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# THE FEDERAL ELECTORAL REGIME CONFRONTS THE CHARTER ... AGAIN:

## A Comment on *Somerville v. Canada (A.G.)*

Jane Jenson

In June 1993, in Calgary before the Court of Queen's Bench of Alberta, reforms to the *Canada Elections Act* passed that May were found to infringe Sections 2 and 3 of the *Charter of Rights and Freedoms*.<sup>1</sup> These reforms include a limit, during the campaign, on independent expenditures on advertising directly to support or oppose a candidate or party.<sup>2</sup> The limits on the interventions of anyone who is not an official candidate or a registered party are serious; they may spend no more than \$1000.00. Nonetheless, the logic of this comment is that the restriction on freedom of expression involved is necessary to protect and sustain another — equally central — value of Canada's democratic politics, that is a collective interest in elections which are competitive and facilitate openness and access. The challenge in this case is to appreciate the interconnectedness of the elements of a regulatory regime rather than to treat each part in isolation. Therefore, the argument, in brief, is that limits on independent expenditures are essential to the federal electoral regime as it exists, and has existed, for two decades. Since its creation, a basic principle of that regime has been to limit expenditures by parties and candidates in the name of equity. Such restraints on official candidates and registered parties would be easily bypassed if interest groups were permitted to make unlimited expenditures on their own. The *Somerville* decision, if left to stand, would threaten the whole regime of election financing, created in order to translate into practice the general principle of fairness in access — that is, a level playing field — for ideas and persons seeking office. Given the centrality of the regime to free and democratic government in Canada, this matter needs to be addressed by the Supreme Court.

### BACKGROUND TO THE DECISION

This second challenge to the federal election law, brought by David Somerville, President of the National Citizens' Coalition (NCC), is a direct descendent of the first. The initial NCC case in 1984, decided by Mr. Justice Medhurst, found the federal election law's prohibition of spending by non-

contestants during the campaign to infringe upon the *Charter*.<sup>3</sup> When the federal government decided not to contest the judgement, the way was opened for unlimited independent expenditures in both the 1984 and 1988 federal elections. In the "free trade election" of 1988 the huge sums spent by the supporters of the agreement and the notable, if less lavish, expenditures of its opponents constituted a parallel campaign which threatened at times to eclipse the parties' efforts.<sup>4</sup> This was only the most visible manifestation of the kind of independent spending which had characterised campaigns in several ridings since 1984, where single-issue groups (pro-life, for example) targeted sitting Members or other candidates who did not share their position.<sup>4</sup> Such interest groups were able to spend as much as they liked, not being subject to the restrictions on campaign expenditures which the *Canada Elections Act* sets for official candidates and registered parties. Fear of the results if such interventions were to multiply in future elections, as well as a more general concern to fit the regime of federal electoral law designed in the 1960s and 1970s to the constraints of the *Charter*, prompted the 1989 appointment of the Royal Commission on Electoral Reform and Party Financing (RCEFPF), chaired by Pierre Lortie.

The federal regulatory regime has drawn laudatory comments from many in Canada and abroad.<sup>6</sup> Its coherence and its capacity to make a significant contribution to maintaining fair elections and enhancing access has been highlighted.<sup>7</sup> It is a quite simple regime which depends on four basic principles, all of which are challenged directly or indirectly by the *Somerville* decision. First, it limits the amount candidates and political parties can spend during the campaign. Such regulation of expenditures is designed to keep the costs of elections from rising. Expensive elections have been identified as a hindrance to incumbent challengers mounting serious campaigns, and therefore restrains the competition of ideas and persons.<sup>8</sup> Studies in other jurisdictions, especially congressional elections in the United States, show that incumbents have major advantages in raising money and are able to outspend their opponents at all stages

of the electoral process. This does not mean, of course, that incumbents always win congressional elections. It does mean, however, that they have a substantial financial advantage over any challengers.<sup>9</sup> Simply put, the elections are less competitive.<sup>10</sup> The second principle of the regime is public funding, both through reimbursement and tax credit. The goal is to enhance fairer access of persons to candidacy by the public assuming responsibility for some of the costs incurred by candidates and parties. Of course, such funding can only have its desired effect of levelling the playing field if spending is restrained so that the wealthy — or successful fund-raisers — do not simply overwhelm the competition. The third principle is regulation of the who, how and how much of advertising in the broadcast media, again so that spending will not spiral out of control. The fourth principle of the federal regime is that of *transparency*. The designers of the federal regime decided to rely on the public dissemination of information about who — which individuals, associations, corporations, unions, interest groups — made contributions to candidates or parties. If neither public funding, broadcast regulation nor transparency was directly impugned in the *Somerville* case, their effectiveness would also be affected if the first principle were to fall.

## THE DECISION

The plaintiff's case was that Sections 213(1), 259.1(1) and 259.2(2) of the *Canada Elections Act*, as amended by Bill C-114 in May 1993, are an impermissible infringement of the *Charter*. *Somerville* argued that the first two sections infringed section 2(b) (freedom of expression) and section 3 (the right to vote and run for office), while the third of the contested sections infringed section 2(d) (freedom of association) in addition to sections 2(b) and 3. These sections of the *Elections Act* limit "independent expenditures" for advertising in print or broadcast media during the last four weeks of the election campaign to promote or oppose a registered party or candidate directly to \$1000.00, and prohibit combining such advertising to exceed \$1000.00.

The *Canada Elections Act*, as amended in 1993, reimposed the ban on independent expenditures aimed directly or indirectly to support or oppose a party or candidate. These had been found to infringe the *Charter* in the 1984 case. Nonetheless, in recognition of the rights defined in the *Charter*, expenditures for advertising to present general policy positions were not prohibited completely. They were limited, however, to \$1000.00.<sup>11</sup>

Even before the reforms had been presented to Parliament in the spring of 1993, David *Somerville* and the NCC were assaulting them in advertisements in the national press. As soon as the law was passed he took his case to the jurisdiction where the NCC had been successful in 1984. Mr. Justice Macleod heard the case, and found for the plaintiff.

Following previous *Charter* cases (especially *R. v. Keegstra*, [1990] 3 S.C.R. 697 and *Irwin Toy Ltd. v. Quebec (A.G.)*, [1989] 1 S.C.R. 927), Macleod J. delivered the judgement in two steps. The first was to find that the relevant sections of the *Charter* were indeed infringed; the second was to determine whether the Crown had demonstrated that such interference was justified under Section 1 of the *Charter* and constituted a "reasonable limit" on the rights defined in subsequent sections. The judge's finding was that the *Canada Elections Act* infringed the *Charter*, and that the Crown had not provided sufficient justification for such.

### Step 1:

There is probably little doubt, although the Crown did not concede the point, that the *Canada Elections Act* interferes with section 2(b). Macleod J. found, however, that sections 2(b), 2(d), and 3 were all infringed. The major issue meriting commentary in the first step of the process relates to section 3. The finding that the *Canada Elections Act* interferes with section 3 is especially important because, while section 2 is subject to section 33 of the *Charter* (the notwithstanding clause), section 3 is not. Therefore, decisions touching on it deserve even more careful scrutiny than usual.

With respect to section 3, the Crown argued that the right to vote was not infringed by limits on advertising, even when measured against the standard of an "informed vote". The Attorney-General claimed that no evidence had been presented that Mr. *Somerville's* vote could not be a sufficient vote if the delivery system for some information (advertising) was limited (9-10). Macleod, J. rejected this argument and then went on very quickly and without much argumentation, to set an exceedingly high standard for an "informed vote". Quoting from the final report of the RCEFPP, that a \$1000.00 limit on advertising would be "insufficient for those who wish to mount national media campaigns," Mr. Justice Macleod found that David *Somerville* was denied his rights under section 3, because "voters are effectively precluded from receiving third party views from other parts of the country" (11).

Two comments can be made about the formulation presented in *Somerville v. Canada (A.G.)*: The first is the simple observation that nothing in the *Canada Elections Act* precludes voters hearing views from other parts of the country. Nothing prevents an individual or association from Alberta choosing to spend its \$1000.00 in Ontario, Nova Scotia or Newfoundland. Nor is anyone from Alberta prohibited from *seeking* such views by consulting a local newspaper from other parts of the country. These are readily available in public libraries or newspaper stores. Any information about an election campaign — with the possible exception of campaign literature which arrives at the door unsolicited — must be sought by the voter, by reading a newspaper or gaining access to electronic media. Such steps necessary to inform oneself about "other parts of the country"

do not seem at variance with the way voters must always conduct themselves, and therefore is not an undue burden.

The second comment is more general and relates to the very definition of an election and a campaign, following the basic principles of liberal democratic theory. In Canada, as in other countries with comparable first-past-the-post electoral systems, elections are local events. Citizens must elect an MP from their locality, judging his or her merits as a potential representative of their interests, both local and national. An election is not a referendum. In the latter the electorate *as a whole* is called upon to act together and to evaluate a single political proposal. In elections, in contrast, the decision process is fragmented, as votes are cast for the local candidate who the voter considers able to provide representation on many different issues. Therefore, the local campaign remains central to democratic electoral politics. It is precisely in such local campaigns that \$1000.00 can provide a hefty amount of advertising and can inform and convince others about how to behave. Moreover, Canadian history, including most recently, is replete with examples of federal political parties which are rooted in a region. Again, advertising in regional media, often emanating from one or two population centres, could have an impact on the campaign. Finally, while something which is often termed “the national campaign” does exist, this is nothing other than the campaign waged by the leader of a political party and reported to the voters by the media. Unless the leader visits a voter’s area, any voter experiences this “national campaign” only as it is mediated by the media. There is nothing in the *Canada Elections Act* that prohibits the media reporting how the campaign “is going” in particular parts of the country, including how “independent expenditures” are being made.

In his decision, Mr. Justice Macleod did not evaluate these or other basic philosophical principles and everyday practices underpinning Canadian democracy. Thus, the notion that section 3 of the Charter somehow includes a fundamental right to receive advertising directly in one’s home looks suspiciously like a judge reaching far beyond either the legislators’ or the ordinary citizens’ understanding of the right to vote. It merits further attention.

## Step 2:

In determining whether section 1 concerns justify sections 2 and 3 infringements in this case, Macleod J. relied on the *Oakes* test.<sup>12</sup> He determined, first, that the onus falls on the party proposing the limit, in this case the Crown defending the *Canada Elections Act*, to demonstrate that the limit on a Charter right or freedom is reasonable and justified. If the Crown failed to make such a demonstration, then the law is of no force or effect. Mr. Justice Macleod declared himself unable to conclude that the Crown’s argument that limits on independent expenditures were essential to the comprehensive regulatory regime was a sufficiently pressing and substantial

claim which could outweigh Charter rights and freedoms (15). Because he did not consider the Crown had passed the first test of demonstrating a pressing and substantial need to limit the Charter, he did not consider it necessary to go to the next step in the *Oakes* test, which is that of “proportionality”. He did, however, offer a few thoughts on this second test.

In finding that the Crown had failed to establish a “pressing and substantial” case for limiting a Charter right or freedom, Macleod J. broke with the practice of almost all reviewing courts, which have been open to arguments about the societal interests, as expressed by legislatures, moderating individual rights in the Charter.<sup>13</sup> Macleod J., in contrast, rejected — or ignored — Parliament’s intent to enhance electoral democracy. That societal goal provided the essential argument of the Crown, which explained why limits on independent expenditures are a crucial element of the regulatory regime. Relying heavily on a logic similar to that used by the RCEFPE, Mr. Shaw argued for the Crown that:

third party spending limits are an essential part of the comprehensive electoral financing regime which seeks to promote fairness in the electoral process by equalizing the opportunity of all to participate in democratic debate in a meaningful way regardless of financial resources. The *specific objective of third party limits* is to preserve the integrity and effectiveness of party and candidate spending limits.  
(quoted at 14-15, emphasis added.)

Instead, Macleod, J. focused on another issue. He concentrated on whether unlimited spending has “an undue influence” or, most simply, whether elections can be bought. This issue has never been at the heart of the debate about the federal regulatory regime.<sup>14</sup> Nonetheless, the *Somerville* decision is centred around this issue.

Mr. Justice Macleod gave five reasons for his decision, none of which assessed the claim of the Crown — and as we will see below, the lawmakers’ — insistence that preservation of the federal regime of election financing, which is a good in itself because of the values it fosters, *requires* limits on independent expenditures. Instead, three reasons — and the ones which occupied the bulk of his argumentation — addressed the question of the power of spending to influence electoral choice, rather than the power of spending to alter the contours of electoral competition.<sup>15</sup>

As part of his test of whether the matter was “pressing and substantial” Mr. Justice Macleod found that the Chief Electoral Officer’s failure to “make any investigation that third party advertising influences election results” to be a reason to reject limits on independent expenditures. It is questionable, of course, whether Elections Canada is empowered to conduct such investigations on its own initiative. Nonetheless, the matter is somewhat moot, in that



the judgement fails to mention that the federal government, alarmed by reactions to the events of the 1988 election, appointed the Royal Commission on Electoral Reform and Party Financing and provided it with a substantial budget which permitted it to investigate precisely this issue of independent expenditures.

