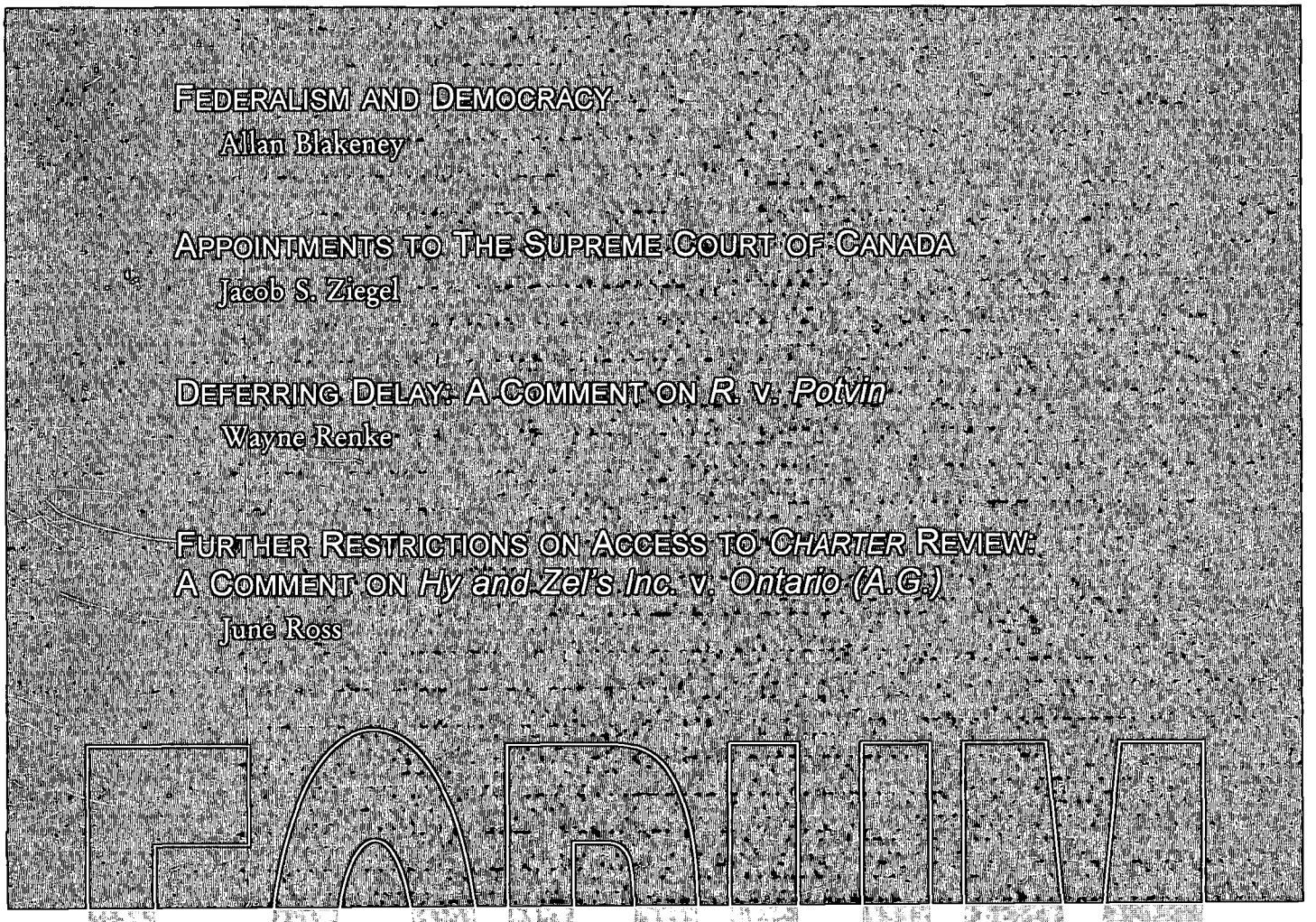

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FEDERALISM AND DEMOCRACY

Allan Blakeney

I. INTRODUCTION

I was delighted when my friend, former Premier Peter Lougheed, called me and asked that I give the Merv Leitch Memorial Lecture in 1992.

My relationship with Merv Leitch was as a colleague dealing with a number of inter-provincial and federal-provincial issues in the late 1970s and early 1980s. The government of Premier Lougheed and our government in Saskatchewan had an interesting relationship. We had philosophical differences and acted in our own provinces in accordance with the principles upon which we were elected. We recognized, however, that we shared many common objectives. We had a shared desire to further the interests of Western Canada in the Canadian federation. Cooperation in this area took many forms. I think of my work with the Alberta government in sponsoring the Western Economic Opportunities Conference conceived and carried forward — brilliantly so — by Premier Lougheed and his ministers.

There was close cooperation to see that our two provinces did not engage in destructive competition to attract industry. We found ways of sharing the economic benefits of a particular industry. And, we were close allies in battling what we believed were ill conceived and unfair interventions by the federal government in the production and taxation of oil and gas resources in Western Canada, an issue of great interest to Merv Leitch.

Merv Leitch was, of course, a son of Saskatchewan and of drought. He reflected the almost super-human determination of many in that province to surmount the huge obstacles to success created by the depression and drought of the 1930s and its aftermath. If any writers were looking for a model for a Canadian Horatio Alger story they could do no better than the story of Merv Leitch. It is a story of which legends are made. And, in his case, are being made.

There is no better way to honour the sense of determination, the outstanding success achieved and the modesty which so unfailingly characterized Merv than to associate his name with scholarships which offer to young people opportunities to contribute to the life of Alberta and Canada. So, I am pleased and honoured to join you in paying tribute to the memory of Merv Leitch.

I felt I would offer you some remarks about how Canadians view our constitution, how these views differ in different parts of Canada, and how these views and differences in views seem to impede the rational discussion of some key issues in Canadian constitutional life. We may have ceased to discuss constitutional issues for the next few months (I suspect most of us hope this is the case) but these issues will not go away and sooner than we may think the issues will emerge once again.

In broad terms our difficulties flow from a singular fact: Canadians do not agree, even in the most basic way, on the nature of the Canadian federation. Let me elaborate. There are three abiding themes running through Canadian constitutional history. Most Canadians acknowledge two very differing themes. The first theme concerns relations between Canada and the United States. This theme is widely acknowledged by Canadians everywhere. The second theme concerns relations between English

speakers and French speakers in Canada. For many people, particularly in Ontario and Quebec, this is regarded as *the* basic reality of Canadian life; *the* matter that our constitution must address.

The third theme concerns relations between the economic heartland and the economic hinterland, between central Canada and outer Canada. In this view, that was what 1867 was all about — the gathering — in by Ontario and Quebec of the quasi-colonies of Nova Scotia, New Brunswick, and thereafter all the other provinces. It is the changing of this colonial status of outer Canada to which constitutional change should be directed.

You will note that by theme two — the French-English theme — the "oppressors" (and I use that overblown word to give a flavour of the sense of grievance felt or at least expressed) are the eight or nine largely English-speaking provinces and the "oppressed" is Quebec.

But by theme three — the central-Canada outer-Canada theme — the "oppressors" are Quebec and Ontario and the "oppressed" are the remaining eight provinces. Ontario is the common "oppressor" in both themes. All other provinces change sides depending upon the lens through which one chooses to view the constitutional landscape.

This partly explains why successive Ontario governments play the role of benign honest brokers in, as Ontarians would phrase it, a true pan-Canadian spirit, while all other governments are pressing parochial issues in their struggles to remedy perceived injustices.

Quebec seeks some additional law-making powers and other means to preserve and promote the Francophone reality or, to put it another way, Quebec's distinct society. Other Canadians, particularly Western Canadians, wonder why we can't all be equal as citizens and equal as provinces, with no distinctions.

Western Canadians seek some way to curb the central provinces using their political power to the economic disadvantage of the West and Atlantic Canada. Québecers wonder why they should not use such political power as they have to balance the disadvantages they suffer at the hands of the Anglophone majority, including Anglophones in the West and Atlantic Canada.

That is the Canada for which we are trying to shape a constitution.

The Charlottetown Accord attempted to deal with both the heartland-hinterland and English-French themes. It approached the heartland-hinterland problem with, as I will later note, the standard federal remedy of a second chamber, with equal representation from each province. It is uncertain whether the Triple-E Senate would have proved to be an effective shield for outer Canada — this would have depended upon whether the new Senate developed a party hue or a regional hues and whether regional objectives clearly articulated by elected representatives in the Senate would have inhibited the unrestrained use by central Canada of its House of Commons majorities.

The English-French problem was dealt with by using several approaches. The legislative jurisdiction of Quebec (and of other provinces) was confirmed as exclusive in a number of areas — tourism, forestry, housing, and others. The use of the federal spending power — the power to spend money in areas of provincial legislative jurisdiction — was to be curtailed. It can be argued that these changes would have in some ways responded to both English-French and heartland-hinterland issues by increasing the role of all provincial governments.

Dealing more directly with the English-French issue, Quebec was to be recognized as a distinct society and the *Charter of Rights* was to be interpreted accordingly. Quebec was to be guaranteed a minimum of 25 per cent of the seats in the House of Commons. Laws dealing with French language and culture would have had to be approved by a majority of the Senate and by a majority of the Francophone members of the Senate. A decision on these matters could not have been overridden by any combined vote of the House of Commons and the Senate.

This was the Accord's attempt to establish limited forms of geographic federalism of the conventional kind and a kind of ethnic federalism of which there are few examples in the world. But the Charlottetown Accord was not accepted by Canadians. The debate revealed that many Canadians (even those among, what my academic friends call, the chattering classes) disagree on the meaning of some basic concepts which are the foundation of our political life and understanding — the concepts of federalism and democracy. I want to turn now to these concepts.

II. American Federalism

Federalism in its modern sense effectively arose with the formation of the United States of America in 1789. We will recall that the British colonies along the eastern seaboard of the United States rebelled and fought a war of independence. The colonists organized an effective common army but did not organize an effective common government in order to pursue the war. The Second Continental Congress, which had, in effect, been acting as the national government, chose to form a loose confederal union under a document entitled the Articles of Confederation which was not ratified by all the states until 1781. However, this weak confederal arrangement was soon found to be wholly unsatisfactory and a new federal constitutional arrangement was devised by the Constitutional Convention of 1787.

I think this event is best regarded as the coming together of former colonies, now independent and sovereign, who recognized that they needed a union to assure their mutual defence and protection and to encourage trade and economic growth. But, in the words of A.V. Dicey, these colonies desired union but not unity — union for limited purposes and continued individual independence for other purposes. That is the essence of federalism.

