] Absent a justifiable rationale for prohibiting SSM, the courts lifted the ban.

Notably, in *Halpern*, the pro-SSM Metropolitan Community Church of Toronto (MCCT) made the additional argument that denying the Church the right to perform legally recognized marriages violated its freedom of religion under section 2(a) of the *Charter*. This claim proved unsuccessful. The Ontario Court of Appeal's view was that although "marriage is a legal institution, as well as a religious and a social institution," the SSM case was "solely about the legal institution of marriage. It is not about the religious validity or invalidity of various forms of marriage. We do not view this case as, in any way, dealing or interfering with the religious institution of marriage."[14] In short, because the MCCT could perform religious marriage ceremonies for gays and lesbians—even if they were not legally recognized—the Church's religious freedom was not violated. Conversely, and as confirmed by the Supreme Court in the subsequent *Reference re Same-Sex Marriage*,[15] the *Charter*'s protection of freedom of religion means that churches that are doctrinally opposed to homosexuality cannot be forced to perform or recognize SSMs.

What, then, are the implications of these findings for polygamists?

Polygamy: Some Background

The practice of polygamous or plural marriage in Bountiful is based on a literalist reading of the Old Testament, which features many examples of men taking multiple wives, and on Mormon founder Joseph Smith, Jr.'s revelation that only men with three or more wives can reach the highest realm of heaven. (Sect members also believe that the "prophet" or church

elders should determine which man a woman will marry). This raises a matter of terminology, as what is practiced by residents of Bountiful—as with most other practitioners of plural marriage, including some ultra-Orthodox Jews and some Muslims under Sharia law—is more accurately labelled *polygyny*, or taking multiple wives, since all of the plural marriages involve a single man with multiple wives, rather than the reverse (*polyandry*) or a mix of many men and women (*polygamy*, in its strict usage). However, for simplicity, I will use the more familiar term "polygamy" throughout to refer to all of these permutations. Polygamy has been illegal in Canada since before Confederation, first under British common law (*Hyde v. Hyde and Woodmansee*) and then in our first *Criminal Code*, adopted in 1892. The current prohibition is found in section 293 of the *Criminal Code*, and reads as follows:

293. (1) Every one who

(a) practises or enters into or in any manner agrees or consents to practise or enter into

(i) any form of polygamy, or

(ii) any kind of conjugal union with more than one person at the same time, whether or not it is by law recognized as a binding form of marriage, or

(b) celebrates, assists or is a party to a rite, ceremony, contract or consent that purports to sanction a relationship mentioned in subparagraph (a)(i) or (ii),

is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

Prosecutions under section 293, however, are rare.

Polygamy and the *Charter* in Court

Equality Rights

If SSM is supposed to be a slippery slope to polygamy, it stands to reason that our analysis should begin with equality rights, which formed the basis of the successful claims in *EGALE* and *Halpern*. How well would those precedents serve the residents of Bountiful?

The short answer is not particularly well. That is not to say that polygamists cannot successfully claim protection under section 15, but as I will explain, the claim rests on grounds that have nothing to do with gays and lesbians. Recalling the standards established in *Law*, polygamists actually have a fairly strong claim that section 293 of the *Criminal Code* discriminates against them. Section 293 certainly makes a distinction between polygamy and other forms of marriage by criminalizing the former, and does so on the basis of a "personal characteristic," in this case marital status. Moreover, while section 293 does not mention religion, it nonetheless treats the religious community of Bountiful (and of polygamous Muslims and Jews) differently from religious groups which practice monogamy.

Similarly, as to the question of whether this differential treatment is based on one or more enumerated and analogous grounds, there are at least two different grounds upon which polygamists could answer in the affirmative (neither of which is sexual orientation). The first is the enumerated ground of religion, which to date has never been successfully claimed in the Supreme Court of Canada. This does not preclude success, however, as previous claims of religious equality failed in cases where the law had been enacted before section 15 came into effect,[16] or where the claim was trumped by the right to denominational schooling enshrined in section 93 of the *Constitution Act, 1867*.[17] There is a chance the Court could rule that polygamists are being discriminated against not because of their religion but because of a particular practice, but this seems unlikely as the very basis for this sect's schism from the larger Mormon Church was its position on polygamy.