Mr. Justice Macleod's fourth and fifth reasons occupied most attention in the judgement, and both of these dealt exclusively with attempts to assess the influence of spending on electoral outcomes. One involved the interpretation of statistical findings in empirical studies of public opinion. The plaintiff's expert witness, Neil Nevitte of the University of Calgary, testified that the data from the 1988 National Election Study he was asked to comment on showed "... that the cumulative impact of advertising is nothing, there is none" (17). This testimony did not, however, fully reflect the spirit of the statistical complexities which the authors of the book in which the data were reported were struggling to analyze, nor their final conclusions about advertising's influence on elections. Confronted with data which suffered from multicollinearity (which means, basically, that all effects were going in the same direction and independent causes could not be identified statistically), Johnston *et al.* wrote that "third-party advertising coefficients defy substantive interpretation." By this they meant that the statistical meaning was not clear, and they could not give a firm statistical interpretation to the data.<sup>16</sup> This is quite different from saying that the *data show* that advertising has no impact. What the data meant to the authors was that further analysis was needed before they could come to any assessment of the influence of advertising.<sup>17</sup>

Finally, Macleod J. liberally quoted M.P. Jim Hawkes, who chaired the parliamentary committee to which the final report of the RCEFPF was sent, and testimony to that committee by Harvie André. Both of these Tory MPs declared their personal opposition to spending limits for anyone; Mr. André is quoted at length about the impossibility of spending your way to victory, as well as the supposed mythology of the impact in 1988 of independent expenditures (19-20). These extracts from the parliamentary hearings were presented in the judgement without commentary. Imputing a reason for presenting them, one might think that Macleod J. wished to point out that at least some politicians do not consider spending limits essential, and that some do not believe that victory goes to the candidate or group which spends the most, despite the fact that they themselves continue to seek funds and spend them in election campaigns.

Summarising this encounter between the federal regulatory regime and *Charter* jurisprudence, we see that Mr. Justice Macleod followed the unusual practice of denying Parliament's claim that the *Canada Elections Act* represented a "pressing and substantial" step towards realising a free and democratic society. The second stage — termed the "form of proportionality test," having the three criteria identified by

Hogg (1992: 867) — is the more usual area of dispute in cases which invoke the *Oakes* test. At this stage, the court attempts to balance society's interests against those of individuals and groups. The *Somerville* decision makes no determination on these matters because of its rejection of the first criterion, that the objective itself was sufficiently important.

## ELECTION-FINANCING REGIMES AND SOCIETAL INTERESTS

In focusing almost exclusively on the question of the *impact of advertising on electoral results*, Mr. Justice Macleod ignored the argument about the structure of the financing regime which was made by the Crown, by both the Barbeau Committee and the RCEFPF, and by the same politicians quoted in the judgement. As Mr. André so bluntly put it, "You can't have limits on the candidates and parties without limiting third parties" (20). This was essentially the position taken by the RCEFPF after its detailed reflection on the matter, an analysis which it shared with the Barbeau Committee which had made the first recommendations for a federal regulatory regime in 1966. While concern about the impact of unlimited spending on voters' choice did figure in the RCEFPF's reasoning, it was primarily with reference to the regulation of party or candidate expenditures. When the Commission turned to independent expenditures, the weight of its analysis and rationale for regulation — and that of most experts on the subject as well as the politicians who live under the regime — was the presence of an integral and inevitable link between controls on candidate and party spending and limits on independent expenditures. As K.Z. Paltiel wrote of Barbeau:<sup>18</sup>

The Committee was aware that this [restrictions on independent expenditures on advertising] could be interpreted as an interference with the freedom of political action but argued that to ignore such groups and their activities would 'make limitation on expenditures an exercise in futility, and render meaningless the reporting of election expenses by parties and candidates.'

From the beginning, in other words, all these observers have seen the regulatory framework as a regime, in the sense that its parts are interdependent. It can function as its designers intended it only with all of its parts and only if none of the parts are rendered ineffective. For example, restricting expenditures rather than contributions *requires* transparency in reporting; otherwise, the risk is that the public will not be able to monitor the relationship between candidates or parties and those who provide them with campaign contributions. Otherwise, the legitimacy of electoral outcomes might be threatened. Secondly, spending limits are effective only if they are meaningful and real. If they can be by-passed by

individuals who are not candidates or by groups which are not parties, then the regime as a whole is threatened.

It is this regime which the *Somerville* decision threatens to dismantle, because it renders ineffective one of the essential pillars, that of limiting campaign expenditures by candidates and parties. While the decision did not address the limits on candidates and parties directly, the judgement dismantled the corollary, which are the limits on independent expenditures.

The question to be faced remains, however, whether this regime is worth maintaining because of the contributions it makes to a free and democratic society, and despite the constraints on individual freedoms which it necessarily imposes for a short period of time and for some forms of expression.<sup>19</sup> The answer given at the federal level has always been that society's interest in such a regime, because of the fairness which it promotes in election campaigns, outweighs the limits imposed on individuals, whether candidates, party campaign organisers, or interest groups.

Since the 1960s at the federal level in Canada, that question has been answered consistently in the positive not only by commissions of inquiry like the Barbeau Committee and the RCEFPF but also by legislators, even when as individuals they might have preferred no limits. The regulations were interpreted as a design to accomplish certain goals benefitting society as a whole. In the case of the federal regime, a central — although never the exclusive — goal identified by the Barbeau Committee, the RCEFPF, the members of the public who intervened before the Royal Commission, and the legislators who argued for spending limits, was one of sustaining democracy by encouraging equity. Restrictions on spending went along with public funding to enhance equality among participants.<sup>20</sup> Such an increase in fairness, as well as other efforts to broaden participation — tax credits for example — would all contribute to the legitimacy of electoral politics, upon which Canadian democracy rests.

Not all regulatory regimes identify the same goals, of course. In many cases the motivation for establishing regulations has been to limit corruption. Reform efforts were sparked by scandals in which contributors to candidates or parties appeared to have gained an unfair advantage from their ability to give important sums of money. Such concerns about undue influence motivated the regulations in the U.S., for example, where contributors to congressional campaigns are limited in how much they may give. Quebec and Ontario's regulatory regime are also products of scandal, while Alberta adopted the same approach as Ontario, setting contribution limits as part of a set of measures to prevent undue influence.<sup>21</sup>

From the beginning the architects of the federal regime were motivated by a variety of goals which were somewhat

different. While seeking to avoid the fact or appearance of undue influence and limiting escalating costs were two of their intentions, they never were pre-eminent. Central to these reforms were the goals of guaranteeing meaningful debate about policy options while guaranteeing fairness during that primordial moment of democracy, the election. Reformers sought to develop a set of rules of the game which would guarantee that the formal rights to run for office and to present competing policy positions during elections would be meaningful ones. Therefore, the fundamental principles of equity and equality of opportunity demanded a democratic system in which wealth, whether of an individual or a party, could not hinder others' participation.

Such a notion of fairness has been at the core of the federal regime regulating election activities from the beginning, and has been confirmed by each round of legislative reform. This notion rests, of course, on a larger definition of what constitutes a free and democratic society. As the five Commissioners, charged by the federal government in 1989 with addressing the obvious tension between the rights of individuals and the requirements of Canada's long-standing commitment to certain democratic practices, wrote after two years of consultation with the public, consideration of numerous research studies, and their own debates:<sup>22</sup>

The gaping hole in our existing framework in relation to independent expenditures is patently unfair. The conundrum that this development presents for electoral reform is now widely acknowledged. Without fairness, we may continue to have a 'free' society, but we would certainly diminish the 'democratic' character of our society. □

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### Endnotes

1. *Somerville v. Canada (A.G.)* (June 25, 1993), Calgary 9301-05393 (AB. Q.B.). Internally cited page references refer to this decision.
2. There is no perfect label for such expenditures, which are distinguished by being "other than" spending by candidates or registered parties. In common parlance they are "third party expenditures" and this is the label used in the judgement. This term is obviously confusing, however, because of the use of the word "party" in order to distinguish such spending by non-party groups or individuals from that of registered parties and because of the long-standing habit in political science in Canada of calling parties other than the Liberals and Conservatives "third parties". Therefore, I have adopted the term used by the Royal Commission on Electoral Reform and Party Financing (RCEFPF), that of independent expenditures.
3. *National Citizens' Coalition Inc. and Brown v. Canada (A.G.)*, [1984] 5 W.W.R. 436.

4. According to a research study prepared for the RCEFPF, more than \$4.7 million in advertising expenditures made during the campaign was in the form of independent expenditures. Janet Hiebert, "Interest Groups and Canadian Federal Elections" in F. Leslie Seidle, ed., *Interest Groups and Elections in Canada* (Toronto: Dundurn Press, 1992) at 20.
5. For example, the NCC targeted Jim Hawkes, the sitting Conservative in Calgary West in 1993, because he had chaired the parliamentary committee which recommended the limits on independent expenditures. The irony was that, as the quotations given in the judgement indicate (at 19), he was not himself a great fan of spending limits for anybody. The NCC spent \$50,000 in the riding; *Calgary Sun* (10 October 1993). Mr. Hawkes was limited to spending \$62,413.07.
6. In a recent book addressed to policy-makers in the U.K., the author recommends Canada as a positive model of appropriate action in the face of the "quagmire of money politics" and goes on to suggest that when the U.K. finally examines the issue in detail (that it should do so is one of the major recommendations of the report), "it will recognise the value of the system that Canada has created". Martin Linton, *Money and Votes* (London: Institute for Public Policy Research, 1994) at 65.
7. The RCEFPF convened a symposium at the Kennedy School of Government, Harvard University in November 1990 to examine the U.S. party system and the regime regulating election financing, particularly of congressional elections. After a detailed exploration of the American system and its reforms, the symposium developed a consensus that the Canadian party system is healthier than its U.S. counterpart, in part because the traditional functions of parties — especially policy development and campaigning — have not yet been given over to non-party groups, such as Political Action Committees (PACs). See RCEFPF, *Reforming Electoral Democracy*, Vol. 4 (Ottawa: Supply and Services, 1991) Part 2:3, especially at 164-65.
8. Restraints on expenditures have always been a pillar of thinking about electoral reform at the federal level in Canada. As early as 1870 Edward Blake proposed such limits, while the Committee on Election Expenses (the Barbeau Committee) was established in 1964 with the mandate to investigate establishing such limits. K.Z. Paltiel, *Political Party Financing in Canada* (Toronto: McGraw-Hill, 1970) at 133-34.
9. Herbert Alexander, the leading expert on electoral finance legislation in the U.S.A., prepared a research study for the RCEFPF in which he described the costs of campaigning in a regime where spending is not limited. According to him the major effect of the very high costs of elections was to favour the incumbent. For example, in 1990 the re-election rate of incumbents was 96%. Alexander, "The Regulation of Election Finance in the United States and Proposals for Reform" in F.L. Seidle, ed., *Comparative Issues in Party and Election Finance* (Toronto: Dundurn Press, 1991) at 32. At one of its symposia, the RCEFPF heard more about the 1990 election:

Of the 406 incumbents in the 1990 election for the House of Representatives, 79 were unopposed, 168 faced challengers who spent less than \$25,000, and 124 faced challengers who had less than half the financial resources of the incumbent, leaving only 10 per cent of incumbents in competitive contests.

(RCEFPF, *Reforming Electoral Democracy*, Vol. 4 [Ottawa: Supply and Services, 1991] at 156.)

Any turnover which did occur was essentially because an incumbent did not run again. Other practitioners at the same

symposium estimated that a challenger in the U.S. must spend more than \$600,000 simply to achieve the same name recognition enjoyed by an incumbent.

10. Empirical studies in Canada demonstrate that public funding and spending limits together can contribute to weakening the "incumbent effect". More campaigning by a challenger can undermine the advantages which an incumbent begins with due to name recognition, etc. Keith Heintzman, "Electoral Competition, Campaign Expenditure and Incumbency Advantage" in F. Leslie Seidle, ed., *Issues in Party and Election Finance in Canada* (Toronto: Dundurn Press, 1991). Obviously, the ability of a candidate to undertake such spending is enhanced by the availability of tax credits and the promise of reimbursement. In addition, spending limits prevent the incumbent from simply drowning the challenger's message. Both forms of regulation, in other words, contribute to more competitive elections as well as to enhancing access for challengers.
11. It is worth noting that Bill C-114 did *not* implement the recommendation of the RCEFPF. In its final report, the Commission rejected the distinction between partisan and policy advertising, arguing that the distinction was too murky to be sustainable, either in practice or under the *Charter*. Therefore, it recommended that independent expenditures be permitted, but limited to \$1000 and without a possibility of pooling. See RCEFPF, *Reforming Electoral Democracy*, vol. 1 (Ottawa: Supply and Services, 1991) at 337-39, 350-56. While Mr. Justice Macleod relied heavily on a few sentences in the final report about the \$1000,00 making a "national campaign" impossible, he never distinguished between the Commission's "\$1000.00 limit," and the one enacted.
12. For a presentation of the *Oakes* test, upon which I have relied, see Peter Hogg, *Constitutional Law of Canada* 3rd ed. (Scarborough: Carswell, 1992) at 866-67.
13. As Peter Hogg writes:
 

... the requirement of a sufficiently important objective has been satisfied in all but one or two of the *Charter* cases that have reached the Supreme Court of Canada. It has been easy to persuade the Court that, when Parliament or Legislature acts in derogation of individual rights, it is doing so to further values that are acceptable in a free and democratic society, to satisfy concerns that are pressing and substantial and to realize collective goals of fundamental importance.