Federalism is a system of government whereby the public have dual loyalties and choose two governments, one national and one local, as a focus for their split allegiances. Or, as the late Eugene Forsey stated it, the federal idea is this: federalism means a state that brings together a number of different communities with a common government for common purposes, and separate local governments for the particular purposes of each community.

It is instructive to look at how the American colonists set about to create what was in many ways a new form of governance. Let us look at what bricks they used to create this new kind of structure.

Written Constitution

The first brick was a written constitution.

Federalism is a legal structure of some complexity. Since this form of government was to be a new one, not relying on well understood practices, it was next-to impossible that it could be achieved by any means other than a written constitution. The written constitution was necessary in order to clearly delineate and define which powers of government were to be exercised by each of the two orders of government. The American constitution accomplished this by spelling out the powers to be exercised by the federal government of the United States and, by exclusion, those to be exercised by the governments of the new states of the union. All residual powers remained with the states.

Supreme Court

If some laws were to operate throughout the whole federation and if some state laws might collide with federal laws, there was a need for a judicial system capped by a court which had the power to deal with federal and inter-state issues — the Supreme Court of the United States. It soon became clear that the same body would have to arbitrate when federal and state powers came into seeming conflict. The Supreme Court became the *arbiter*.

A supreme court provided for in a written constitution was another brick in the federal edifice.

Amending Procedure

The federating states appreciated that their new constitution might need to be changed over the years, so they provided a formula by which it could be amended.

It was clear that the formula could not allow the new federal government to change the constitution as it saw fit — this would provide no security for the states in the exercise of their exclusive power. Similarly the formula could not allow the states to change the constitution at will — this would mean that the people of the United States, the supposed root of sovereignty, would have no vehicle to express their will as an entity. Clearly, the people of the United States or the federal Congress which they elected and the legislatures of the states should be involved in amending the constitution. So, the constitution included several elaborate provisions for amendment. I believe the only one that has been used for the twenty-six amendments to date requires that an amendment obtain a two-thirds vote by both houses of Congress — the Senate and the House of Representatives — and then be ratified by three quarters of the state legislatures.

This third brick was a constitutional amending formula which required that amendments gain the approval of Congress and three quarters of the states.

Equal and Effective Senate

It was recognized at the outset that the federal government would exercise great power (and this has proven to be true to an extent greater than anticipated by the founding fathers), and that the federal government must provide a forum where every citizen's voice had the same weight. It was also recognized that this would give enormous power to the more populous regions of the country. This power needed to be restrained by another body, providing a countervailing power to the people in the smaller states. The solution arrived at was a Congress with two chambers — a House of Representatives whose members were chosen on the basis of equality of citizens, and a Senate whose members were chosen on the basis of the equality of states.

So, the Senate of the United States has two Senators from each state, and effective powers to restrain and shape decisions of the House of Representatives.

These, then, are some of the basic building blocks of American federalism:

- a written constitution
- a supreme court as a constitutional referee
- an amending formula involving Congress and the state governments
- an equal, effective Senate

III. Iroquois Confederacy

The new government of the United States was not the only government in North America based on some principle of sovereignty divided among orders of government.

The Iroquois Indians had an elaborate confederal form of government which united five nations (and later six) with a Great Binding Law which provided for a collective leadership, separate bodies for debating issues, and an arbitrator for resolving disputes.

Like most constitutions, it relied heavily on shared customs and traditions and is not easily transferable to other societies. But it did illustrate to the American colonists that separate nations which had previously warred with each other could join together to deal with common concerns of defence, trade and other like matters, while remaining independent for other purposes.

IV. Other Federations

The framers of the American constitution could also look to Europe where the Swiss Confederation had evolved along lines similar to the Iroquois. Several ethnically and religiously diverse cantons had formed together in 1291 to defend their mountain ramparts against the Hapsburg armies which ranged over central Europe. In its various forms, it has been remarkably successful in preserving Swiss independence as aggressive military powers around them waxed and waned.

Since 1787, we have seen some variation of the federal model used many times in both homogeneous and heterogeneous states. Based on formal constitutional arrangements, as of January 1, 1993, there were fourteen federal states in the world. There would have been seventeen but, over the past year, three federations — the Soviet Union, Yugoslavia, and Czechoslovakia — have broken up.

Federalism is no panacea. The East Africa Federation, the Federations of Rhodesia, Nyassaland, and the West Indian Federation, each of which came and went, provide additional testimony to that. Many of these fourteen federations — such as India, Pakistan, Malaysia, and Mexico — while federal in the formal constitutional or institutional sense, are in the practical or political sense so highly centralized that it is difficult to describe them as truly federal.

However, there have been some very successful federations which were born after the formation of the United States. They have followed some or all of the criteria for federalism first set out by the United States — Canada in 1867, Australia in 1900, and the postwar Federal Republic of Germany in 1949. Several other non-federal countries — Spain and the United Kingdom — also have recently been undergoing a federalizing process. Depending upon one's definition, Belgium may have become a federal state. And it is the stated objective of the European Economic Community to establish federative superstructures which will eventually lead to the creation of a United States of Europe based on federal principles.

V. CANADA

The Canadian federation came into being in 1867 with the passing of the *British North America Act*, since re-named the *Constitution Act, 1867*. The most striking thing about that constitution is that it is not the constitution of an independent country but, rather, one of a semi-independent colony of Great Britain.

It provided for a division of legislative powers between the new federal government and the old colonies — the new provinces — and defined the nature of the new central parliament. It did little more.

The framers of the new federation assumed that the institutions of a unitary state — the parliamentary system as it operated in Great Britain and, partially, in each of the federating colonies — could be incorporated into a federal state where a single sovereign authority would not operate but, rather, federal and provincial governments would operate side-by-side, each sovereign in its own field.

Should problems arise at the provincial level, these would be dealt with through the use of extensive powers given to the federal government to supervise provincial governments: the appointment of the Lieutenant-Governors, powers of reservation and disallowance, the declaratory power under s. 92(10)(c) of the *Constitution Act, 1867*, the power to appoint judges of superior provincial courts, and others. If these did not suffice, the powers of the Imperial Parliament at Westminster could still be exercised in Canada.

Canada used few of the building blocks that the Americans had used eighty years before. Let us briefly compare the federal elements in our constitution of 1867 with those of the United States.

Written Constitution

In 1867 our constitution was only partly written. I say partly because it depended for much of its substance on continuing British parliamentary customs and conventions. Thus, the 1867 constitution made no mention of such matters as political parties, a prime minister, a government selected from the majority party in Parliament and other basic, albeit unwritten, parts of our constitution.

I mention this because it is important to remember that constitutional documents do not a constitution make. They help immensely, particularly if they acquire powerful symbolic value like the United States constitution has for Americans. But they must be supported by some shared values embodied in common customs and practices.

Supreme Court

The 1867 constitution made reference to the right of the federal government to set up a court of appeal, and one was set up in 1875 — the Supreme Court of Canada. It was neither the final court of appeal for ordinary legal disputes nor was it the arbiter of constitutional disputes. Both of these functions were performed by the Judicial Committee of the Privy Council in London, as was the case for other British colonies.

Amending Formula

The 1867 constitution contained no amending formula. It was not thought to be necessary or desirable. The *British North America Act* was an ordinary statute of the Imperial Parliament at Westminster and could be amended by the Imperial Parliament at the request of Canadian authorities, or otherwise. The final decision-making authority was assumed to reside with the Imperial Parliament.

The Senate

The Senate of 1867 was not a federation-type Senate. It was appointed by the federal cabinet and was not regarded as the voice of the provinces or the regions in the central government. It was viewed more as the protector of propertied interests — the sort of function performed by the House of Lords — and less as a representative of the smaller provinces or regions.

It is interesting to note that the Australian constitution passed by the Imperial Parliament in 1900, only thirty-three years after the *British North America Act*, did provide for a way to amend the constitution without reference to the Imperial Parliament. It also provided for a powerful Senate which was directly elected and had equal representation from each Australian state. There was no doubt that the Australian Senate was designed to represent the states, and particularly the smaller states, at the centre.

Colony to Nation

Canada moved from colony to nation sometime between 1867 and 1931. Milestone dates were the signing of the Treaty of Versailles and joining the League of Nations as a separate country in 1919, and then the passing of the Statute of Westminster in 1931 by the Imperial Parliament formally declaring that, henceforth, laws passed by the Imperial Parliament would not apply to Canada. An exception to the general rule was that the Imperial Parliament could pass laws amending the *British North America Act*, an exception requested by Canada because Canadians had no other way to amend their constitution.

Canada evolved to nation status without its constitution accommodating that change. We were clearly an independent country with a federal form of government, but one whose constitution reflected this fact quite inadequately.

VI. From Colony to Nation: Constitutional Form

One way to characterize Canada's constitutional history during the last sixty years is as a story of the continuing efforts of Canadians to make our formal constitution reflect the realities of national life. These efforts have revealed surprising difficulties.

Written Constitution

We have set out to reflect in the constitution more of the way our governments operate. The major changes achieved were the amendments made in 1982 which added a *Charter of Rights and Freedoms* and an amending formula. If the Charlottetown Accord had been adopted, we would have added another fifty-odd pages of text to our constitution thereby achieving a constitution of world class proportions for bulk alone if not for lack of clarity or capacity to quicken the pulse.

Supreme Court

The Supreme Court became the final court for constitutional disputes in 1949. We thereby changed the constitutional referee from a court outside Canada with no perceived bias — the Judicial Committee of the Privy Council — to a court all of whose members are appointed by the federal cabinet.

The provinces frequently express the view that this puts them at a disadvantage. René Lévesque used to say: "the Supreme Court of Canada is like the leaning tower of Pisa, always leaning, and always leaning in the same direction." Proposals to involve provincial governments in the process of appointing the judges of the Supreme Court have abounded: the latest were part of the Meech Lake and Charlottetown Accords. The situation remains one where the Court continues to be a creature of federal statute with one fleeting and somewhat incongruous reference to the Court contained in the constitutional changes adopted in 1982.

The position of the Supreme Court represents unfinished business in enacting a federal constitution for Canada.

Amending Formula

By providing for a way to amend the constitution of Canada, the 1982 changes patriated the constitution, since they removed our last constitutional link with the imperial parliament (if not the monarch).

This amending formula (or formulae if you will — there are several) recognizes the principle of the equality of provinces but contains a population threshold as well. The general formula requires that constitutional changes have the approval of the House of Commons and the legislatures of two-thirds of the provinces representing fifty per cent of the population of Canada. A further formula sets out a short list of the subjects that cannot be changed except with the consent of the House of Commons and all the provincial legislatures.