A second potential ground is "marital status," which was accepted as an analogous ground in *Miron v. Trudel*[18] and *Nova Scotia (Attorney General) v. Walsh*.[19] Although it is likely that a court would simply accept an argument that the precedent regarding marital status as an analogous ground applies to polygamy, it is worth noting that there are some significant differences between these cases and polygamy. *Miron* and *Walsh* arose because of differences in the way the law treated unmarried but monogamous common-law spouses as compared to married couples. In *Walsh*, the court upheld the distinction that common-law spouses do not automatically receive half of any "matrimonial" property in case of separation. As well, these marital status cases concerned civil law (provincial car insurance in *Miron*, family law in *Walsh*), while polygamy arises in the context of criminal law.

Finally, regarding the issue of whether section 293 offends the human dignity of polygamists as required by the third prong of the section 15 test laid down in *Law v. Canada*, polygamy is viewed with moral opprobrium by the majority of society, which is the reason it was criminalized in the first place. There is no doubt that this prevailing attitude, and its embodiment in the *Criminal Code* suggests that polygamists are "less capable or less worthy of recognition or value as human beings or as members of Canadian society, equally deserving of concern, respect, and consideration" pursuant to part three of the *Law* test. As such, section 293 clearly violates the dignity of polygamists in the terms laid down in *Law*.

Before proceeding, it is interesting to compare the polygamists' section 15 claim with that of recreational pot smokers, whom the Supreme Court rejected as an analogous ground in *R. v. Malmo-Levine* and *R. v. Caine*.[20] Let us assume for the moment that both the drug users and polygamists are guilty of what Herbert Packer termed consensual or "victimless crimes," in which their actions cause no harm to others.[21] Both groups have seen their behaviour prohibited based on the majority's moral values,[22] but absent the precedents in *Miron* and *Walsh*, would the marital status of polygamists qualify as an analogous ground? If we bracket out the religious basis for polygamy, what remains is an equality rights claim based on a socially derided and criminalized but ultimately voluntary act—plural marriage—rather than an immutable characteristic which is irrelevant to the law in question. This strikes me as extremely similar to the argument advanced unsuccessfully by the pot smokers in *Malmo-Levine*. As such, the real issue for polygamy in the context of section 15 *should* be religious discrimination (and, just for fun, we can make another analogy to drug use: if the colonists in Bountiful can make an equality rights claim to polygamy based on religion, why can Rastafarians not make an equality rights claim to possess and smoke marijuana based on its centrality to their religious practices? Just a thought).

All of this is to say that polygamists would probably be able to establish a *prima facie* violation of their equality rights. Their claim would still need to survive a section 1 reasonable limits analysis, which I take up after considering a *Charter* claim based on freedom of religion.

Freedom of Religion

As polygamy in Bountiful is based on religious beliefs, the most obvious constitutional challenge would be based on the *Charter*'s section 2(a) "freedom of conscience and religion." To begin, the claimants would need to show that polygamy is essential to their religious beliefs. It is unlikely that the courts, which have taken a "broad, purposive approach" to the *prime facie* scope of rights, would reject this claim. While the mainstream Mormon Church, under threat of prosecution in the U.S., officially disavowed Joseph Smith's position on polygamy in 1890, the group in Bountiful (among others) broke away largely because of this issue. The group also has textual support from the Bible and past practice, as monogamy was only adopted in Christendom because of Roman influence, and other religions with roots in the Old Testament—including some Jews and Muslims, and other Mormons—practiced or still practice polygamy.

As such, polygamists are likely to have more

success at this stage than the Metropolitan Community Church had in *Halpern*. In large measure this is because the courts do not have the same "out" here of allowing purely religious ceremonies, as even exclusively religious plural marriage is prohibited. Recall the *Criminal Code's* section 293(1)(a)(ii), mentioned above, which prohibits "any kind of conjugal union with more than one person at the same time, *whether or not it is by law recognized as a binding form of marriage*" [emphasis added]. Notably, if one tried to argue in defence of polygamy that the second and subsequent unions were not "conjugal"— that is, they were celibate—section 293(2) makes it clear that it is not necessary "to prove that the persons who are alleged to have entered into the relationship had or intended to have sexual intercourse." In any case, this is hardly an issue in Bountiful, where one of the community's leaders, Winston Blackmore, has over 100 children by his 30 wives.