*Constitutional Law of Canada*, *ibid.* at 870.
14. As K.Z. Paltiel, the research director for the Barbeau Committee, wrote in 1970: "[d]espite the rising cost of election campaigns it would be rash to conclude that there is a direct relationship between the amounts spent by a party or candidate and success at the polls" in *Political Party Financing in Canada*, *supra* note 8 at 158-59.
15. The other two reasons were the following. The first reason given by Macleod J. was that the regime itself, because it limits party and candidate spending, infringes on the *Charter* (at 15). This was, not of course, the matter under consideration but it was his first reason for rejecting the Crown's argument. His third reason (at 15-16) was that the expert witnesses called by the Attorney-General were unaware that Alberta did not limit election expenditures at all. The thrust of this point is difficult to discern, since he said nothing further, but one can assume that his notion was either that elections in Alberta are democratic,

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# STARVING IN THE SHADOW OF LAW:

## A Comment on *Finlay v. Canada* (*Minister of Finance*)

Margot E. Young

By none of the standard measures of poverty, do income assistant recipients in any Canadian province receive support that raises them out of statistical poverty.<sup>1</sup> What is remarkable about this national embarrassment is that very little political will seems to exist to do anything to remedy the injustice. One might expect to hear expressions of governmental concern over the level of economic suffering to which large numbers of our citizens are condemned<sup>2</sup> or even pledges to increase income support levels so that assistance would in fact offer more than impoverishment. Instead, responses of a different sort predominate. Thus, members of the recent federal Conservative government focused on the redefinition of poverty itself, illustrating that by numerical manipulation we can reduce the number of Canadians we count as poor while leaving untouched the current distribution of income and wealth.<sup>3</sup> Or, in the case of our current federal government, promises are made to review social programmes but primarily, it appears, from the perspective of efficiency and restraint, with the probable result that what inadequate amounts we do give recipients will be made all the more stigmatized, and difficult to receive.<sup>4</sup> Even those provinces led by governments we once thought of as social democrat are often on the wrong end of the welfare reform movement. So, Ontario, reeling from its own form of income reduction, appears to be choosing to share that hardship with those least able to bear it — linking welfare reform to re-training initiatives and delaying reform until almost the end of its electoral term.<sup>5</sup> British Columbia, although notable under its recent government for some positive welfare reform, has given way to the temptation of taking a tough stand on “welfare fraud” to placate those opposed to more humane welfare regimes. Thus, British Columbia’s Social Services Minister speaks not of lessening the hardship of those on welfare but, rather, of increasing the accountability of the system and of “getting tough on abuse.”<sup>6</sup> And, all of these recent governmental responses to poverty and to the provision of social programmes have occurred against the backdrop of international concern and apparent puzzlement about our governments’ failure to deal effectively with the poverty issue.<sup>7</sup>

In the face of such political reluctance to address the real concerns of those reduced to second-class citizenship through economic deprivation,<sup>8</sup> poverty activists have turned to the courts to attempt to force governmental adherence to at least those minimum expressions of obligation towards the economically disadvantaged our legal system contains. An example of such legal manoeuvring is the recent case, *Finlay v. Canada*.<sup>9</sup> In this decision, one sees a depressing indication that the struggle for economic justice is likely to meet with no more sympathetic or understanding an environment in our courts than it has in the legislatures across our land. This comment is a brief discussion of the Court’s findings in *Finlay*. In particular, the implication of the legal issues raised in the case for future anti-poverty litigation will be explored.

The Supreme Court of Canada’s decision in March 1993 brought to an end Robert James Finlay’s extended trek through the Canadian courts. The journey began in 1982 when Finlay sought a declaration in the Federal Court that payments made by the federal government to the Manitoba government pursuant to the *Canada Assistance Plan*<sup>10</sup> were illegal. The *Canada Assistance Plan* (CAP), enacted in 1966, authorizes the federal government to enter into agreements with individual provinces to share up to fifty percent of the cost of eligible provincial social assistance programmes.<sup>11</sup> Finlay claimed that because the provincial social assistance plan to which the federal payments were contributory did not comply with the conditions CAP imposed on federal cost-sharing arrangements, these payments lacked statutory authority. He maintained that they failed to conform for two reasons. First, Finlay argued that CAP allowed federal cost sharing only if the province provided assistance that at least fully met the basic requirements of recipients.<sup>12</sup> Finlay charged that Manitoba’s *Social Allowances Act*<sup>13</sup> (SAA) which authorized, in certain circumstances, the reduction of a social assistance recipient’s monthly allowance below the level of basic requirements as set by the province’s own rate, was in breach of CAP.<sup>14</sup> Finlay pointed to his own situation where, because of the provincial government’s desire to recoup

previous overpayments of benefits, his monthly assistance rate was reduced below the level required to meet his basic needs. This alteration of Finlay's benefits began in February of 1974 and amounted to a 5 per cent deduction from Finlay's monthly living allowance. The deduction plan was to continue for the next ten years — at which point the overpayment would be recovered. Left without an adequate income to live on, Finlay was forced to go without food for three days a month. Only after Finlay lost sixty pounds did the deductions stop.<sup>15</sup> Finlay's second argument was that CAP stipulated that the provincial government set assistance rates. In Manitoba's case, municipalities often set the rates.

It took Finlay four years, until December 1986, to establish that he could get standing to bring such an action. The Supreme Court granted Finlay public interest standing, accepting that "there [was] no other reasonable and effective manner in which the issue of statutory authority raised by the respondent's statement of claim may be brought before a court."<sup>16</sup> An additional six and a half years later, the Supreme Court of Canada ruled on Finlay's substantive claims, holding that the federal government, in making contributory payments to the Manitoba social assistance scheme, was not in contravention of CAP.

This comment will not discuss Finlay's argument that the provincial government alone must set the rates of any cost-sharing programme under CAP, nor will it review the Court's rejection of this point. Instead, this comment focuses on the argument that CAP authorizes federal contribution to only those plans which fully cover claimants' necessities, a concern that speaks more directly to the issue of levels of economic support our society guarantees to economically disadvantaged individuals.

Finlay's claim was successful in both the Federal Court, Trial Division and the Federal Court, Appeal Division. At trial, Justice Teitelbaum concluded that CAP and the federal government's agreement with Manitoba did indeed make cost-sharing contingent upon provincial assistance rates fulfilling a recipient's basic needs.<sup>17</sup> As the deduction of overpayments reduced support below this level, provincial obligations under CAP were not met. The provincial governments had argued that CAP required only that provincial assistance rates reflect a simple consideration of individuals' basic requirements. Allowances levels could otherwise be arbitrarily set; the provincial governments have no duty to meet fully basic needs. The Trial decision was upheld on appeal by Justice MacGuigan in the Federal Court of Appeal. Provincial assistance schemes were determined to be required by CAP to "fulfil" or "meet" a recipient's basic requirements.<sup>18</sup>

The majority opinion of the Supreme Court of Canada — written by Justice Sopinka and concurred in by Chief Justice Lamer and Justices Gonthier, Iacobucci, and Major — overturned these lower court results. The decision is notable for the compromise position it reached between the provincial

governments' claim that CAP demands only cursory attention to a claimant's basic requirements and Finlay's position that a complete fit between basic requirements and provincial assistance levels is mandated. The Court addressed the issue in two stages: it first assessed CAP's requirements and, second, it evaluated the extent to which Manitoba's legislative scheme met such requirements.

Sopinka J. began the first stage of analysis by stressing the purposive nature of the current interpretive inquiry, presumably because of the special nature of CAP as a federal spending statute.<sup>19</sup> As an aid to this task, he identified the general objectives underlying the statute as expressed in CAP's preamble. The preamble reads as follows:

WHEREAS the Parliament of Canada, recognizing that the provision of adequate assistance to and in respect of persons in need and the prevention and removal of the causes of poverty and dependence on public assistance are the concern of all Canadians, is desirous of encouraging the further development and extension of assistance and welfare services programs throughout Canada by sharing more fully with the provinces in the cost thereof ....

In framing what he saw to be CAP's objective, Sopinka J. focused on only the last portion of the preamble. Thus he read the first clause of the statement as merely supporting the statute's objective of encouraging the further development and extension of assistance programmes throughout Canada by way of cost-sharing agreements. The recognition in the preamble of a shared concern about poverty, dependence, and adequate assistance did not, for Sopinka J., function as a statement of parliamentary purpose informing the legislative provisions. By so limiting the statute's purpose, Sopinka J. was able to give a more restricted range to the remedial aspirations of the statute, and to allow more flexibility to federal/provincial agreements reached under it. He set the stage for allowing substantial provincial variance under CAP.

Having thus identified the underlying statutory purpose, Sopinka J. turned to the question of the level of assistance CAP obligates provinces to provide if federal cost-sharing is desired. The key provision with respect to this question is section 6(2)(a) of CAP. The section states that the province will provide financial assistance to any person in need in an amount that "takes into account" the basic requirements of that person. At issue was what that phrase requires participating provinces to do. Sopinka J. compared this section with similar wording contained within section 2(6)(b): provinces in their determination of who constitutes a person in need must "take into account" the budgetary requirements and resources of that person. Convinced that these two sections imply different standards of consideration on the part of the provincial governments, despite the similarity of their phrasing, Sopinka J. looked to the statute's French text for assistance. Here the phrases are indeed rendered differently,<sup>20</sup>

enabling Sopinka J. to conclude that section 6(2)(a) requires assistance to be provided in a manner that is simply “compatible” or “consistent” with an individual’s basic requirements,<sup>21</sup> as opposed, that is, to demanding that assistance fulfil or equal basic needs. So, on the basis of the section at stake in Finlay’s claim — section 6(2)(a) — an exact fit between assistance levels and basic needs is not required.

What is required, however, is not clear. Sopinka J. did go on to distinguish between the requirement of compatibility and that of mere consideration, stating that provinces will not meet the standard imposed by section 6(2)(a) by simply and only putting their minds to an individual’s basic requirements and then proceeding to furnish whatever level of support they choose, even one that is far from adequate. However, neither is it necessary for provincial assistance to equal or fulfil individuals’ basic requirements. Such a rigid stipulation would, Sopinka J. held, clearly belie Parliament’s intention to encourage provinces to develop programmes.<sup>22</sup> So the standard lies somewhere between an exact fit and no fit at all.

The Court provided no further articulation of the standard, and thus provincial assistance remains subject only to a broadly constituted standard of “consistency” or “compatibility”. However, some further indication of what at least will not be found to be inconsistent was provided by the Court’s application of this standard to the Manitoba legislation. The Court did not consider the actual amounts Manitoba pays to its assistance recipients, since Finlay’s challenge to the scheme was not directed to the adequacy of regular benefits but to the effect deductions from these benefits had. Sopinka J. did find, however, that since deductions, over time, only recover amounts that should not have been paid out in the first place, there was no issue of non-compliance with CAP.<sup>23</sup> Finlay’s challenge fails. Looked at over the whole span of Manitoba’s payments to Finlay, the deductions are countered dollar for dollar by the original overpayments such that Finlay’s “net” receipt of assistance equals the general Manitoban rate. Moreover, the federal statute contemplates deductions for overpayments, indeed mandates them.<sup>24</sup> And because the provincial statute qualifies the Director’s authority to deduct past overpaid amounts from current payments by stipulating that it is to be done only absent imposition of “undue hardship” and provides for review of such deductions by an appeal board, Sopinka J. concluded that such a reduction of an individual’s payments did not constitute a violation of the federal section’s requirement of compatibility. This was despite the evidence before the Court as to the effects of such a deduction on Finlay’s economic situation<sup>25</sup> (and, incidentally, of the incoherence of distinguishing between the hardship all welfare recipients find themselves in and “undue hardship”).

Justice McLachlin’s dissent — concurred in by Justices L’Heureux-Dubé, Cory, and La Forest — reached the opposite conclusion, but by way of an analysis that is different in only one major respect from the majority’s. McLachlin’s judgment is sensitive to the particular sort of legislation CAP is — social welfare legislation — and to the practical realities of life on social assistance. She dealt less abstractly and formally with the interpretive and practical judgements she was called on to make.

Like Sopinka J., McLachlin J. arrives at the starting point that section 2(6)(a) of CAP dictates compatibility between the basic requirements of a person in need and the provincial aid provided. She did this, however, against a backdrop of a more generous parsing of CAP’s preamble such that the statute’s purpose is both to ensure the provision of adequate basic allowances and to encourage assistance with respect to needs beyond basic requirements. To confirm her interpretation of section 2(6)(a), McLachlin J. looked to the legislative debate around the enactment of CAP and the applicability of the “adequacy principle” — the notion that social welfare legislation should be interpreted to provide for adequacy of assistance. She concluded that this interpretation was best in accord with the spirit of CAP as social welfare legislation and with the preamble.

