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The IOC Made Me Do it: Women's Ski Jumping, VANOC, and the 2010 Winter Olympics

Margot Young*

Introduction

Equality cases under the *Canadian Charter of Rights and Freedoms*[1] are discussed mostly for the complexity of their equality dimensions and the corresponding jurisprudential challenges such nuances present litigator and judge alike. The recent *Charter* equality challenge in *Sagen v. VANOC*[2] — the women's ski jumping case — presents a modification to this theme. It was a tricky case for the challengers, but not because of the discrimination issue. Rather, the novelty of the state action problem in this case caused the ski jumpers the most trouble, and, formally, defeated their claim. Indeed, at both the British Columbia Supreme Court and the British Columbia Court of Appeal this state action issue befuddled the equality analysis itself. The result is a case that has tremendous immediate popular power as an instance of sex discrimination but that nonetheless has no purchase under the *Charter*.

One might choose to discuss at length this doctrinal twist. After all, both court decisions add to the free-for-all that equality reasoning under section 15 has become. Delphic utterances from the Supreme Court of Canada and lower court creativity have combined to render section 15 jurisprudence the ski cross of *Charter* litigation. This comment will discuss some of the problematic turns the two decisions took in rejecting the claimants' arguments about violation of the *Charter*'s equality provisions. However, the point of doing so is not to argue that there is another, doctrinally truer, course the courts should have taken, one that guarantees just, fair, and right results. Rather, the purpose is to demonstrate that application questions under the *Charter* are condemned to jurisprudentially "uncomfortable" outcomes as a result of an indeterminacy at the base of bills of rights — such as the *Charter* — born of and nourished by liberal legalism. As law professors Hutchinson and Petter argue, "inevitably the foundation collapses, like a false bottom, disclosing the political chasms beneath."[3]

The outcome in *Sagen* is, perhaps, not quite the disaster that the quote implies. The women ski jumpers, while clearly facing gender discrimination, are not the most indigent equality claimants one can imagine. Even excluded from jumping at the Olympics, they are not fording the Styx. The case on its own immediate terms is less distressing than those of other defeated equality claimants — such as that of Louise Gosselin in *Gosselin v. Quebec (Attorney-General),*[4] where the ideological shaping that guided both the Quebec legislative regime and the majority judgment at the Supreme Court of Canada displayed deeply problematic (but popular) political assumptions about young welfare recipients — assumptions that left untroubled severe economic deprivation. Nonetheless, sanctioned sex discrimination in a publicly funded exercise on the scale of the Olympics is no small issue. It reinforces and perpetuates a troubling but traditional discriminatory message about women, athletics, and social citizenship. (More about this later.) But even more remarkable is what the decisions say about the relevance of the *Char-*

ter to government activities. A programme of activity successfully located as governmental under section 32 of the *Charter* can still evade *Charter* scrutiny as long as the element at issue in that programme simply follows directions issued by some private actor. It is another turn of the screw: even governments can escape *Charter* responsibilities. It becomes less and less clear just what progressive contribution the *Charter* makes to struggles for a just and fair society. Or, perhaps, it becomes more and more clear that the *Charter* is not of any great direct or special help to such endeavours.

The "Inrun"[5] to the Case

The facts surrounding the ski jumping case have become part of the larger political fabric of the 2010 Winter Olympics in Vancouver. Already contentious for its civil, economic, and environmental impacts, the Winter Olympics became notorious for the International Olympics Committee's (IOC) refusal to include women's ski jumping as an event[6] in the Olympic games programme, and for the Vancouver Organizing Committee's (VANOC) apparent acquiescence in this decision. Ski jumping has the dubious status of being the only sport in the Winter Olympics that is not open to both men and women.[7] Men have jumped in the Olympics since 1924. Three men's ski jumping events were scheduled for the 2010 Games.[8] No women ski jumpers' competitive events have ever been scheduled at any Olympics.

A string of events led to the initiation of a constitutional challenge before the British Columbia courts. Women ski jumpers have argued for inclusion in the Winter Olympics for several past Olympics. In May 2006, the International Ski Federation, the governing body for international skiing competitions, voted 114 -1 to approve a request to the IOC that women's ski jumping be added to the 2010 Games programme. The following November, VANOC, after receiving a request to do so from members of the Canadian Women's Ski Jumping Team, sent a letter in support of inclusion to the IOC. Days later, however, the IOC Executive Board decided not to include women's ski jumping in the Games. The IOC claimed the ruling was based on "technical merit" and had nothing to do with gender discrimination.[9] President of the IOC Jacques Rogge elaborated: "We do not want the medals to be diluted and watered down."[10] At this point, by all appearances, VANOC quietly accepted the IOC ruling and the exclusion. The women ski jumpers did not. Four mothers of female ski jumpers filed a discrimination complaint with the Canadian Human Rights Commission.[11] The complaint resulted in a mediated settlement which, it has been reported, required the federal government to press the IOC to include women's ski jumping in the 2010 Olympics.[12] Efforts by Helena Guergis, federal Secretary of State for Sport, were unsuccessful. Faced with this outcome, on May 21, 2008 a group of nine elite women ski jumpers — from five countries including Canada — filed a *Charter* challenge to their exclusion from the Olympic Games.[13]

A year and a half later, the case has failed: a rejection of the challenge by the British Columbia Supreme Court[14] was confirmed by the Court of Appeal[15] and leave for a further appeal was denied by the Supreme Court of Canada.[16]

The Jump: Argument at Each Level of Court

The case raised two key doctrinal issues: does the *Charter* apply to VANOC and, if so, has VANOC unjustifiably infringed the *Charter*'s equality rights by staging men's ski jumping but not women's ski jumping at the 2010 Olympics? And there was one critical fact: the IOC alone has control over the selection of events staged at the Games. The results at both levels of court in British Columbia revolved around this fact, although its doctrinal significance varied.

Application of the *Charter*

Jurisprudence on the application of the *Charter* is complex. It relies on a fundamental, but ultimately porous and indeterminate, distinction between government and non-government. The result is that Supreme Court of Canada case law is a labyrinth of qualifications and alternative lines of argument. Even the first decision on *Charter* application, *RWDSU v. Dol-*

phin Delivery Ltd.,[17] is contradictory—holding that the *Charter* both does and does not apply to the common law.[18] Comment on this inconsistency is not novel[19] but it reminds us that, from the start, *Charter* application jurisprudence has been plagued by judicial insistence on a false positivism with consequent contradiction and confoundment.

The reason for this is simple. The *Charter*, like any other liberal rights protecting document, has a central (but impossible) necessity: it must articulate a coherent boundary between the public and the private, between government and non-government. And it must use this boundary to determine whether the *Charter* applies. Protecting the individual from the powerful state is one thing. Indeed it is the ambition that animates liberalism: in classical liberal thought, the concentrated power of the state imperils the "heroic individual." For many liberals, this core "anxiety" is addressed by the imposition of formal, legally imposed rights to maintain the ideologically mandated boundary between state power and individual liberty.[20] But requiring non-state actors to adhere to constitutional virtues is something else. This use of rights smacks of the very state coercion of individuals that liberalism fears: an attack on the moral autonomy of the individual.[21] It tips rights protections on their liberal heads, changing them from markers of liberty to instruments of state control.[22] The application of rights to non-state actors is thus contradictory within classical liberalism's prism. Liberal rights documents must preserve a sphere of untouchable private action clear of obligatory constitutional norms and "state" virtues.[23] And, this separation of the public sphere from the realm of private activity sets limits on the types of rights claims the courts recognize.[24]

Section 32 of the *Charter* governs the reach of the *Charter*[25] and has been interpreted by the Supreme Court to instantiate such a public/private distinction. This is done by way of the doctrine of vertical application and that doctrine's reliance on the distinction between government and non-government. Thus the *Charter*, we are told, applies only to government actors and actions. This requires in any *Charter* application case some analytical inquiry into whether or not the state, as the Supreme Court of Canada's interpretation of section 32 understands it, is involved.[26]

Of course, it is impossible to draw a clear and predictable line between what is an exercise of state power and what is not. The state is so fully imbricated in all aspects of social and economic life, in both the retention of current distributions of resources and changes to that distribution, that convincing arguments can almost always be made that something both is and is not a product, somehow, of state action. Reliance on such a distinction ignores how the "public" and the "private" influence and reinforce each other. While the distinction is an interesting and sometimes useful abstraction, attempts to use it to draw a line in the real world are "at best futile and at worst covertly ideological."[27] That is, while the line between the public and private is indeterminate, the articulation of it, in this instance by courts, is not apolitical but rather follows often clear ideological lines.[28] (Indeed, the line-drawing involved is always political — sometimes just more starkly so depending on where the observer stands.) Still, the larger point is that *Charter* application jurisprudence is committed to a distinction that is analytically central but practically indeterminate. When judges, then, are asked to decide if an entity or an action lies inside or outside the realm of *Charter* scrutiny, they are "engaged in political and partisan decision-making."[29] Liberal democratic theorists generally need not deny this — but certainly some (liberal) defenders of judicial review do.[30]

The result is case law that skates on thin ice — using fancy judicial footwork, and the occasional leap, to distinguish past jurisprudence when new and compelling factual scenarios emerge. In this manner, at least two lines of argument for holding an entity or an activity accountable as government under the *Charter* have emerged from the Supreme Court. First, the *Charter* will apply if the entity in question is itself "government" for the purposes of section 32. This entails an examination of the nature and degree of governmental control and requires a finding of routine, daily governmental

oversight of the entity.[31] The test is one of form, rather than function: are the markers of government control present? If the entity in question or the action under issue is subject to the requisite degree of government control, then it will be deemed governmental for the purposes of *Charter* application. The second line of argument holds that, even if the entity itself is not "governmental" in this first sense, the *Charter* will be held applicable to an otherwise private entity to the extent that the entity is carrying out a government policy or programme. This second test's ancestry lies in *Eldridge v. British Columbia (Attorney General)*,[32] a judgment where the Supreme Court of Canada, faced with sympathetic rights claimants, had to find a way around its previous holding that hospitals were private (not governmental) entities and thus immune from *Charter* oversight.[33] The Court's solution in that case was to generate a second line of argument for *Charter* applicability — one that looked to the activity not the entity.[34]

The ski jumpers, at least at the trial court, argued that VANOC was subject to the *Charter* along both lines of argument. VANOC's argument here, and at every stage of argument at both levels of court, was simply that the IOC alone had the power to set Olympic events.

The issues of *Charter* application were canvassed at most length in the trial judgment of the British Columbia Supreme Court. Madam Justice Fenlon rejected the plaintiffs' contention that VANOC was subject to "routine or regular" control by government.[35] This was despite the following facts:

1. the governments collectively[36] appoint a majority of the members of the Board of Directors, at pleasure (not fixed terms), and can also name special appointees to the Board;
2. the governments have a series of rights to financial and business information and approvals;
3. the governments make significant direct and indirect financial contributions to the Games' budget;
4. VANOC is prohibited from amending its bylaws or essential governing structure without consent of all governments;
5. VANOC's original by-laws and letters patent are subject to approval of three of the governments;
6. VANOC is fiscally accountable to government.

Instead, the court stated that VANOC was subject to the "routine and regular" or "day-to-day" control of the IOC, a private, Swiss non-governmental entity.[37]

Madam Justice Fenlon continued nonetheless, stating that "hosting the 2010 Games is uniquely governmental in nature."[38] The Olympic Games are awarded not to a private entity but to the host governments: only a government can bid for and host Olympic Games.[39] The IOC, while it owns the Games, does not actually stage them. The result, Justice Fenlon concluded, was that "VANOC is subject to the *Charter* when it carries out the activity of planning, organizing, financing, and staging the 2010 Olympics."[40] Thus, the *Charter* is applicable as an extension of the second line of argument, initially elaborated in *Eldridge*.[41]

However, despite her earlier conclusion that the *Charter* applied to VANOC as it delivered the Olympics, Justice Fenlon found that section 15 could not apply to the exclusion of women ski jumpers from the Olympics. A breach of section 15 cannot be found for decisions that VANOC cannot control: "only those activities and the decisions that VANOC has the ability to make while delivering those activities can be the source of a breach of the *Charter*."[42] VANOC did not, the court asserted, exercise any of its decision-making power in delivering the 2010 Games in breach of section 15. In short, the application issue reemerges, this time as spoiler of the section 15 claim.

Like a piece of Swiss cheese, the activity of delivering the Olympics has holes in it. VANOC, staging a government programme with a discriminatory element, gets to say it is merely acting on the orders of the IOC and is therefore immune to section 15 obligations. The government activity named in the application discus-

sion turns out not to include the selection of competitive events — only the staging of those events.[43] The result allows government to carry out or assign a programme with any number of explicitly discriminatory events, provided that the control over the decision to discriminate is contractually left with some entity other than the government or the stager of the event. This effectively folds the "ascribed government activity" test back into the government control test, albeit at the section 15 stage, and the slice of government activity is now more holes than cheese.

Reasoning at the Court of Appeal followed this result but by a different route. The Court of Appeal began its section 32 analysis from the position that VANOC is a private entity controlled by another private entity, the IOC: "no government has legal power to control VANOC even if government wished to do so."[44] The court goes on to say that even if the hosting of the Games could be construed as a matter within the authority of the government under section 32 of the *Charter* (and thus a governmental programme), the selection of the events at the Games could not. This is because the IOC has the exclusive authority to set those events. Moreover, the government contracted for the Olympics before the events had been set, indicating that "it is clear that the specific events to be staged were not important to the goals of government."[45] This is unpersuasive. Governments may have been agnostic as to what events are scheduled generally. But surely they should be assumed to have as at least an implicit goal that constitutional standards are observed in any programme in which they participate.

At the Court of Appeal, the *Charter* application focus is narrowed to the decision to exclude the women. The broader context is irrelevant and the question of whether the staging of the Games is otherwise subject to the *Charter* is left open. Thus the claim fails at the *Charter* application stage: there is no government actor nor government activity involved in the exclusion of the women ski jumpers. The import is the same as at the lower court: leave decision-making responsibility for some element of a (possible) government programme with some other private player and that decision — no matter how odious — is *Charter* immune.

The British Columbia Supreme Court and Court of Appeal both ignored that the IOC's decision to exclude the women is implemented and realized by VANOC's staging of the Games. VANOC must take a myriad of small and large actions to ensure that the men can compete: construction of the ski jumps, transportation to Vancouver and to the competitions, provision of housing in Vancouver, provision of athletes' seats at the Opening Ceremonies, conducting medal ceremonies with medals, and so on.[46] VANOC excluded the women from each of these activities and the men's exclusive participation is made possible only by these activities. Pointedly, in practice, there is no clear and sharp line between the IOC's decision and VANOC's implementation of it.[47]

Contractual obligations ought not to negate VANOC's duty to refuse to implement a discriminatory decision if the law, here the Constitution, requires such a refusal. To say that VANOC had no control over the question, and therefore no constitutional obligation, is to reverse the proper order of analysis and to allow contract to trump constitution. It was a variant of this concern that led the Supreme Court of Canada to elaborate an alternative course to *Charter* applicability in the *Eldridge* decision: "Just as governments are not permitted to escape *Charter* scrutiny by entering into commercial contracts or other 'private' arrangements, they should not be allowed to evade their constitutional responsibilities by delegating the implementation of their policies and programs to private entities."[48] Otherwise, governments can simply privatize their way out of *Charter* compliance.

The Court of Appeal, despite its section 32 conclusion, also considered the section 15 aspect of the case, if merely to recycle its initial arguments about control. Here the court narrowed the guarantee of equality proffered by section 15 to a guarantee that applies only to "the way that the law affects individuals."[49] Relying on the Supreme Court of Canada judgment in *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*[50], the court argued that the

ski jumpers must show that the unequal benefit (the availability of men's but not women's ski jumping events) is "in some way a product of 'law'."[51] This, the Court stated, is a threshold requirement for section 15 breaches.[52] And because the decision to exclude the women does not stem from statutory authority (or from any other power flowing from the Crown) there was no "law" involved to trigger section 15 analysis.[53] Moreover, even if the Multiparty Agreement or the Host City Contract (the two contracts "assigning" the Olympics to Vancouver) qualified as law,[54] the policy that is the subject of the ski jumpers' complaint lay within the exclusive authority of the IOC, not those contractual documents.[55] The issue under section 15, for the Court of Appeal like the trial court, then, was control — more specifically, VANOC's lack of control over the choice of events at the Olympics.