Successive governments of Quebec have not accepted the idea of the equality of provinces. In their eyes Canada is a pact between two founding peoples, each of which should have a veto over constitutional changes. Accordingly, the province of Quebec, as representative of the Francophone founding people in Canada, should have a veto over all significant constitutional change.

The Meech Lake and Charlottetown Accords sought to deal with Quebec's objection to the 1982 constitutional changes by adding many items to the list of changes that would require the consent of all provincial legislatures. This met, in part, the claim of Quebec to the right of veto but, by extending the right to each province, respected the idea of equality of

provinces. Both Meech and Charlottetown having failed, this item too represents unfinished business.

Senate

There are few constitutional issues upon which Canadians agree more completely than that the Senate as now constituted should be abolished or radically changed. Yet,when it comes to deciding what should replace the existing Senate, unanimity of view collapses.

The Meech Lake Accord promised future Senate reform. The Charlottetown Accord provided for an elected and equal Senate with significant powers. This was a clear attempt to respond to the feeling in outer Canada that people here are effectively shut out of the decision-making processes in party caucuses and parliaments dominated by representatives from Ontario and Quebec. The Charlottetown Accord sought to make Canada more of a classic federation with a second chamber representing the regional governments at the centre, as in the United States, Australia, Germany, and Switzerland.

With the failure of the Charlottetown Accord, this represents more unfinished business.

VII. The Trouble With Canada

A constitution is intended to embody the common beliefs held by the citizens of a country, at least to the extent of setting out the institutions by which the citizens agree to be governed. Why do Canadians have so much difficulty reducing to constitutional form the rules of governance upon which we agree?

I have already referred to the differences about what the basic subject matter of the constitution should be: the one view that the constitution should address as a first priority the relations between English and French in Canada and the other view that the first priority must be to address the relations between the heartland and the hinterland. This is a difference of long standing.

A further problem has emerged since 1982. Before 1982, Canadians were reasonably content to have their constitution provide for the institutions of government and the division of powers between federal and provincial governments. They did not look to the written constitution to protect their individual rights. This was done by the *Canadian Bill of Rights*, provincial bills of rights, and human rights codes — all statutes as opposed to constitutional enactments. They looked also to the principles of constitutional law and justice which have protected rights under our system for centuries.

Debate around the *Charter* gave rise to the remarkable proposition that if a right is not mentioned in the *Charter* it does not exist. The *Charter* has captured the imagination of groups whom perceived themselves to be disadvantaged, from whom came demands for recognition of more rights. Added to this were calls to set out in the constitution a statement of the values for which our country stands.

This is surely a dangerous course. As we attempted in the last decade to encapsule our communal soul in the constitution, we found that we had not one soul but two or perhaps more — one based on the values of individualism, another based on the values of collective rights. These gave rise to the Canada clause and the social charter included in the Charlottetown Accord, both of which generated opposition from one side or the other to damn and doom that document.

I sometimes envy the Americans for their *Declaration of Independence*. Canada needs such a document, where we can hold forth with ringing phrases of purple prose in the full knowledge that these phrases carry no legal meaning or consequences. To state, as the Americans did, that: "We hold these truths to be self-evident — that all men are created equal," while chattel slavery existed throughout much of the land, represented a triumph of dreams over reality. Perhaps governments should hold forth dreams to their citizens. But, preferably, not in legally-binding constitutional documents.

VIII. Democracy

The Charlottetown Accord debate not only renewed familiar discussions about individual and collective rights and the wisdom of including in the constitution statements of national dreams and aspirations. It revealed some less well-known differences: differences over what we mean when we speak of federalism and democracy. Having spoken at length about federalism, I turn now to the concept of democracy.

I sometimes think that democracy as the term is used today means nothing more precise than "a form of government of which I approve." There is probably no harm done to the term democracy when using it to mean all that is right and proper in the eye of the speaker. The harm comes from giving the term "undemocratic" a highly pejorative overtone and then branding as undemocratic any system that fails to conform to a particular and narrow meaning of democracy. We witnessed this in the Charlottetown Accord debate. I recall letters and articles, some of them by professors of political science, which defined democracy as meaning government on the basis of one person, one vote. They went on to argue that any government which did not conform to that model was undemocratic and, therefore, undesirable.

I quote from a letter in the July 30, 1992 edition of the *Globe and Mail*. Referring to possible Triple-E Senate, the writer opined:

> If the new Senate were to be powerful, and Canada to remain a democracy, people and not provinces must be the basic unit to be represented. There is no reason why the two thirds of Canadians who happen to reside in Ontario and Quebec should accept an egregiously undemocratic formula which gives the vote of a Prince Edward Islander eight times the weight of an Ontarian."

Clearly, if one describes democracy as a system in which both chambers of a parliament are chosen on the basis of one person, one vote, then Canada with a Triple-E Senate would indeed be undemocratic; as it is now, with an appointed Senate. Indeed, I can think of no country in the world that is federal and by this definition, democratic.

Every working federation in the Western world (except Canada) has a second chamber which in some sense represents the component states and not the population as a whole. If this is part of what constitutes a federation, then federalism is, by definition, undemocratic. The very reason why countries form themselves into federations is that for some purposes they do not wish a numerical majority to prevail.

It is singularly unhelpful to stand four-square for democracy and then give that word a definition which consigns to the undemocratic fringe every working federation in the world.

It is tenable to argue that Canada should not be a federation but a unitary state — although, in the present context, it is the height of unreality. It is tenable to argue that a federation can work simply based upon a division of law-making powers between a central and regional governments, without any effective regional voice in the central government. It is, however, useful to note that no other western federation attempts to operate without such a regional voice. Not coincidentally, in no other federation is there such a continuous demand for the transfer of legislative power from the central government to the regional governments. I believe it is no accident that Canada, with perhaps the most centralist formal federal constitution in the western world, is in fact one of the most decentralized federations. I attribute this to the lack of an effective regional voice at the centre, the consequent lack of acceptance of federal government decisions as representing all Canadians, and the attempt to deal with this lack of legitimacy by transferring law-making powers from the centre to the provincial governments. To those who wish for a Canada with a strong central government able to deal with national issues, I say that nothing would add more strength to Parliament than an effective regional voice expressed in a reformed Senate.

We must either suspend the use of the term democracy as the essence of all that is good in government, or else give it a broader meaning than the one person, one vote, in-all-cases definition.

Federalism is a noble experiment which has proved in many circumstances to be the best working model by which free people can govern themselves. The strengthening of the Canadian federation should not fall victim to a pedantic definition of democracy suitable, perhaps, for a unitary state but wholly inappropriate for a country as diverse as Canada.

Permit me to close on a larger theme. I suggest that we need a different and wider concept of democracy, combining some concept of a government representing all citizens with a concept of geographic representation with, very possibly, concepts of ethnic and religious representation. That is certainly not tidy, but it has the virtue of reflecting reality, since in many countries, including Canada, citizens do not think of themselves only as citizens of a nation. They think of themselves as citizens of their province, and as Francophones, or Aboriginal people, and they seek to have those realities reflected in their governments.

People who share the vision of a widening world government look to the possibility of a transformed United Nations, one with institutions that would:

1. represent each member state, as the General Assembly now does

2. represent the countries which are strong economically and militarily, but without any single state veto, as a reformed Security Council might do

3. represent all the people of the world, as a people's parliament elected on the basis of one person, one vote might do. Such a parliament might start with an advisory role, much like the role the European Parliament now fills, and grow from there. One of the ways it might grow is by the formation of caucuses within the Parliament that represent people who group themselves on ethnic or religious or ideological lines as well as national ones

We need to seek institutions through which people can feel that they are represented, no matter what basis of representation they feel is most important to them. It may not satisfty a narrow definition of democracy. But if we see the ideal government as one that gives the greatest opportunity for people everywhere to influence the decisions that affect their lives, then clearly one which has flexible models of representation is better than a sterile one-person, one-vote definition of democracy. For adherence to the latter will almost certainly freeze the world in a mould of hundreds of unitary states with no effective mechanism except absorption of one state by another to build towards some measure of world government.

We need to expand our ideas of how institutions resolve conflicts between states, and how peoples can be created and strengthened on a world scale. There are few models, but the world's federations are perhaps the best place to start. And Canada, where we attempt to balance geographic diversity and ethnic diversity within a federation, is a model worth considering. Canada is a very successful federation, even if our formal attempts to redesign it do not inspire confidence. I do not commend to the world the way Canadians talk about constitutions. I do commend to the world our record of achievement. And people throughout the world, except perhaps Canadians, are aware of our measure of success.

My hope would be that young people, like the recipients of the Merv Leitch scholarship, play a role not only in addressing Canada's unfinished business, but in helping Canada and other nations move along a path of broadening federations with the impossible dream of shaping some form of world government embracing all humanity.

Allan Blakeney
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APPOINTMENTS TO THE SUPREME COURT OF CANADA

Jacob S. Ziegel

INTRODUCTION

Entrenchment of the Supreme Court of Canada in the Canadian constitution was one of the many casualties of the voter's rejection last October of the Charlottetown Accord and, we are assured, it is likely to be many years before politicians will embark on another heavy dose of constitution changing. However, this does not mean that public interest and concern about the way judges are appointed to our highest court has abated, or that nothing can be done outside the *Constitution Act* to put the selection process on a more credible footing. Recent public reaction to the appointment of Justice Jack Major[1] attests to growing public awareness of the importance of the Court's role and, therefore, of the men and women who sit on the Court.

This attention is fairly new. *The Supreme Court Act*[2] does not prescribe how members of the Court are to be selected: it deals only with minimum qualifications, mandatory retirement age, and the requirement that three of the nine judges must come from Québec.[3]

A comparison of modern federal systems[4] shows that a variety of methods are adopted for the selection of members of a country's highest constitutional court. Canada belongs to a small group of countries in which the federal executive enjoys unfettered discretion to make the appointments without any statutory obligation to consult with or act on the recommendations of any other body, or submit the chosen candidate for public scrutiny before the appointment is confirmed.

There is a great deal of anecdotal talk about how the federal government goes about in practice filling vacancies on the Supreme Court, but very little hard fact. All we know for sure is that the Department of Justice claims to consult widely and to canvass names before submitting its recommendations to the incumbent Prime Minister, who makes the final decision. The cabinet, apparently, is not formally consulted.

We have inherited this system of executive appointments from the United Kingdom; but there are vital differences between our system and the environment in which the British system operates. In the United Kingdom, with rare exceptions, the law lords are drawn from sitting members of the English Court of Appeal and, with respect to the Scottish law lords, the Court of Sessions in Scotland. They, in turn, were leaders at the English and Scottish Bars before their appointments to the trial bench and subsequent elevation through the ranks. Apart from the Lord Chancellor, it is generally agreed that since the end of the Second World War political affiliations have played no role in the selection of law lords.