Where the majority and minority analyses differ in result is over the evaluation of the Manitoban scheme and its administration in terms of this (shared) understanding of CAP’s formal requirements. McLachlin J., like Sopinka J., did not examine the adequacy of regular assistance rates under the SAA, as she accepted that the level of assistance necessary to satisfy CAP’s requirement was to be fixed by the provinces. However, she did conclude that as Manitoba’s allowance for “basic necessities”<sup>26</sup> covers only and exactly those items covered by “basic requirements” in CAP, any reduction in these payments would result in assistance below the minimum level specified in CAP. Thus as long as deductions for overpayment did not deprive recipients of the amount of income the provincial government itself had determined was consistent with their basic requirements (the SAA regular assistance rates), such deductions would be consonant with CAP.<sup>27</sup> In Finlay’s situation, this was not the case. Deductions reduced his income below the amount set by general assistance rates in SAA; overpayments had been used to reimburse third parties and thus were not available to be recouped separate from and above his monthly assistance rate. Nor had Finlay any other source of funds to supplement the deficit created by the deductions. McLachlin J. refused to find Finlay’s situation anomalous and discountable as simply an improper application of the SAA, instead concluding that, given the scale and scope of provincial deductions demonstrated in evidence,<sup>28</sup> Manitoba’s policy with respect to its own statute was clearly in violation of CAP. Such

government policy did not guarantee to assistance recipients allowances consistent with their basic requirements as understood by the provincial legislation itself. Notably, McLachlin J. refused to adopt an accounting approach that averaged payments over a long term. Rather, her analysis rested on the monthly implications of provincial deductions. To do otherwise, McLachlin J. asserted, would be to overlook the “human reality of persons in need” and to deny basic necessities in direct opposition to CAP’s philosophy. At this stage, then, McLachlin J.’s broader reading of CAP’s preamble became important.

One other way of understanding the difference in perspectives underlying Sopinka J.’s and McLachlin J.’s opinions lies in the respective stance each appears to take toward the federal spending power. Both Justices agree that the federal involvement with provincial assistance programmes depends entirely upon the federal government’s spending power. Spending statutes are peculiar and controversial constitutional entities. What the federal government does through agreements reached under CAP is hold out the carrot of financial assistance to influence or shape provincial policy on matters purely within provincial jurisdiction, thus arguably sidestepping the division of powers as set out in the Constitution. The importance of this fact for the majority is reflected in its refusal to interpret CAP as dictating precise terms to which provincial legislation must adhere. Instead, only substantial adherence to the objectives of CAP, as expressed in a narrowly read preamble, is mandated. Sopinka J.’s reluctance, in this instance, to read CAP as dictating specific, rigid terms for provincial cooperation may reflect a more general sensitivity to the power federal spending gives the federal government to circumvent the formal division of powers in the Constitution.

The dissent, on the other hand, appears less concerned about this potential displacement of provincial powers. McLachlin J. characterized the shared-cost agreement as essentially co-operative, stating that “the provinces may participate; they are not obliged to.”<sup>29</sup> Thus, McLachlin J. may, with respect to the politics of federalism, be generally less wary than Sopinka J. about a finding that the provincial scheme in question is more tightly bound to certain conditions. And, while the possibility of differing judicial attitudes on this federalism question did not result in different interpretations of section 2(6)(a) of CAP, it may still have been operative in conclusions reached about the implications of such an interpretation for Manitoba’s actual legislative scheme.

What message can those interested in using the legal system to address the needs of welfare recipients take from this case? One possible message is an optimistic one. Despite the majority’s failure to recognize and credit the practical effects of Manitoba’s deduction scheme — the monthly deprivation and hardship it occasions — and even though the Court did not regard CAP as holding provinces to payments

which are exact fits with basic requirements, the Court did make one useful finding. Provincial income assistance rates, to be part of programmes eligible for federal funding, cannot be completely freely set. Provinces cannot arbitrarily determine assistance rates. While the Manitoba legislation was found not to display this kind of problem, more recent provincial assistance rates — some the product of quite dramatic cutbacks — might.

Several provinces are considering changes in income assistance rates and at least one province has already brought in quite severe reductions.<sup>30</sup> Arguably, given that current rates are already under most poverty line measures, new lower rates will be manifestly not consistent with individuals’ basic requirements. As absolute reductions, not off-set by higher payments in other months as was the case in *Finlay*, the new rates might well challenge even Sopinka J.’s understanding of “consistent”. Of course, such a conclusion would require a quantitative examination of what level of support is entailed by CAP’s reference to “basic requirements” — an issue which both the majority and minority opinions in *Finlay* were able to duck, as *Finlay* was challenging only his allowance after deductions. However, were a province’s assistance rates to provide a regular allowance that clearly could not provide for, say, both food and shelter needs, a challenge to such a rate might succeed. After all, Sopinka J.’s judgement says very bluntly that provinces must provide assistance rates that are consistent with basic requirements. Nothing is mentioned about a province’s prerogative to determine whether rates are consistent or not.<sup>31</sup> And, were the claimant able also to establish that other factors such as arbitrary budget reductions, political antagonism to assistance recipients, or unreasonable concerns about fraud were primary motivations for the reductions — precisely those motivations currently observable in provincial welfare reform politics<sup>32</sup> — it would be hard to argue that even subjectively, from the province’s own perspective, the rates should be considered consistent with basic requirements.<sup>33</sup>

But how probable is it that the judiciary, especially those sitting on the Supreme Court, will find a breach of CAP in these circumstances? Commentators feel that such an outcome is politically unlikely.<sup>34</sup> After all, current income assistance rates, including Manitoba’s at the commencement of *Finlay*’s case, are already well below the poverty line established by Statistics Canada’s low income cut-off lines. This fact did not seem to give pause to either Sopinka J. or McLachlin J. As well, it is important to remember that underlying this issue is the larger question of the constitutionality of the exercise of the federal spending power. If provinces want federal economic participation in provincial programmes to continue, they are put in the tricky position of arguing for provincial control within the larger context that, by tolerating the use of federal spending to influence provinces somewhat, legitimates a reduction of this control. So provinces, in assertion of their ability under CAP to set assistance rates with only limited

control exercised by CAP's terms, will have to argue for such autonomy without also pushing the courts to find, precisely in defense of provincial autonomy, shared-cost agreements constitutionally untenable. Too rigorous a control exercised by CAP over contrary provincial desires to lower assistance rates might politically doom CAP's programmes by convincing provinces to discard this balancing act and to attempt simply to persuade the courts to curtail constitutionally the exercise of the federal spending power. Federal money might no longer be seen as sufficient enough an incentive or bargain if it came attached with too economically onerous a set of conditions. Thus, were a challenge to provincial rates mounted that promised some chance of success, it is possible that the question of the constitutional legitimacy of the federal spending power — a consideration that, in *Finlay*, Sopinka J. implicitly and McLachlin J. explicitly steered clear of — would directly arise.<sup>35</sup> What *Finlay* attempted to do, after all, was use the federal spending power, as it has been crystallized in CAP, to force Manitoba's adherence to certain social policy goals not otherwise favoured by the province. Courts themselves might be reluctant to allow such circumvention of the Constitution's jurisdictional assignment if the conflict between the economic coercion the spending power enables the federal government to wield and the provinces' political autonomy became too apparent.

But more important, perhaps, to consideration of the import of *Finlay*, are recent indications that CAP itself is destined to become only an interesting historical artifact. Under the previous federal Conservative government, there were indications that when the current federally-imposed ceiling on CAP contributions to British Columbia, Ontario, and Alberta expired in 1995,<sup>36</sup> the federal government would retire the scheme itself. The new federal government's calls for revision and re-thinking of social programmes hint at a similar threat to CAP's continued existence.<sup>37</sup> Thus with federal/provincial cost-sharing agreements as currently structured by CAP likely on the way out, whatever import the principles established in *Finlay* will have is uncertain and probably irrelevant.

This last point brings consideration of the underlying politics of *Finlay* full circle. Without a more favourable political environment for social welfare issues, attempts to use the courts to force observance or creation of legal (non-constitutional) obligations towards individuals in economic need remain vulnerable to shifts in legislative will.<sup>38</sup> Litigation such as *Finlay* is thus politically contained by what political actors will ultimately tolerate and by what legal opportunities political actors are willing to leave open. Given the current antipathy toward social programmes discussed in the opening paragraphs of this comment, it may be much more effective to

engage directly with these politics instead of hoping to circumvent them through legal action. □

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### Endnotes

1. Statistics from 1991 show that in most provinces single, employable recipients receive less than 50% of Statistics Canada's low income cut-off line. Most other recipients receive amounts clustering around 60 or 70% of this poverty line (National Council of Welfare, *Welfare Incomes 1992* [Ottawa: Minister of Supply and Services Canada, 1993]). How poverty is measured is far from uncontroversial and will, of course, affect the degree to which income assistance rates are considered to raise individuals out of poverty. Two types of approaches are identifiable. The first relies on an absolute measure of poverty that is determined by simple cataloguing of the essentials necessary for physical survival. Whatever items fall within this list are priced, and the resulting sum sets the level below which a person is considered to be living in poverty. Such an indicator is independent of the levels at which others in society are living. For an example of an articulation and defense of an absolute approach to defining poverty, see Christopher A. Sarlo, *Poverty in Canada* (Vancouver: The Fraser Institute, 1992). A less extreme adherence to an absolute measure is illustrated by the Montreal Diet Dispensary Guidelines, issued by the Montreal Diet Dispensary in association with the Montreal Council of Social Agencies. The second type of poverty measurement sets up a relative indicator of poverty. Statistics Canada's "Low Income Cut-Offs" are the most well-known of these and are based on the finding that, on average, Canadians spend 36.2% of their gross income on food, clothing, and shelter. Any family that must spend at least an additional 20% of income on these items, is considered to be in a low income group. The measurement is thus formulated relative to the standard of living others in society enjoy (David P. Ross & E. Richard Shillington, *The Canadian Fact Book on Poverty-1989*, [Ottawa/Montreal: The Canadian Council on Social Development, 1989]).
2. Statistics Canada has reported that the poverty rate in 1992 was 16.8%, compared with a rate of 16.5% in 1991. Thus, an additional 139,000 people fell below Statistics Canada's low income cut-off line in 1992. See Geoffrey Yorke, "Welfare offers radical reform of safety net: Newfoundland to help poorest poor" *The Globe and Mail* (15 December 1993).
3. Geoffrey Yorke, "Tories determined to redraw poverty line" *The Globe and Mail* (14 April 1993); Jonathon Ferguson, "Poverty numbers inflated, PCs say" *The Toronto Star* (9 June 1993).
4. Public opinion seems to indicate support for this approach to reform of social programmes. A public opinion poll conducted by Decima Research in August, 1992 found that only 28% of Canadians believed that income support was a right that should not be linked to education or training requirements. Of those polled, 79% felt it was time for a serious review of social programmes. See "Public seeks welfare changes: More education favoured in poll" *The Globe and Mail* (25 August 1993).
5. Ontario's government has been examining the question of welfare reform for over three years. The government's most recent release of proposals, in a report entitled *Turning Point*, was released on July 8, 1993. Implementation of welfare reform

- was recently delayed until Spring 1994. The government hopes to have its reforms in effect by 1995, the year the New Democrats must seek re-election. Welfare advocates are not optimistic that the Ontario proposals will signal a social assistance programme that is more sensitive to the circumstances income assistance recipients face, or the levels of poverty that currently characterize their economic situations. See Martin Mittelstaedt, "Ontario to overhaul welfare: 'Penalty planned if recipients don't acquire job skills'" *The Globe and Mail* (9 July 1993); Richard Mackie, "Ontario likely to delay bill on welfare reforms: Minister cites cost, complexities of system" *The Globe and Mail* (16 November 1993).
6. Some recent changes to the administration of British Columbia's income assistance system include mandatory job search report cards for single employable individuals and childless couples, pilot programmes of required in-person cheque pick-up from local ministry offices, alteration of the single parent exemption policy such that a single parent will be considered employable when her youngest child is 12 years of age rather than 19. See Ministry of Social Services, *News Release*, January 20, 1994; Keith Baldrey, "Special investigations unit set up to fight welfare fraud," *The Vancouver Sun* (7 May 1993).
  7. In June of 1993, the Committee on Economic, Social, and Cultural Rights, acting under the auspices of the Economic and Social Council of the United Nations, conducted its second periodic review of Canada's performance as a signatory under *The International Covenant on Economic, Social, and Cultural Rights*. Specifically, the Committee considered Canada's adherence to articles 10 through 15 of the *Covenant*. These articles provide for a range of social and economic rights including, for example, the right to an adequate standard of living (Article 11). Concern was expressed by the Committee over the persistence of poverty in Canada and the observable lack of progress Canada has made over the last decade in alleviating the severity of poverty, particularly with respect to specially vulnerable groups. The Committee was also concerned that individual Canadians entirely dependant on welfare payments did not thereby derive an income which was at or above the poverty line. The Committee noted that there were no fundamental difficulties impeding Canada's application of the *Covenant*. Despite the fact that it had been affected by the recent recession, Canada still enjoyed one of the highest rates of economic growth during the 1980's (United Nations Economic and Social Council, Committee on Economic, Social, and Cultural Rights, "Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social, and Cultural Rights (Canada)" 10 June 1993).
  8. For discussions of the negative consequences of poverty with respect to political resources and participation in civil society, see R. Miliband, "Politics and Poverty" in D. Wedderburn, ed., *Poverty, Inequality and Class Structure* (Cambridge: Cambridge University Press, 1974); Martha Jackman, "'Constitutional Contact with the Disparities in the World': Poverty as a Prohibited Ground of Discrimination Under the Canadian Charter" (unpublished manuscript on file with author).
  9. [1993] 1 S.C.R. 1080.
  10. R.S.C. 1980, c. C-1.
  11. Manitoba and the Federal government reached such an agreement in March 20, 1967. Federal funding to provincial and territorial programmes takes a variety of forms in addition to CAP. Other forms include equalization payments through which the federal government effects wealth transfers from the wealthier to the poorer provinces, grants for specific programmes or projects, and block-funding calculated according to a per-capita formula.
  12. Basic requirements are defined in section 2 of CAP as covering food, clothing, shelter, fuel, utilities, household and personal supplies.
  13. C.C.S.M., C. s. 160.
  14. Finlay was not arguing for a right to a particular level of income assistance. Rather, he argued that the Manitoba government, having made a decision about what was adequate assistance when it set its assistance rates, could not pay individuals below this level.
  15. Presumably, the deductions stopped for compassionate reasons. SAA allows that overpayments are to be recovered except in circumstances where such recovery would occasion hardship for the assistance recipient. See *infra* text associated with notes 24-25.
  16. *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607.
  17. (1989), 57 D.L.R. (4th) 211.
  18. [1990] 2 F.C. 790.
  19. For a discussion of the federal spending power, see *infra* text on p.35 and accompanying notes.
  20. The phrase "dans une mesure ou d'une manière compatibles avec ses besoins fondamentaux" (emphasis added) appears in subsection 6(2)(a) and the requirement that the province "tienne compte ... de ses besoins matériels et des revenus et ressources" (emphasis added) constitutes paragraph 6(2)(b).
  21. Section 6(2)(b) on the other hand, according to Sopinka J. establishes the requirement that the factors it lays out are to be "considered" in the resulting determination.
  22. Of course, had Sopinka J. read the preamble so as to allow its initial recognition of concern over the adequacy of assistance to persons in need to inform the purpose of CAP, simple encouragement of programme development — regardless of the support levels — could not be properly understood as Parliament's goal. That is, the objective would have to be to encourage adequate and effective programmes, not simply a greater number of programmes.
  23. Sopinka J. looked generally at the provisions in SAA and its accompanying regulations. Section 20(3) of the *Act* currently allows deduction from social allowance payments of overpayments, provided that such deduction does not amount to undue hardship.
  24. Provisions for re-payment are included within the federal statute: section 5 of CAP provides for federal and provincial sharing of the cost of overpayments, while section 3 requires provinces to make provision for recovery of such overpayments.
  25. See *supra* text associated with notes 14-15.
  26. Section 1 of the Manitoba legislation uses the term "basic necessities".
  27. Like Sopinka J., McLachlin J. found the overpayment recovery provisions of SAA formally consistent with CAP.
  28. It was shown that 11% of the 5,000 recipients of aid were reduced below the basic requirement level set by the principal legislation due to provincial administration of the statutory power to deduct overpayments.
  29. Commentators have expressed concern about such a simple and voluntaristic understanding of the force the federal spending