This is an unconvincing argument. It makes little sense to restrict section 15 to a narrower ambit than other *Charter* rights and to exclude actions otherwise caught by section 32.[56] The argument immunizes significant ranges of the modern administrative state's allocation of resources and powers. And this argument also effectively allows government to contract out of equality rights responsibility for elements of programmes for which it is otherwise accountable under the *Charter*. Too thin a parsing of government action that is accountable under section 15 adds yet another mogul to the run for equality litigants.

Discrimination Against the Women Ski Jumpers

While the issue of discrimination was not the legal fulcrum on which these judgments turned, it was, after all, the whole point of the case. Some observations consequently are warranted. This case is just one moment in the history of women in ski jumping but it encapsulates the larger and long-standing gender issues of the sport. Commentators have noted that the sport of ski jumping, in particular, "offers an illuminating discourse in gender stereotypes and expectations."[57] Organized sport in general both constructs and enforces historical myths about women's physical inferiority.[58] Ski jumping offers a particularly compelling illustration, as it is a sport from which women have until quite recently been excluded, yet it is also a sport in which women's abilities are roughly comparable to men's.[59] Thus, tensions around women's exclusion and the threats their inclusion represents to the gendered texture of the sport are easier to read.[60] Certainly, despite women's performance as jumpers, gender stereotypes about women and the sport persist. Only a few years ago, Gian Franco Kasper, at the time head of the International Ski Federation, opined to the media about ski jumping for women: "Don't forget, it's like jumping down from, let's say, about two meters on the ground about a thousand times a year, which seems not to be appropriate for ladies from a medical point of view."[61] Apparently, exploding uteri threaten.[62]

Consequently, the equality issue in this case is, as equality issues go, an easy one. It is simple, formal equality that is at stake. The much-maligned "similarly situated" test does just fine as a vehicle for showing up the discrimination at issue here. As a number of commentators have already noted, rights claims that require significant redistribution or state expenditures tax our courts.[63] Claims where the female equality litigants are much the same as comparable men "but for" their gender are the most section 15 friendly.[64] In the *Sagen* case, the jumps were already built. No subtle understandings of gendered nuance or complications of the social manifestations of sex difference are needed. The women jump as well, sometimes better, than the men and the evidence is clear that it is only their gender that holds them back.

This case is also not unique, nor is the discrimination newly noted. Sex discrimination challenges to sporting facilities and organizations abound. One of the first section 15 gender discrimination cases involved a successful challenge by a twelve year old girl, Justine Blainey, who wished to play in a boys-only hockey league.[65] Since *Blainey,* every year or two it seems, a sex discrimination challenge based on exclusion from full benefits of some organized sport surfaces, although typically these cases

are brought under statutory human rights law and not the *Charter*.[66] While the ski jumpers were considering their legal action at least two other sport sex discrimination complaints were in the news.[67]

Madam Justice Fenlon's conclusion on the question of different treatment was stark: "the exclusion of women's ski jumping from the 2010 Games is discriminatory.… [T]he plaintiffs will be denied this opportunity for no reason other than their sex."[68] Her reasoning was straightforward. Neither the male nor the female ski jumpers met the requisite degree of "universality" required by the IOC's formal criteria for event inclusion. [69] Both fail by roughly the same amount (taking into account the differential rates the criteria set for men and women), yet the men got to jump by virtue of their historic involvement in the "Olympic tradition."[70] And the "Olympic tradition" by which the men benefit incorporates and is shaped by historic stereotyping and prejudice against women athletes — women ski jumpers in particular. The "grandfathering" of the men into the Olympics "perpetuates the effect of that prejudice and is, therefore, discriminatory."[71] The only problem for the ski jumpers' case was that the discrimination was done by the IOC, not VANOC.

The IOC escaped lightly. The British Columbia Supreme Court took at face value the IOC's many expressions of good will towards gender equity. The court gave only slight weight to expert findings of extensive discrimination against women in the ski jumping movement and in sport generally, and the impact of this discrimination on the IOC's decision.[72] The women had argued that historic prejudice against women in ski jumping meant that, even though the IOC's criteria determining the required degree of universality for a sport to be included in the Olympics set a lower threshold for women than for men, the criteria for women were discriminatory.[73] Historic prejudice had acted as "societal headwinds" preventing women from reaching technical merit requirements.[74] The ski jumpers gave evidence about lower levels of funding, support, and training opportunities than their male counterparts, making the achievement of a world-class level very difficult, if not impossible.[75] Inclusion in the Olympics was cited as a key and necessary mechanism for the growth and expansion of the sport.[76] The court rejected these broader arguments, arguing that discrimination flowed only from the application of the "Olympic tradition exemption" to the men's ski jumping.[77]

Outside of the courts, more realistic and less naive understandings hold sway. Observing that other events newly scheduled for the 2010 Games — notably women's ski cross[78] — also fall significantly below the universality threshold for inclusion that the IOC claims it applies, some argue that: "What matters to the IOC is: Will the event sell tickets, will it sell TV time, is it popular?"[79] Partner this observation with the following comment by Dick Pound, a longtime Canadian IOC official, about future IOC treatment of the ski jumpers, and the IOC's insistence that the decision was based "purely on technical merit"[80] becomes increasingly suspect:

> But if in the meantime, you're making all kinds of allegations about the IOC and how it's discriminating on the basis of gender and so on then the IOC, in a very human reaction, might say, "Oh yeah, I remember them. They're the ones that embarrassed us and caused us a lot of trouble in Vancouver. Maybe they should wait another four years or eight years or whatever it may be."[81]

Only 17 per cent of the IOC members are women and only one woman sits on the IOC executive.[82] The evidence suggests that the commercial imperatives of a private corporation that owns the rights to a very expensive sporting event — as well as personal grudges or biases — can significantly and unfairly influence selection of new competitive Olympic events.

The "Outrun:"[83] Reflections on the Challenge

The decisions by the two courts were not particularly popular. Editorials in the local papers supported the women[84] and a recent poll showed that 73 per cent of Canadians were in favour of including women ski jumpers in the Olympics.[85] A comment by Lindsay Van, one of the defeated ski jumpers, sums up one par-

ticular sentiment: "The Canadian court system is a little bit weak if it can't stand up to the IOC and apply Canadian law."[86] Even the trial judge found "something distasteful"[87] about the outcome.

Certainly, one could argue for an improved theory of *Charter* applicability. Both academics and judges have articulated more functional tests for designating an entity or activity as governmental that better fit the landscape of contemporary Canadian society.[88] But such doctrinal finessing is not the main mission of this comment. Rather, the purpose is to show how even a fairly simple claim of sex discrimination can founder when forced to seek resolution through *Charter* litigation.

Law can variously moderate, confirm, or challenge power.[89] *Charter* law, in particular, has been touted as establishing a set of guarantees that moves us towards a better and fairer society. But as we have seen in *Sagen*, the distinctions at play in *Charter* argument can instead "provide formal paraphernalia behind which private power thrives relatively unchecked and substantive issues are arbitrarily and unjustly resolved."[90] More specifically, the private power of both the IOC and VANOC as the two corporations roll out a large public event — at considerable public inconvenience and expense, with broad government involvement — is rendered unproblematic. VANOC's complicity in IOC treatment of the women is excused, even legitimated. The exclusion of the women ski jumpers, even though condemned by the lower court judge, is left intact. Governments, the IOC, and VANOC, after expressions of concern for the "girls," quickly move on.[91] The *Charter* case, it seems, simply reinforces the power of the Olympics corporations to treat women however they see fit.

To return to the earlier point that the drawing of any line between the public and the private is inevitably political, what was at stake in this case? How can we understand the courts' refusal to draw the line so that VANOC and the exclusion of the women ski jumpers lie within the reach of the *Charter* and its equality rights? Certainly, VANOC occupies a hazy middle ground between formal government and its legislative acts, and other entities now clearly doctrinally accepted as private. Would holding VANOC subject to the *Charter* threaten the collapse of these older distinctions? Perhaps. Anytime a new and challenging factual scenario forces a recalibration of the line, there is the risk that the indeterminancy of the whole public/private edifice will be clearly revealed. If this corporation (VANOC) or this programme (the Olympics) is considered governmental, then who knows what corporation is within range of the *Charter*'s strictures?

But maybe it is also important that this case is about sport, and about women in sport. Imagine if the exclusion had been of some other group, say black or Jewish participants, and if the event had been some other form of international meeting hosted by our governments. Would the courts have been as hands-off in such a case? Would the governments and local organizers been as quick to defer to an extranational decision maker?

Much has been written about sport as transmitter of social and cultural values, its replication of hierarchical, racist, militaristic, and patriarchal social structures, and its centrality to Western society.[92] A history of exclusion and discrimination (of many sorts) marks national and international sports organizations. "The history of modern sport is a history of cultural struggle."[93] But it often takes clever and persistent social archaeology to reveal how this history persists and shapes what we consider normal and natural about sport, and how sport plays such a powerful and structural role in our societies. Perhaps the ski jumpers' application of the *Charter* to the Olympics ran afoul of deeply entrenched ideas about sport — of dominant assumptions about sport as essentially private and individual, not a public institution. That Canadian human rights law had a tradition (now defunct) of allowing sex discrimination in sports speaks to long-standing assumptions about, among other things, the preferability of private ordering in sports and its organization.[94] It may also be that sport just seems too trivial to engage the full force of constitutional law; it is okay, that is, to leave it to its own devices, even if a few women suffer some missed competitions.

So, at the end of the day, what can one say about this case? Certainly, it is a shame that the women are shut out. Their exclusion has implications for the development of their sport, as funding — both governmental and sponsorship — so often is dependant upon Olympic eligibility. But there are other observations more specific to the sport of *Charter* litigation as it plays out in the Canadian polity. *Charter* litigation has contingent and unpredictable significance. In addition to its containment of the struggles of subordinate groups and its legitimation of that subordination, it can on occasion catalyze broader political support for those struggles. It is also possible that, despite what Dick Pound says, the public black eye the case gave the IOC will make a positive difference to the fate of the women ski jumpers at the 2014 Olympics. Already, movement on the issue is discernable. The Governor General of Canada, Michaëlle Jean, reports lobbying IOC President Jacques Rogge at the opening ceremony of the 2010 Olympics for inclusion of women's ski jumping at the next Winter Olympics. Rogge is reported by her to have commented favourably on the women's chances.[95] (Although in the wake of the 2010 Olympics and the domination of women's hockey by the Canadian and American teams, Rogge waded into gendered controversy again by hinting that women's hockey may soon be on the chopping block.[96]) The story continues, with a new flight of ski jumpers to carry the cause and another chapter in women's ski jumping to be written. But the *Charter* has once again proven resilient to attempts to use it to obtain gender justice. The orchestration of the 2010 Olympics was the wrong playing field for *Charter* claims, and women ski jumpers continue to be consigned to the bleachers and kept from the podium.

Notes

* Associate Professor, Faculty of Law, University of British Columbia. Thanks to Ted Murray for excellent research assistance. Comments from Martha Jackman, Natasha Affolder, and Andrew Petter gratefully received. Funding support from Foundation for Legal Research and SSHRCC CURA programme.

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

2 *Sagen v. Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games,* 2009 BCCA 522, 98 B.C.L.R. (4th) 141 (CanLII) [*Sagen* (BCCA)], affirming *Sagen v. Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games*, 2009 BCSC 942, 98 B.C.L.R. (4th) 109 (CanLII) [*Sagen* (BCSC)].

3 Allan C. Hutchinson & Andrew Petter, "Private Rights/Public Wrongs: The Liberal Lie of the *Charter*," in Andrew Petter, *The Politics of the Charter: The Illusive Promise of Constitutional Rights* (Toronto: University of Toronto Press, 2010) 77 at 77 [Hutchinson & Petter].

4 2002 SCC 84, [2002] 4 S.C.R. 429 (CanLII).

5 The inrun is the name of the approach ramp the skier travels down to build speed heading into the jump.

6 The programme of the Olympic Games includes sports, disciplines and events.

7 Because the Nordic Combined event includes ski jumping as an element, this event has no women in it either.

8 The first measured jump was made in 1809 by a Norwegian lieutenant, Olaf Rye, to impress his soldiers. For an engaging summary of the history of the sport, see Patricia Vertinsky, Shannon Jette & Annette Hoffman, "'Skierinas' in the Olympics: Gender Justice and Gender Politics at the Local, National and International Level over the Challenge of Women's Ski Jumping" (2009) 18 Olympika 43 [Vertinsky et al., forthcoming]. Ski jumping competitions are held on three types of hills: Normal Hills, Large Hills and Ski Flying Hills. The men were scheduled to compete on the Normal and Large Hills at the 2010 Games and also in a Team Event. The women asked to be included with only a Normal Hill event.

9 Canadian Press, "IOC 'Technical Merit Keeping Women's Ski Jumping Out of Games'" *TSN* (19 November 2008) online: TSN.ca <http://tsn.ca/olympics/story/?id=25607&lid=sublink07&lpos=headlines_olympics>.

10 Canadian Press, "Rogge: Women jumpers would dilute Olympics medals" *CTV News* (28 February 2008) online: CTV.ca <http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20080228/ski_jumping_080227/20080228/>.

11 Randy Starkman, "Ski jumpers face an uphill battle" *The Star* (10 January 2008) online: TheStar.com <http://www.thestar.com/printArticle/292590>.

12 "In an announcement Tuesday, Canada's federal government and the Canadian Olympic Committee promised to step up the pressure to get

female competitors the same chance to take flight as their male counterparts. 'It's about equality,' Helena Guergis, Canada's secretary of state for sport, told CTV British Columbia." "Feds confirm they will push for female ski jumping" *CTV News* (8 January 2008), online: CTV.ca < http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20080108/Ski_Jumpers_080108/20080108?hub=Politics>.

13 The number at the Supreme Court soon grew to 10 and at the Court of Appeal level the number of ski jumper appellants grew to 14.

14 *Sagen* (BCSC), *supra* note 2.

15 *Sagen* (BCCA), *supra* note 2.

16 *Sagen* (BCCA), *supra* note 2, leave to appeal to S.C.C. refused 33439 (22 December 2009).

17 1986 CanLII 5 (S.C.C.), [1986] 2 S.C.R. 573 [*Dolphin Delivery*].

18 *Dolphin Delivery* concerned the legality of a common law injunction granted by the British Columbia Supreme Court against an action of secondary picketing. McIntrye J. wrote in response to the question of whether the Charter applied to the common law: "In my view, there can be no doubt that it does apply." But he then went on to rule that the *Charter* did not apply because the case involved only a common law rule with no government actor: "While, as we have found, the *Charter* applies to the common law, we do not have in this litigation between purely private parties any exercise of or reliance upon governmental action which would invoke the *Charter.* " *Ibid*. at paras. 25, 41.

19 Hutchinson & Petter, *supra* note 3 at 80-81.

20 Martin Loughlin, "Rights, Democracy, and Law," in Tom Campbell, K.D. Ewing, & Adam Tomkins, eds., *Sceptical Essays on Human Rights* (Oxford: Oxford University Press, 2001) 41 at 42 [Campbell et al.]. For a judicial articulation of this concern, see Wilson J. in *R. v. Morgentaler*: "Thus, the rights guaranteed in the *Charter* erect around each individual, metaphorically speaking, an invisible fence over which the state will not be allowed to trespass." 1988 CanLII 90 (S.C.C.), [1988] 1 S.C.R. 30 at 164.

21 Peter W. Hogg, "The Dolphin Delivery Case: The Application of the *Charter* to Private Action" (1987) 51 Saskatchewan Law Review 273 [Hogg]; John Whyte, "Is the Private Sector Affected by the *Charter*" in Lynn Smith, Gisele Cote-Harper, Robin Elliot & Magda Seydegart, eds., *Rights in the Balance: Canada's New Equality Rights* (Saskatoon: Canadian Human Rights Reporter, 1986) 145 at 149 [Whyte].