Even more significant is the fact that the United Kingdom has no written constitution and no entrenched bill of rights. The role of the House of Lords therefore differs fundamentally from the role of the Canadian Supreme Court and that difference, already huge, continues to grow exponentially.

Because of these differences, the British system of executive appointments was never an ideal model for Canada. This would not have mattered so much if successive prime ministers had been able to resist the temptation or pressures to make appointments for partisan or patronage reasons. The temptation was not resisted and, at least until Lester Pearson's tenure as prime minister, a significant number of appointees fell short of the highest qualities desirable in a member of our highest court.

In my estimation, this was one of the reasons why, for the first 75 years of its existence, the Supreme Court enjoyed an indifferent reputation among ultimate courts of appeal in the Commonwealth, its judgments being rarely referred to outside Canada. It is true the Court also suffered from working in the shadow of the Privy Council. The Council had the final word in almost all important constitutional litigation and, frequently, in private law cases as well. Nevertheless, in my view, a seriously flawed selection system contributed to the Court's diminished stature and its depressingly uncritical adherence to English authorities and English precedents even when they were not binding on the Court.

Appeals to the Privy Council were abolished in 1949, but the Supreme Court was slow to assert its legal and intellectual independence. I would mark the beginning of the new era with Bora Laskin's appointment as Chief Justice of the Court in 1973. For others, the critical date may be the adoption of the *Constitution Act 1982* and the enactment of the *Canadian Charter of Rights and Freedoms*. Undoubtedly the overall quality of members of the Supreme Court has greatly improved over the past 25 years and many of the Court's judgments can hold their own, especially in the public law area, with the decisions of ultimate courts of appeal in other common law jurisdictions, including the United States. We have been served, and are being served supremely well, by judges of the stature of Laskin, Dickson, Wilson, La Forest, Le Dain, Cory, Iacobucci, and McLachlan. This shows, I think, that recent prime ministers have been much more conscious than their predecessors of the importance of choosing carefully, and that the influence of other factors has declined.

Nevertheless, there is little room for complacency. This is shown by the fact that between 1972 and 1992 nine judges retired from the Court before reaching the mandatory retirement age of 75, and in a substantial number of cases retired well before reaching the age of 70.[5] Some of the premature retirements were attributable to illness or intellectual or emotional burnout, but others cannot be so easily explained.

These numbers reflect continuing weaknesses in the selection process and, it seems to me, ambiguity in the minds of the appointees: is it such an honour to sit on the Court? Do they have the right temperaments and qualification for the demanding work? Even if contemporary prime ministers could be persuaded to exercise their prerogative with utmost integrity and disinterest (surely Herculean qualities in the Canadian context), there would still be formidable objections in principle to vesting this enormous power in the federal executive without adequate checks and balances — checks and balances that are currently non-existent.

The need for public accountability and transparency in the selection process has always been there, but its importance has grown immensely since the abolition of appeals to the Privy Council and adoption of the *Charter*. We are now masters in our own home, but increasingly the ultimate masters are not the politicians, federal or provincial, or the Canadian people, but the judges of the Supreme Court.

They are the ones who determine whether the *Charter* is to be applied liberally or conservatively, or a bit of each; whether the *Charter* is to be used defensively or aggressively; when legislative judgments are to be respected and when overridden; how the division of powers between the federal and provincial governments is to be mediated under our constitution; and to what extent the development of private law principles and doctrines should be entrusted to judicial hands or left to the legislatures. This is an intimidatingly long list, to be sure, and raises the profoundly difficult question whether we are wise to expect so much from a gifted but nevertheless unelected group of nine men and women.

I am not going to try to answer the question. The point is that the decision to vest so much power in the Supreme Court *has* been made and, having been made, it behooves us to search out the selection method best designed to elicit maximum input from the constituencies most likely to be affected by the Court's decisions and to reflect fairly contemporary values in Canadian society.

I will discuss shortly what my preferred selection method is, but let me first pause to buttress my pleas for greater democratic input with the following quotation from an article Felix Frankfurter wrote in 1930 before he was himself appointed to the U.S. Supreme Court:[6]

> It is because the Supreme Court wields the power that it wields, that appointment to the Court is a matter of general public concern and not merely a question for the profession. In truth, the Supreme Court *is*

> the Constitution. Therefore, the most relevant things about an appointee are his breadth of vision, his imagination, his capacity for disinterested judgment, his power to discover and to suppress his prejudices. ... In theory, judges wield the people's power. Through the effective expression of public opinion, the people should determine to whom that power is entrusted.

Frankfurter's views surely are equally apposite in this Canadian context.

Provincial Participation

In recent years a growing number of academic commentators and influential media like *The Globe & Mail* have echoed the same refrain. Nevertheless, starting with the Victoria Charter in 1971 and ending with the Charlottetown Accord, most of the attention over the past 20 years has focused on *provincial* input into the selection process, not on democratic input from Parliament or elsewhere. In between there have been at least ten other proposals from provincial governments, legislative committees, and the Canadian Bar Association.[7]

The details vary but most of the proposals have a common core. The position of the Supreme Court is to be entrenched in the Constitution, the number of judges is also to entrenched, and one-third of them are to come from Québec. Most importantly, under all the recent proposals, appointments by the federal government must be based on nominations or short lists put forward by the provincial Attorney General from whose province the nominee is to be appointed. In case of a deadlock between the provincial and federal Attorneys General, the Victoria Charter and some of the other proposals required the establishment of a nomination council to break the impasse. The Charlottetown Accord dispensed with a nominating council and, instead, allowed the federal government to make an interim appointment until a provincial Attorney General provided a list of candidates acceptable to the federal government.

It is easy to see why in the 1970s and 1980s so much attention focused on the provincial input. Debates over division of powers and the status of Québec dominated the political scene: recognition of provincial roles in the selection of Supreme Court judges formed a logical part of the agenda.

Nevertheless, there were troubling features about many of the proposals. None of them required a province, in drawing up its short list, to consult with anyone. No doubt, in practice, the incumbent Attorney General would ask around, but it would not be a transparent process, and it would have all the weaknesses of the current federal selection process. The only difference is that we would have two sets of executives making the selections instead of one. One would have to be naive to assume that it would not have led to much clandestine bargaining between the two governments. It was on these grounds that the Special Committee on Judicial Appointments of the Canadian Association of Law Teachers (CALT) opposed the Meech Lake Accord provisions dealing with the appointment of the Supreme Court judges.[8]

There is another important consideration. The Canadian proposals appear to be alone among modern federal constitutions in requiring the federal government to pay so much heed to the preferences of a single province in making appointments. By way of contrast, the *High Court of Australia Act,* 1979 requires the Commonwealth Attorney General to consult the Attorneys General of *all* the states before making his or her recommendations to the Commonwealth cabinet.[9]

To use another illustration, the Germans recognize the federal element by requiring one-half of the members of the Federal Constitutional Court to be elected by the *Bundesrat*, the federal legislative upper chamber. The members of the *Bundesrat* are designated by the *Länder*, the German counterpart to our provinces. Federal systems of government following the U.S. model recognize the federal element by requiring nominees to the highest constitutional court to be approved by the legislative chamber (the Senate in the U.S. case) representing the constituent units of the federation.

Let me pose this question. Are we in Canada wise to attach so much importance to the role of individual provinces or regional interests in the selection of Supreme Court judges? I appreciate the pride and satisfaction lawyers in a Province may feel in being able to look at a judge on the Court as being "their" man or woman; and the influence of the Québec precedent in engendering this attitude.

Nevertheless, we pay a significant price for this form of provincialism, and it leads to the arbitrary type-casting of judges. Does Frank Iacobucci owe greater loyalties to Ontario than to British Columbia,

his native province, because he worked at the University of Toronto before being appointed federal Deputy Attorney General and then Chief Justice of the Federal Court of Canada? Did Gerald Le Dain lose his Québec roots, where he practised law for many years and taught at McGill, because he was subsequently appointed Dean at the Osgoode Hall Law School? To change the focus slightly, given the problems the federal government claims to have encountered trying to find an Alberta woman judge willing to allow her name to go forward,[10] why should not the federal government have felt free to look for a suitable female candidate elsewhere in the Prairies?

With the possible exception of Québecers, Canadians, I believe, have become sufficiently mobile and flexible to recognize the folly of tying the federal government to rigid constitutional conventions in the selection of common law judges. Most are willing to give the federal government greater leeway having regard to individual circumstances and the range of available candidates. It also seems to me that the justification for direct provincial input has greatly diminished. The number of division of power cases now coming before the Supreme Court is quite modest. It is *Charter* cases and criminal cases not involving constitutional issues, and frequently a combination of the two, that today absorb so much of the time and intellectual energies of the Supreme Court.

Nomination Commissions and Confirmation Procedures

If I am right in these perceptions, then I think it strengthens the case for changing our focus and concentrating more heavily on two questions that have not received the attention they deserve. These two questions are: should there be a nominating commission or council to provide the federal government with a short list of candidates when a vacancy arises on the Supreme Court; and do we need a confirmation procedure, whether or not there is a nominating commission, to review and pass upon the nominee actually selected by the federal government?

Role of Nomination Commissions

The use of nomination commissions is usually associated with the state of Missouri, where it was first introduced in 1940 to avoid the shortcomings of electoral systems for the appointment of judges. It has since been copied in about two-thirds of the American states. These commissions, made up of bar and lay representatives and at least one judge, draw up a short list of recommended candidates from which the governor is required to select one. The judge then serves for a short period following which his continuance in office must be approved by the voters.

The use of judicial nomination commissions has also caught on in Canada at the provincial level. The concept is used in some fashion in British Columbia, Ontario and Québec for the selection of provincially appointed judges.[11] The system works well, and there is general agreement that it is incomparably superior to the patronage and otherwise random selection systems that preceded it. The use of nomination commissions or councils also appealed greatly to the Special Committee of the CBA to whose report I have referred to earlier, and to a similar committee of the CALT which reported in the summer of 1985, several months before the CBA committee did. Both committees favoured extending the use of nomination commissions for the selection of judges to the Supreme Court. In the latter case they envisioned the commission being made up of senior representatives of the legal profession, a nominee of the Attorney General of the province from which the appointment was to be selected, a nominee of the federal Minister of Justice, and one or more well regarded lay persons.