- power lends to federal government initiatives in otherwise provincial areas of control. A conditional offer of federal funds is of course formally voluntary; provinces are free to reject the offer. However, realistically, such offers are politically difficult to turn down, particularly since provincial residents will continue to pay federal taxes which fund the shared programme for other provinces (Peter Hogg, *Constitutional Law of Canada, 3rd Edition* [Scarborough: Carswell, 1992]). As well, the federal government continues to occupy the tax room required to co-fund such programmes, thus depriving provinces of the availability to generate funding on their own for their own programmes through provincial taxes. See Andrew Petter, "Meech Ado About Nothing? Federalism, Democracy and The Spending Power" in K.E. Swinton & C.J. Rogerson, eds., *Competing Constitutional Visions: The Meech Lake Accord* (Toronto: Carswell, 1988) at 191.
30. Alberta has recently lowered its social assistance rates. In an attempt to reduce the provincial deficit, the Alberta government has cut \$39 million dollars from welfare payments. This has meant a very substantial reduction of monthly rates. The new rates will give a single, employable adult \$427 a month for basic requirements as compared with \$521 before. The allowance a single parent with one child receives has gone from \$1013 to \$899. See Jim Morris, "Poor will suffer under welfare cuts, agencies contend" *The Vancouver Sun* (21 August 1993); "Alberta cuts welfare, justice and farm programs" *The Vancouver Sun* (20 August 1993).
31. McLachlin J. does, in her minority opinion, note that the level of assistance felt necessary to meet basic requirements is fixed by the provinces. However, McLachlin J. speculates that provinces cannot arbitrarily reduce payments below the amount required for "basic requirements" and still claim under CAP.
32. See *supra* text associated with notes 5-6.
33. Arne Peltz, "The *Finlay* Decision: What Next?" (on file with author).
34. See for example, Peltz, *ibid.*
35. The Supreme Court has yet to rule directly on the issue of the constitutional legitimacy of the federal spending power. In *Re Canada Assistance Plan*, [1991] 2. S.C.R. 525, British Columbia brought a constitutional challenge to federal legislation amending CAP which placed a five per cent annual cap on growth of federal contributions to the three economically healthy provinces of Ontario, Alberta, and British Columbia. The result of such amendment was unilaterally to alter the terms of the agreements the federal government had reached under CAP with each of these provinces. In answering one particular argument raised by the intervening province of Manitoba, Sopinka J. for the unanimous Court said that the CAP cost-sharing scheme and the fact that the CAP amendments resulted in the withholding of federal money previously granted to fund a matter within provincial jurisdiction did not amount to federal regulation of that provincial matter. A number of cases have been dealt with this issue in the lower courts, the most recent of which is *Winterhaven Stables v. Canada*, (1988) 53 D.L.R. (4th) 413 (Alta. C.A.), in which CAP was upheld as constitutional.
36. See discussion *ibid.*
37. Recent newspaper accounts cite unnamed federal sources as indicating that the CAP programme could be replaced within the next two years in favour of more direct delivery of federal money to the poor. See Geoffrey Yorke, "Fishery may be test of social reforms" *The Globe and Mail* (12 February 1994).
38. Commentators have argued that the solution to this problem is to constitutionalize social welfare rights, thus insulating such protections from political alteration. However, it is far from uncontroversial that the judiciary is a reliable overseer of the interests of the economically disadvantaged. As evidence of this, one need only be reminded of the obliviousness exhibited by the majority in *Finlay* to the hardship individuals like Finlay experience when monthly assistance rates are reduced. In any case, the issue of constitutionally entrenched social rights has been discussed quite extensively, see, for example: Havi Echenberg *et al.*, *A Social Charter For Canada: Perspectives on the Constitutional Entrenchment of Social Rights*, (C.D. Howe Institute, 1992); Joel Bakan and David Schneiderman, eds., *Social Justice and the Constitution: Perspectives on a Social Union for Canada* (Ottawa: Carleton University Press, 1992).

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**Jane Jenson / *Somerville v. Canada (A.G.)* / Endnotes  
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(fn. 15 continued)

- too, or that there are alternative regimes available. As will be discussed below, the Alberta regime (which is modelled on Ontario's in many ways) is designed to achieve other goals than those that have always been at the heart of the federal regime. For comparisons of the rationales for and forms of regimes see F. Leslie Seidle, *Provincial Party and Election Finance in Canada* (Toronto: Dundurn Press, 1991).
16. Richard Johnston, André Blais, Henry E. Brady and Jean Crête, *Letting the People Decide* (Montreal, McGill-Queen's, 1992). The authors were also suspicious that "lag effects" might be in play, which would mean that any effect would appear only after a lag, and would not be reflected in correlations of action and attitudes at a single point in time.
17. Indeed, in subsequent pages they came back to the problem from another direction, performing an analysis which led them to conclude, for example, that "if news drove the immediate aftermath of the debates, advertising dominated the endgame", and each boosted support for the FTA. Johnston *et al.*, *Letting the People Decide*, *ibid.* at 166.
18. K.Z. Paltiel, *Political Party Financing in Canada*, *supra* note 8 at 142.
19. It is worth noting that all forms of expression by "third parties" are not limited. Internal communications within organizations (companies, trade unions, associations) are not — and never have been — prohibited under the federal regime.
20. F.L. Seidle and K.Z. Paltiel, "Party Finance, the Election Expenses Act, and Campaign Spending in 1979 and 1980" in Howard R. Penniman, ed., *Canada at the Polls, 1979 and 1980: A Study of the General Elections* (Washington: AEI, 1981) at 276-79.
21. The Alberta legislation also differs from Ontario in significant ways: it does not set spending limits, for example. Nonetheless, the Legislative Assembly explicitly saw its regulations as forming a package, which included disclosure, designed to regulate the contributor-recipient relationship in the direction of transparency.
22. RCEFPF, *Reforming Electoral Democracy*, Vol. 1 (Ottawa: Supply and Services, 1991) at 328.

# TERMINAL CARE, TERMINAL JUSTICE: THE SUPREME COURT OF CANADA AND SUE RODRIGUEZ

Roxanne Mykitiuk and  
Jeremy T. Paltiel

On February 12, 1994, Sue Rodriguez ended her life. According to her friend and supporter, M.P. Svend Robinson, who was present at her death, she was assisted by an anonymous physician who attended at her home and helped her accomplish the manner of death she had publicly declared she wanted. She controlled — to the extent that someone with a relentless, intractable condition could — the circumstances, timing and manner of her death. Sue Rodriguez achieved in her death what she could not persuade the Supreme Court of Canada to do during her lifetime. By placing the manner of her death on the public record, she forcefully demonstrated that death is indeed part of life. Bearing witness to her own cause, she preserved the power to take an initiative with her life by determining the time and manner of her death.

In the case of *Rodriguez v. British Columbia*,<sup>1</sup> Sue Rodriguez, a 42 year old woman suffering from amyotrophic lateral sclerosis (ALS), an untreatable intractable neurological disorder, asked the court to find that section 241(b) of the *Criminal Code* violated her individual rights under the *Charter*. That provision of the Code makes it an indictable offence to aid or abet a person to commit suicide, whether suicide ensues or not. In particular, Sue Rodriguez argued that, while she would prefer to continue to live as long as she still has the capacity to enjoy life, she was suffering from an incurable disease, understood the inevitability of how her life would end, and wished to control the circumstances, timing and manner of her death. However, she argued, by the time that she is no longer able to enjoy life, she will be physically unable to terminate her life without the assistance of a physician. Such assistance would constitute a violation of the *Criminal Code*, which prohibits the assistance of suicide. This result, she maintained, deprived her of her rights to live her remaining life with the inherent dignity of a human person, the right to control what happens to her body while she is living, and the right to be free from governmental interference in making fundamental personal decisions concerning the terminal stages of her life (531). In a five to four decision, the majority of the Court upheld the constitutionality of the

*Criminal Code* provision with the result that Ms. Rodriguez could not legally engage in a physician-assisted suicide.

The Supreme Court of Canada judgment does not inquire deeply into the circumstances of Sue Rodriguez, and contains little information about her. In one brief passage, it contains a description of her condition:

Sue Rodriguez is a 42-year-old ... mother of an 8 1/2-year old son. [She] suffers from amyotrophic lateral sclerosis ...; her life expectance is between 2 and 14 months but her condition is rapidly deteriorating. Very soon she will lose the ability to swallow, speak, walk and move her body without assistance. Thereafter she will lose the capacity to breathe without a respirator, to eat without a gastrostomy and will eventually be confined to a bed.

Ms. Rodriguez knows of her condition, the trajectory of her illness and the inevitability of how her life will end ... (530-31).

In the majority opinion, Sopinka J. refers to Sue Rodriguez by name only once, whereas McLachlin J. and Lamer C.J., respectively, refer to her by name no fewer than fifteen times. Cory J., in the course of a concurring opinion of only two pages, does so four times (four times more than the majority judgement which is fifteen times longer). These figures are symbolic of the manner in which the Justices looked at the circumstances of her case. The majority was preoccupied with abstract principles, not Sue Rodriguez, yet, the dissenters also failed to compose decisions appropriate to the circumstances of the terminally ill.

The judgement is carefully crafted, engaging at the level of legal principle rather than considering the life of Sue Rodriguez. Writing for the majority, Sopinka J. based his opinion on arguments concerning the state's interest in preserving the "sanctity of life". This line of argument led the court to inquire into the meaning of life, and, in the opinion

of Sopinka J., to decline to second-guess the legislators' prerogative to protect life by prohibiting anyone to assist in a suicide. Basing his opinion entirely on section 7 of the *Charter*, Sopinka J. engaged in a two-stage analysis: he acknowledged in the first place that section 241 (b) impinged on the security interest of Sue Rodriguez in controlling the timing and manner of her death, but argued in the second place that the resulting deprivation was not contrary to the principles of fundamental justice (584). Sopinka J. found the notion of the 'sanctity of life' to have a double aspect in section 7: first, as one of the three values protected by section 7 (life, liberty and security of the person), and then again as an aspect of the principles of fundamental justice with respect to "the state interest in protecting life" (595). The opinion makes no effort to reconcile what appears to be a contradictory usage of "sanctity of life" with respect to the same section of the Charter — first, as an individual right to life and, second, as a societal or state interest which may be employed to temper or restrict individual rights.

Overlooked by the majority of the Court was the important question concerning the substantive nature of the life protected by section 7. Writing in dissent, both McLachlin J. and Cory J. saw death as an integral component of life and therefore, the right to die with dignity as an essential component of the right to life. Relying on the judgement of McEachern C.J.B.C., who held that Sue Rodriguez was seeking to die with dignity, Lamer C.J. substantially agreed with this interpretation.