22 "The legal system, at least, is theoretically implicated in all that we do, but if the Charter's rights are to prevail everywhere many valuable aspects of private arrangements will be lost." Whyte, *ibid*. at 179.

23 Hogg, supra note 21at 274; David Dyzenhaus, "The New Positivists" (1989) 39 University of Toronto Law Journal 361 [Dyzenhaus]; Whyte, *ibid*. This is no less true of human rights legislation than of constitutional rights documents. Human rights legislation may have a larger sphere of public action regulated by the law but it nonetheless also articulates a line between that sphere of public action and action that lies outside the ambit of the legislative structuring.

24 Judy Fudge, "The Canadian *Charter of* Rights: Recognition, Redistribution, and the Imperialism of the Courts" in Campbell et al, *supra* note 20, 335 at 351 [Fudge].

25 Section 32(1) reads:
This *Charter* applies:
(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

26 Hutchinson & Petter, *supra* note 3 at 83.

27 *Ibid*. at 84.

28 See generally, Susan B. Boyd, "Challenging the Public/Private Divide: An Overview" in Susan B. Boyd, ed., *Challenging the Public/Private Divide: Feminism, Law and Public Policy* (Toronto: University of Toronto Press, 1997) at 3.

29 Dyzenhaus, *supra* note 23 at 372.

30 For a discussion of this, see Dyzenhaus, *ibid*.

31 *McKinney v. University of Guelph*, 1990 CanLII 60 (S.C.C.), [1990] 3 S.C.R. 229 [*McKinney*]; *Stoffman v. Vancouver General Hospital*, 1990 CanLII 62 (S.C.C.), [1990] 3 S.C.R. 483 [*Stoffman*].

32 *Eldridge v. British Columbia (Attorney General)*, 1997 CanLII 327 (S.C.C.), [1997] 3 S.C.R. 624 at para. 44 [*Eldridge*].

33 *Stoffman*, *supra* note 31.

34 *Eldridge, supra* note 32 at paras. 41-45.

35 La Forest J. writes in *Stoffman*, *supra* note 31 at 513 that there is a difference "between ultimate extraordinary control, and routine or regular control"; *Sagen* (BCSC), *supra* note 2 at para. 24.

36 Four governments (Canada, B.C., Vancouver, and Whistler) were involved in hosting the Olympics and the British Columbia Supreme Court treated them collectively as "government."

37 *Sagen* (BCSC), *supra* note 2 at para. 39. For discussion of the factors of the IOC's routine and

regular control see paras. 35–38. For an interesting discussion of just what kind of entity the IOC is, see David J. Ettinger, "Comment: The Legal Status of the International Olympic Committee," (1992) 4 Pace Yearbook of International Law 98.

38 *Sagen* (BCSC), *supra* note 2 at para. 56.

39 Fenlon J. buttresses her conclusion by noting as well that governments have imposed on VANOC obligations similar to those imposed in the *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.), procurement policies, policies in relation to tobacco advertising, investment restrictions, participation by the national government in aspects of the opening ceremonies, and pay equity and equal employment standards: *Sagen* (BCSC), *supra* note 2 at para. 63.

40 *Sagen* (BCSC), *supra* note 2 at para. 65.

41 *Eldridge*, *supra* note 32 at paras. 41-45.

42 *Sagen* (BCSC), *supra* note 2 at paras. 121, 123.

43 *Ibid*. at para. 123.

44 *Sagen*,(BCCA), *supra* note 2 at para. 45.

45 *Ibid*. at para. 48.

46 *Sagen v. Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games*, 2009 BCCA 522 (Factum of the Appellant) at para. 33 (on file with author).

47 The women ski jumpers were clear in their legal arguments that their first choice was that VANOC host both male and female events. However, failing that they understood their section 15 rights to require VANOC to refuse to host any ski jumping if the men alone were authorized by the IOC to jump. *Ibid*. at para. 28, on file with author.

48 *Eldridge*, *supra* note 32 at para. 142.

49 *Sagen* (BCCA), *supra* note 2 at para. 54.

50 2004 SCC 78, [2004] 3 S.C.R. 657 (CanLII) [*Auton*].

51 *Sagen* (BCCA), *supra* note 2 at para. 56.

52 *Ibid*. at para. 58.

53 *Ibid*. at paras. 62-64; Madam Justice Fenlon, conversely, had no difficulty finding that a contract entered into by a private entity not controlled by government could be the source of a "benefit of the law" within the meaning of section 15. Whether the government activity flows from legislation, government policy, or contract is irrelevant to the general principle that governments should not be able to circumvent *Charter* obligations through use of other than formal statutory instruments: *Sagen* (BCSC), *supra* note 2 at paras. 69-72.

54 The trial judge had indeed ruled that these contractual arrangements were "law" for the purposes of section 15: *Sagen* (BCSC), *supra* note 2 at para. 72.

55 *Sagen* (BCCA), *supra* note 2 at para. 64.

56 For elaboration of this argument, see Peter W. Hogg, *Constitutional Law of Canada*, vol. 2 looseleaf, 5th ed. Supp. (Toronto: Carswell, 2007) "Application of s. 15" at s. 55.5(b).

57 Vertinsky et al., *supra* note 8 at 44.

58 Eileen McDonagh & Laura Pappano, *Playing With the Boys: Why Separate Is Not Equal in Sports* (New York: Oxford University Press, 2008).

59 Vertinsky et al, *supra* note 8 at 44. Some contend that women are better suited to the sport than men, arguing that characteristics geared to accomplishment in ski jumping (slight build, flexibility, balance, mental focus) are associated more with women's physical and mental attributes than men's. See Gerd von der Lippe, "Ski Jumping," in Karen Christensen, Allen Guttmann and Gertrud Pfister eds., *International Encyclopedia of Women and Sports*, vol. 2 (New York: MacMillan Reference, 2001) 1046 at 1047, quoted in Vertinsky et al, *supra* note 8 at 56.

60 See Annette R. Hofmann, Shannon Jette & Patricia Vertinsky, "The Rocky Road on Mount Olymp: Women's Fight to Enter the Olympic Venue in Ski Jumping" in Gigiola Gori (ed.), *Sport and Gender Matters in Western Countries: Old Borders and New Challenges* (Germany: Academic Verlag, 2008) 111 at 117 [Hofmann et al.].

61 "Profile: Women Lobby for Olympic Ski Jumping Events," *North Country Public Radio* (14 November 2005), online: < http://www.womens-skijumpingusa.com/news04.htm>. (Accessed January 29, 2010. This comment has since been retracted.)

62 See Hofmann, et al, *supra* note 60 at 116.

63 See, for example, Fudge, *supra* note 24 at 349. Fudge employs Nancy Fraser's distinction between recognition and redistribution claims. See Nancy Fraser, "From Redistribution to Recognition? Dilemmas of Justice in a 'Post Socialist' Age" (1995) 212 New Left Review 68.

64 Nitya Iyer, "Categorical Denials: Equality Rights and the Shaping of Social Identity" (1993-94) 19 Queen's Law Journal 139; Margot Young, "Sameness/Difference: A Tale of Two Girls" (1997-98) 4 Review of Constitutional Studies 150.

65 *Re Blainey and Ontario Hockey Association et al.*, 1986 CanLII 145 (ON C.A.), (1986) 54 O.R. (2d) 513 [*Blainey*]. See also *Re Cummings and Ontario Minor Hockey Association*, (1978), 21 O.R. (2d) 389, 90 D.L.R. (3d) 568, 7 R.F.L. (2d) 359 (Div. Ct.), and *Re Ontario Human Rights Commission et al. and Ontario Rural Softball Association*,

(1979), 26 O.R. (2d) 134, 102 D.L.R. (3d) 303, 10 R.F.L. (2d) 97 (C.A.).

66 For example, see recent reports of a human rights complaint filed after cancellation of a girls' hockey league in Nanaimo, British Columbia. Dustin Walker, "Parents file complaint against Nanaimo Minor Hockey Association" *Vancouver Sun* (13 November 2009), online: VancouverSun.com < http://www.vancouversun.com/sports/Parents+file+complaint+against+Nanaimo+Minor+Hockey+Association/2218295/story.html>. See also *Hawkins obo Beacon Hill Little League Major Girls Softball Team v. Little League Canada*, 2006 BCHRT 606. For a discussion of past cases, see Canadian Association for the Advancement of Women and Sport and Physical Activity, *Sex Discrimination in Sport: An Update*, (November 2008), online: CAAWS.ca < http://www.caaws.ca/e/resources/pdfs/discrimination_full.pdf>.

67 Mary Ormsby, "Move over, boys, girls are getting their ice time: Gender discrimination outcry prompts mayor's order to protect female leagues" *The Star* (12 November 2009), online: TheStar.com < http://www.thestar.com/sports/hockey/article/724701>; "Girls win big victory in softball team's discrimination battle" *CBC News* (13 January 2009), online: CBC.ca < http://www.cbc.ca/canada/british-columbia/story/2009/01/12/bc-softball-team-victory.html>.

68 *Sagen* (BCSC), *supra* note 2 at para. 7.

69 The criteria applied by the IOC for admission of new events are set out in Rule 47 of an older version of the Olympic Charter. This rule was removed from the 2006 version of the Olympic *Charter* but is still applied by the IOC in practice. Rule 47 stipulates the factors of sport development required for inclusion; a lower threshold is set for women as compared to the threshold set for men's events.

70 The former Rule 47(4.4) stipulates that events that no longer satisfy the criteria can be maintained for the sake of the Olympic tradition: *Sagen* (BCSC), *supra* note 2 at para. 84.

71 *Ibid*. at para. 90.

72 *Ibid*. at para. 93.

73 *Ibid*. at para. 92.

74 *Ibid*.

75 *Ibid*. at para. 94.

76 *Ibid*. at para. 96.

77 *Ibid*. at para. 99.

78 Women's ski jumping has 135 elite athletes registered in 16 countries. The newly added ski cross has 30 women athletes in 11 countries. When admitted, women's snowboard cross had 34 athletes in 10 countries and women's bobsled had 26 athletes in 13 countries. The IOC rules also require at least two world championships before admission to the Olympics. Cross country skiing was admitted in 1952 having had no world championships. Hofmann et al., *supra* note 60 at 119.

79 Ski cross is tremendously popular with television audiences. See Christa Case Bryant, "Why women can't ski jump in the Winter Olympics" *The Christian Science Monitor* (11 November 2009), online: CSMonitor.com < http://www.csmonitor.com/USA/Society/2009/1109/p17s03-ussc.html>.

80 Associated Press, "Women ski jumpers out because of low participation" *USA TODAY* (19 November 2008), online: USAToday.com < http://www.usatoday.com/sports/olympics/2008-11-20-ioc-women-skijumpers-out_N.htm>.

81 Beau Dure, "Women's ski jumpers wish they were Olympians, not spectators" *USA TODAY* (19 February 2010), online: USAToday.com < http://www.usatoday.com/sports/olympics/vancouver/nordic/2010-02-19-womens-ski-jumping_N.htm>.

82 Philip Hersh, "To walk the walk about supporting women, IOC must pick softball for 2016" *Chicago Tribune* (6 August 2009), online: ChicagoTribune.com < http://newsblogs.chicagotribune.com/sports_globetrotting/2009/08/by-philip-hershnext-thursday-when-its-executive-board-announces-the-two-sports-chosen-for-possible-inclusion-in-the-2016-sum.html>.

83 This is the term for the landing slope of the ski jump.

84 See for example, "IOC's flimsy reasons for banning female ski jumpers boil down to discrimination," Editorial, *Vancouver Sun* (11 January 2008), online: VancouverSun.com < http://www.canada.com/vancouversun/news/editorial/story.html?id=2b4634fd-27f5-409b-89bf-8eae0cb-9d7aa>; Vaughn Palmer, "The IOC is accountable to no one — as female ski jumpers now know" *Vancouver Sun* (24 November 2009), online: VancouverSun.com < http://www.vancouversun.com/sports/2010wintergames/ski-jumping/accountable+jumpers+know/2261280/story.html>; "Editorial: Dragging the IOC into the 21st century" *The Province* (23 December 2009), online: The Province.com < http://www.theprovince.com/sports/Editorial+Dragging+into+21st+century/2373122/story.html

85 Stephen Hui, "73 percent of Canadians want women's ski jumping in 2010 Olympics, poll finds" *Georgia Straight* (18 December 2009), online: Straight.com < http://www.straight.com/article-275965/vancouver/73-percent-canadians-

want-womens-ski-jumping-2010-olympics-poll-finds>.

86 Rod Mickleburgh, "Olympic dream dashed for women ski jumpers" *The Globe and Mail* (13 November 2009), online: CTV.ca < http://www.ctvolympics.ca/ski-jumping/news/newsid=19752.html> [Mickleburgh].

87 *Sagen*, (BCSC), *supra* note 2 at para. 124.

88 See for example Wilson J.'s judgment on this issue in *McKinney*, *supra* note 31 at 320-379; Whyte, *supra* note 21 at 179.

89 Judy Fudge & Brenda Cossman, "Introduction: Privatization, Law, and the Challenge to Feminism" in Brenda Cossman and Judy Fudge, *Privatization, Law, and the Challenge to Feminism* (Toronto: University of Toronto Press, 2002) 3 at 5.

90 Hutchinson & Petter, *supra* note 3 at 94.

91 After the court decision, Mr. Furlong expressed sympathy for the young women ski jumpers. "It's an unhappy day for these girls. It's not fun watching it. But for us, this is a chance to move on and focus our attention on preparing for the Olympics." Mickleburgh, *supra* note 86.

92 See, generally, Laura Robinson, *Black Tights: Women, Sport, and Sexuality* (Toronto, Harper Collins Publishers Lte, 2002); Sarah K. Fields, *Female Gladiators: Gender, Law, and Contact Sport In America* (Chicago: University of Illinois Press, 2005).

93 M. Ann Hall, *The Girl and the Game: A History of Women's Sport in Canada* (Peterborough: Broadview Press, 2002) at 1.

94 See, for example, the now repealed section 19(2) of the Ontario *Human Rights Code, 1981*, S.O. 1981, c. 53 at issue in the *Blainey* case; *Blainey*, *supra* note 65.

95 David Ebner, "Governor-General joins fight for women ski jumpers" *The Globe and Mail* (19 February 2010), online: CTV.ca <http://www.ctvolympics.ca/ski-jumping/news/newsid=47119.html>.

96 Ann Killion. "When it comes to women's Olympic sports IOC just doesn't get it" *Sports Illustrated* (2 March 2010), online: SI.com < http://sportsillustrated.cnn.com/2010/writers/ann_killion/03/02/olympics.women/index.html#ixzz0h46z343U>.

Drivers Needed: Tough Choices from *Alberta v. Wilson Colony of Hutterian Brethren*

Janet Epp Buckingham*

Introduction

The recent Supreme Court of Canada decision in *Alberta v. Wilson Colony of Hutterian Brethren*[1] has broken new ground in important areas of *Charter* interpretation. While the Court has previously interpreted section 2(a) of the *Canadian Charter of Rights and Freedoms*[2] as an individual right, in this judgment it gave the communal aspects of religion some constitutional recognition. The Wilson Colony of Hutterites sought an exemption from the mandatory photo ID requirement for drivers' licences in Alberta. This requirement violates the Hutterite religious prohibition on having one's photograph taken, which is based on their very strict interpretation of the biblical Second Commandment not to have a "graven image." The Hutterites lost their case, raising a significant issue: what factors should now be taken into account in determining whether the state must accommodate a particular religious practice protected by section 2(a) of the *Charter*? There seems to be some confusion as to whether human rights concepts of reasonable accommodation have any place in interpreting the ambit of religious freedom. The Court was divided, four judges to three, with three separate judgments. Such division is typical of Supreme Court of Canada cases that consider religious freedom. Chief Justice McLachlin, writing for the majority, and Justice Abella, in dissent, actually debate with one another in their judgments.