Assuming that polygamists clear this initial legal hurdle, they would still need to address the Court's well-established position that the freedom to hold religious beliefs is distinct from the right to act on those beliefs. On its face, it is hard to see how such a distinction could be made in this case; it seems unintelligible to suggest that religious freedom protects the right to believe in polygamy but not to practice it. The closest parallels, in which religious belief required a particular course of action contrary to state regulations, are the blood transfusion[23] and child custody cases[24] involving Jehovah's Witnesses. These cases hold some important lessons for polygamists. First, in all of these cases the Supreme Court considered whether countervailing principles—the "harm" principle, or the "best interests of the child"—provide internal limits to the freedom to act upon religious belief. In other words, echoing John Stuart Mill's classic formulation in *On Liberty*,[25] the Court asked whether one's enjoyment of a right extends only to the point where it interferes with the ability of others to do the same? If so, and if such interference could be shown, then there would be no *prima facie* rights violation, and so there would be no need to engage in a section 1 "reasonable limits" analysis—in short, the *prima facie* right to act upon a religious belief would be narrower than the right to hold that belief. However, in each case a majority of the Court (albeit narrowly) refused to employ this approach, opting instead to read the right broadly, in keeping with the Court's "living tree" philosophy, and work out the conflicting principles in the context of section 1.

A second lesson from the transfusion and custody cases is that the Court uses this approach of interpreting rights broadly and handling limitations of those rights under section 1, even if the case involves adults making decisions affecting minors, which is the case with respect to polygamy. Children have no control over whether they are born into polygamous families, with all the negative consequences that that may entail. These consequences include, according to studies commissioned by Status of Women Canada and the Department of Justice Canada[26]: the unclear legal status of children of illegal marriages (which affects inheritance, custody, support payments, etc.), possible psychological damage, economic deprivation, lower levels of academic achievement and self-esteem and, in the case of Bountiful, probably sexual abuse. So, even though there are competing principles at play here (more about these below), the Court's track record suggests that it would not block the rights claim at this stage.

As such, the case law suggests that the residents of Bountiful would meet their burden of showing a *prima facie* violation of religious freedom, thus putting the onus on the government to demonstrate why limiting their religious freedom is reasonable under section 1. As the government's argument could be virtually identical to that offered for a violation of equality rights, a single analysis of section 1 issues will suffice.

Reasonable Limits under Section 1

Limit "Prescribed by Law"

The first step in section 1 analysis requires verifying that the rights violation is "prescribed

by law." This is self-evident here, as it is a provision of the *Criminal Code* which is at issue with respect to polygamy.

Pressing and substantial objective

Although the origin of the anti-polygamy law is rooted in enforcing mainstream Judeo-Christian morality through the criminal law, this is typically no longer a legitimate objective in the eyes of the courts, given Canada's multicultural and liberal democratic character. This is evident in cases concerning pornography[27] and "swingers" clubs,[28] which ruled out traditional morality-based justifications for the crimes of, respectively, obscenity and indecency, in favour of a "harm-based" approach. A majority of the Supreme Court in *Malmo-Levine* maintained that morality could be the legitimate basis of criminal law in narrow circumstances, when it reflects societal values "beyond the simply prurient and prudish" rather than "conventional standards of propriety" or current tastes.[29] Justices Gonthier and Binnie, writing for the majority, identified bestiality, cannibalism and consensual dueling as examples—but not, notably, polygamy. Moreover, as noted, polygamy today is not universally condemned among the cultural communities within Canada, nor is it without historical precedent. As such, it is unlikely that a strictly morality-based objective for the prohibition would be accepted by the Court. What, then, would be a liberal, harm-based objective for prohibiting polygamy? The Court would have several to choose from, but all are somewhat problematic:

1. Protecting underage girls from forced marriage and sexual exploitation. This argument might be confounded somewhat by the government's inability to prosecute successfully any actual cases, even after appointing a special prosecutor to investigate the issue. Moreover, polygamy does not *necessarily* involve young girls, and minors could arguably be protected in other ways, such as by prosecuting the offences of underage marriage, sexual abuse, and/or other sexual offences (sexual exploitation, sexual interference, etc.). On the other hand, relying on individual prosecutions misses the bigger picture, which is the highly indoctrinating context in which these youths live. As a report for Status of Women Canada by the Alberta Civil Liberties Research Centre observes,[30] the children of Bountiful are indoctrinated against discussing any sexual abuse they experience, and indeed, are discouraged from even recognizing it as abuse as it is framed as obedience to their leaders who are God's prophets on Earth. Prosecution of sexual offenses without the assistance of the victim is extremely difficult, and virtually impossible if the victim and their family actively frustrate the Crown's efforts.