At the heart of the issues covered by the Rodriguez case is an argument about the relationship of embodiment to agency. By agency we mean the capacity to act as well as the legal autonomy or liberty to make choices to act. While no one would seriously take issue with the notion that embodiment is essential to personhood and therefore a necessary condition for rational agency, the operative issue in the Rodriguez case is whether rational agency may be employed against one's own embodied existence through the action of another.<sup>2</sup> Sue Rodriguez required medical assistance in order to maintain the dignity of her life by enabling her to have some autonomy over the timing and manner of her death. The "fierce will" which many observers detected in Sue Rodriguez centred on her determination to have some control over her life in a body which progressively slipped out of the control of her mind. Choosing the time and manner of her death would be the final effort to exercise control over her body even though this would require her to seek the assistance of a physician as her agent. To deny her that right would guarantee that she would be deprived of agency not just within her own body as a consequence of a progressive, degenerative disease, but also over her body through communicating her desires to others. To Sue Rodriguez and others like her, it is

precisely the circumstances of her own embodiment which led her to exercise a choice to end her embodied existence.

Sopinka J. chose to regard capacity to act as a "quality of life" issue, and noted the expansive interpretation of palliative care in medical jurisprudence as an adequate guarantee of patient autonomy in exercising choice regarding end-of-life decisions. The fact that Sue Rodriguez chose not to avail herself of the option to shorten her life by choosing palliative care over life-prolonging medical procedures and technologies proves that this was not the issue for her. Rather, it was precisely her own autonomy and agency as the essential attributes of her own personhood that were at issue. She wanted to prove with her death not just her abhorrence of dependency, but her capacity to act. To die while still capable of organizing and communicating her choices was the only reason why she would choose to put the circumstances of her death on the public record. Instead of negating societal values, Sue Rodriguez reaffirmed the supreme value attached to agency in our society — not just the liberty to act, but the value of action.

Sue Rodriguez regarded her body as her own property, and by implication as an instrument of her will. When it was no longer capable of performing as that instrumentality, she wanted to end her life. As she put it: "Whose body is this? Who owns my life?" Her attitude was, therefore, symptomatic of the ways in which embodiment is viewed in our culture. By looking at her own body as property, she reflects the way in which the liberal emphasis on rational agency — the essence of liberty — transforms embodied existence into the object of will. Her language presupposes a division of the self between will and embodiment. For her, physician-assisted death was a way to impose reason's authority over her increasingly recalcitrant body. It was the final restoration of the norms of our society. The nature of Sue Rodriguez' disease was such that her life could continue beyond the point at which she was capable of communicating her choices to others. Her body would literally entomb her, rather than enable her to act. Possibly she could learn to communicate by using less physically demanding means, but there was no question that her capacity to act and, eventually, her capacity even to communicate her will was rapidly diminishing.

A concern with events and actions pervades the reasoning of the Court. The majority wished to draw an absolute distinction between actions deliberately intended to bring about death and those which "passively" allow death to take its "natural" course (605-6). The majority cited the Law Reform Commission of Canada approvingly: "In the case of assisted suicide or euthanasia, however, the course of nature is interrupted, and death results directly from the human action

taken” (606). What the Court failed to note, is that to find that life may be prolonged “unnaturally” begs the question of what ‘life’ is.

Instead, the majority fell back on a familiar species of rational agency, “intention”: “in the case of palliative care the intention is to ease pain, which has the effect of hastening death while in the case of assisted suicide, the intention is undeniably to cause death” (607). This distinction conveniently erases Sue Rodriguez, who surely had no intention of dying or causing her own death before she was afflicted with ALS. In her case, pain was not the cause of the impairment of her body’s functioning, but in fact ensued only once the body was at the very boundary of sustaining life. Palliative care, therefore, could only begin once this threshold was reached, an option which Sue Rodriguez was adamantly against.

All of the dissenters focused their arguments on maintaining the agency of Sue Rodriguez. McLachlin J. stated plainly:

... what value is there in life without the choice to do what one wants with one’s life ... One’s life includes one’s death. Different people hold different views on life and on what devalues it. For some the choice to end one’s life with dignity is infinitely preferable to the inevitable pain and diminishment of a long, slow, decline. Section 7 protects that choice against arbitrary state action which would remove it (624).

Curiously, McLachlin J. makes an equality-like argument by reference to the principles of fundamental justice in section 7, arguing that the restriction on that right by virtue of her disability, or by reference to other vulnerable individuals who may suffer death by influence or coercion, is arbitrary and does not meet the test of conformity with the principles of fundamental justice. While McLachlin J. used section 7 to make an equality argument, Lamer C.J. chose to base his opinion on the basis of the equality provisions of section 15(1). Implicit in his analysis is the idea touched on explicitly by McLachlin J., that autonomy is an essential attribute of life and it is this attribute which should be protected through the equality provisions of section 15. Lamer C. J. does this by relying on the dissenting opinion of McEachern C.J.B.C. in the court below:

I have no doubt that a terminally ill person facing what the Appellant faces, qualifies under the value system upon which the Charter is based to protection under the rubric of either liberty or security of the person. This would include at least the lawful right of a terminally ill person to terminate her own life, and in my view, to assistance under the proper circumstances.

It would be wrong, in my view, to judge this case as a contest between life and death. The Charter is not concerned only with the fact of life, but also with the quality and dignity of life. In my view, death and the way we die is part of life itself (536).

Lamer C.J. affirmed that section 241 (b) of the *Criminal Code* breaches the equality provisions of section 15 by denying the possibility of assisted suicide to a disabled person, when it would be lawful for an individual to commit suicide on their own. It seems Lamer C.J. resorts to section 15 out of a concern *not* to read into section 7 a *right* to suicide. Thus, he concentrated on the discriminatory effect of the legislation based on the personal characteristic of disability. Lamer C.J. followed McEachern C.J.B.C. in seeking a remedy specifically tailored to the circumstances of Sue Rodriguez. These circumstances, which are not easily generalizable, include not only terminal illness compounded by physical disability, but also mental competence and psychic good health.

Constitutional litigation is a blunt instrument. Through it, courts may elucidate general abstract principles and strike down legislation which offends these principles, but it is not especially well-suited to offer particular remedies for specific circumstances. In this case, the majority preferred to erase the particular circumstances of Sue Rodriguez in order to defer to the will of the legislators in protecting “the sanctity of life.” Lamer C.J. opted for the unusual expedient of tailoring an exception for Ms. Rodriguez which could later be codified in legislation. The procedures, initially laid down by McEachern C.J.B.C., included the requirement of an application to a court, a coroner-monitored psychiatric examination, and a certification which would be time-limited. In so doing, Lamer C.J. recognized the potential for abuse which would have resulted had section 241(b) been struck down and assisted suicide decriminalized.

This case testifies to the limitations of legal reasoning, particularly legal reasoning which is framed in dichotomous terms. Most of the discussion focused on the problem of agency of the “patient,” Sue Rodriguez, and very little on the agency of the attending physician, the one who might be called upon to assist in the death of Ms. Rodriguez and would be liable to criminal sanction under the terms of the *Criminal Code*. (One legitimate concern of the majority was that the decriminalization of assisted suicide might give rise to a “macabre specialty” personified in Dr. Kevorkian.) This latter effect appears to be the result of detaching legal principles from the actual contexts of decision-making, between physician and patient, between the patient and her intimate circle of family and friends. But are there not grounds for questioning the dichotomies in this case?

FIGURE 1  
**Dichotomous Concepts in  
 the Rodriguez Case**

universal abstract principle	↔	contextual decision-making
mind	↔	body
public	↔	private
society	↔	individual
self	↔	other
passive	↔	active
death	↔	suicide

Each of these sets of polar opposites in Figure 1 were engaged by this case. The first, contextual decision-making versus universal principles was endorsed by the legalization of the end of life decisions of Sue Rodriguez. The second, mind and body, by the very idea of agency which Rodriguez sought over her own body and which different Justices read as intrinsic or extrinsic to the value of life. The public and private dichotomy was engaged by the whole circumstance of Sue Rodriguez's death as well as the Court decision which framed it. The juxtaposition of individual and society was central to the opinion of the majority which denied Rodriguez the right to assisted suicide which the dissenting judges would have granted. The self and other dichotomy was implicated by the two concepts of agency engaged in this case: the agency of the doctor assisting the death of another and the agency of the patient in seeking an end to her own life. The distinction drawn between active and passive euthanasia, and that made between death and suicide are both distinctions which grow problematic as technology increasingly plays a role in the extension of life. If instead of reading these as opposing principles that courts must choose between but, rather, as different points engaged by end of life decisions, the polarization of the argument surrounding assisted suicide would be permitted to find its appropriate context in the complex of decisions attendant on the end of life process of a terminally ill person. After all, it is an artificial distinction in this case to speak of death as a single irrevocable event, when it is part of a known process whose end is foreseeable and irrevocable. It is this context which was disregarded by the majority in their appeal to abstract principles. The public, with the outpouring of sympathy which surrounded the death of Sue Rodriguez, implicitly recognized this.

The care of the terminally ill tends to blur the boundaries between the opposing principles outlined above. Madam Justice McLachlin pointed out in her opinion the ways in which even the principle of the "sanctity of life" is not as consistent or as clear cut as the majority implied. For example, homicide may on occasion be justifiable; likewise, determining what constitutes "suicide" requires a social context. Acts of courage or self-sacrifice, such as the heroic action of a fire fighter rushing into a burning building, is not considered suicide. Therefore, suicide is a social construct which is often loaded with pejorative meaning and interpreted as irrational. Such was not the reaction attendant on the death of Sue Rodriguez. Indeed, her death could be interpreted as the defence of a certain kind of rationality, as a final act of autonomy in the face of the failing circumstances of her embodiment.

One attempt at a feminist re-reading of the issue of physician-assisted suicide concentrates on a re-working of language and context. Leslie Bender argues that a focus on physician care of the dying would at least help avoid the sharp dichotomization of "death" and "suicide."<sup>3</sup> It is her hope that by moving to a care-based paradigm of medical ethics and eschewing abstract dichotomous principles, the substance of normative discourse in medical ethics and law could be changed.<sup>4</sup> By attending to the particularized needs of patients and the intimate context in which the patient arrives at decisions, physicians may allow the patient to act for herself. In the particular circumstances of the Rodriguez case, however, even the dissenting judgement in the British Columbia Court of Appeal specifically rejected the prospect of including physician-assisted death under the rubric of palliative care:

McEachern C.J. rejected the appellant's contention that reasonable management of terminal illness does not engage the common law, stating that physician-assisted suicide could not be considered palliative care. According to McEachern C.J., the only route open to Ms. Rodriguez was under the Charter (536).

Charter principles already having been engaged, the only route open was to construct a remedy which would not overly compromise the waning autonomy of dying patients. Ironically, the elaborate process prescribed by McEachern C.J.B.C. and endorsed by Lamer C.J. would bring the state into the decision-making process. The state would oversee the entire end of life process, from certifying that the patient had a terminal disease to assessing the patient's mental competence. Under these procedures, every aspect of physician-assisted dying would become a public act.

Rather than gloss over the fact that active intervention at the end of life affects an extremely vulnerable population, few of whom share Ms. Rodriguez's mental and social resources, we must instead confront this fact. There are clear dangers in

looking at the Rodriguez case as a paradigmatic case of assisted suicide. Dr. Kevorkian is a retired pathologist, without experience caring for terminally ill patients. He got to know his first suicide patient at the time he was preparing to aid her in her death. Suicide was not just one among a number of options of the patient he was “caring” for, but the only one. The “caring” role was limited to suicide. In another case, Ann Humphry, the former wife of Derek Humphry, author of *Final Exit*, was suffering from terminal breast cancer. She announced that she would opt for suicide rather than cause him or her to suffer the final stages of disease. He responded with complete and unhesitating agreement rather than reassure her that she could never be a burden to him and that he wanted to be with her as long as she wanted to stay alive. She felt abandoned.<sup>5</sup> The question, therefore, is not whether vulnerable populations exist rather, the question is whether criminalizing assisted suicide is the best way to approach the problem of vulnerability. Here, the problem is whether existing laws make it more likely rather than less likely for macabre specialists like Kevorkian to emerge, and whether the laws currently existing actively discourage physicians from providing appropriate care at the request of dying patients. The bias of the discussion in the *Rodriguez* case was on dying as a single event, rather than as a prolonged process punctuated by a definable ending. This perception was aided by Rodriguez herself, who focused attention on this single, final, event. Yet, if we return to the question of the relationship of agency and embodiment, this focus is also an artifact of a particular conception of life.

The case of Dr. Quill and Diane illustrates a rather different aspect of assisted death.<sup>6</sup> Diane was a patient who had decided against continued chemotherapy for the treatment of leukaemia. When she asked about help in dying, Dr. Quill directed her to the Hemlock Society. She asked for and was given a prescription for barbiturates to aid in sleeping. Some months later she called her doctor and friends to say goodbye and asked her husband and son to leave her alone for an hour while she died peacefully in her couch at home. When the case against Dr. Quill was presented to a grand jury, they refused to return an indictment.<sup>7</sup>

Oddly enough, in a case where the role of agency played such a large part, the court in *Rodriguez* inquired very little into the role of the physicians who were to be the agents of the patient in hastening death. Implicitly, the court seemed to accept the notion that the physician was the mere “agent” or instrumentality of the appellant. Peter Ubel notes that the idea that physicians should not assist in suicide is grounded in the Hippocratic Oath: “I will neither give a deadly drug to anybody if asked for it, nor will I make a suggestion to this effect.”<sup>8</sup> However, he points out that this socially constructed conception of the physician’s role only as healer can legitimately be interrogated. The rational patient’s goal in consulting the physician may not always be to restore health — “many times this is impossible.” “Health” is broad enough

to include easing pain and relief of suffering among the proper goals of medicine. As Ubel suggests, “[t]he proper way to deal with patient suffering, and the role the medical profession should have in dealing with it, are not *a priori* truths inseparable from the nature of medical practice ... professions as socially constructed occupational roles, do not seem to fit such a prior analysis.”<sup>9</sup>

If dying were seen more generally as a part of life and as part of a prolonged process which is intrinsic to embodiment, then, there may be less likelihood that life will be valued only in terms of will and agency. Moreover, greater attention to the intimate context of dying would distinguish medically-assisted dying from the more pejorative connotations of suicide. Instead of a sharp focus on the agency of the dying patient or the agency of the individual physician attending the dying patient, the focus should be more generally on the social context of the dying patient. The meaning of assisted death then would be transformed. If, as in the Diane and Rodriguez cases, dying were accepted as a process which connects one to one’s own intimate social network, it would negate the usual connotations of suicide, with their implications of isolation from loved ones and rejection, even aggression, against society. It would appear perverse to apply the same vocabulary to two such utterly dissimilar events, a distinction so stark as to suggest at least legal significance with respect to the meaning of section 241(b) of the *Criminal Code*. Voluntary death at the end of a terminal illness surrounded by supportive family and friends would seem to be the opposite of suicide.