The case was decided on the last step of the second part of the *Oakes* test, proportionality between salutary and deleterious effects. The Court itself makes note of the importance of the judgment for that reason. For the first time, lawyers and lower courts have some guidance in exactly how to apply this test in *Charter* cases. As well, the Supreme Court signalled its interest in comparative law to assist it in determining the ambit and application of rights analysis under the *Charter*. Both Chief Justice McLachlin and Justice Abella referred to European Court of Human Rights cases in their judgments. Unfortunately, there was little reference to international law.

Divided Court

At a 2009 Canadian Bar Association conference on the first 10 years of the McLachlin Court, the Chief Justice received kudos for the remarkable degree of consensus developed by this Court. This does not mean that there are never dissents, far from it. But under Chief Justice McLachlin, the Court has been less prone to numerous judgments. The ruling in *Wilson Colony* came down shortly after that conference and is one example where the Court was significantly divided; in a ruling where only seven judges participated,[3] there were three judgments. Consensus was clearly not on the table.

At the outset of her dissent, Justice Abella indicated her disagreement with the majority judgment, written by the Chief Justice.[4] Her dissent goes on to cite passages from the 1995 judgment of Justice McLachlin (as she then was) in *RJR-MacDonald Inc. v. Canada (Attorney*

General).[5] These passages from *RJR-MacDonald* caution against overstating the "pressing and substantial" objective[6] of a right-infringing measure and emphasize the government's responsibility to prove that no less-intrusive alternative was available.[7] Justice Abella also points out that *RJR-MacDonald* rejected a complete ban on advertising as more than minimally impairing.[8] She appears to argue that Chief Justice McLachlin's own analysis from 1995 supports the reasoning of Justice Abella's dissent. Furthermore, Justice Abella refers to an article the Chief Justice published in 2004[9] to substantiate her concern that the majority's approach in this case risks "presumptively shrinking the plenitude of what is captured by freedom of religion in s. 2(*a*) of the *Charter*."[10]

The Chief Justice, writing for the majority, responded directly to Justice Abella's argument. Her judgment takes issue with Justice Abella's emphasis on the collective aspects of religion and how they should be considered in this case, saying explicitly that the community impact in this case does not lead to "group right"[11] for Wilson Colony. She then argues against Justice Abella's assertion that the 700,000 Albertans with no driver's licence pose a greater risk to the integrity of the system than the 250 Hutterites who ask that their religious objections be accommodated.[12] Finally, she downplays Justice Abella's assertion that the photo ID requirement represents a serious infringement of the Hutterites' religious freedom. She states that it is up to the courts to make this determination, and not for the claimant to simply assert it.

Religion, it appears, is a divisive issue, even for justices of the Supreme Court of Canada.

Communal Aspects of Religion

This case is unique in that Hutterian Brethren farm communally and hold their farm property as a collective, and this was a significant fact in the case. Communal living is an integral part of their religious beliefs. Alvin Esau describes this lifestyle as living "*in* a church"[13] as all property is owned by the church. In fact, to be a member of the colony, it is essential to be a church member in good standing.[14] The objects common to all Hutterian Brethren colonies are set out in Articles of Association and include that the members "achieve one entire spiritual unit in complete community of goods."[15] It is quite clear that any member who deviates significantly from the theology of the colony risks expulsion, thereby forfeiting all rights to communal property and any share in the community's livelihood. But it is not just communal ownership that is at risk; spiritual unity is also vital. If a member is living contrary to the tenets of the faith, that person will be outside the spiritual unity of the colony.

Unlike some other religious communities, Amish and Old Order Mennonite for example, Hutterian Brethren do not eschew modern equipment. They use modern farm equipment and drive modern vehicles like tractors, large trucks, and even semi-trailer transports for agricultural produce. Drivers' licences are therefore important for getting their products to market. Yet this is more than just a matter of commercial convenience; members of the community serve one another by taking on various tasks required to run the communal farm. Not being able to obtain non-photo drivers' licences will change the community as, after this decision, the Wilson Colony is faced with an unpleasant choice: violate its religious beliefs or hire out driving duties.

It is notable that Hutterian Brethren have some history of discriminatory treatment in Alberta, although it is not discussed in the case. From World War II until 1972, the Province of Alberta restricted the size and spacing of colonies,[16] effectively prohibiting their expansion.[17] The Hutterites lost a legal challenge to the discriminatory legislation in 1969.[18]

Relatively few religious freedom cases have required Canadian courts to consider the communal aspect of religion, although judges have commented in *obiter*.[19] The issue was first considered in *R. v. Edwards Books and Art*,[20] a case concerning exemptions from Sunday closing laws for those of different religions. Chief Justice Dickson stated in relation to section 2(a) of the *Charter*, "The Constitution shelters individuals and *groups* only to the extent that religious beliefs or conduct might reasonably or actually

be threatened"[21] (emphasis added). Yet that case did not turn on this point.

The community aspects of religious life were squarely at issue in a 2001 Quebec trial decision concerning the Chassidic Jewish community.[22] At issue was a small wire strung around a neighbourhood in the City of Outremont, a suburb of Montreal. The wire is called an *eruv* and allows the Jews to consider the entire neighbourhood their "home" for the purposes of movement on their Sabbath. While the wires were seemingly innocuous, city officials began removing them after complaints from non-Jewish neighbours.[23] In finding for the Orthodox Jews, the Quebec Superior Court specifically referred to the importance of being able to participate in the religious life of the community.[24] Without the *eruv*, they are essentially confined to their homes on the Sabbath and cannot participate in community worship. For this reason, the court held that removing the *eruv* violates the Jews' religious freedom under section 2(a). The court therefore granted an injunction to stop city officials from removing the *eruv*.

Outside of religious communities like Hutterian Brethren, the most significant communal aspect of religion is the gathering place of a religious community, usually a house of worship. This was at issue in *Congrégation des témoins de Jéhovah de St.-Jérôme-Lafontaine v. Lafontaine (Village)*[25] but the majority of the Supreme Court of Canada decided the case on administrative law principles. Justice LeBel addressed the issue in his dissent:

> Freedom of religion includes the right to have a place of worship. Generally speaking, the establishment of a place of worship is necessary to the practice of a religion. Such facilities allow individuals to declare their religious beliefs, to manifest them and, quite simply, to practise their religion by worship, as well as to teach or disseminate it. In short, the construction of a place of worship is an integral part of the freedom of religion protected by s. 2(a) of the *Charter*.[26]

While Justice LeBel's focus still seems to be the individual, much of what transpires at a house of worship is communal in nature.

In the case brought by the Wilson Colony, the Alberta Attorney General conceded that the photo ID requirement violates the Hutterites' religious freedom under section 2(a) of the *Charter*. Thus, at both the Alberta Court of Queen's Bench[27] and the Alberta Court of Appeal[28] the issue was whether the violation could be justified under section 1. Justice LoVecchio of the Court of Queen's Bench did not review in detail the nature of the Hutterite community, but he noted in the introduction to his judgment that "it is essential to their continued existence as a community that some members operate motor vehicles."[29] In the section 1 analysis, he held that the requirement did not meet the minimal impairment test because "there is a reasonable accommodation available,"[30] namely, non-photo drivers' licences which were available in the province prior to 2003. He did not make any reference to the communal aspects of the colony in his section 1 analysis.

At the Alberta Court of Appeal, the communal aspects of the Wilson Colony were much more influential in the decision. In setting out the facts of the case Justice Conrad reviewed the Hutterian arguments regarding their religious community:

> The evidence shows that although the colonies attempt to be self-sufficient, certain members must drive regularly on Alberta highways in order to, *inter alia*, facilitate the sale of agricultural products, purchase raw materials from suppliers, transport colony members (including children) to medical appointments, and conduct the community's financial affairs. The respondents say that if they are unable to drive it will be impossible for them to continue this communal way of life, and that they are therefore being forced to choose between two of their religious beliefs: adhere to not having their photo taken or adhere to living a communal life and performing their assigned duties within the colony.[31]

Having noted the Province of Alberta's admission that the photo ID requirement violates the Hutterites' religious freedom, Justice Conrad turned to the section 1 analysis. She found that the objective of the regulation, preventing identity theft and fraud, was pressing and substantial, but there was no pressing and substantial

need for it to be universal with no exemptions, particularly for religious objections. She went on to find that the regulation did not meet the minimal impairment test. Finally, she weighed the effects of the legislation, again commenting on the impact on the community of not granting the exemption: "Although the Hutterian Brethren may be able to hire drivers to help with some routine tasks, it is difficult in today's world to imagine an entire rural community functioning effectively when none of its members are able to operate a motor vehicle on Alberta's highways."[32]

At the Supreme Court of Canada, Justice Abella's dissent makes the strongest affirmation of the communal aspects of religion. In both the "Background" section and early paragraphs of the "Analysis" section of her judgment she notes the impact of the photo ID requirement on the community. She refers to the *Edwards Books* decision, which noted that freedom of religion has "both individual and collective aspects."[33] She further affirms Justice Wilson's statements in the same case (although Justice Wilson dissented in part):

> [I]t seems to me that when the *Charter* protects group rights such as freedom of religion, it protects the rights of all members of the group. It does not make fish of some and fowl of the others. For, quite apart from considerations of equality, to do so is to introduce an invidious distinction into the group and sever the religious and cultural tie that binds them together. It is, in my opinion, an interpretation of the *Charter* expressly precluded by s. 27, which requires the *Charter* to be interpreted "in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians."[34]

This discussion takes place within the context of the infringement of section 2(a), rather than the section 1 analysis.

Justice LeBel, also in dissent, shares this concern for the community in relation to the interpretation of religious freedom in section 2(a):

> Religion is about religious beliefs, but also about religious relationships. The present appeal signals the importance of this aspect. It raises issues about belief, but also about the maintenance of communities of faith. We are discussing the fate not only of a group of farmers, but of a community that shares a common faith and a way of life that is viewed by its members as a way of living that faith and of passing it on to future generations. As Justice Abella points out, the regulatory measures have an impact not only on the respondents' belief system, but also on the life of the community.[35]

Justice Fish also dissented, agreeing with both Justice Abella and Justice LeBel.

The majority judgment notes Justice Abella's focus on the communal aspects of religion, but states that the impact of the decision on the Hutterian community is only relevant at the proportionality stage of the section 1 analysis. "Community impact does not … transform the essential claim — that of the individual claimants for photo free licences — into an assertion of a group right."[36] This conclusion denies exactly what the Hutterites were asking for: recognition of a group right to be exempted from the photo ID requirement. Hutterite colonies function as communities, with each member given certain responsibilities for the proper functioning of the community.[37] The Wilson Colony was not asking for individual exemptions to protect individual religious freedom. But the majority was quite clear that section 2(a) of the *Charter* protects individual religious freedom only. The impact on the communal aspects of religion, while important, is only a factor in considering whether the infringement on religious freedom is justified under section 1.

Protection and Accommodation of Religious Practices

The Supreme Court of Canada has affirmed time and time again its commitment to strong protection for religious freedom. *Big M Drug Mart*[38] is the seminal case on religious freedom under the *Charter*. Justice Dickson, as he then was, set out a broad definition of religious freedom and went further to discuss the absence of coercion as characterizing freedom. He concluded, "Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the funda-

mental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience."[39]

In a recent case the Supreme Court affirmed, "The protection of freedom of religion afforded by s. 2(a) of the *Charter* is broad and jealously guarded in our *Charter* jurisprudence."[40] While the pivotal case *O'Malley v. Simpsons-Sears*[41] in 1984 was not decided under the *Charter*, it established the principle of reasonable accommodation of employees' religious practices. This has included observance of holy days[42] and religious dress requirements.[43] The accommodation requirement has been applied beyond employment situations, including in *Charter* cases. Two recent Supreme Court decisions, *Multani*[44] and *Amselem*[45] would have led observers to expect the Court to rule for the Hutterian Brethren in the instant case.

The *Amselem* case pitted Orthodox Jewish condominium owners against their condominium corporation. The by-laws specifically prohibited the building of any structures on the balconies of the high-rise, luxury condominiums. The Orthodox Jews wished to build temporary structures, *succahs*, on their balconies during the Jewish festival of *Succot* in accordance with their interpretation of Scripture. The condominium corporation sought an injunction to prevent the owners from building these temporary structures. The owners argued that this violated their religious freedom under the Quebec *Charter of Human Rights and Freedoms*.[46] In interpreting the Quebec *Charter*, Justice Iacobucci, writing for the majority, used interpretations of the Canadian *Charter* as authoritative. He summarized the definition of religious freedom as follows:

> [F]reedom of religion consists of the freedom to undertake practices and harbour beliefs, having a nexus with religion, in which an individual demonstrates he or she sincerely believes or is sincerely undertaking in order to connect with the divine or as a function of his or her spiritual faith.[47]

Justice Iacobucci went on to weigh the impact on other condominium owners if the Jewish owners built *succahs* on their balconies for nine days. He was quite unsympathetic to their concerns about the aesthetic impact or the possible diminution of value of their condominiums. He said, "[M]utual tolerance is one of the cornerstones of all democratic societies. Living in a community that attempts to maximize human rights invariably requires openness to and recognition of the rights of others."[48]

Similarly, in *Multani* Justice Charron, writing for the majority, stated, "Religious tolerance is a very important value of Canadian society."[49] She upheld the right of a Sikh student to wear a *kirpan*, a ceremonial dagger, to school contrary to the no-weapons policy of the school. She recognized that the no-weapons policy has a pressing and substantial objective. But when she reached the minimal impairment part of the proportionality test, she found that refusing to accommodate Multani did not meet the requirements of the minimal impairment test. The evidence did not show that Sikh boys used the *kirpan* for violence; on the contrary, the Sikh religion teaches that the *kirpan* is not to be used to harm others. This case was brought under section 2(a) of the *Charter* but Justice Charron specifically referenced reasonable accommodation: "[T]he analogy with the duty of reasonable accommodation seems to me to be helpful to explain the burden resulting from the minimal impairment test with respect to a particular individual, as in the case at bar."[50]

In both of these cases, the Supreme Court of Canada made it clear that laws or rules of general application must allow exemptions to accommodate religious practices. There does not appear to be anything novel about *Wilson Colony* that would cause the Court to deviate from its previous position.

Until 2003, the Registrar of Motor Vehicles in Alberta had the discretion to grant exemptions from the general requirement to have a photograph on every driver's licence.[51] These licences were called Condition Code G licences and indicated that they were not to be used for identification purposes. In 2003, this discretion was eliminated.[52] The Alberta government claimed that mandatory photo ID is necessary to prevent identity theft as driver's licences are "breeder documents" used as foundational ID in order to obtain other identity documents.

The Hutterian Brethren held Condition Code G licences, so the elimination of this licence category became a direct infringement of their religious freedom.

The majority of the Supreme Court takes issue with the lower courts' application of Justice Charron's interpretation of the minimal impairment test in the *Multani* case. Justice Charron used a reasonable accommodation test as part of the minimal impairment test. But the majority states, "Minimal impairment and reasonable accommodation are conceptually distinct."[53] The majority focuses on the fact that the case was brought under section 52 of the *Constitution Act, 1982*; under this section, a finding that the provision did not minimally impair the rights of the applicants would result in the regulation being struck down. Yet the regulation was what set out the absolute requirement of photo ID. Presumably, if it was struck down, it would not invalidate all drivers' licences in Alberta but merely the absolute requirement for photo ID. The majority indicates that the outcome might have been different if the application had been brought under section 24(1) of the *Charter*; this section, unlike section 52, allows the court to fashion a remedy for an individual claimant rather than being forced into the all-or-nothing remedy of striking down a law. While no doubt the Court is sensitive to accusations of judicial activism, striking down one subsection of a regulation with a one-year suspension in enforcement, as proposed by Justice Abella, does not appear to be a drastic remedy.