2. Child protection more generally, based on the factors cited above (uncertainty over their legal status, economic deprivation, psychological harm, etc.).

   It should be noted at this point that if either or both of these objectives for the prohibition of polygamy are the only objective(s) the Court accepts, it opens the door a crack to polygamists who do not have children (elderly couples, for example). However, it is unlikely that such a narrow concern would prevent the Court from upholding the ban in its entirety.

3. Promoting sexual equality. In their study for the Department of Justice, Rebecca Cook and Lisa Kelly[31] lay out several ways in which polygamy, as practiced in Bountiful and elsewhere in the world, harms women and undermines sexual equality. These include:

   - as a form of patriarchy, polygamy is intended to control women and prevent wives from asserting their interests and rights within marriage;
   - denying couples sexual intimacy, which "hinders the equal sharing of both material and emotional attention";
   - fostering competition between wives (although examples of close co-operation also exist) and unequal distribution of domestic resources;

- elevating levels of mental illness and stress among wives;
- aggravating deprivation and poverty;
- undermining women's enjoyment of citizenship (including fundamental political values such as freedom of expression, freedom of assembly and association, the right to freedom of thought, belief and opinion, and even the right to vote); and
- as a consequence of unequal power relations based on gender, women and adolescent girls are often unable to refuse sex or insist on safe and responsible sex practices, exposing them to unsafe pregnancies, STDs and HIV/AIDS.

These factors might carry particular weight in the context of a violation of polygamists' equality rights, since it could be argued that *allowing* polygamy offends the *Charter*'s section 15 guarantee of sexual equality, as well as parallel guarantees in human rights legislation and international treaties to which Canada is a ratified signatory. The objective of promoting sexual equality would certainly allow a comprehensive ban on polygamy, but it does raise one major concern: banning polygamy based on the harm it does to women represents a fairly invasive form of statist paternalism, as it denies the agency of those women *who nevertheless want to participate in plural marriage*. This concern is arguably attenuated by the fact that polygamy typically occurs in an extremely insular and indoctrinating context, which serves to constrain or deny women's agency in the first place.

4. Preventing in-breeding. While this is a concern in highly insular communities like Bountiful, it is not inherent to plural marriage. This said, the Nova Scotia Court of Appeal's decision upholding the *Criminal Code*'s ban on consensual incest (section 155) in *R. v. F. (R.P.)*[32] cited "the societal goal of reducing the chance of children being born with genetic mutations."

Notwithstanding the concerns I have raised, it seems likely that the Court would accept the government's claim that the ban on polygamy has a pressing and substantial objective, particularly since the courts usually defer to the government at this stage of analysis. Moreover, in *Malmo-Levine*, the Court characterized the burden of proof on government to show a threat to vulnerable groups (or health) in the context of section 1's "pressing and substantial objective" analysis as "minimal." In other words, the government should not have a particularly hard time satisfying this requirement in the polygamy case. What, then, is the Court likely to decide about the ban's proportionality?

Proportionality

i) Is there a rational connection? While this is highly speculative without knowing what objective the Court might accept, it does stand to reason that if Parliament believes polygamy is the root of the problem, then banning polygamy is a "rationally-connected" response.

ii) Is the impairment minimal? As is usual in section 1 analysis, this is likely to be the biggest obstacle for the government, especially since there are ample precedents of the Court objecting to "total" prohibitions where more tailored ones might suffice (take for example the cases regarding Quebec's sign law[33] and tobacco advertising[34]). While it is true that a similar argument was employed in the SSM cases, the situation is subtly different from the ban on polygamy. In *EGALE* and *Halpern*, the courts argued that the "complete exclusion [of homosexuals from the institution of marriage] cannot constitute minimal impairment."[35] Polygamists, in contrast, are not being completely excluded from the institution of marriage, but being told to *limit* their involvement in that institution to only one partner at a time. The minimal impairment analysis would also be the real test of the Court's ability to reconcile religious freedom with sexual equality (and/or child protection), or whether the former must simply give way to the latter, in which case a total ban would be upheld. How the Court resolves this ques-

tion has direct consequences for any potential remedy, as will be discussed below.

iii) Does the collective benefit outweigh the individual cost? Banning polygamy has some benefits for the non-polygamous majority, but they are mostly of the economic variety (imagine, for example, if Blackmore was able to claim Canada Child Tax Benefits for all 100 of his children). The more pressing issue to the Court would be the presence of any benefits that accrue to the children of polygamous marriages, as they cannot speak for themselves, and are too young to have formed their own opinions about their religious beliefs. On this count, the Court would have sufficient grounds to find in the government's favour.