It took the federal governments almost two and a half years to react to the reports. The federal government, it turned out, favoured a radically different type of advisory committee, and such committees have now been established in each of the provinces. Their job is *to screen* persons applying for judicial office and to advise the Minister of Justice whether the applicant is highly recommended, recommended, or not recommended. There is much that is wrong with the structure and operations of these committees. Their most important weakness is that they are not free to seek out candidates and compile a short list of the best qualified. Given these shortcomings, it is not surprising that most observers dismiss the advisory committees as little more than window dressing designed to distract attention from continuing complaints about the role of patronage appointments. Even this formality does not apply to appointments to the Supreme Court. Here the federal government continues to make its selections unaided and unhampered by any formal screening mechanisms

and the recommendations of any committee, however designated.

Confirmation Procedures

Neither the CBA nor the CALT committees recommended the introduction of confirmation procedures for appointments to the Supreme Court, or to any other court whose judges were appointed by the federal government. They did not feel it was needed, given the creation of a credible nomination procedure. I was a member of the CALT committee and I concurred with my colleagues' views. I have changed my mind since then, at least so far as the Supreme Court is concerned.

First, I see no evidence of any willingness by this or any other foreseeable federal government to relinquish its unfettered nominating power in deference to the recommendations of a nominating council. Federal politicians, it seems, treasure too highly the trappings of power and the prestige that goes with them. Second, I am not persuaded that a nomination commission with a majority of traditionally oriented lawyers, although undoubtedly high-minded and dedicated, should be entrusted with a *de facto* final say in the selection of the most powerful group of judges in Canada.

My third reason is the most important. It is precisely because of the intensely political role — I use the word political in a positive and not pejorative sense — played by the Supreme Court judges in applying and interpreting the Charter, as well as the rest of the constitution, that I deem it critical to inject a democratic and balancing note in the appointing process. Canadians should be able to learn about, see, and evaluate the candidate before his or her appointment becomes a *fait accompli*. If the federal government has chosen well, with or without the help of a nomination commission, it will have little to fear. The candidate is likely to earn quick approval from the confirming authority.

If the candidate is controversial, all the more reason why his or her merits should be publicly debated while there is still time to do it. If candidates for the office of prime minister are expected to expose themselves to close public scrutiny, why should we require less of a nominee to the Supreme Court, who is likely to remain in office long after the appointing prime minister has disappeared from the public arena and who, in many respects, wields as much power as does the Prime Minister — and with less accountability?

In truth, the notion of a confirmation procedure is no longer radical. It appeared in the report of the Ontario Advisory Committee on the Constitution in 1978 and in Bill C-60 introduced by the federal government in the same year. Both provided for confirmation of Supreme Court nominees by a revised Upper Chamber. In the case of Bill C-60, approval would have been necessary by the Upper Chamber even though the nominee would have been selected by the cooperative efforts of the Attorney General of Canada and the Attorney General of the province from where the nominee was to be appointed. The Charlottetown Accord saw a confirmation role for the revised Senate in the appointment of members of senior government agencies and boards. It would surely be anomalous if the public were given a greater opportunity to comment on the putative head of the CBC, the CRTC or the Canadian Transport Commission, than to assess the qualities and suitability of a future member of the Supreme Court, or of the judge selected to become the Chief Justice of Canada.

It may be that those who claim to be appalled at the prospect of judicial nominees having to run the gauntlet of a confirmation process are confusing different questions and are too readily drawing false inference from the U.S. model. Theoretically, a confirmation process that does not involve public hearings or questioning the nominee, in public or otherwise, is entirely feasible. It does not appear to be widely appreciated that until 1929 the Senate Judiciary Committee met exclusively in executive session to consider nominees for the U.S. Supreme Court, and nominees were not required to appear in person before the Committee until 1939.[12]

Still, I recognize there is not much point in going to the trouble of establishing a confirmation procedure if the hearings are not to be held in public and interested groups are not permitted to make submissions. What is wrong with that? Much, we are told, and those who oppose any type of confirmation requirement or public hearings, or both, base their opposition on the American experience. Hearings, we are told, that inquire into the private lives of nominees, as occurred in the Clarence Thomas nomination, or that cross-examine the nominee about his views on the constitution, as happened in the Robert Bork nomination, are either demeaning to the judicial office or compromise the independence of the judiciary.

I believe the critics misinterpret the significance of both these events. Bork came under intense scrutiny because his constitutional philosophy was anathema to many segments of American society.[13] Clarence Thomas ran into fierce opposition because he was seriously underqualified, professionally, intellectually, and probably in temperament, to sit on the most powerful court in the Western world. He had been chosen by President Bush to support a right-wing agenda on the Court and not because of a distinguished public career or his understanding of the U.S. Constitution. If the hearings in the Thomas case became embarrassingly personal it was because, as President Bush must have known it would, Thomas' colour made it very difficult to attack his lack of qualifications to sit on the Supreme Court.

In any event, it seems to me, Canadian criticisms of the U.S. confirmation hearings are a little too precious and greatly underestimate the resilience of candidates for high judicial office. Yes, it would have been better if the confrontation between Anita Hill and Clarence Thomas could have been avoided but, overall, Americans who watched the proceedings learned a great deal about the role of Supreme Court judges and gained a heightened appreciation of its importance.

I would welcome such learning experiences in Canada.

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AUTHOR'S NOTE: This is a moderately revised version of a lunch time address given to students at the Faculties of Law at the University of Alberta and the University of British Columbia by the author in March 1993.

Endnotes

1. See Editorial, *The Globe & Mail* (17 Nov. 1992); "Judging the Judge" *The Globe & Mail* (23 Jan. 1993) D1; and "A 'Lawyer's Lawyer' Ascends to the Top Court" *The Globe & Mail* (23 Jan. 1993) D5; and "A Disputed Choice" *Maclean's Magazine* (23 Nov. 1992) 54.

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

3. *Ibid.*, ss. 4(1), 6, 9(2).

4. See Carl Baar, "Comparative Perspectives on the Judicial Selection Process" in Ontario Law Reform Commission, *Appointing Judges: Philosophy, Politics and Practice* (Toronto: OLRC, 1991) at 143.

5. The nine judges were Roland Ritchie, William McIntyre, Jean Beetz, William Stevenson, Bertha Wilson, Gerald Le Dain, William Estey, Yves Pratte, and L-P. de Grandpré. For further details see *The Globe & Mail* (10 Aug. 1992) A7.

6. See Paul A. Freund, "Appointment of Justices: Some Historical Perspectives" in *Essays on the Supreme Court Appointment Process* (1987-88) 101 Harv. L. Rev. 1146 at 1153.

7. A convenient summary of the various proposals to 1987 will be found in the Report of the Committee of the Canadian Bar Association, *The Supreme Court of Canada* (1987), Append. 3-2.

8. The CALT committee was struck in 1985 to generally review the procedure for the appointment of judges by the federal government at all levels of court. The author was a founding member of the committee and served as its chair from 1986 until 1990.

9. For the details see *Australian Judicial System: Report of the Advisory Committee to the Constitutional Commission* (Canberra, 1987), §§5.28-33.

10. "Few women willing to join top court, Campbell says" *The Globe & Mail* (17 Nov. 1992) A6.

11. Reliable accounts of the structure and operations of the provincial committees are readily available. A bill is currently before the Ontario Legislative Assembly to give permanent status to the Ontario Committee. See *Courts of Justice Statute Law Amendment Act*, 1993, Bill No. 68, 1st Reading, 7/7/93, s.22.

12. Freund, *supra* note 6 at 1157-58.

13. For two contrasting views on the Bork nomination see Nina Totenberg, "The Confirmation Process and the Public: To Know or Not to Know" (1988) 101 Harv. L. Rev. 1227 and Patrick B. McGuigan & Dawn N. Weyrich, *Ninth Justice: the Fight for Bork* (Free Congress. Research & Education Foundation 1990). For Bork's own account, see Robert Bork, *The Tempting of America: The Political Seduction of the Law* (New York: Collier Macmillan, 1990).

DEFERRING DELAY

A Comment on *R.* v. *Potvin*

Wayne Renke

An accused or the Crown may be dissatisfied with a trial judge's disposition of a case and launch an appeal. The hearing of the appeal or the rendering of the decision may be delayed sufficiently that the accused takes the position that his or her constitutional rights have been violated. Appellate delay might have been considered reviewable under s. 11(b) of the *Charter* — "Any person charged with an offence has the right...to be tried within a reasonable time:" an accused might have argued that the right to be "tried" within a reasonable time includes the right to an appeal within a reasonable time. This argument was supported by some lower court decisions,[1] and by Supreme Court *obiter*, most notably in the dissent of Sopinka J. in *Conway*.[2]

In *Potvin*[3], however, Sopinka J., writing for the majority,[4] determined that appellate delay is not reviewable under s. 11(b). But, should the delay amount to an abuse of process, appellate delay is reviewable under s. 7. His conclusion applies to appeals from conviction, acquittal, and judicial stays (106, 111).[5] Sopinka J.'s decision is remarkable for two reasons. First, his decision is a paradigm of "legalistic" interpretation, opposed to the "generous" approach to *Charter* interpretation described in the *Big M* case.[6] Second, his decision exposes the malleability of *Charter* language; Sopinka J. reverses himself on the interpretation of s. 11(b).

After a brief review of the *Potvin* facts and a subordinate issue, I shall discuss the main features of Sopinka J.'s decision, with reference to the minority's responses and Sopinka J.'s position in *Conway*. I cannot argue that Sopinka J.'s interpretation of s. 11(b) in *Potvin* is "wrong," in the sense of lacking rational support — his is a legitimate reading of s. 11(b). I shall argue that an alternative reading, advocated by Sopinka J. in *Conway*, is also legitimate, and, in view of the *Big M* "generous" interpretation directive, ought to have been adopted in *Potvin*. I shall suggest two practical reasons for Sopinka J.'s retreat from his *Conway* position.

Background

Potvin was charged with criminal negligence causing death. The Information was sworn on September 15, 1988. Potvin was released from custody on an undertaking. The case was complicated — about 16 lay witnesses and some expert witnesses were to be called between Crown and defence counsel, and an out-of-town judge was required to hear the case. The case was expected to take about ten trial days. Following numerous pre- and post-preliminary inquiry adjournments, Potvin's trial was set for December 3, 1990. On that date, Potvin successfully applied for a stay of proceedings on the basis that his right to be tried within a reasonable time had been infringed. On December 24, 1990, the Crown filed an appeal. The Crown served the appeal book on June 21, 1991. Counsel appeared to set a date for the appeal hearing on January 15, 1992. The hearing was set for April 24, 1992, the earliest date available for Potvin's counsel. At the appeal hearing, Potvin raised the issue of appellate delay. The Ontario Court of Appeal, in a unanimous decision written by Osborne J. A., allowed the appeal, set aside the stay, and remitted the matter for trial on an expedited basis, without dealing with the appellate delay issue. Potvin appealed to the Supreme Court, raising two grounds of appeal. He claimed that both the pre-trial and appellate delay offended s. 11(b).