The two dissenting judgments follow a different approach. While they find the objective of the regulation to be pressing and substantial, they do not find that it meets the minimal impairment requirement. Justice Abella states, "The requirement therefore completely extinguishes the right."[54] Justice LeBel views the issue more broadly: "The photo requirement was not a proportionate limitation of the religious rights at stake."[55] Neither is convinced that allowing a small group of religious objectors to have non-photo ID licences, marked with a notice that they are not to be used for identification purposes, would undermine the integrity of the Alberta driver's licence system. And clearly, if the applicants are denied accommodation, it has a drastic effect on their community. As Justice LeBel comments, "a small group of people is being made to carry a heavy burden."[56]

One is left wondering what is different about this case compared to *Amselem* or *Multani*. Is it that a provincial regulation was impugned, rather than a condominium agreement or school rule? Is it that a regulation would be struck down rather than an administrative decision? Does asking for a remedy under section 52 rather than section 24(1) really make such a difference that it requires "a small group of people … to carry a heavy burden"?[57]

Salutary and Deleterious Effects

The majority of the Supreme Court apparently took the view that *Wilson Colony* is the first case to be decided on the last step of the *Oakes* test.[58] The *Oakes* test has four steps. The first is to determine if there is a pressing and substantial objective that justifies the legislation or regulation. The second part requires proportional means to meet that objective. This second part is broken down into three steps: (a) means rationally connected to the objective; (b) minimal impairment of rights; and (c) proportionality between the deleterious effects of the infringement and the salutary effects of the law (abbreviated as "salutary and deleterious effects").

Every other judgment in this case, including the trial judgment and the majority judgment in the Alberta Court of Appeal, turned on minimal impairment, step (b) of the proportionality part of the *Oakes* test. The majority judgment of the Supreme Court goes through each of the steps of the *Oakes* test, specifically giving guidance on the application of "salutary and deleterious effects." The Hutterites were not successful at this fourth and final step. From a review of the majority's reasoning, however, it is doubtful that any future case will see a rights violation that is upheld on every part of the *Oakes* test that could fail on salutary and deleterious effects.

The majority found that the Province of Al-

berta had a pressing and substantial objective in establishing a universal photo ID requirement for drivers' licences; namely, reducing the risk of identity theft.[59] It went on to find that the universal requirement is rationally connected to the goal of preserving the integrity of the driver's licence system.[60] When addressing minimal impairment, the majority indicates that the courts must "accord the legislature a measure of deference, particularly on complex social issues where the legislature may be better positioned than the courts to choose among a range of alternatives."[61] However, this provision is a regulation, not legislation. It was never considered by the legislature.

In its analysis of minimal impairment, the majority focuses on the Hutterite proposal for an alternative that does not require a photograph. The majority characterizes this as an "'all or nothing' dilemma."[62] It contrasts this with the province's proposals, all of which require a photograph but allow the Hutterites not to show it to others. The whole point of the Hutterites' religious objection, however, is to having a photograph taken, not showing it to others. It appears that there was intransigence on the part of both the Wilson Colony and the government, but the majority of the Court only sees that of the Hutterites. The majority judgment indicates that the provincial requirement minimally impairs the Hutterites' religious freedom, as photo ID is essential to the integrity of the driver's licence system.[63]

After citing Peter Hogg's view that the fourth step of the *Oakes* test is "actually redundant,"[64] the majority revives this neglected branch of the test: "The final stage of *Oakes* allows for a broader assessment of whether the benefits of the impugned law are worth the cost of the rights limitation."[65] The salutary effects of the law are clearly related to the integrity of the driver's licence system and the prevention of identity theft. In assessing the deleterious effects of the law, the majority attempts to determine the seriousness of the limit on religious practice.[66] It determines that the limit imposes "the cost of not being able to drive on the highway"[67] but does not deprive "the Hutterian claimants of a meaningful choice as to their religious practice."[68] Contradicting the trial judge's finding of fact,[69] the majority held that while it would necessitate some changes to the life of the Wilson Colony, "the evidence does not support the conclusion that arranging alternative means of highway transport would end the Colony's rural way of life."[70] Thus, it ruled that the deleterious effects "fall at the less serious end of the scale."[71]

With this analysis, Peter Hogg's criticism (as restated by Chief Justice McLachlin) is acute:

> If a law has an objective deemed sufficiently important to override a *Charter* right and has been found to do so in a way which is rationally connected to the objective and minimally impairing of the right … how can the law's effects nonetheless be disproportionate to its objective?[72]

Constitutional experts have disagreed with Hogg's categorical assessment, arguing that although the deleterious effects of a legislative enactment had not yet been found to outweigh its objective, this conclusion remained theoretically possible.[73] Both of the dissenting judgments in *Wilson Colony*, for example, found that the deleterious effects on the litigants outweighed the legislative objective. As well, at least one Supreme Court of Canada case has been decided on this point but there was little analysis of this fourth step that was applicable to other cases.[74]

Justice Abella approaches the salutary and deleterious effects test quite differently from the majority. She looks at the issue from the perspective of the effects of accommodating the Hutterian exemption from the mandatory photo ID system. She says, "Here, the constitutional right is significantly impaired; the 'costs' to the public only slightly so, if at all."[75] Similarly, Justice LeBel states:

> [A] small number of people carrying a driver's licence without a photo will not significantly compromise the safety of the residents of Alberta. On the other hand, under the impugned regulation, a small group of people is being made to carry a heavy burden.[76]

The majority's explanation of the value of the "salutary and deleterious effects" step of the *Oakes* proportionality test does not appear to

significantly revive this part of the test. Perhaps if the impact on the claimants is shown to be drastic, more drastic than the potential loss of their religious communities, the state would fail on this branch of the test. The dissenting judges believed that this was a real possibility while the majority remained unconvinced that taking away the self-sufficiency of the community threatened the community itself.

Comparative Law

In the early days of *Charter* interpretation, Canadian courts looked far and wide – mainly to American judgments – for guidance in interpretation. But after several years of developing its own jurisprudence, this fell out of fashion and Canadian lawyers ceased to include much comparable jurisprudence from other jurisdictions. When faced with novel issues, however, the Court is showing interest in comparative and international law for guidance. In *Bruker v. Marcovitz*,[77] the judgments referred to European, Israeli and South African authorities. In the instant case, while American cases were argued, they were not referenced in the judgment. On the other hand, European jurisprudence referenced in the judgments was not argued before the Court.

As noted above, the Supreme Court of Canada has not addressed the communal aspects of religion as a central issue in a *Charter* case, although it has made reference to them. When coming to a novel issue, it is appropriate to consider how other courts, especially those with particular expertise, have addressed the issue. Justice Abella quotes with approval from three European Court of Human Rights judgments on this aspect of the case: *Kokkinakis v. Greece*,[78] *Şahin v. Turkey*,[79] and *Metropolitan Church of Bessarabia and Others v. Moldova*.[80] (The majority also refers to one of the European cases, *Kokkinakis v. Greece*.[81]) The quotations point to the importance of the communal aspect of religion but do not indicate how the Court applied the principles in the cases.

The Supreme Court of Canada has signalled its interest in hearing international authorities, particularly when interpreting the rights guaranteed by the *Charter*.[82] There is room for counsel to bring a broader and deeper range of authorities when arguing appeals before the Supreme Court of Canada. In this case, there were several interveners, which often bring that broader perspective.

Conclusions

The *Wilson Colony* decision is a significant step in the growing religious freedom jurisprudence. One wonders, however, if it is a step forward or backward for the protection of religious freedom in Canada. The Court was faced with novel issues and was far from unanimous in how to address them. The majority judgment side-stepped the issue of group rights for religious adherents. Although the majority indicated that the communal aspects of religion can be raised at the fourth branch of the *Oakes* test, the outcome in this case was the trampling of the acknowledged religious beliefs of a Canadian religious minority. This precedent leaves religious freedom solely as an individual right.

The Court has signalled its willingness to look to foreign judgments, particularly when considering novel issues. This will be helpful to counsel who can now bring to the Court helpful jurisprudence from other jurisdictions. Counsel will be well advised to argue these cases directly.

Given that *Wilson Colony* is a split decision by a less than full panel of the Supreme Court of Canada, it is not likely the final word on the place of the communal aspects of religion; it is the opening salvo. Religious communities can take some encouragement for future protection of religious beliefs and practices from the judgments of Justices Abella and LeBel. The results of *Wilson Colony* are, however, cold comfort to the members of the Hutterian Brethren who will now have one more community duty to assign: find truck drivers or decide who among them will have to break the Second Commandment and get an Alberta driver's licence ... or opt for civil disobedience.[83]

Notes

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1 2009 SCC 37, [2009] 2 S.C.R. 567 (CanLII) [*Wilson Colony].*

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

3 The Court was short one judge so the case was not heard by the full panel of nine.

4 *Wilson Colony, supra* note 1 at para. 112.

5 1995 CanLII 64 (S.C.C.), [1995] S.C.R. 199 [*RJR-MacDonald*].

6 *Wilson Colony, supra* note 1 at para. 137, citing *RJR-MacDonald, ibid.* at para. 144.

7 *Wilson Colony, ibid.* at para. 144, citing *RJR-MacDonald*, *ibid*. at para. 160.

8 *Wilson Colony, ibid.* at para. 148.

9 "Freedom of Religion and the Rule of Law: A Canadian Perspective" in Douglas Farrow, ed., *Recognizing Religion in a Secular Society: Essays in Pluralism, Religion, and Public Policy* (Montreal: McGill-Queen's University Press, 2004) at 12, quoted in *ibid.* at para. 173.

10 *Wilson Colony, supra* note 1 at para. 173.

11 *Ibid.* at para. 31.

12 *Ibid.* at paras. 63-64.

13 Alvin J. Esau, *The Courts and the Colonies: The Litigation of Hutterite Church Disputes* (Vancouver: University of British Columbia Press, 2004) at 4.

14 See *Lakeside Colony of Hutterian Brethren v. Hofer*, 1992 CanLII 37 (S.C.C.), [1992] 3 S.C.R. 165.

15 *Ibid.* at para. 15.

16 *Land Sales Prohibition Act,* S.A. 1942, c. 16. *Repealed* S.A. 1972, c. 103.

17 William Janzen, *Limits on Liberty: The Experience of Mennonite, Hutterite, and Doukhobor Communities in Canada* (Toronto: University of Toronto Press, 1990) at 67-75.

18 *Walter et al. v. Attorney General of Alberta, et al., 1969 CanLII 64 (S.C.C.),* [1969] S.C.R. 383.

19 See Janet Epp Buckingham, "The Fundamentals of Religious Freedom: the Case for Recognizing Collective Aspects of Religion" (2007) 36 Supreme Court Law Review (2d) 251.

20 1986 CanLII 12 (S.C.C.), [1986] 2 S.C.R. 713 [*Edwards Books*].

21 *Ibid.* at para. 9, quoted in *Wilson Colony, supra* note 1 at para. 32.

22 *Rosenberg v. Outremont (City),* [2001] R.J.Q. 1556, 84 C.R.R. (2d) 331 (Que. S.C.) [*Rosenberg*].

23 Shauna Van Praagh describes the larger cultural context of this case in "View from the *Succah*: Religion and Neighbourly Relations" in Richard Moon, ed., *Law and Religious Pluralism in Canada* (Vancouver: University of British Columbia Press, 2008) at 21.

24 *Rosenberg, supra* note 22 at paras. 33-36.

25 2004 SCC 48, [2004] 2 S.C.R. 650 (CanLII).

26 *Ibid.* at para. 73.

27 2006 ACQB 338, (2006) 398 A.R. 5 (CanLII) [*Wilson Colony, QB*].

28 2007 ABCA 160, (2007) 417 A.R. 68 (CanLII) [*Wilson Colony, CA*].

29 *Wilson Colony, QB, supra* note 27 at para. 2.

30 *Ibid.* at para. 29.

31 *Wilson Colony, CA, supra* note 28 at para. 6.

32 *Ibid*. at para. 55.

33 *Wilson Colony, supra* note 1 at para. 130, quoting *Edwards Books, supra* note 20 at para. 145.

34 *Edwards Books, ibid*. at para. 191.

35 *Wilson Colony*, *supra* note 1 at para. 182.

36 *Ibid.* at para. 31.

37 *Ibid*. at para. 8.

38 *R. v. Big M Drug Mart Ltd*, 1985 CanLII 69 (S.C.C.), [1985] 1 S.C.R. 295.

39 *Ibid*. at para. 95.

40 *Reference re Same-Sex* Marriage, 2004 SCC 79, [2004] 3 S.C.R. 689 (CanLII) at para. 53.

41 1985 CanLII 18 (S.C.C.), [1985] 2 S.C.R. 536.

42 *Central Okanagan School District No. 23 v. Renaud,* 1992 CanLII 81 (S.C.C.), [1992] 2 S.C.R. 970; *Commission scolaire régionale de Chambly v. Bergevin,* 1994 CanLII 102 (S.C.C.), [1994] 2 S.C.R. 525.

43 See *Central Alberta Dairy Pool v. Alberta (Human Rights Commission),* 1990 CanLII 76 (S.C.C.), [1990] 2 S.C.R. 489. While this case concerned holy days, it overruled *Bhinder v. CN,* 1985 CanLII 19 (S.C.C.), [1985] 2 S.C.R. 561 in which a Sikh man had lost when he claimed the right to wear a turban rather than a hard hat. See also *Multani v. Commission Scolaire Marguerite-Bourgeoys,* 2006 SCC 6, [2006] 1 S.C.R. 256 (CanLII) [*Multani*].

44 *Multani, ibid*.

45 *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551 (CanLII) [*Amselem*].

46 R.S.Q., c. C-12.

47 *Amselem, supra* note 45 at para. 46.

48 *Ibid*. at para. 87.

49 *Multani, supra* note 43 at para. 76.

50 *Ibid.* at para. 53.

51 *Operator Licensing and Vehicle Control Regulation,* Alta. Reg. 320/02, s. 14(1)(b).

52 *Operator Licensing and Vehicle Control Amendment Regulation,* Alta. Reg. 137/03, s. 3.

53 *Wilson Colony, supra* note 1 at para. 68.
54 *Ibid*. at para. 148.
55 *Iibid* at para. 201.
56 *Ibid*.
57 *Ibid*.
58 *Ibid*. at paras. 75-78, citing *R. v. Oakes*, 1986 CanLII 46 (S.C.C.), [1986] 1 S.C.R. 103.
59 *Ibid*. at para. 47.
60 *Ibid*. at para. 52.
61 *Ibid*. at para. 53.
62 *Ibid*. at para. 61.
63 *Ibid*. at para. 62.
64 *Ibid*. at para. 75. See Peter W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), vol. 2, at s. 38.12.
65 *Wilson Colony, ibid*. at para. 77.
66 *Ibid*. at para. 95.
67 *Ibid*. at para. 96.
68 *Ibid*.
69 *Wilson Colony, QB, supra* note 27. Note that the Wilson Colony applied for a rehearing on this point, which was denied.
70 *Wilson Colony, supra* note 1 at para. 97.
71 *Ibid*. at para. 102.
72 *Ibid*. at para. 75.
73 Leon E. Trakman, William Cole-Hamilton and Sean Gatien, "R. v. Oakes 1986-1997: Back to the Drawing Board" (1998), 36 Osgoode Hall Law Journal 83 at 103.
74 *New Brunswick (Minister of Health and Community Services) v. G. (J.)* 1999 CanLII 653 (S.C.C.), [1999] 3 S.C.R. 46 at para. 98.
75 *Wilson Colony, supra* note 1 at para. 175.
76 *Ibid*. at para. 201.
77 2007 SCC 54, [2007] 3 S.C.R. 607 (CanLII).
78 No. 14307/88, [1993] 17 E.C.H.R. 397. Series A no. 260-A, quoted at *Wilson Colony, supra* note 1 at para. 128.
79 [GC], No. 44774/98, E.C.H.R. 2005-XI, quoted in *Wilson Colony, ibid*. at para. 129.
80 No. 45701/99, E.C.H.R. 2001-XII, quoted in *Wilson Colony, ibid*. at para. 131.
81 *Wilson Colony, ibid*. at para. 90.
82 See *Baker v. Canada (Citizenship and Immigration),* 1999 CanLII 699 (S.C.C.), [1999] 2 S.C.R. 817 at para. 70.
83 Jamie Komarnicki, "Hutterites may defy driving law," Calgary Herald, February 28, 2010.