Remedy

If we were to assume for a moment that the Court did not find a complete ban on polygamy to be a reasonable limit on religious freedom, this rights violation would be the easiest one to remedy, according to Martha Bailey et al.[36] All the Court would need to do to satisfy religious freedom is read out of the *Criminal Code* the phrase in section 293(1)(a)(ii) prohibiting polygamy "whether or not it is by law recognized as a binding form of marriage," thus allowing purely religious ceremonies which have no status in law—indeed this is what the Court said was sufficient to satisfy the religious freedom of the pro-SSM Metropolitan Community Church in *Halpern*. This would also side-step the government's likely argument that legalizing polygamy would wreak havoc on Canadian family law and government programs, all of which are premised on the model of the monogamous (or single-parent) family. A successful claim under section 15, however, would require a more substantial remedy than for a violation of section 2(a), and entail nullifying at least some part of section 293 of the *Criminal Code*, though the grounds claimed under section 15 (religion versus marital status) would be relevant here. A ruling based on religious discrimination could allow the courts, or a government in response to the ruling, to carve out an extremely narrow exception for well-established religious communities, in part to prevent any secular opportunists from trying to rack up spousal pension benefits or RRSP room. A decision based on marital status, on the other hand, would require an even broader remedy, most likely the complete invalidation (either immediate or delayed) of section 293. Notably, this might create favourable conditions for the government to invoke the notwithstanding clause, as it would likely face fairly little public backlash for retaining the prohibition on polygamy.

Right to Life, Liberty and Security of the Person

Before closing, I should note that some arguments against the ban on polygamy could arise from the *Charter*'s section 7 right to liberty, which the court has expanded beyond its initial "freedom from physical restraint" to include government interference with a person's "fundamental personal choices."[37] As Bailey et al. aver, "it is difficult to conceive of a more fundamental personal choice than whom one chooses to marry."[38] Be that as it may, section 7's wording indicates that the rights in that section may be limited when doing so is "in accordance with the principles of fundamental justice." The *Charter* does not specify these principles, and the Court has tended to focus on what does *not* satisfy fundamental justice. The latter includes vagueness in the law, lack of "fair notice" for those subject to a law, and arbitrary application of the law (i.e., too much discretion left to government officials, especially if there is evidence of bias). The ban on polygamy suffers from none of these defects. Anyone practicing polygamy is perfectly aware that they are violating the *Criminal Code*, and "polygamy" is clearly defined as the taking of more than one spouse at a time, even if in a purely religious ceremony. While there is obviously discretion involved in deciding whether to prosecute, this is no different from the discretion Crown Attorneys have over prosecuting any offence—moreover, the Court has ruled that this discretion is itself constitutionally protected except in cases of "flagrant impropriety."[39] On the other hand, the promotion of sexual equality and the protection of children are surely consistent with the prin-

ciples of fundamental justice. Thus, the same concerns which would justify limiting religious freedom in the context of section 1 would also justify internally limiting section 7, so a claim advanced under section 7 would face the same calculus of success as a claim under sections 2(a) and 15. Having said this, a successful claim under section 7 would require the same sort of substantial remedy as required by a section 15 claim based on marital status. This suggests that it would be inappropriate for the Court to cease their analysis of other rights claims if they were to uphold the more narrowly remediable religious freedom or religious discrimination claims (which is the practice of many judges when facing multiple legal questions).