I shall not address the pre-trial delay issue, since the Supreme Court developed no new pre-trial delay

law. The Court held unanimously that the pre-trial delay was reasonable in the circumstances and dismissed this ground of appeal. Sopinka J. noted that Osborne J. A. carefully applied the *Morin*[7] principles to the facts, and adopted Osborne J. A.'s reasons (106).

Appellate Delay

Both the majority and minority of the Supreme Court dismissed the appellate delay ground of appeal, but on different bases. McLachlin J., writing for the minority,[8] argued that s. 11(b) does apply to appellate delay, but the delay did not violate s. 11(b). McLachlin J. did not assert that a s. 11(b) analysis would apply in exactly the same way to appellate and pre-trial delay. She held that the established s. 11(b) principles are sufficiently flexible to apply to all stages of delay. The majority, as indicated, ruled that appellate delay is not reviewable under s. 11(b), but is reviewable under s. 7; in this case, the delay did not violate s. 7. Sopinka J.'s position has four main planks: (1) appellants[9] do not suffer restrictions of interests requisite to engage s. 11(b); (2) appellants are not "charged" within the meaning of s. 11; (3) the words "to be tried" in s. 11(b) should not be interpreted to apply to appeals; and (4) s. 7 may be used to review appellate delay.

(1) Not Restricted

Sopinka J. referred to the *Morin* list of rights protected under s. 11(b) — (i) security of the person (protected by minimizing anxiety, concern, and stigma of exposure to criminal proceedings), (ii) liberty (protected by minimizing exposure to liberty-restrictions from pre-trial incarceration or restrictive release conditions), and (iii) fair trial (protected by ensuring that proceedings take place while evidence is available and fresh) (107).[10] Sopinka J. argued that restrictions of interests caused by appellate delay are not comparable to restrictions of interests suffered through pre-trial delay. Sopinka J. analogized appellants to persons facing pending charges. An acquitted person, in particular, is in the position of a person against whom charges are only contemplated — an appeal may not be filed; if it is, the appeal may not be allowed (the Crown must prove error) (108). Sopinka J. suggested that in some respects appellate delay restricts appellants' interests less than pre-charge delay restricts uncharged persons' interests: "the acquitted accused is somewhat more removed from the prospect of being subject to a charge than the suspect. In the former case, no charge can be revived until the acquittal is set aside....In the latter case, all that stands between the suspect and a charge is the *ex parte* decision of the prosecutor" (107-108). Sopinka J., moreover, evinced little sympathy for convicts who have engaged the appeal process. He quoted Stevenson J. in *C.I.P. Inc.*: "The appellant invoked the processes of which it now complains and must accept the burdens inherent in full appellate review" (108).[11]

Sopinka J. invited a strong rejoinder from McLachlin J. She asserted that Sopinka J. "diminishes the seriousness of the position of an acquitted person facing an appeal" (116). An appellant, acquitted or not, suffers the "stigma" and "anxiety" of criminal proceedings; the Crown continues to aver the guilt of the accused (or the invalidity of the accused's acquittal), and the appellant faces the "real danger" of an adversely determined appeal (ibid.). The restrictions of interests of an appellant, claimed McLachlin J., are more like the restrictions besetting a person awaiting trial than those besetting an uncharged person (117). McLachlin J. echoed the Sopinka J. of *Conway*, where Sopinka J. wrote that "[t]here is little question that most persons charged with an offence suffer some prejudice such as stress, anxiety or stigmatization. As well, prejudice is likely to increase over time and will almost certainly continue until the ultimate resolution of the matter...[prejudice] will persist until all appellate proceedings are finished."[12] I suggest that McLachlin J. and the *Conway* Sopinka J. have a more realistic view of the effects of appeals than the *Potvin* Sopinka J. I also suggest that Sopinka and Stevenson JJ.'s response to convicted appellants is unprincipled. We can concede that convicted appellants must bear reasonable appellate delays. A convict, though, should not be denied *Charter* rights simply for exercising appeal rights.

Sopinka J. could grant his former and McLachlin J.'s current restriction of interests assessment, but still attempt to deny s. 11(b) review of appellate delay, on the ground that appellants are not "charged" within the meaning of s. 11.

(2) Not "Charged"

Sopinka J. is inconsistent on the issue of whether appellants are "charged." On the one hand, while claiming that "as a general rule 'a person charged' under s. 11 does not include an accused person who is party to an appeal," he admitted that a "particular

paragraph may apply to appeal proceedings as an exception to the general rule" (107). If some provisions of s. 11 might apply to appeals, appellants must be "charged" within the meaning of s. 11, or the section could not apply. On the other hand, Sopinka J. claimed that neither acquitted accuseds nor convicts are persons "charged" (108-109).

Sopinka J. supported the claim concerning the non-charged status of convicts by a reference to the *Lyons* case.[13] In *Lyons*, La Forest J. held that a convict subject to a dangerous offender application is not "charged" with an offence (so that the application need not be tried before a jury). In further support of Sopinka J., I note that we would not ordinarily say (absent appeal considerations) that acquitted or convicted persons are "charged." To say that a person is "charged" is to say that the person has been formally alleged to have committed an offence: "a person is 'charged with an offence' within the meaning of s. 11 of the *Charter* when an information is sworn alleging an offence against him, or where a direct indictment is laid against him when no information is sworn."[14] Once the allegations have been dealt with at trial, the "charge" has been dealt with; the verdict marks a change in status of the person from a person "charged" to a person acquitted or convicted. In the civil law, a claim "merges" in a judgment; one might say that a criminal charge "merges" in a verdict. On appeal, moreover, an appellant is not re-charged. On appeal, not the charge, but the verdict or stay is at issue.

Three responses may be made. First, *Lyons* is distinguishable. In a dangerous offender application, liability for an offence is not directly or indirectly at issue — in an appeal, liability is directly or indirectly at issue. A convicted appellant contests conviction; an acquitted appellant contests potential conviction. Second, where an acquittal or conviction is appealed, we can intelligibly regard the appellant as "charged" with an offence, since the appellant is exposed to the threat of conviction or sustained conviction for a charged offence. The Information or Indictment, after all, is included in the Appeal Book.[15] Moreover, in *Conway*, Sopinka J. referred favourably to Marshall J.'s dissent in the *Loud Hawk* case.[16] Marshall J. wrote: "There has been at all relevant times a case on a court docket captioned *United States* v. *Loud Hawk* — I can think of no more formal indication that the respondents stand accused by the Government."[17] This could be said of both convicted and acquitted appellants. Third, the opening words of s. 11 are "Any person charged with an offence," not "Any person *who is* charged with an offence." The opening words are broad enough to include any person who is or was charged with an offence; the opening words do not require that the charge be technically outstanding throughout proceedings taken in respect of or arising from the charge.

Sopinka J. intimated, referring to the *Kalanj* case, that appellate delay is not the "result" of a charge — it does not "proceed from" a "formal charge" (108). Two sorts of responses might be made. One might accept Sopinka J.'s terms of engagement, and argue that appellate delay does, in fact, result from an actual charge. This was McLachlin J.'s tactic. She claimed that "[t]he appeal proceedings clearly result from an actual charge; indeed, they are dependant upon it for their validity" (115-116). Alternatively, one might deny Sopinka J.'s terms of engagement. For Sopinka J., the charge seems to be a sort of proximate cause of reviewable delay. The opening words of s. 11, though, do not require any causal link between a charge and delay. Section 11 sets as a necessary condition for its application only that a person have a certain status — the person must be "charged." Furthermore, *Kalanj* does not impose the condition Sopinka J. relies on. In *Kalanj*, McIntyre J., for the majority, did not refer to delay "resulting" from a charge. McIntyre J. decided only that before delay may be reckoned under s. 11(b), an Information must be laid or an Indictment preferred.[18]

I trust that I have shown that appellants may reasonably be considered to be persons "charged" under s. 11. Since the *Charter* should be interpreted "generously," the opening words of s. 11 should not be interpreted to exclude appellants.

(3) Not "Tried"

Sopinka J.'s strongest argument (La Forest J. concurred specifically on this point) was that s. 11(b) refers to a right to be "tried" and does not refer to appeal rights. If appeal rights were to be encompassed by s. 11(b), Sopinka J. suggested, more apt language would have been used (109). To bolster his argument, Sopinka J. referred to Articles 5 and 6 of the *European Convention on Human Rights*. Article 5(3) provides that "everyone...shall be entitled to a trial within a reasonable time....." Article 6(1) provides that "[i]n the determination...of any criminal charge against him everyone is entitled to a fair and public hearing within a reasonable time...." Sopinka J. also referred to the *Wemhoff* case,[19] in which the European Court of Human Rights held that the former provision

applies only to trial, while the latter extends to "final determination," even if that is on appeal. "No doubt," Sopinka J. mused, "this language was before the framers of the *Charter*, and the selection of the more limiting term is significant" (ibid.).[20]

One might approach *Wemhoff* in this way: The *Charter* does not contain provisions referring to "trial" and to "determination." One could conclude that no distinction between "trial" and "determination" is, then, suggested by s. 11(b) — had that distinction been contemplated, it could have been expressed. Since it was not expressed, the distinction should not be made, and s. 11(b) should not be taken to exclude appeals.

Furthermore, the *Charter* (unlike the Sixth Amendment to the U.S. Constitution and Article 5(3) of the *Convention*) does not refer to "trial" within a reasonable time, but to the right to be "tried" within a reasonable time. One might infer that this usage shows that the *Charter* does not attempt to distinguish between trial and appeal rights. If the framers of the *Charter* had intended to restrict s. 11(b) to trials, they could have used the term "trial" in s. 11(b). I concede that in ordinary English legal parlance, the term "try" is used in connection with "trials:" the claim "I've tried one hundred cases" is more naturally rephrased as "I've run one hundred trials," than as "I've argued one hundred appeals." The English reading, though, is not determinative. In *Conway*, Sopinka J. considered the French text of s. 11(b) — "*Tout inculpé a le droit: ...d'être jugé dans un délai raisonnable.*" Sopinka J. commented that "'*Jugé*' means 'judged' or 'sentenced' and connotes a sense of adjudication which goes beyond the mere trial itself. Had the section been intended to apply to the start of the trial only, then '*mis en jugement*' would have been used."[21] Even if Sopinka J. is incorrect, ordinary legal parlance should not be determinative of the meaning of *Charter* terms. The language chosen to articulate a *Charter* provision is only one factor to be considered.[22]

In *Potvin*, Sopinka J. interpreted s. 11(b) legalistically: he seized on technical, restrictive interpretations of the terms "charged" and "tried" and used these interpretations to exclude from s. 11(b) protection those caught in the appellate meshes of the criminal justice system. Legalistic interpretation is not proper *Charter* interpretation. A right guaranteed by the *Charter* is to be understood "purposively," in light of the interests the right is meant to protect. Sopinka J. accepted this interpretive approach in *Conway*.[23] As indicated in part (1) above, appellate delay impairs interests — the same interests that have been protected in pre-trial delay applications of s. 11(b). Since the language of s. 11(b) may be reasonably interpreted to include appeals, it should have been interpreted to apply to appeals.