Abdelrazik: Tort Liability for Exercise of Prerogative Powers?

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Introduction

From 2003 to 2009, Mr. Abousfian Abdelrazik was effectively exiled in Sudan. A Canadian citizen, Abdelrazik had travelled to Sudan on a valid Canadian passport to visit his ailing mother. He was subsequently arrested and detained by Sudanese authorities, during which time his passport expired. In the ensuing years, he made numerous attempts to return home to Canada. These efforts were hampered by suspicions that he was a terrorist, by the resulting wariness of commercial airlines to accept him as a passenger, and by his eventual destitution. Abdelrazik was finally able to obtain an airline ticket to Toronto for April 3, 2009. But when he contacted the Minister of Foreign Affairs to obtain the emergency passport that had been assured to him, it was summarily refused.

Abdelrazik ultimately returned to Canada in June 2009, after Federal Court Justice Zinn ordered the Canadian government to issue an emergency passport and arrange for his return.[1] He has since filed a statement of claim[2] in the Federal Court against the Attorney General and the Minister of Foreign Affairs, alleging, *inter alia*, breaches of sections 6, 7 and 12 of the *Canadian Charter of Rights and Freedoms*,[3] false imprisonment, intentional infliction of mental suffering, and breach of fiduciary duty. The focus of this comment, however, is Abdelrazik's claim against the Minister of Foreign Affairs for the tort of misfeasance in a public office. Abdelrazik alleges that the minister's refusal to issue him an emergency passport in April 2009 was deliberately unlawful and made in bad faith.

The tort of misfeasance in a public office (sometimes referred to as abuse of office, abuse of power, or public misfeasance) holds some historical interest, and it was critical in a series of election-rigging cases in the eighteenth and early nineteenth centuries.[4] Indeed, Lord Justice Holt's decision in *Ashby v. White* is perhaps the most famous application of the maxim, *ubi ius, ibi remedium* ("where there is a right, there is a remedy").[5] But the tort fell into disuse for most of the twentieth century, and has only been resurrected in the last 25 years. Since the turn of the millennium, the decisions of the House of Lords in *Three Rivers District Council v. Governor and Company of the Bank of England (No. 3)*[6] and the Supreme Court of Canada in *Odhavji Estate v. Woodhouse*,[7] which affirmed and restated the elements of the tort, have encouraged plaintiffs to plead misfeasance in a public office with greater frequency.[8] It is now common for plaintiffs to plead misfeasance in their claims against public officials, alongside better-known torts like false imprisonment, malicious prosecution, or negligence.[9] Misfeasance is also a promising option for plaintiffs wishing to challenge administrative actions, such as licensing or municipal planning decisions.[10]

However, to the author's knowledge, the claim by Abdelrazik will be the most high-profile instance of misfeasance in a public office being claimed for the exercise of a prerogative power (*i.e.*, the refusal to issue a passport).[11] Needless to say, this claim has significant implications in terms of the separation of powers. Although the days of complete discretion in the exercise of prerogative powers have long passed, and they are now undoubtedly susceptible to

judicial review,[12] there is something about the potential for consequences in tort that causes unease. To what extent should the courts be declaring, as a matter of private law, that prerogative actions of the executive branch are wrongful and give rise to a claim for damages?

Misfeasance in a public office, as the only tort that applies exclusively to public-law defendants, inherently raises questions about the appropriateness of using private law to sanction public officials. Nevertheless, most misfeasance cases involve more mundane issues of licensing, zoning, or professional discipline, where judicial review of administrative action is relatively uncontroversial. The Abdelrazik litigation, by contrast, presents an opportunity for the public/private debate to be aired in a context where the stakes are much higher. Set against the backdrop of alleged terrorism, torture, and national security risks, the Abdelrazik case will likely spawn impassioned arguments about government accountability and human rights on the one hand, and executive discretion and national security on the other. While these arguments will undoubtedly be influenced by the Supreme Court's recent decision in *Canada (Prime Minister) v. Khadr*,[13] which was released just as this article went to press, the parties will need to account for the unique purposes of private law, as opposed to judicial review. As discussed below, the courts may be hesitant to find that the Minister of Foreign Affairs acted maliciously (as is required to succeed in the misfeasance tort) when he was making decisions in the purported interests of national security.

The Primary Elements of the Tort

Before turning to its broader constitutional implications, it is necessary to review the main elements of misfeasance in a public office (malice, unlawful conduct, and material damage) to identify the doctrinal framework in which the debate will be played out. Lord Steyn, in his leading opinion in *Three Rivers*, explained the rationale for the tort: "[I]n a legal system based on the rule of law executive or administrative power 'may be exercised only for the public good' and not for ulterior and improper purposes."[14] The main point of contention in *Three Rivers* was whether the defendants had the requisite malicious state of mind. As with all torts requiring proof of malice, there has been some debate about how to define malice in misfeasance cases.

The leading historical cases on misfeasance tend to involve some degree of bias or personal ill-will toward the plaintiff, and this has come to be known as "targeted" malice. For instance, in the well-known case of *Roncarelli v. Duplessis*,[15] the defendant Premier of Québec had a deliberate intention to harm the plaintiff restaurateur for his involvement with the Jehovah's Witnesses. He ordered the revocation of the plaintiff's liquor licence in order to cause financial harm to the plaintiff. In other words, the Premier used his influence for the improper purpose of punishing the plaintiff for supporting his coreligionists.

The element of malice is critical because it separates the tort of misfeasance in a public office from mere judicial review. Those whose rights are affected by unlawful administrative action can seek judicial review to have that action set aside or reconsidered. However, they can only claim damages in tort if some sort of bad faith was involved. The malice requirement was historically aimed at protecting public officers who made good-faith errors of judgment.[16] As long as they were not motivated by spite or some improper purpose, they could not be subject to a claim in tort.

However, the malice requirement is now subject to a more liberal interpretation. In recent years, a second type of malice or "limb" of the tort has evolved: where the public officer knowingly acts unlawfully or in excess of power, with the knowledge that the plaintiff will probably be harmed by that unlawful action. The impugned actions need not be targeted toward the plaintiff, as long as the plaintiff is within the class of persons who will probably be harmed.[17] In *Three Rivers*, Lord Steyn defined the degree of knowledge required to satisfy the second limb of the tort as either actual knowledge or subjective recklessness, with respect to both the lawfulness of the officer's actions and their likelihood to cause harm to the plaintiff.[18] Recklessness is considered to be bad faith be-

cause the officer proceeds in the absence of an honest belief in the lawfulness of his actions.

Obviously, the second limb of the tort can involve conduct that is much less "abusive" or "malicious" in the way that those terms are normally understood. The defendant need not have acted for an ulterior motive. Rather, because the defendant did not have an honest belief in the lawfulness of her actions, we presume that she was acting for reasons other than the public good. The recognition of this second limb has the potential to significantly expand the scope of liability for misfeasance in a public office. While instances of a public officer acting with express ill-will toward a plaintiff are rare, instances of mere subjective recklessness are presumably more frequent.[19]

The reasoning in *Three Rivers* was adopted by the Supreme Court of Canada in *Odhavji Estate*, which provided further guidance on the type of misconduct that could form the basis of a misfeasance claim. *Odhavji Estate* was a claim against several police officers who had been involved in the shooting of a robbery suspect, and who allegedly failed to comply with the ensuing internal investigation. This was a breach of their duties under the Ontario *Police Services Act*.[20] Justice Iacobucci, for the Court, concluded that breach of statutory duty, and not just abuse of power, was capable of supporting a claim in misfeasance. In the course of his opinion, Justice Iacobucci wrote that the tort could be grounded in "a broad range of misconduct," and that the essential question is "whether the alleged misconduct is deliberate and unlawful."[21] Like the broad definition of malice, the conclusion that *any* unlawful conduct can form the basis of a misfeasance claim has the potential to widen the scope of recovery.

Interestingly, both the Supreme Court's and the Ontario Court of Appeal's[22] decisions in *Odhavji Estate* made reference to, and apparently accepted (albeit indirectly), the potential for liability in misfeasance for the unlawful exercise of a prerogative power. For instance, in finding that the tort could be based on the breach of a statutory duty, Justice Iacobucci wrote that misfeasance "is not limited to circumstances in which the defendant officer is engaged in the unlawful exercise of a particular statutory *or prerogative* power."[23] However, neither court cited any case actually involving the exercise of a prerogative power, and the language appears to have been used somewhat offhandedly (elsewhere in their respective judgments, the courts referred simply to "legislative and administrative powers"). Thus, it is not clear that the references to prerogative powers in *Odhavji Estate*, which were *obiter dicta* in any event, will have much bearing on the Abdelrazik litigation.

The other main element of misfeasance in a public office is material damage, as affirmed by the House of Lords in *Watkins v. Home Office*.[24] That case is particularly pertinent here because it involved an allegation that the defendants had infringed the plaintiff's constitutional rights, specifically a prisoner's right to private correspondence with his legal advisors. The English Court of Appeal had allowed the claim, concluding that breach of constitutional rights represented an independent form of misfeasance in a public office, which was actionable *per se*. The House of Lords overturned this decision. Apart from the difficulties posed by defining constitutional rights in a country, like England, with no codified constitution, Lord Bingham explained that "the primary role of the law of tort is to provide monetary compensation for those who have suffered material damage rather than to vindicate the rights of those who have not."[25] He acknowledged that there was a public interest in holding public servants accountable for their conduct, but suggested that those who have not suffered material damage must seek alternative redress, whether through judicial review or disciplinary proceedings against the relevant officers.

This divergence in the purposes of judicial review and tort law will likely be key to Abdelrazik's civil claim. Justice Zinn has already reviewed the denial of an emergency passport from an administrative or constitutional law perspective: Abdelrazik successfully argued that the minister had not properly justified his decision and that it should be reversed. In Lord Bingham's words, Abdelrazik's rights have been vindicated. However, the purpose of the civil claim is to obtain damages to compensate Ab-

delrazik for the harm that he has suffered and, possibly, to punish the minister for his high-handed or abusive conduct. In order to award damages in tort, a court will have to conclude that the minister's exercise of prerogative power was malicious (in either its targeted or reckless form). And although the element of malice has been watered down in recent years, it is still there to protect public officials who make legitimate errors of judgment. In our security-conscious era, a court may be unwilling to conclude that the minister was acting for an improper purpose.

Application to Abdelrazik's Case

Abdelrazik's misfeasance claim against the Minister of Foreign Affairs is still in its early stages, so it would be foolish to predict its possible success or failure. I present here only some preliminary thoughts about the application of the various elements of the tort to his case.

Given the Supreme Court's statement in *Odhavji Estate* that misfeasance in a public office can be based on any unlawful conduct, this element of the tort should pose little difficulty for Abdelrazik. As indicated in my introduction, Abdelrazik's misfeasance claim is based on the minister's refusal to issue him an emergency passport after he had booked and paid for a flight home in April 2009. In Abdelrazik's *Charter* application, Justice Zinn found that this refusal was a breach of his right under section 6(1) of the *Charter* to enter and remain in Canada. He rejected the government's argument that section 6(1) merely prevents the government from refusing entry to Canada and does not impose a positive obligation to issue a passport. Justice Zinn found that such an interpretation would render the rights under section 6(1) illusory, quoting from the Federal Court of Appeal's decision in *Kamel v. Canada (Attorney-General)*:

> To determine that the refusal to issue a passport to a Canadian citizen does not infringe that citizen's right to enter or leave Canada would be to interpret the Charter in an unreal world…. The fact that there is almost nowhere a Canadian citizen can go without a passport and that there is almost nowhere from which he or she can re-enter Canada without a passport are, on their face, restrictions on a Canadian citizen's right to enter or leave Canada, which is, of course, sufficient to engage Charter protection. Subsection 6(1) establishes a concrete right that must be assessed in the light of present-day political reality.[26]

Further, since the government had not adduced any evidence as to why the refusal to issue an emergency passport was justified in the circumstances, Justice Zinn found that the breach of Abdelrazik's rights under section 6(1) was not saved under section 1 of the *Charter*. This unjustified breach of *Charter* rights should suffice as "unlawful" conduct for the purposes of a claim for misfeasance in a public office.

Even beyond the breach of his *Charter* rights, Abdelrazik could point to the lack of procedural fairness as evidence of the government's unlawful conduct. Abdelrazik's emergency passport was purportedly refused under section 10.1 of the *Canadian Passport Order*[27] as being necessary for the national security of Canada.[28] Justice Zinn criticized the minister for invoking section 10.1 without any further explanation. The minister did not apparently seek input from Passport Canada and did not specify the information on which the determination regarding national security had been made.[29]

The failure to meet standards of procedural fairness can support a claim for misfeasance in a public office, independent of any other breach of rights. For instance, in *O'Dwyer v. Ontario (Racing Commission)*,[30] the Commission denied the plaintiff's right to a hearing after his status as a thoroughbred racing official was effectively revoked. The Ontario Court of Appeal found that this amounted to misfeasance. Similarly, the minister's failure to explain or follow any apparent procedures to justify the refusal to issue an emergency passport to Abdelrazik should also satisfy the requirement that the minister acted unlawfully.

Perhaps the more difficult hurdle for Abdelrazik to overcome will be the element of malice. As it stands, there is little direct evidence of the minister's state of mind when deciding to refuse the emergency passport. All the same, while Justice Zinn acknowledged that bad faith was

not a requirement for his finding that Abdelrazik's section 6(1) rights had been infringed, he stated that he would have had "no hesitation" in finding bad faith, had it been necessary.[31] He explained:

> [T]he Minister waited until the very last minute before the flight was to depart to deny the emergency passport, and although the basis of the refusal is indicated, he provides no explanation of the basis on which that determination was reached, no explanation as to what had changed while Mr. Abdelrazik resided in the Canadian embassy that warranted this sudden finding, and nothing to indicate whether the decision was based on him being a danger to the national security of Canada or on being a danger to another country. Further, there was no explanation offered as to whether Mr. Abdelrazik posed a security risk if returned to Canada, or a greater security risk, than he did in Sudan.[32]

At the very least, the minister's actions should satisfy the second limb of the misfeasance tort, which requires that the defendant be subjectively reckless as to the lawfulness of his actions, and that he foresee that the plaintiff will probably be harmed. The minister knew about section 10.1 of the *Canadian Passport Order*, and it seems safe to assume that he knew, or was at least reckless to the fact, that the denial of a passport under that section requires justification. It can also be safely assumed that the minister knew that Abdelrazik would be harmed by the denial of an emergency passport: without the passport, Abdelrazik would remain exiled and living in the Canadian Embassy in Sudan.

The final main element of misfeasance in a public office, material damage, should not be especially problematic for Abdelrazik. Because the minister failed to issue him an emergency passport, he was stranded in Sudan and suffered at least some physical and psychological harm. He also incurred financial loss in booking a flight that he was not allowed to board. If proven, these harms should qualify as material damage.

On preliminary analysis, then, Abdelrazik has an arguable claim for misfeasance. Nevertheless, given the context of national security and suspected terrorism, the courts may be hesitant to award damages against the minister, particularly since the refusal to issue a passport is a prerogative power. The decision was within the minister's discretion and was made expressly, though perhaps too sketchily, for the purposes of national security. Moreover, even though they were never substantiated, the allegations that Abdelrazik was engaged in terrorist activity will linger in the public consciousness. Should a court award damages to Abdelrazik for the minister's public misfeasance, it can expect at least some public and critical backlash.

Judicial Review of Prerogative Powers

Misfeasance in a public office is closely linked with the process of judicial review. Importantly, if the conduct in question is entitled to judicial deference, the possibility of a claim in tort is dubious. Therefore, to predict the outcome of Abdelrazik's misfeasance claim, it is instructive to examine the degree of deference afforded to the prerogative power to deny a passport, particularly in the interests of national security.