Summing Up

The foregoing analysis suggests that while polygamists have strong *prima facie* claims under multiple *Charter* rights, there are ample justifications available to the courts to rule any violations reasonable under section 1. The most compelling of these come from feminist analyses of polygamy as an inherently sexist institution with important negative consequences for female family members, and youths in particular. In reviewing the array of constitutional principles and precedents which may support a claim by polygamists, however, one fact is clear: *none* of these arguments are directly derived from the same-sex marriage cases. Contrary to the Chicken Little-esque claims of some commentators, the most likely claims by polygamists are based on religious freedom, liberty (since they face criminal sanction), or their own unique experience as social outcasts. What is more, consider how the courts characterized marriage in the SSM cases: they explicitly endorsed the idea that marriage, even same-sex marriage, is a committed long-term relationship between two people, based on monogamous sexual relations, love, and mutual care. The judges also severed procreation from the legal construct of marriage, whereas polygamists typically view procreation as the *central* purpose of marriage, and the imperative of producing as many children as is feasible provides the main rationale for taking multiple wives. The most that can be said to link polygamy and SSM is that the same-sex marriage cases illustrated that marriage, as a state-defined and supported institution, is subject to judicial review under the *Charter*, and that that definition cannot be grounded in mainstream Judeo-Christian religious doctrine or morality. However, the fate of polygamy in court is in no way wed (pardon the pun) to that of same-sex marriage.

Notes

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1 See, *e.g.*, *EGALE Canada Inc. v. Canada (Attorney General),* 2003 BCCA 251, *(sub. nom. Barbeau v. British Columbia (Attorney General)*, 2003 225 D.L.R. (4th) 472 (CanLII) [*EGALE*] and *Halpern v. Canada (Attorney General)*, [2003] 65 O.R. (3d) 161 (C.A.) (CanLII) [*Halpern*]. Courts in most other provinces subsequently recognized a right to same-sex marriage as well. The Supreme Court opinion in the *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 S.C.R. 698 (CanLII) [*Reference*] refused to address whether the common-law definition of marriage violated the *Charter.*

2 Stephanie Levitz, "Same-sex legal argument won't hold for polygamy" *Toronto Star* (3 August 2007) A23.

3 See, *e.g.*, Stanley Kurtz, "Beyond gay marriage" 8 (45) *The Weekly Standard* (4 August 2003), Charles Krauthammer, "Pandora and polygamy" *The Washington Post* (17 March 2006) A19, and REAL Women of Canada, "Address." (Submission to the Standing Committee on Justice and Human Rights on same-sex marriage, 12 February 2003), online: <http://www.realwomenca.com/newsletter/2003_mar_apr/article_3.html>.

4 Being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

5 *Criminal Code*, R.S.C. 1985, C. C-46, s. 293.

6 In the interests of full disclosure, I should stress at this point that I am not a lawyer by training but a political scientist. Nonetheless, my teaching and research over the past decade have focused on *Charter* jurisprudence and argumentation, with particular emphasis on the decisions of the Supreme Court of Canada and factums submitted to that Court by the Government of Canada.

7 *Hyde v. Hyde and Woodmansee, (*1866) L.R. 1 P.&D. 130, at para. 133. There was no statutory definition of marriage in Canada which excluded

same-sex unions until 2000 (see Modernization of Benefits and Obligations Act, S.C. 2000, c.12, s.1.1, and Federal Law-Civil Law Harmonization Act No. 1, S.C. 2001, c. 4, s. 5), as the common law definition was widely taken for granted, and sodomy was still a crime until 1969. The statutory measures adopted in 2000 and 2001 were not at issue in either case.

8 *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at para. 39 (CanLII) [*Law*].

9 *Egan v. Canada*, [1995] 2 S.C.R. 513 (CanLII) [*Egan*]. Criticism of the Court's expansive approach to s. 15 tends to ignore this basic fact about the section's wording, which reads: "*Every 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" [emphasis added]. It is quite clear that this phrasing does not restrict equality rights to the grounds enumerated at the end of the section.

10 *Halpern*, *supra* note 1 at para. 94.

11 *Ibid*. at para. 89.

12 *R. v. Oakes*, [1986] 1 S.C.R. 103 (CanLII).

13 *Halpern*, *supra* note 1 at para. 139.

14 *Ibid*. at para. 53.

15 *Reference*, *supra* note 1.

16 *R. v. Edwards Books and Art Ltd*., [1986] 2 S.C.R. 713 (CanLII).

17 *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5. *Reference re Bill 30, An act to Amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148 (CanLII). *Adler v. Ontario*, [1996] 3 S.C.R. 609 (CanLII) [*Adler*]. While one constitutional provision does not usually "trump" or outrank another, the framers of the *Charter* anticipated this particular conflict and added s. 29, which explicitly protects denominational schooling from Charter challenges. In light of this, I have always found it curious that the courts agreed to hear the challenge in *Adler* at all (as a reference, the Court was obliged to hear the earlier case).