The kind of inquiry into the context of decision making alluded to above would require a different process of fact collection than the one traditionally followed. Applied ethics of this type rely on specific details — generating a need for thick descriptions and multiple view points, including not just the patient and her doctors, but also her family and friends. To apply, as the majority did, a fixed rule or principle to the case does little to reveal the moral complexity of the issues. A sharp focus on rights language, especially in the context of section 7 of the *Charter* as was entered into by the majority as well as the dissenting opinions by Justices McLachlin and Cory, would tend to preclude the exercise of “thick description” called for here. Rights language draws dichotomies which have the effect of fragmenting a context which needs to be examined in full. Dying with dignity should not be too easily identified with the right to suicide. □

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# ABORIGINAL RIGHTS AND *DELGAMUUKW* V. *THE QUEEN*

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On the long and tortuous path to justice for the First Nations of Canada, the case of *Delgamuukw v. The Queen*<sup>1</sup> is likely to become one of the most important landmarks. Whether the outcome of this ongoing litigation will represent a step towards, or a sidetrack from, the achievement of a just settlement for Aboriginal Peoples is now in the hands of the Supreme Court. The case raises a number of issues of immense consequence that were not addressed in the Supreme Court's decision in *Sparrow* (1990)<sup>2</sup> or that have been left unresolved by the failure of attempts to amend the constitution to explicitly recognize an inherent Aboriginal right of self-government. Is Aboriginal title an "existing aboriginal right" protected by section 35 of the *Constitution Act, 1982* in those parts of the country where Aboriginal lands have not been ceded by treaty? Does the concept of Aboriginal rights entail a right of self-government, and if so, was that right extinguished prior to 1982?

## THE TRIAL JUDGMENT

The *Delgamuukw* case involves a claim brought by the hereditary chiefs of the Gitksan and Wet'suwet'en peoples to ownership of and jurisdiction over 58,000 square kilometres of territory in central British Columbia. The trial of this momentous claim lasted 374 days from May 1987 to June 1990. The trial judgment of McEachern C.J., released in March 1991, dismissed the claims to ownership and jurisdiction. McEachern C.J. held that Aboriginal jurisdiction or self-government was extinguished by the exercise of British sovereignty over the mainland colony of British Columbia in 1858. He further held that Aboriginal title over unceded territory throughout B.C. had been extinguished by colonial enactments passed prior to 1871 which asserted Crown title over all lands in B.C.. McEachern C.J. did issue a relatively inconsequential order that, subject to the general law of the province, the B.C. government has a continuing fiduciary duty to permit the plaintiffs to use unoccupied or vacant Crown land in the territory for Aboriginal sustenance purposes.

The breadth of McEachern C.J.'s reasoning meant that the Aboriginal title and Aboriginal rights of self-government of B.C. First Nations were lost entirely over a century ago and thus no longer qualify as "existing" rights protected by section 35 of the *Constitution Act, 1982*. Given that these rights were extinguished, in McEachern C.J.'s view, by the simple exercise of British legislative sovereignty and by the assertion of underlying Crown title in land, the implications of his reasoning were dire for Aboriginal Peoples throughout the country.<sup>3</sup>

## THE B.C.C.A. JUDGMENT

The appeal to the British Columbia Court of Appeal was argued in 34 days of hearings from May to July 1992. The newly elected N.D.P. government abandoned the argument — made by the previous Social Credit administration and accepted by the trial judge — that there had been a "blanket extinguishment" of Aboriginal title in the colony prior to 1871. In its decision released in June 1993, the Court of Appeal ruled unanimously in favour of the plaintiff in light of the government's new position. The Court thus allowed the appeal in part and issued a declaration that the plaintiffs' have existing Aboriginal rights of occupation and use over much of the claimed territory. The determination of the precise boundaries of the lands subject to the plaintiffs' Aboriginal title was left to negotiations.

In all other significant respects, the factual findings and legal rulings of the trial judge were affirmed by a 3-2 majority of the Court. The majority judgments of Macfarlane J.A. (Taggart J.A. concurring) and Wallace J.A. found that the trial judge had made no palpable or overriding errors in his assessment of the evidence. They agreed with his conclusion that any Aboriginal right held by the plaintiffs to exercise jurisdiction over the territory or their people had been extinguished by 1870. In separate dissents, Lambert J.A. and

Hutcheon J.A. disagreed on this crucial point. In their view, the plaintiffs' Aboriginal rights included a right of self-government or self-regulation that had not been extinguished by the assertion of either British or Canadian sovereignty.

## ABORIGINAL TITLE AND SELF-GOVERNMENT AS COMMON LAW ABORIGINAL RIGHTS

The Supreme Court in *Sparrow* defined Aboriginal rights as including customs or practices that constitute "an integral part" of a "distinctive" Aboriginal culture.<sup>4</sup> This test was applied by the judges of the B.C.C.A. in *Delgamuukw*.<sup>5</sup> While Aboriginal title is a well-established component of the common law doctrine of Aboriginal rights,<sup>6</sup> the Supreme Court has yet to rule on the question of whether the doctrine of Aboriginal rights entails a right of self-government. The majority judges in *Delgamuukw* seemed to presume that it does, although they did not find it necessary to directly address the point given their conclusions on extinguishment, to be discussed below. The dissenting judges did address the point. Lambert J.A. found that "the aboriginal rights of self-government and self-regulation," to the extent that they "formed an integral part" of a "distinctive culture," are recognized as part of the common law doctrine of Aboriginal rights.<sup>7</sup> Hutcheon J.A. reached a similar conclusion regarding a more narrowly conceived "aboriginal right of self-regulation."<sup>8</sup> Indeed, once one accepts, as Macfarlane J.A. did, that the Gitksan and Wet'suwet'en peoples had an "organized society" at the time that British sovereignty was asserted,<sup>9</sup> the conclusion seems inescapable that a right of self-government was an "integral part of their distinctive culture," and thus was incorporated in the common law doctrine of Aboriginal rights.<sup>10</sup>

## THE TEST FOR EXTINGUISHMENT

The Supreme Court decision in *Sparrow* held that any common law Aboriginal rights that were not extinguished prior to 1982 are "existing" and thus "recognized and affirmed" in a contemporary fashion by section 35 of the *Constitution Act, 1982*. The Court made clear that extensive and detailed regulation or impairment of a right does not amount to extinguishment.<sup>11</sup> Adopting the test put forward by Hall J.A. in *Calder* (1973),<sup>12</sup> the Court held that a right is extinguished only when it is completely abrogated by a "clear and plain" intention of the sovereign.<sup>13</sup> The Crown has the burden of establishing these elements of extinguishment.

Neither the Aboriginal title nor the Aboriginal right of self-government of the Gitksan and Wet'suwet'en peoples have ever been explicitly extinguished. A question that arises,

therefore, is whether sovereign intent can ever be "clear and plain" if not explicitly stated in legislation. All members of the B.C.C.A. in *Delgamuukw* held that implicit legislative extinguishment is possible. For example, Macfarlane J.A. noted that the Supreme Court had not stated in *Sparrow* that intent to extinguish must be expressly stated in legislation. It followed, in his view, that a clear and plain sovereign intention "may be declared expressly or manifested by unavoidable implication."<sup>14</sup> Extinguishment by necessary implication is possible only in those rare cases where "the interpretation of the statute permits no other result."<sup>15</sup>

This conclusion, allowing the possibility of extinguishment by necessary legislative implication, is faithful to the word of the *Sparrow* decision but, arguably, not to its spirit. The strict test for extinguishment is an important limitation on the orthodox and draconian view that prior to 1982 Aboriginal rights existed at "the pleasure of the Crown."<sup>16</sup> The unilateral expropriation of Aboriginal rights was an extraordinary possibility that was apparently available to the colony of British Columbia prior to 1871 and to the government of Canada from 1871 to 1982.

The legal basis for untrammelled British, and later Canadian, sovereign authority over Aboriginal nations has never been adequately explained.<sup>17</sup> Ultimately it rests on the common law doctrine of discovery, or the notion that sovereignty over an uninhabited territory vests in the discovering or settling power. In applying this principle to British North America, judges have managed to skirt the fact that Aboriginal Peoples did indeed inhabit the territory. The *Delgamuukw* decision continues a tradition that has woven this ugly fiction into the fabric of our law. Wallace J.A., for example, relied on decisions that limited the application of the doctrine of discovery to "uninhabited" or "unoccupied" territories,<sup>18</sup> yet he did not find it necessary to explain how the principle could possibly be relevant to territories occupied by the Gitksan and Wet'suwet'en.

If Canadian courts are unwilling to question the validity of the assertion of British or Canadian sovereignty over Aboriginal societies, as it appears they are,<sup>19</sup> then the principle of extinguishment has an especially crucial role to play in limiting the ability of contemporary Canadian governments to argue that the actions of their predecessors amounted to effective unilateral expropriation of Aboriginal interests. One important role that the "clear and plain intention" test could fulfil is the prevention of expropriation without at least some notice to the persons most affected, namely, the holders of the Aboriginal rights. Expropriation without notice is especially offensive, because those persons detrimentally affected are not informed of the change in their legal position and thus are deprived of an opportunity to object to the taking without consent.

The "clear and plain intention" test is closely related to the "honour of the Crown:" if the Crown has not explicitly conveyed its intention to Aboriginal Peoples, how can it be said that its intention is either honourable or "clear and plain"? Clear and plain to whom? Surely it is not just the subjective intention of non-Aboriginal authorities that ought to be relevant. There ought to be a requirement that the intention be made clear and plain in an objective or public sense, particularly to Aboriginal persons whose knowledge and awareness of the significance of European legal practices cannot be presumed. These considerations suggest that a stricter understanding of the requirement of "clear and plain intention" than that adopted by the B.C.C.A. would be more consistent with the twin goals of upholding the honour of the Crown and promoting a just settlement for Aboriginal Peoples that the Supreme Court has said should guide the interpretation of section 35.<sup>20</sup>

## EXTINGUISHMENT OF ABORIGINAL TITLE

The B.C.C.A. held unanimously that thirteen colonial instruments passed between 1858 and 1870 did not manifest a clear and plain sovereign intention to extinguish Aboriginal title by necessary implication. These enactments asserted Crown title over all lands in B.C. and empowered the Governor to sell Crown lands in the colony. They made no mention of Aboriginal interests in land. Macfarlane J.A. stated that the purpose of these enactments was to facilitate settlement, not to disregard Aboriginal interests nor to foreclose the treaty process.<sup>21</sup> The other judges all agreed that the taking of underlying title by the Crown was not inconsistent with a recognition of the burden constituted by Aboriginal title.<sup>22</sup>

All of the judges agreed that after B.C. joined Confederation in 1871, section 91(24) of the *Constitution Act, 1867* placed the extinguishment of Aboriginal title beyond provincial legislative competence.<sup>23</sup> Nor had the federal government passed any legislation extinguishing Aboriginal title between 1871 and 1982.<sup>24</sup> After 1982, extinguishment is constitutionally prohibited because it would not meet the justificatory standard set out by the Supreme Court in *Sparrow*.<sup>25</sup> The judges noted that the ways in which Aboriginal title and grants of fee simple and other property rights will co-exist "cannot be decided in this case, and are ripe for negotiation."<sup>26</sup>

It followed, then, that Aboriginal title is an existing Aboriginal right in British Columbia, now afforded constitutional protection by section 35 of the *Constitution Act, 1982*. The question of extinguishment that had divided the

Supreme Court 3-3 in the *Calder* case twenty years earlier has finally been resolved. It seems highly unlikely that the present Supreme Court will disagree with the persuasive reasoning of the B.C.C.A. on this point, especially in light of the B.C. (and federal) government's demonstrated willingness to begin negotiations on settling the land claims covering most of the province.