(4) 7 not 11

Sopinka J. held that appellate delay may be initially addressed outside of the *Charter*, under the Criminal Code appeal provisions and criminal appeal rules.[24] Where "systemic delay" causes "real prejudice" to appellants, resort may be had to s. 7 to remedy the abuse of process (112).

McLachlin J. identified practical difficulties with Sopinka J.'s delivery of appellate delay to s. 7. Segregating delay reviews under two different sections unduly complicates delay analyses involving appellate delay. Suppose that an appeal results in an order for a trial (in the case of a stay) or a new trial (in the case of a verdict). Sopinka J. tells us that s. 11(b) will apply, again, to the accused — "the accused reverts to the status of a person charged" (110). Sopinka J. does not tell us how the trial judge is to assess the full measure of delay. McLachlin J. suggested that either the full quantum of delay might be assessed under s. 11(b), or the analysis might be broken into stages, with s. 11(b) applying to the period from the commencement of proceedings until stay or verdict, s. 7 applying to the appeal period, and s. 11(b) applying to the period after the order for a trial or a new trial until trial (113). Sopinka J. avoided determinate comment on this matter, sheltering behind metaphor. He quoted from an article by D. H. Doherty, who claims that after the order for trial, "the constitutional clock should be rewound at the time of the order by the appellate court" (110).[25]

McLachlin J. reminded us of another practical difficulty with s. 7: "The abuse of process doctrine is a narrow doctrine which has only on rare occasions provided a remedy to accused persons caught in the meshes of criminal process....Moreover, it has been repeatedly held that the doctrine...should be applied only in the clearest of cases...the fact remains that abuse of process has seldom, in its long history, served as a remedy for delay in the criminal process" (118).

We might predict that s. 7 shall seldom, in its post-*Potvin* abuse-of-process applications, serve as a remedy for delay in the appellate process. *Potvin* is a

useful case for appellate administrators; it is not for accuseds. This observation leads to the practical reasons which may lay behind Sopinka J.'s retreat from *Conway*.

Appellate Practicalities

Two practical concerns tend to support the restriction of appellate delay review.

First, the Supreme Court appears to have seen *Askov*'s ghost. In *Conway*, Sopinka J. made some Askovian pronouncements about the scrutiny of delay at all levels of the judicial system. *Askov*, decided after *Conway*, proved *Charter* scrutiny expensive. In *Askov*, Cory J., writing for the majority, set out the factors to be considered in determining whether s. 11(b) has been infringed by pre-trial delay — (i) length of the delay; (ii) explanation for the delay, with reference to (a) the nature and inherent time requirements of the case and the conduct of the Crown and other officers of the State, (b) systemic or institutional delay, and (c) the conduct of the accused; (iii) waiver by the accused; and (iv) prejudice to the accused. Cory J. stated that in the case of long delays, an often "virtually irrebuttable presumption of prejudice" arises.[26] Cory J. also (fatefully) opined that "a period of delay in a range of some six to eight months between committal and trial might be deemed to be the outside limit of what is reasonable."[27]

As a result of *Askov*, by April, 1992 in Ontario alone, more than 52,000 criminal charges had been judicially stayed or withdrawn by Crown Prosecutors; to comply with *Askov*, the Ontario government had spent about $39.2 million and had hired 27 Provincial Court Judges, 61 Crown Prosecutors, and 168 court administrators.[28]

The Supreme Court performed damage control with the March 26, 1992 *Morin* decision. In *Morin*, Sopinka J., writing for the majority, characterized the six to eight month reference not as a "limitation period," but as an "administrative guideline."[29] The burden of proving prejudice was returned to the accused.[30]

What would have happened if appellate delay were turned over to s. 11(b) review, even as tempered by *Morin*? We can speculate that the Supreme Court did not desire to expose the appellate system to Askovian scrutiny. Keeping appellate delay out of s. 11(b) review avoids that provision's administrative guidelines and criteria for evaluation of delay. Appellate delay is left to more vague review under s. 7 — i.e., to review more fully controlled by the courts. (An unkind observer might suggest that the Supreme Court was more willing to constrain trial courts than appeal courts, like itself.)

Second, applying s. 11(b) to appeals could restrict possible appellate cut-backs. If s. 11(b) were held to apply to appeals, one might fear that a foothold would be created for the claim that appeal rights are constitutionally guaranteed (the right to an appeal within a reasonable time could be taken to imply an right to an appeal). If appeal rights were constitutionally guaranteed, legislation eliminating appeals might be held unconstitutional. At least some members of the Supreme Court, in fact, desire some limitation of criminal appeals. Lamer C.J.C. has been reported to have said that certain appeals as of right to the Supreme Court should be eliminated to free time for the hearing of non-criminal cases.[31] By keeping appeals out of s. 11(b), and leaving appellate delay to more vague review (and constitutional status) under s. 7, *Potvin* helps keep the way clear for the requisite legislation.

Perhaps these are the reasons for Sopinka J.'s retreat from *Conway*. I hope to have shown that, in any event, Sopinka J. did not simply come to a "better view" of the interpretation of s. 11(b).

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Endnotes

1. *R* v. *Ramsay* (1992), 9 O.R. (3d) 400 (Gen. Div.) per Lovekin J. at 402-403; *R.* v. *Ushkowski* (1991), 67 C.C.C. (3d) 422 (Man. C.A.) per Twaddle J.A.; *R.* v. *Boire* (1991), 66 C.C.C. (3d) 216 (Que. C.A.) per Baudouin J. A. at 219, per Brossard J. A. at 227; *R.* v. *Hudson's Bay Co.* (1990), 58 C.C.C. (3d) 507 (Sask. Q.B.) per Barclay J. at 515; *R.* v. *Stapleton* (1990), 262 A.P.R. (Nfld. S.C.T.D.) per Easton J. at 147; *Gordon Redi-Mix* v. *The Queen*, [1988] 6 W.W.R. 470 (Sask. Q.B.) per Wedge J. at 477.

2. *R.* v. *Conway*, [1989] 1 S.C.R. 1659; *A.D.* v. *The Queen*, [1993] S.C.R. 441; cf. *Rahey* v. *The Queen*, [1987] 1 S.C.R. 588 per Lamer J., as he then was, at 611.

3. *R.* v. *Potvin* (1993), 83 C.C.C. (3d) 97; I shall refer in the text to page numbers from this report.

4. L'Heureux-Dubé, Gonthier, Cory, and Iacobucci, JJ., concurring; La Forest J. concurred in a separate judgment.

5. Sopinka J. does not refer to sentence appeals. I shall assume that the analysis applicable to other appeals applies to sentence appeals.

6. *R* v. *Big M Drug Mart*, [1985] 1 S.C.R. 295 per Dickson J., as he then was, at 344.

7. *R.* v. *Morin* (1992), 71 C.C.C (3d) 1 (S.C.C.).

8. Lamer C.J.C. and Major J., concurring.

9. By "appellants" I shall mean acquitted and convicted appellants.

10. Sopinka J. does not refer in *Potvin* to the "social interest" protected under s. 11(b). I shall not pursue the relevance of social interest to appellate delay.

11. *R.* v. *C.I.P. Inc.*, [1992] 1 S.C.R. 843 at 864-5.

12. *Conway*, *supra* note 2 at 1709.

13. *R.* v. *Lyons* (1987), 37 C.C.C. (3d) 1 (S.C.C.).

14. *Kalanj* v. *The Queen* [1989] 1 S.C.R. 1594 per McIntyre J. at 1607.

15. Alberta Rules of Court, Rule 854(3)(i).

16. *United States* v. *Loud Hawk* 88 L. Ed. 2d 640 (S. Ct., 1986) at 657; *Conway*, *supra* note 2 at 1708.

17. *Loud Hawk*, *supra* note 16 at 657.

18. *Kalanj*, *supra* note 14 at 1607.

19. (1968) 1 E.H.R.R. 55.

20. What is perhaps more significant is that Sopinka J. quoted *Wemhoff* to support his contrary position in *Conway*: *Conway*, *supra* note 2 at 1708-9.

21. *Conway*, *supra* note 2 at 1707.

22. *Big M*, *supra* note 6 at 1707.

23. *Conway*, *supra* note 2 at 1709.

24. See, for example, Alberta Rules of Court, Rules 840(3) and 515.1(8), and the Consolidated Practice Directions of the Court of Appeal of Alberta, January, 1991, E.8.

25. D.H. Doherty, (now Doherty, J.A. of the Ontario Court of Appeal) "More Flesh on the Bones: The Continued Judicial Interpretation of s. 11(b) of the Canadian *Charter* of Rights and Freedoms" (1984) *Canadian Bar Association, Ontario: Annual Institute on Continuing Legal Education* 9.

26. *R.* v. *Askov* (1990), 79 C. R. (3d) 273 (S.C.C.) at 306.

27. *Askov*, *ibid.* at 313.

28. C. Schmitz, "S.C.C. relaxes tight *Askov* pre-trial time limits" *Lawyers Weekly* (10 April 1992) 1.

29. *Morin*, *supra* note 7 at 19.

30. *Morin*, *supra* note 7 per Lamer C.J.C. (diss.) at 6; Sopinka J. at 14, 24; McLachlin J. at 31.

31. S. Bindman, "Top Court wants to eliminate right to appeal in some cases" *The Edmonton Journal* (20 Aug. 1993) A4.

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FURTHER RESTRICTIONS ON ACCESS TO *CHARTER* REVIEW

A Comment on *Hy and Zel's Inc.* v. *Ontario (A.G.)*

June Ross

In *Hy and Zel's Inc.* v. *Ontario (Attorney General)*[1] the Supreme Court of Canada denied standing to parties in a civil action wishing to challenge legislation under which they were being prosecuted criminally. On the face of it, this seems astonishing. But, when one considers that the court has already restricted the right of corporate applicants to rely on the *Charter* rights of others, and has already indicated that it will not expand the principles governing public interest plaintiff standing, the decision is simply another example, albeit extreme, of the court's use of standing and similar threshold rules to limit the availability of judicial review.