18 *Miron v. Trudel*, [1995] 2 S.C.R. 418 (CanLII) [*Miron*].

19 *Nova Scotia (Attorney General) v. Walsh*, [2002] 4 S.C.R. 325 (CanLII) [*Walsh*].

20 *R. v. Malmo-Levine; R. v. Caine*, 2003 SCC 74, [2003] 3 S.C.R. 571 (CanLII) [*Malmo-Levine*].

21 Herbert Packer, "Two Models of the Criminal Process" (1964) 113 *University of Pennsylvania Law Review* 1 at 4.

22 Although one might argue that marijuana was prohibited for some other reason, such as health protection, the historical evidence suggests otherwise. See, for example, Catherine Carstairs, *Jailed for Possession: Illegal Drug Use, Regulation and Power in Canada, 1920-1961* (Toronto: University of Toronto Press, 2006) and Marcel Martel, *Not This Time: Canadians, Public Policy, and the Marijuana Question, 1961-1975* (Toronto: University of Toronto Press, 2006).

23 *B.(R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 (CanLII). The case concerned devout Jehovah's Witness parents who refused to consent to a blood transfusion for their infant. When the Children's Aid Society secured a court order of temporary guardianship so the transfusion could be performed, the parents challenged the order on the grounds that it violated their and their child's religious freedom.

24 *Young v. Young*, [1993] 4 S.C.R. 3 (CanLII) and *P.(D.) v. S. (C.)*, [1993] 4 S.C.R. 141 (CanLII). The issue in these cases was court-ordered custody arrangements which prevented the non-custodial parent (the father) from disparaging the mother's (Roman Catholic) faith or taking the children soliciting in public (such as door-to-door, a required part of mission work for Jehovah's Witnesses); in both cases, the marriages had broken down largely because of religious discord.

25 John Stuart Mill, *On Liberty and Considerations on Representative Government*, ed. by R. B. McCallum (Oxford: Basil Blackwell, 1946).

26 Respectively, Angela Campbell *et. al*, *Polygamy in Canada: Legal and Social Implications for Women and Children – A Collection of Policy Research Reports* (Ottawa: Status of Women Canada, 2005), online: < http://www.swc-cfc.gc.ca/pubs/pubspr/0662420683/200511_0662420683_e.pdf > [*Polygamy*] and Rebecca J. Cook & Lisa M. Kelly, *Polygyny and Canada's Obligations under International Human Rights Law* (Ottawa: Department of Justice Canada, 2006), online: <http://www.justice.gc.ca/en/dept/pub/poly/poly.pdf> [Cook and Kelly].

27 *R. v. Butler*, [1992] 1 S.C.R. 452 (CanLII).

28 *R. v. Labaye*, 2005 SCC 80, [2005] 3 S.C.R. 728 (CanLII).

29 *Malmo-Levine*, *supra* note 20 at paras. 77 and 117-19.

30 Alberta Civil Liberties Research Centre, "Separate and Unequal: The Women and Children of Polygamy" in *Polygamy*, *supra* note 26 at 25-26.

31 Cook and Kelly, *supra* note 26 at 22.

32 *R. v. F. (R.P.)*, [1996] 105 C.C.C. (3d) 435.

33 *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R.

712 (CanLII), where the Supreme Court voided Quebec's total ban on non-French outdoor commercial signage, but concluded that the "marked predominance" of French on such signs would meet Quebec's objective of promoting and protecting the province's French language and culture.

34 *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 (CanLII), in which the Supreme Court vitiated the federal government's complete ban on tobacco advertising in favour of a narrower ban on "lifestyle advertising."

35 *Halpern*, *supra* note 1 at para. 139.

36 Martha Bailey, Beverley Baines, Bita Amani, and Amy Kaufman, "Expanding Recognition of Foreign Polygamous Marriages: Policy Implications for Canada" in *Polygamy*, *supra* note 26 at 29.

37 *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 144 [2000] 2 S.C.R. 307 (CanLII) at para. 54.

38 Bailey *et al.*, *supra* note 36 at 30.

39 *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372 (CanLII). See also Lori Sterling & Heather Mackay, "Constitutional recognition of the role of the Attorney General in criminal prosecutions: *Krieger v. Law Society of Alberta*" (2003) 20 *Supreme Court Law Review* (2d) 169.