## EXTINGUISHMENT OF ABORIGINAL SELF-GOVERNMENT

A 3-2 majority of the B.C.C.A. found that any Aboriginal right of the plaintiffs' to exercise legislative jurisdiction over their lands and peoples had been extinguished by either the acquisition or exercise of sovereignty over the mainland colony in 1846 and 1858 respectively, or, in the alternative, by the entry of B.C. into Confederation in 1871. In Macfarlane J.A.'s judgment, "any vestige of aboriginal law-making competence was superseded" on "the date that the legislative power of the Sovereign was imposed."<sup>27</sup> He agreed with the trial judge that this likely occurred in 1858 when the mainland colony was established and the governor was empowered by imperial legislation to make all laws necessary for the good governance of the colony. If he was mistaken with respect to colonial extinguishment, Macfarlane J.A. was of the opinion that continuing Aboriginal rights of self-government were "inconsistent with the division of powers found in the *Constitution Act, 1867* and introduced into British Columbia in 1871. Sections 91 and 92 of that Act exhaustively distribute legislative power in Canada ... The division of governmental powers between Canada and the Provinces left no room for a third order of government."<sup>28</sup>

Wallace J.A. fixed the moment of extinguishment of Aboriginal self-government in B.C. at an earlier date, namely the acquisition of sovereignty by the British over the territory in 1846 pursuant to the Oregon Boundary Treaty. At that point, "supreme legal authority vested with the British Crown" and "the Indians became subjects of the Crown and the common law applied throughout the territory and to all inhabitants."<sup>29</sup> Like Macfarlane J.A., Wallace J.A. was of the view that, in the event that any rights of self-government survived the colonial period, they were eliminated by the exhaustive distribution of legislative power between Parliament and the provincial legislature that came into force in 1871.<sup>30</sup>

The reasoning of the majority judgments is open to challenge on a number of fronts. For one, Macfarlane and Wallace JJ. failed to apply the clear and plain intention test for extinguishment to this issue. Indeed, they did not discuss the test for extinguishment until later in their reasons, as if somehow it was not relevant to the question of whether an

Aboriginal right of self-government continues to exist. If they had applied the test they developed, they would have found extinguishment of an Aboriginal right of self-government only if there was no other possible interpretation of the consequences of the assertion of British and Canadian sovereignty.

Secondly, both judges cited Dicey in support of the absolute supremacy of the British Parliament.<sup>31</sup> Wallace J.A., after quoting Dicey, asserted that the claim of Aboriginal jurisdiction "is incompatible with every principle of the parliamentary sovereignty which vested in the Imperial Parliament in 1846."<sup>32</sup> Yet, accepting the authority of Dicey's views regarding the domestic powers of the British parliament, they do not necessarily hold when applied to an unconquered, unsundered territory occupied by indigenous nations. The British principle of parliamentary supremacy is not, and never has been, an absolute in the Canadian context.<sup>33</sup> It has had to yield, for example, to Canadian constitutional realities such as the division of powers in a federal state and the entrenchment of guaranteed rights in constitutional documents. A possible interpretation of the assertion of British sovereignty over B.C. is that the principle of parliamentary supremacy had to yield to accommodate the presence of self-governing indigenous societies, just as it has had to yield to other Canadian realities.<sup>34</sup>

Similarly, as Rand J. stated in 1958, the principle of exhaustiveness is "subject always to the express or necessarily implied limitations of the [1867] Act itself."<sup>35</sup> The question, then, is whether the presence of self-governing Aboriginal nations in Canada is a "necessarily implied limitation" on the powers of provincial and federal governments,<sup>36</sup> a question that is avoided by treating the exhaustiveness principle as an absolute. It is worth noting that in past judicial decisions, the principle of exhaustiveness has been put to the service of the federal ideal of co-ordinate and equal sovereign authorities.<sup>37</sup> In this sense, it is troubling to see the principle employed to maintain and justify a distinctly non-federal, colonial relationship between Aboriginal and non-Aboriginal governments.

Nevertheless, even if we accept that Aboriginal sovereignty could be extinguished without consent prior to 1982, and that it was in fact so displaced by the assertion or exercise of colonial sovereignty, or by the coming into force of the *Constitution Act, 1867*, it does not follow that the Aboriginal right of self-government has ceased to exist for the purposes of section 35 of the *Constitution Act, 1982*. The Dicey theory of parliamentary supremacy and its federal derivative, the principle of exhaustiveness, simply lead to the conclusion that the combined legislative authority of non-Aboriginal Canadian governments was plenary prior to 1982. Therefore, there was no space, prior to 1982, for Aboriginal self-government that amounted to a co-ordinate sovereignty or

third order of constitutional government. But that is a far cry from saying that Aboriginal governmental traditions and practices ceased to exist and thus are not constitutionally protected after 1982 by section 35.

In other words, the most that can be said, following Dicey, is that the colonial government of B.C. prior to 1871, and the federal government from 1871 to 1982, had the power or capacity to unilaterally extinguish all vestiges of Aboriginal self-government. But the mere existence of this capacity is not proof of its exercise. With respect, the majority judges in *Delgamuukw* confuse the *capacity to extinguish* with *actual extinguishment in fact*. As a result, they left aside the potential of section 35 to create a constitutional guarantee of jurisdiction where none existed before.<sup>38</sup>

Following the *Sparrow* decision, even detailed regulation of the self-governing practices and traditions of the Gitksan and Wet'suwet'en peoples would not amount to extinguishment of their Aboriginal right of self-government. Yet as Hutcheon J.A. noted in dissent, the self-governing practices of the plaintiffs could not have been extinguished prior to 1871, because the penetration of European society in the territory had barely commenced.<sup>39</sup> After 1871, B.C. lacked the jurisdiction to pass laws having the intent or effect of extinguishing Aboriginal rights. In the dissenters' view, federal legislation passed after 1871, including successive *Indian Acts*, heavily regulated the right of self-government, but did not amount to a clear and plain blanket extinguishment.<sup>40</sup>

There are persuasive reasons for preferring the dissenting position in *Delgamuukw* that the plaintiffs' Aboriginal rights of self-government were not extinguished prior to 1982, and thus are existing rights recognized and affirmed by section 35. On this view, even if Aboriginal self-government rights fell short of constitutionally-guaranteed autonomy or jurisdiction prior to 1982, this is no longer the case. The exercise of the right of self-government is protected from any government interference that cannot meet the strict justificatory standard set out by the Supreme Court in *Sparrow*.

## CONCLUSION

Together with the change in provincial government policy signalled by the establishment of the B.C. Treaty Commission, the Court of Appeal judgment in *Delgamuukw* brings an end to the era of official denial of the existence of Aboriginal title in B.C.. Nevertheless, in other respects, the majority decisions are open to many of the same objections that critics have levelled at the McEachern judgment. I have focussed here on the failure of the majority to apply the same rigour to the question of extinguishment of Aboriginal self-government

as they did to their analysis of the extinguishment of Aboriginal title.

Given the position taken by the majority judges, their statements wishing the parties success in resolving their differences through negotiation ring rather hollow in so far as self-government is concerned. To understate the obvious, blanket extinguishment places Aboriginal Peoples in an unenviable bargaining position. In their defence, the judges insisted that the role of the court was to state the law rather than to facilitate a just settlement through negotiations.<sup>41</sup> Yet this insistence on marking clear boundaries between law and politics is futile and compromises the ability of section 35 jurisprudence to achieve its remedial promise of a just settlement for Aboriginal Peoples. A glance at the history of relations between Aboriginal Peoples and the Canadian state reveals that the content of legal doctrine and the outcome of negotiations have moved together in a close dialectical relationship. Legal decisions have played and will continue to play a crucial role in setting the parameters of negotiations and shaping the realm of the possible for Aboriginal Peoples. □

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### Endnotes

1. (1993), 104 D.L.R. (4th) 470 (B.C.C.A.), leave to appeal to the Supreme Court of Canada granted, March 10, 1994.
2. *R. v. Sparrow*, [1990] 1 S.C.R. 1075.
3. The trial judgment in *Delgamuukw* attracted much negative academic comment. See, for example, Frank Cassidy, ed., *Aboriginal Title in British Columbia: Delgamuukw v. The Queen* (Lantzville: Oolichan Books, 1992) and the symposium of anthropological views in (1992) 95 B.C. Studies.
4. *Supra* note 2 at 1099.
5. *Supra* note 1 per Macfarlane J.A. at 492; Wallace J.A. at 571-2; Lambert J.A. at 646.
6. For example, *Calder v. A.-G. B.C.*, [1973] S.C.R. 313; *Mabo v. Queensland*, (1992) 107 A.L.R. 1.
7. *Supra* note 1 at 730, 739.
8. *Ibid.* at 761, 764.
9. *Ibid.* at 543.
10. For further discussion of this point, see Slattery, "First Nations and the Constitution: A Question of Trust" (1992) 71 Can. Bar Rev. 261, 278-9; Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-Government and the Constitution* (Ottawa: Supply and Services, 1993) 19-21.
11. *Supra* note 2 at 1097-9.
12. *Supra* note 6.
13. *Supra* note 2 at 1099.
14. *Supra* note 1 at 523.
15. *Ibid.* at 525. The same test was adopted by the other members of the Court: see Wallace J.A. at 595, Lambert J.A. at 667-8, and Hutcheon J.A. at 753.
16. Lambert J.A. pointedly rejected this language as a reflection of "the highest style of imperial glory" and "a discredited imperial and colonial approach to indigenous peoples." *Supra* note 1 at 662-3.
17. For further discussion of this point, see McNeil, "Envisaging Constitutional Space for Aboriginal Governments" (1993) 19 Queen's L.J. 95; Foster, "Forgotten Arguments: Aboriginal Title and Sovereignty in *Canada Jurisdiction Act Cases*" (1992) 21 Man. L. J. 343; Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991) 36 McGill L.J. 382; Asch and Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R. v. Sparrow*" (1991) 29 Alta. L. Rev. 498; Slattery, "Aboriginal Sovereignty and Imperial Claims" (1991) 29 Osgoode Hall L.J. 681.
18. *Supra* note 1 at 566-7.
19. See *Sparrow*, *supra* note 2 at 1103: "... there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to lands vested in the Crown...".
20. *Ibid.* at 1105-8. Macfarlane J.A. did acknowledge that the honour of the Crown is a relevant consideration in determining the approach to the question of extinguishment. *Supra* note 1 at 524.
21. *Supra* note 1 at 530-1.
22. *Ibid.*, per Wallace J.A. at 595; Lambert J.A. at 675; Hutcheon J.A. at 753.
23. *Ibid.*, per Macfarlane J.A. at 535; Lambert J.A. at 681.
24. *Ibid.*, per Macfarlane J.A. at 538-9; Lambert J.A. at 681-5.
25. *Ibid.*, per Lambert J.A. at 686.
26. *Ibid.*, per Macfarlane J.A. at 539.
27. *Ibid.* at 519.
28. *Ibid.* at 519-20.
29. *Ibid.* at 591.
30. *Ibid.* at 592-3.
31. *Ibid.*, per Macfarlane J.A. at 520 and Wallace J.A. at 592.
32. *Ibid.* at 592.

33. See Ryder, "The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations" (1991) 36 McGill L.J. 308 at 310, fn. 4.
34. See Macklem, "Distributing Sovereignty: Indian Nations and Equality of Peoples" (1993) 45 Stanford L. Rev. 1311.
35. *Murphy v. C.P.R.*, [1958] S.C.R. 626, 643.
36. For an argument that it is, see Ryder, *supra* note 33 at 314-5.
37. *Bank of Toronto v. Lambe* (1887), 12 A.C. 575, 587; *Union Colliery v. Bryden*, [1899] A.C. 580, 585; *A.-G. Ontario v. A.-G. Canada (Reference Appeal)*, [1912] A.C. 571, 581, 584; *A.G. Can. v. A.G. Ont. (Labour Conventions)*, [1937] A.C. 326, 354; *Murphy*, *supra* note 35; *Jones v. A.G. N.B.*, [1975] 2 S.C.R. 182, 195; *Re Agricultural Products Marketing*, [1928] 2 S.C.R. 1198, 1296; *Re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 754, 820-1.
38. See Foster, *supra* note 17 at 350, fn. 20; McNeil, *supra* note 17 at 119.
39. *Supra* note 1 at 761.
40. *Ibid.*, per Hutcheon J.A. at 763; Lambert J.A. at 729-30. Accord: Slattey, *supra* note 10 at 278-87; Royal Commission on Aboriginal Peoples, *supra* note 10 at 35: the *Indian Act* did not "deprive Indian peoples of all governmental authority, even if it severely disrupted and distorted their political structures and left them with very limited powers."
41. *Supra* note 1, per Macfarlane J.A. at 520, 547; Wallace J.A. at 601; Lambert J.A. at 603.



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Endnotes

1. [1993] 3 S.C.R. 519; internally cited page references in this paper refer to this report.
2. For further discussion of the cultural and legal significance of embodiment see: R. Mykitiuk, "Fragmenting the Body" (1993) 1(2) *Australian Feminist Law Journal*.
3. Leslie Bender, "A Feminist Analysis of Physician-Assisted Dying and Voluntary Active Euthanasia" (1993) 59 *Tenn. L. Rev.* 519.
4. Bender, *ibid.* at 534.
5. Trip Gabriel, "A Fight to the Death: Was Ann Humphry's 'Final Exit' Intended to Pull the Plug on Her Ex-husband's Right-to-die Movement?" *New York Times* (8 December 1991) ss.6 (Magazine), 46 cited in Peter A. Ubel, M.D. "Assisted Suicide and the Case of Dr. Quill and Diane" *Issues in Law and Medicine*, 8:4 (Spring 1993) 487 at 491.
6. Timothy E. Quill "Death and Dignity — A Case of Individualized Decision Making" (1991) 324 *New Eng. J. Med* 691.
7. Lawrence K. Altman, "Jury Declines to Indict Doctor Who Said He Aided in a Suicide" *New York Times* (27 July 1991) at 1.
8. Ubel, *supra* note 5 at 497.
9. *Ibid.* at 498.

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