The case arose as follows. Two corporations involved in retail sales had been charged under the *Retail Business Holidays Act*[2] with being open for business contrary to the Act. In addition, the Attorney General in separate proceedings sought injunctions against the corporations to require them to comply with the Act.[3] The corporations, adding as applicants a number of their respective employees, commenced cross-applications seeking declarations that the Act or some portion of it infringed s. 2(a) or s. 15 of the *Charter of Rights and Freedoms*. The purpose of the cross-applications was to ensure that "if the Attorney General decided to withdraw the s. 8 closing applications, the time, money and effort involved in the defence of those applications would not be wasted."[4] The cross-applications proceeded through the courts, while the injunction applications were adjourned.[5]

In the lower courts, the declaration applications were dismissed on the merits.[6] In the Supreme Court of Canada a majority of the court, in a judgment written by Major J., held that neither the corporations nor their employees had standing to bring the declaration applications.[7]

The standing issue arose because the proceeding before the court was a civil declaration application, rather than a criminal proceeding. The distinction became significant in previous cases where parties sought to rely on *Charter* rights and freedoms of third parties. In *R.* v. *Big M Drug Mart Ltd.*[8] an objection was raised that a corporate accused should not be able to rely on s. 2(a) of the *Charter*. The Supreme Court of Canada responded that an accused could raise any constitutional defect in a law under which it was charged — the constitutionality of the law, not the particular rights of the accused, was the paramount issue.

This principle was limited in *Irwin Toy Ltd.* v. *Quebec (Attorney General)*,[9] a declaratory action by a corporation threatened with regulatory proceedings. The corporation was permitted to argue that provincial advertising regulations violated its freedom of expression, and that the regulations were outside provincial legislative jurisdiction. The corporation was not permitted to rely on the *Charter* rights of others found in s. 7.[10] The *Big M* principle was held not applicable to a civil action.[11]

Peter Hogg has argued, and the dissent in *Hy and Zel's* agreed, that the limitation on the *Big M* principle is irrational.[12] Plaintiffs whose private rights are affected by a law, whether in a civil or criminal context, should be able to challenge its constitutional validity, on federal or *Charter* grounds: "the overriding concern is whether governments have respected the limits of their constitutional authority."[13]

The *Irwin Toy* principle may be avoided if a corporation can attain public interest standing. Unlike a private plaintiff, a public interest plaintiff can rely on the rights of others and, indeed, must if its own rights are not involved. As a public interest plaintiff, a corporation can rely on rights guaranteed only to individuals.[14] The appellants in *Hy and Zel's* apparently sought public interest standing, presumably for this reason.[15] The court was prepared to assume that a serious issue was raised, and held that the liability to prosecution of both retailers and their employees meant that they were directly affected by the legislation. But public interest standing was denied because there were other reasonable means of bringing the constitutional issues before the court.

In previous public interest standing cases, the other means of access to the courts involved other plaintiffs, seen as more appropriate parties because of their interest in the issues raised. In *Hy and Zel's*, the other means of access included criminal enforcement proceedings such as those actually commenced against the same parties. The interest that caused these plaintiffs to be directly affected created an alternative means of access to the courts and so denied them public interest standing.

This aspect of the decision is not really concerned with entitlement to bring a proceeding, but with the form of action. The use of a civil declaratory action as an alternative to criminal proceedings was recently considered by the Supreme Court of Canada in *Kourtessis* v. *Canada (Minister of National Revenue)*.[16] To some extent, the court demonstrated the virtue of consistency in that one test applied to determine the availability of a civil action was stated to be whether other reasonable means of access to the court existed.[17] Generally, a declaratory action should not be used as a substitute for a trial ruling in a criminal case. But in *Hy and Zel's*, no procedural issues, such as appeal rights or the fragmentation of trials, arose as a result of the declaratory action. The nature of the constitutional challenge presented in the criminal and civil proceedings was identical. The declaratory action possessed an advantage in that it also invoked the interests of employees who, while subject to charge, had not been charged. Further, the action had already proceeded to the Supreme Court of Canada. In these circumstances it seems unreasonable to deny the parties their chosen procedure.[18]

Another means to bring the *Charter* issue to court referred to by the majority was a constitutional challenge by parties claiming that their own religious rights were violated. This form of constitutional challenge would have the advantage of dealing with facts specific to the parties and would ensure that the court heard from persons "most directly affected".

There was no reference to any such litigation actually commenced, but an assumption that it was reasonable to anticipate it. Practical obstacles to such litigation were not addressed. This may partly be attributed to a lack of evidence on the point. The court noted the appellants' failure to provide evidence demonstrating that no other reasonable and effective access to the court existed. Applicants for public interest standing are then left in the unenviable position of having to prove a negative. While applicants do bear the onus of meeting all parts of the public interest standing test, in appropriate cases the onus can be met by a combination of argument and judicial notice. The court should consider who potential plaintiffs might be and what obstacles they might face.

For example, as discussed in the dissent, while the *Charter* rights of employees may be affected, they are unlikely to have the political or financial resources to bring their concerns to court. Retailers who belong to minority religions may have the financial wherewithal to challenge the law, but how many such retailers exist? Further, ascribing a religion to a retailer gives rise to definitional problems that may affect the claim to standing. The retail business is likely conducted through a corporate vehicle. The individual retailer may only be a part, perhaps a minority, of a group that carries on business through a corporation or partnership. Thus, the limitation of standing to persons whose religious rights are personally affected may well preclude judicial review of the law, at least for some substantial period of time.

The majority decision alters and expands the *Irwin Toy* rule prohibiting reliance on the *Charter* rights of others in civil proceedings. It has become a rule of standing in declaratory applications. One's own *Charter* rights, not only one's own proprietary or contractual rights, must be affected to seek a declaration of invalidity under the *Charter*. The rule is now applied to individuals as well as to corporations. The failure of the employee appellants to provide evidence of effect on their own religious freedom or equality meant that they, too, were denied standing. The most significant expansion is that public interest standing will not be available as a means to

circumvent the *Irwin Toy* rule, at least where regulatory legislation is challenged. Plaintiffs who are subject to prosecution must raise their constitutional objections in that action. If private rights are affected in a civil context, this option is not available,[19] but public interest standing still would likely be denied on the basis that plaintiffs whose *Charter* rights are directly involved might come forward. In this case, the court's approach resulted in inefficiency. In others, the consequence may be that unconstitutional laws will be applied to the detriment of private rights.

L'Heureux-Dubé J., in dissent, made many valid criticisms of the majority judgment, and carefully justified a grant of standing to the appellants. She held that the appellants had private standing. This, however, would have been a barren form of standing, if the *Irwin Toy* principle denied them the ability to rely on s. 2(a) or s. 15 of the *Charter*. She resolved this issue by departing from the rule in *Irwin Toy*, holding that Platintiffs with private standing may rely on the *Charter* rights of others. She also found that the test for public interest standing, applied flexibly and purposively, was met. She considered the traditional justifications for limiting standing and demonstrated that they were not served by denying standing to a privately affected party. In fact, judicial economy would have been better served, and a multiplicity of proceedings avoided, by granting standing in the case. The only surprising thing about the dissent is that it attracted only two members of the full court.

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Endnotes

1. [1993] S.C.J. No. 113.
2. R.S.O. 1980, c. 453.
3. Pursuant to the *Retail Business Holidays Act, ibid.* s. 8. An interim injunction was granted with respect to Paul Magder Furs Ltd. and was enforced in contempt proceedings. The injunction application against Hy & Zel's was adjourned.
4. *Hy and Zel's, supra* note 1, per L'Heureux-Dubé J. referring to a statement by counsel.
5. In the case of Hy and Zel's Inc. the injunction application apparently was simply adjourned while the declaration application proceeded. In the case of Paul Magder Furs Limited, the corporation made efforts both to appeal the interim injunction and to have the s. 8 application brought back before the court, both of which were denied due to the corporation's continuing contempt of the interim injunction.
6. The courts held that the constitutional issues had been determined in *Peel (Regional Municipality)* v. *Great Atlantic & Pacific Co. of Canada Ltd.* 2 O.R. (3d) 65. *Peel* was appealed to the Supreme Court of Canada, but had not been heard prior to the hearing in *Hy and Zel's*, and was discontinued prior to the judgment in *Hy and Zel's*: leave to appeal granted sub nom. *Oshawa Group Ltd.* v. *Ontario (Attorney General)*, [1991] 3 S.C.R. x; notice of discontinuance of appeal filed August 31, 1993, S.C.C. Bulletin, p. 1493.
7. Lamer C.J., La Forest, Sopinka, Gonthier, Cory and Iacobucci JJ. concurring. L'Heureux-Dubé J. wrote a dissenting judgment, McLachlin J. concurring.
8. [1985] 1 S.C.R. 295.
9. [1989] 1 S.C.R. 927.
10. The court held that the s. 7 interests, life, liberty and the security of the person did not apply to corporations.
11. The court applied the *Irwin Toy* limiting principle to a civil action for damages in *Dywidag Systems v. Zutphen Bros. Construction*, [1990] 1 S.C.R. 705. On the other hand, the court has reaffirmed the *Big M* principle in *R.* v. *Wholesale Travel Group*, [1991] 3 S.C.R. 154, allowing a corporate accused in penal proceedings to rely on s. 7 of the *Charter*.
12. P.W. Hogg, *Constitutional Law of Canada, 3rd ed.* (Toronto: Carswell, 1992) at 1269-1274.
13. *Hy and Zel's, supra* note 1, per L'Heureux-Dubé.
14. *Canadian Council of Churches* v. *Canada*, [1992] 1 S.C.R. 236.
15. The majority commented that the parties did not present evidence pertaining to private standing, and indicated that the public interest standing test must be met "where, as in the present case, the party does not claim a breach of its own rights under the Charter but those of others.
16. [1993] S.C.J. no. 45.
17. Per LaForest, L'Heureux-Dubé and Cory JJ. Sopinka, McLachlin, Iaccobucci JJ. referred to the court's discretion to deny declaratory relief in somewhat more limited terms, where another procedure would provide "more effective relief" or where it appeared that the legislature had intended that another procedure should be followed.
18. The dissent noted that the appellants had expected that the cross-application for a declaration would function as a test case with regard to outstanding prosecutions, and that it would discredit the administration of justice to simply postpone the issue.
19. *Dywidag Systems* v. *Zutphen Bros. Construction, supra* note 11.