While the exercise of prerogative powers was historically insulated from review by the courts, this is no longer the case. In *Council of Civil Service Unions v. Minister for the Civil Service*,[33] the House of Lords affirmed that judicial review is available for many aspects of the prerogative. Lord Scarman explained that, in modern law, "the controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject matter."[34] Thus, while matters like entering treaties, declaring war, and conducting foreign policy are not justiciable, matters that have the effect of altering a person's rights or obligations, or depriving him of certain advantages or benefits, are amenable to review by the courts.[35] The issuance and revocation of passports falls into this latter category.[36] In *R. v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Everett*,[37] Lord Justice O'Connor described the prerogative power over passports as "an area where commonsense tells one that, if for some

reason a passport is wrongly refused for a bad reason, the court should be able to inquire into it."[38] The English Court of Appeal further held in Everett that procedural fairness must be observed when exercising the prerogative regarding passports. Accordingly, Abdelrazik's claim against the Minister of Foreign Affairs should not be struck out on the simple grounds that it involves the exercise of a prerogative power.

The matter is complicated, however, by the minister's invocation of national security as the reason for denying Abdelrazik an emergency passport. While the courts have been willing to review the minister's discretion regarding passports, they have shown a special degree of deference when it comes to matters of national security. This deference was thoroughly expounded by the House of Lords in *Secretary of State for the Home Department v. Rehman*,[39] a case which involved a deportation order based on Mr. Rehman's suspected links to terrorist groups. Lord Hoffmann, in particular, explained how questions of national security require deference in light of the separation of powers:

> [T]he question of whether something is "in the interests" of national security is not a question of law. It is a matter of judgment and policy. Under the constitution of the United Kingdom and most other countries, decisions as to whether something is or is not in the interests of national security are not a matter for judicial decision. They are entrusted to the executive.[40]

Lord Hoffmann reasoned that determinations of national security involve a balancing of many factors, including the extent of future risk. This is an inherently imprecise evaluation, which is entitled to considerable deference. Further, after the attack on the World Trade Center, which occurred while *Rehman* was still under reserve, Lord Hoffmann appended a foreboding admonition to his decision:

> [I]n matters of national security, the cost of failure can be high. This seems to me to underline the need for the judicial arm of government to respect the decisions of ministers of the Crown on the question of whether support for terrorist activities in a foreign country constitutes a threat to national security. It is not only that the executive has access to special information and expertise in these matters. It is also that such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process.[41]

Thus, given the gravity of the security concerns in the post-9/11 world, the courts may be expected to give wider berth to executive decisions involving questions of national security.

It is not entirely clear whether Canadian courts will follow England's lead on this issue. In perhaps the most famous Canadian case involving the government's obligations toward a citizen suspected of terrorism, *Khadr v. Canada (Prime Minister)*,[42] Justice O'Reilly held that prerogative decisions relating to foreign affairs, while generally falling to the executive, could be subject to *Charter* scrutiny where they affected the rights of an individual.[43] Ultimately, Justice O'Reilly ordered that the government request the repatriation of Khadr, who has been held at Guantanamo Bay since 2002. This order was upheld by the Federal Court of Appeal, but not by the Supreme Court of Canada. While the Supreme Court affirmed that the prerogative power over foreign affairs was subject to judicial review, it held that the appropriate remedy was limited to declaratory relief.[44]

The words of Justice Nadon, who dissented at the Federal Court of Appeal, are instructive in this regard:

> Why Canada has [not requested Khadr's repatriation] is, in my respectful view, not for us to criticize or inquire into. Whether Canada should seek Mr. Khadr's repatriation at the present is a matter best left to the Executive. In other words, how Canada should conduct its foreign affairs, including the management of its relationship with the US and the determination of the means by which it should advance its position in regard to the protection of Canada's national interest and its fight against terrorism, should be left to the judgment of those who have been entrusted by the democratic process to manage these matters on behalf of the Canadian people.[45]

While it is too early to know the full effects of the Supreme Court's decision in *Khadr*, it will

presumably influence the future scope of review for matters of prerogative involving foreign policy, such as the Abdelrazik litigation.

Similar issues arise with respect to the prerogative power to issue or deny passports. In the recent Federal Court of Appeal decision in *Kamel*, the court held that decisions regarding national security, even in the issuance of passports, ought to be treated with humility and deference.[46] If the Minister of Foreign Affairs decided that the denial of a passport was necessary for the purposes of national security, then "it is not for the court to speculate" on whether the passport applicant actually presents a risk of harm to the national or international community.[47] Further, the court may have to be satisfied with the "hypotheses and realistic speculations" of the public officials involved.[48]

At the same time, the court in *Kamel* stressed the need for judicial vigilance, "since this is an area in which information is rare and secret and where there is a temptation to overreact, even in good faith."[49] Accordingly, courts may still take a sceptical stance when presented with an executive decision that was purportedly made in the interests of national security. The court noted in *Kamel* that the minister's discretion in denying passports must be exercised in a reasonable manner, taking relevant factors into account. In addition, the phrase, "*is necessary* for the national security of Canada or any other country" provided, in the court's view, a framework for legal debate" [emphasis added].[50] The minister must believe that the denial of a passport is necessary, not simply advantageous or convenient.

In Abdelrazik's *Charter* claim, Justice Zinn found that the minister had not sufficiently justified that the denial of an emergency passport was necessary for national security. Indeed, the minister had not provided any justification at all. Justice Zinn quipped that the minister was not entitled to simply say, "Trust me," when making a decision that infringed Abdelrazik's *Charter* rights. He explained:

> While it is not the function of the judiciary to second guess or to substitute its opinion for that of the Minister, when no basis is provided for the opinion, the Court cannot find that the refusal was required and justified given the significant breach of the Charter that refusing a passport to a Canadian citizen entails.[51]

So, in terms of judicial review, the courts seem to demand at least some justification for the denial of a passport, even in cases involving national security.

Whether this level of scrutiny will extend to a tort claim, however, is unclear. While judicial review and the misfeasance tort have overlapping purposes, they are not coextensive. Imposing damages in tort amounts to concluding that a public officer has abused his powers. It is not a question of simple procedural irregularity, but of acting with malice or an improper purpose. In Abdelrazik's case, the court may be unwilling to conclude that the minister acted with an improper purpose when he denied the emergency passport on the grounds of national security. When he lived in Montreal, Abdelrazik was acquainted with known terrorists. He was, rightly or wrongly, listed by the United Nations 1267 Committee as an associate of Al-Qaida. Accordingly, although Abdelrazik was never convicted of any offence, it was not unreasonable for the minister to be on his guard. The decision to deny him an emergency passport seems to have been made in the legitimate interests of national security. Whether Abdelrazik should have been provided with more information or explanation for the minister's decision is a matter for administrative law. But whether it was made for a malicious or improper purpose - the question asked by the law of tort - may yield a different answer.

The Misfeasance Tort and Accountability

Misfeasance in a public office is a tort that is currently on the upswing. Although it often captures conduct that could just as easily be framed as negligence or another tort, misfeasance seems to provide a level of psychological vindication to plaintiffs that those other torts do not. A claim in misfeasance paints the public officer's conduct as abusive and malicious, and allows the plaintiff to hold the defendant liable for

the way she has misused the powers entrusted to her. This was the plaintiff's motive in *McMaster v. Canada*[52] a recent and rather atypical case in which a federal prisoner brought a successful misfeasance claim against prison authorities for repeatedly denying him properly-fitting shoes.[53] The claim could well have been framed in negligence. However, the plaintiff's lawyer stressed the role of the misfeasance tort in holding government officials accountable:

> If we run into situations where people at city hall, or people in the provincial government, or people of the federal government start abusing our rights, or not seeing that we are properly served, [the tort of misfeasance in a public office] is something that the average citizen can use to effect some sort of remedy.[54]

Misfeasance in a public office is thus poised to become a critical tool in the promotion of government accountability. While administrative procedures may allow claimants to have the decisions against them reconsidered, only the misfeasance tort can provide public denunciation of the official's conduct as abusive and impose damages against the official as a sort of penalty.[55] Misfeasance is being claimed for increasingly varied types of official misconduct, including not just abuse of powers, but also breach of statutory duty and failure to observe procedural fairness. With the Abdelrazik claim, misuse of prerogative powers may well be added to that list. Given that the exercise of many prerogative powers is already subject to judicial review, their susceptibility to misfeasance claims seems to be the next logical step.

Nevertheless, questions of national security will likely receive a higher degree of deference than the licensing or zoning decisions that are the typical subject matter of misfeasance claims. While not a guarantee of immunity from scrutiny, the invocation of national security may provide a buffer into which the private-law courts are hesitant to intrude. When the courts have previously examined national security, it has generally been in the context of administrative review or constitutional claims. A finding against the relevant public official usually means only that a decision will need to be reconsidered or reversed. By contrast, a successful misfeasance claim will mean that the public official is liable to pay damages and will be branded as having abused her powers. Whether the courts will be willing to evaluate and sanction decisions involving national security for these private law purposes remains an open question.

Thus, while the courts are likely to find that prerogative powers are technically justiciable, even for private law purposes, there may still be effective immunity in tort law for the discretionary exercise of those powers in the interests of national security. Given the concern for the separation of powers already expressed by the English and Canadian courts, it is unclear whether they would impose damages in misfeasance claims involving issues of national security, unless the defendant's conduct were clearly abusive. Whatever the result, Abdelrazik's civil claim provides an opportunity to debate the role of misfeasance in a public office in a high-profile and impassioned set of circumstances. Any judicial decision will need to grapple with the underlying purposes of tort law and its role in the supervision of public administration. It is a decision that both tort law and constitutional specialists can eagerly await.

Notes

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1 *Abdelrazik v. Canada (Foreign Affairs)*, 2009 FC 580, 346 F.T.R. 186 (CanLII) [*Abdelrazik*].

2 *Abdelrazik v. Canada (A.G.) (September 21, 2009), Ottawa T-1580-09 (F.C.) (*Statement of Claim), online: Canadian Centre for International Justice <http://www.ccij.ca/programs/cases/index.php?WEBYEP_DI=11#Abdelrazik>.

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

4 For further discussion on the history of the tort, see R.C. Evans, "Damages for Unlawful Administrative Action: The Remedy for Misfeasance in Public Office" (1982) 31 International and Comparative Law Quarterly 640.

5 (1703) 2 Lord Raymond 938 at 954 (K.B.), 92 E.R.

126, rev'd (1706), 3 Lord Raymond 320 (H.L.), 92 E.R. 710.

6 [2000] UKHL 33, [2000] 2 W.L.R. 1220 (BAILII) [*Three Rivers*].

7 2003 SCC 69, [2003] 3 S.C.R. 263 (CanLII) [*Odhavji Estate*].

8 See Erika Chamberlain, "What is the Role of Misfeasance in a Public Office in Modern Canadian Tort Law?" Canadian Bar Review (forthcoming).

9 See, *e.g., Miguna v. Toronto Police Services Board*, 2008 ONCA 799, 301 D.L.R. (4th) 540 (CanLII); *McNutt v. A.G. Canada et al.*, 2004 BCSC 1113, 133 A.C.W.S. (3d) 49 (CanLII).

10 See, *e.g.*, *Ontario Racing Commission v. O'Dwyer*, 2008 ONCA 446, 293 D.L.R. (4th) 559 (CanLII) [*O'Dwyer*]; *Genesis Land Development Corp. v. Alberta*, 2009 ABQB 221, 96 L.C.R. 239 (CanLII).

11 Misfeasance in a public office is also included in the civil claim by Suadd Hagi Mohamud, who was stranded in Kenya for nearly three months when her Canadian passport was voided by the High Commission in Nairobi following allegations that she was an "impostor." See Tu Thanh Ha, "Woman stranded in Kenya sues Ottawa for $2.5-million" *The Globe and Mail* (21 August 2009). However, that case does not involve the allegations of torture or terrorism that make the Abdelrazik case such a political tempest.

12 Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. (Scarborough: Thomson Canada, 2007) at 1-20.

13 2010 SCC 3 (CanLII) [*Khadr*].

14 *Three Rivers*, *supra* note 6 at 1230, quoting *Jones v. Swansea City Council* (1989), [1990] 1 W.L.R. 54 at 85 (C.A.) (Lord Justice Nourse).

15 1959 CanLII 50, [1959] S.C.R. 121.

16 See *Harman v. Tappenden* (1801), 1 East 555, 102 E.R. 214 (K.B.), where the plaintiff successfully obtained *mandamus* after being wrongfully denied the office of freeman in his local company of free fishermen and dredgermen, but could not claim damages for his lost profits because the defendants had not been motivated by malice.

17 See, *e.g., Bourgoin v. Ministry of Agriculture, Fisheries and Food* (1985), [1986] Q.B. 716 (C.A.), where the plaintiffs were French turkey producers unlawfully excluded from the English market during the lucrative Christmas season. The defendant had revoked their turkey importing licences for the purpose of protecting the English turkey industry from competition.

18 *Three Rivers*, *supra* note 6 at 1231-1233.

19 For a critique of the way the malice requirement has been weakened in recent years, see Erika Chamberlain, "The Need for a 'Standing' Rule in Misfeasance in a Public Office" (2007) 7 Oxford University Commonwealth Law Journal 215.

20 R.S.O. 1990, c. P.15.

21 *Odhavji Estate*, *supra* note 7 at paras. 20, 24.

22 *Odhavji Estate v. Woodhouse*, 2000 CanLII 17007 (ON C.A.), (2000) 52 O.R. (3d) 181. The majority of the Court of Appeal struck out the misfeasance claim against the police officers because it concluded that the tort was limited to abuses of administrative or prerogative powers, and did not encompass mere breach of statutory duty.

23 *Odhavji Estate*, *supra* note 7 at para. 17 (emphasis added).

24 [2006] UKHL 17, [2006] 2 A.C. 395 (BAILII), rev'g [2004] EWCA Civ. 966, [2005] 2 W.L.R. 1538 (BAILII).

25 *Ibid*. at para. 9.

26 2009 FCA 21, 388 N.R. 4 (CanLII) at para. 15 [*Kamel]*. The case involved the refusal to issue a passport to a citizen who wanted to leave the country, rather than one who wanted to return.

27 *S.I./81-86.*

28 *Abdelrazik*, *supra* note 1 at para. 130.

29 *Ibid*. at para. 155.

30 *O'Dwyer, supra* note 10.

31 *Abdelrazik*, *supra* note 1 at para. 153.

32 *Ibid*.

33 [1983] UKHL 6, [1985] A.C. 374 (BAILII).

34 *Ibid*. at 13 (BAILII).

35 *Ibid*. at 15 (BAILII) (Lord Diplock).

36 See *Kamel, supra note 26.*

37 *[*1988] EWCA Civ 7, [1989] 2 W.L.R. 224 (BAILII) [*Everett*].

38 *Ibid.* at 224.

39 [2001] UKHL 47, [2003] 1 A.C. 153 (BAILII).

40 *Ibid*. at para. 50.

41 *Ibid*. at para. 62.

42 2009 FC 405, 341 F.T.R. 300 (CanLII), aff'd 2009 FCA 246, 310 D.L.R. (4th) 462 (CanLII), aff'd in part 2010 SCC 3 (CanLII).

43 2009 FC 405 at paras. 40-41.

44 *Khadr, supra* note 13 at para. 39.

45 *Canada (Prime Minister) v. Khadr,* 2009 FCA 246, 310 D.L.R. (4th) 462 (CanLII) at para.106.

46 *Kamel*, *supra* note 26 at para. 48.

47 *Ibid.* at para. 67.

48 *Ibid.*

49 *Ibid.* at para. 48.

50 *Ibid*. at paras. 29-30.

51 *Abdelrazik*, *supra* note 1 at para. 155.

52 2008 FC 1158, 336 F.T.R. 92 (CanLII), aff'd 2009 FC 937 (CanLII).

53 For a more detailed discussion, see Chamberlain, *supra* note 8.

54 Quoted in Cristin Schmitz, "Serial killer gets

$6,000 for pain and suffering" *Lawyer's Weekly* (7 November 2008).

55 Even an award of damages under section 24(1) of the *Charter* does not seem to provide the same level of vindication as a claim in misfeasance. As Justice Zinn pointed out, such a finding does not entail a conclusion that the Minister of Foreign Affairs acted in bad faith: *Charter* rights can be breached without any intention on the defendant's part to harm the claimant: *Abdelrazik*, *supra* note 1 at para. 65.

A Delicate Balance: Re Charkaoui and the Constitutional Dimensions of Disclosure

Graham Hudson*

Introduction

In the wake of 9/11, Canada quickly adopted a wide range of new criminal law provisions designed to more effectively prevent and punish transnational terrorist activity.[1] Despite the availability of these measures, counter-terrorism policy has since been pursued primarily through immigration law. This is in some ways unsurprising. While transnational terrorist activities span jurisdictions, the jurisdictions of law-enforcement agencies are generally domestically bounded, limiting their independent ability to launch effective investigations and prosecutions. Immigration law helps coordinate Canadian, foreign, and international counter-terrorism strategies by facilitating the movement of alleged terrorists to jurisdictions where they may be prosecuted more effectively or more conveniently. From the government's standpoint, an added advantage is that evidentiary burdens and standards of proof are far lower in deportation proceedings than in criminal proceedings, making it easier to reduce the threats that some non-citizens may pose to Canadian national security.

Unsurprising as it may be, the use of immigration law to perform criminal-law functions raises serious questions about the extent to which constitutional principles germane to the criminal process should be applied to immigration. Security certificates are perhaps the most conspicuous instrument to raise these questions.[2] First enacted in 1976, security certificate legislation allows the government to target non-citizens in Canada who are alleged, among other things, to pose a serious risk to national security. Individuals who are subject to security certificates ("named persons") are arrested and detained. If their certificates are found by reviewing judges to be reasonable, they are deported. Although they may be detained for several years and then deported to face criminal or military trials, as well as the serious risk of human-rights abuses, named persons are denied the protection of basic criminal law principles. In particular, they are prevented from accessing much of the evidence used against them, denied full rights of appeal, and altogether excluded from hearings that concern classified information and other evidence.

Despite the courts' reluctance to strike down or modify certificate legislation,[3] they have begun refining the system to better reflect criminal law principles. In 2007, the Supreme Court of Canada decided in *Charkaoui I*[4] that certificate proceedings are analogous to criminal proceedings and that persons named in security certificates consequently have a constitutional right to a fair hearing, including adequate levels of disclosure, fairness, and adversarial challenge. In 2008, the government complied with this judgment by integrating a special advocate system into the *Immigration and Refugee Protection Act* (*IRPA*), providing detainees with legal representation during secret hearings.[5] Shortly after this amendment, the Supreme Court again relied on criminal law principles in *Charkaoui II*,[6] ruling that the government must retain and disclose to reviewing judges and spe-

cial advocates all information on file relevant to named persons.

These expanded disclosure obligations reflect criminal law standards without replicating them in security certificate proceedings. Nonetheless, expanded disclosure has greatly improved the ability of named persons to defend themselves. In fact, in October 2009, Mr. Adil Charkaoui secured his unconditional release following a dispute over disclosure in *Re Charkaoui*.[7] The dispute began when a Federal Court judge ordered the government to disclose information to Mr. Charkaoui that the government insisted could not be safely released. Unwilling to comply with this order, the government withdrew the evidence, leaving so little on file that the certificate against Mr. Charkaoui was rendered factually unsupportable. The government hoped that this dramatic move would force an appeal on the criteria used by reviewing judges when deciding about matters of disclosure - criteria it felt had been improperly derived from criminal-law jurisprudence. This strategy backfired. The reviewing judge found the certificate to be illegal, quashed it, and ruled that relevant statutory provisions barred the certification of the government's questions for appeal.

Viewed in its broader constitutional context, *Re Charkaoui* shows how the judiciary, the executive, and Parliament have struggled to balance values of national security and human rights in certificate proceedings. On the one hand, courts have recognized the quasi-criminal nature of certificate proceedings and applied criminal-law principles in this context. On the other hand, and despite the symbolic force of *Charkaoui I* and *II*, they have only refined the statutory regime that governs certificate proceedings. The executive has not been subordinated to criminal law principles, nor have the governing legislative provisions of the security certificate system been ruled altogether unconstitutional. Instead, courts have used a bare minimum of procedural safeguards to better level the playing field, leaving it up to the government, special advocates, and persons facing deportation to work within an otherwise unaltered system.

The true impact of *Charkaoui I* and *II* accordingly lies in how the checks and balances already embedded within the certificate system itself have, and have not, been altered. *Re Charkaoui* offers a timely illustration – at the level of day-to-day proceedings – of how deeply the principles of criminal law have filtered through this system, affecting the interplay of national security and procedural fairness.

Setting the Stage: Security Certificates and Disclosure

Security certificates are issued under the joint powers of the Minister of Public Safety and the Minister of Citizenship and Immigration ("the ministers")[8] against persons the ministers allege are inadmissible to Canada on the grounds of national security, the violation of international human rights, serious criminality, or organized crime.[9] Once issued, a certificate authorizes the detention of a non-citizen, the named person, pending a review of the reasonableness of the certificate by a Federal Court judge. If a certificate is ultimately found to be reasonable, it stands as conclusive proof that the person named in it is inadmissible; it effectively becomes a removal order.[10]

Even though activities which may trigger a security certificate are also elements of a number of criminal offences, named persons are denied many procedural protections associated with criminal proceedings. For instance, the *IRPA* requires judges to conduct certificate and detention review proceedings "as informally and expeditiously as the circumstances and considerations of fairness and natural justice permit," to receive into evidence anything that, in their opinion, "is reliable and appropriate, even if it is inadmissible in a court of law," and to base their decisions on that evidence.[11] At the request of the ministers, a judge is required to hear evidence in the absence of the public, the person named in a certificate, and his counsel, if the judge is satisfied that the disclosure of such evidence *could* be injurious to national security or the safety of any person. The judge also must maintain the confidentiality of the evidence for so long as its disclosure would be so injurious.[12]

While judges are required to provide named persons with a summary of the evidence heard in private, the *IRPA* allows judges to make decisions on the basis of evidence that named persons have not heard or responded to, as well as evidence which, for whatever reason, has not been summarized and provided to them.[13]

In criminal proceedings, by contrast, the accused is generally entitled to receive any and all relevant information in the possession of Crown prosecutors and the police.[14] It does not matter if the information is favourable to the accused or if prosecutors intend to submit it as evidence. So long as the information is relevant to an accused's ability to know the case against him and to make full answer and defence, the government is obligated to disclose it.

Sometimes, such as in criminal cases touching upon national security, the government's duty of disclosure may be narrowed. For instance, under section 38 of the *Canada Evidence Act*[15] the Attorney General may file motions for the non-disclosure of information for reasons of international relations, national defence, or national security. As in certificate proceedings, judges consider these motions in the absence of the accused and the public, and on the basis of information that might never be disclosed to the accused.[16] Unlike in certificate proceedings, however, information that is kept secret under section 38 may not be submitted as evidence against the accused. In other words, any information that is submitted as evidence must be shared with the accused.

To further balance secrecy and disclosure, the *Evidence Act* allows the accused to apply to the Federal Court for an order requiring full or partial disclosure of information relevant to his defence.[17] The judge must confirm the prohibition on disclosure – even of relevant information – if she finds that disclosure would be injurious to international relations, national defence, or national security, and also finds that the public's interest in non-disclosure is outweighed by its interest in disclosure.[18] Under the *Evidence Act*, then, judges are authorized to balance the public's (and state's) interest in non-disclosure with the public's (and accused's) interest in disclosure. If the value of non-disclosure outweighs the value of disclosure, judges are authorized to consider ordering partial disclosure.[19] The accused may thus be provided with redacted copies or summaries of relevant information.

Tipping the Scales: National Security and Procedural Fairness

In 2008, the Supreme Court moved to infuse elements of criminal law principles into certificate proceedings. In *Charkaoui I,* the Court found that certificate proceedings and criminal proceedings are analogous on the basis of the kind and degree of their adverse impacts upon the life, liberty, and security of affected persons. As such, the Court found it appropriate to apply principles of fundamental justice developed in the context of the criminal law to certificate proceedings.[20] Applying these principles, the Court found that named persons are entitled to a fair hearing, which includes the right to know the case against them, to respond to that case, and to have decisions made on the basis of the facts and the law.[21] It ruled that excluding named persons and their legal counsel from significant portions of certificate proceedings is inconsistent with the right to a fair hearing and, consequently, with section 7 of the *Canadian Charter of Rights and Freedoms*.[22]

In response to this decision, Parliament amended the *IRPA* to authorize security-cleared "special advocates" to represent named persons during secret proceedings, to access classified evidence, and to challenge that evidence as well as the government's applications for non-disclosure.[23] The role of a special advocate is similar to that of a lawyer: improving the level of adversarial challenge during secret hearings. Of course, the value of disclosure is only partially realized, as neither named persons nor their counsel are permitted, absent judicial authorization, to personally access confidential evidence or to converse with special advocates once the latter has seen the evidence.[24] *IRPA* also does not expressly empower special advocates to subpoena documents or witnesses; they may not demand disclosure of any information that is not submitted as evidence by the ministers.

Special advocates' inability to subpoena

documents and witnesses, or to communicate freely with named persons, are well-documented flaws in this system.[25] Some of these flaws were remedied in *Charkaoui II*, when the Supreme Court ruled that the government is generally obligated to disclose "all information in its possession regarding the person named in a security certificate."[26] This duty was not extended to require the disclosure of information directly to named persons, as in criminal proceedings. The Court only imposed upon the government a duty to disclose information to reviewing judges and, by implication, to special advocates.[27] On receiving the information, reviewing judges become responsible for deciding what may be directly disclosed to named persons.[28]

This ruling helped harmonize certificate provisions with section 38 of the *Evidence Act*. Decisions on what information is relevant or can safely be disclosed are no longer left to the discretion of the ministers. As in criminal proceedings, *all* relevant information must be submitted to reviewing judges and special advocates, remedying to some degree special advocates' inability to subpoena documents. Reviewing judges, with the benefit of arguments from the ministers and special advocates, are then responsible for deciding what information may be disclosed to named persons. In cases where information cannot safely be disclosed to named persons, judges are able to order partial disclosure in the form of summaries. Of course, in such instances, judges may base their decisions on evidence not directly disclosed to named persons; in the criminal context this cannot happen. Nonetheless, the displacement of discretion about disclosure from the ministers to courts has enabled reviewing judges and special advocates to work with more complete information.

The Ministers Strike Back: Discretion, Disclosure, and *Re Charkaoui*

Analogies between the certificate provisions and section 38 of the *Evidence Act* raise an important question: what criteria should judges apply to decide matters of disclosure? The *Evidence Act* allows judges to balance values of non-disclosure with values of disclosure in order to strike a justifiable compromise in criminal proceedings. By contrast, the *IRPA* states in no uncertain terms:

> [T]he judge shall ensure the confidentiality of information and other evidence provided by the Minister if, in the judge's opinion, its disclosure would be injurious to national security or endanger the safety of any person.[29]

The only consideration judges are to apply during certificate proceedings is whether disclosure would be injurious to national security or would endanger personal safety. In deciding on disclosure, they are not allowed to consider the interests of named persons or the public. Judges may not, in other words, balance values of disclosure with values of non-disclosure.

The Supreme Court did not change this feature of the law in *Charkaoui II*. In fact, it said almost nothing about the criteria that should govern disclosure. All the Court said was:

> [C]onfidentiality requirements related to public safety and state interests will place limits on how this duty [of disclosure] is discharged. In short, the judge must filter the evidence he or she has verified and determine the limits of the access to which the named person will be entitled at each step of the process, both during the review of the validity of the certificate and at the detention review stage.[30]

Presumably, the Court expected judges to make this determination consistently with provisions of the *IRPA* that require decisions about the disclosure of information to be made only after judges consider the ministers' and special advocates' positions on the issue.[31] If a judge ultimately finds that certain information can be safely disclosed, she shall make an order to that effect. However, if she finds that the information cannot be safely disclosed, named persons are not entitled to access this information, no matter how pressing their or the public's interest in disclosure may be. However, they are still entitled to receive summaries of the information.[32]

In the months following *Charkaoui II*, the government, special advocates, and named persons competed to influence the trajectory of

disclosure. Immediately after the *Charkaoui II* decision, Mr. Charkaoui's counsel and special advocates applied to the Federal Court for an order requiring the government to disclose directly to Mr. Charkaoui considerable volumes of information. Notwithstanding the ministers' arguments, the reviewing judge, Justice Tremblay-Lamer, found that certain evidence could be disclosed to Mr. Charkaoui without compromising national security or the safety of any person. She proceeded to order the ministers to disclose this evidence directly to Mr. Charkaoui and also to provide, during closed hearings, original copies of the Canadian Security Intelligence Service's (CSIS) operational notes pertaining to this evidence. Justice Tremblay-Lamer indicated that she would give Mr. Charkaoui summaries of these originals and associated information, including some details the ministers had insisted could not be safely disclosed.[33]

Unwilling to let any of this information be disclosed, the ministers invoked section 83(1)(j) of the *IRPA* to withdraw the disputed evidence. The section reads:

> [T]he judge shall not base a decision on information or other evidence provided by the Minister, and shall return it to the Minister, if the judge determines that it is not relevant or if the Minister withdraws it.

As a result of this withdrawal of evidence, the court lacked the authority to require the disclosure of the contested information to Mr. Charkaoui, either directly or in summary form. The withdrawal of the evidence also meant that the ministers did not have sufficient evidence to support the reasonableness of the certificate. Justice Tremblay-Lamer ruled the security certificate *ultra vires* the legislative authority of the ministers, since the *IRPA* provides that no certificate may be issued without the submission to a Federal Court judge of evidence supporting the ministers' allegations.[34] The withdrawal of any such evidence precludes a meaningful review of the reasonableness of the certificate. Having found Mr. Charkaoui's certificate to be illegal, Justice Tremblay-Lamer quashed it and set him free.[35]

Why would the ministers jeopardize the validity of the certificate, just to avoid disclosing information to security-cleared officials who are obligated to maintain its confidentiality? One obvious reason is that they hoped to preserve the confidentiality of any sensitive information that was going to be directly disclosed to Mr. Charkaoui. More importantly though, the ministers believed that Justice Tremblay-Lamer had ordered the disclosure of information on the erroneous grounds that Mr. Charkaoui's and the public's interest in disclosure outweighed the government's interest in secrecy. No formal criteria on this issue had been established in or subsequent to *Charkaoui II*. The ministers wanted to force a decision on the reasonableness of the certificate, so that they could then submit certified questions on the applicable criteria for the Federal Court of Appeal's consideration.

The ministers' questions related to the criteria reviewing judges should use when they decide whether the disclosure of information would be injurious to national security or the safety of any person. In particular, they wanted to know, first, how judges are to balance the inherent tension between their duty to safeguard the confidentiality of sensitive information and their duty to protect named persons' right to be informed of the case against them through the provision of summaries. Second, the ministers wanted to know what consideration should be given to the fact that special advocates may challenge the relevance, reliability, sufficiency, and weight of evidence that is not directly disclosed to named persons.[36]

A Serious Question of General Importance?

A defining feature of certificate proceedings is that they are to be conducted as "informally and expeditiously as the circumstances and considerations of fairness and natural justice permit."[37] In order to expedite the certificate and detention review process, Parliament chose to provide both named persons and the ministers with a limited right of appeal on certificate-based matters. Section 79 of the *IRPA* states:

> An appeal from the determination [of the reasonableness of a certificate] may be made to

> the Federal Court of Appeal only if the judge certifies that a serious question of general importance is involved and states the question. However, no appeal may be made from an interlocutory decision in the proceeding.

The Federal Court has in other contexts established criteria for deciding what constitutes a "serious question of general importance."[38] The criteria are: that the question transcend the interests of the parties to that case; that its (non-) resolution have important consequences for outside parties; that it be dispositive of the appeal; and that the question arise from the facts of the case. This last criterion has been specified to mean that the question must arise "from the issues in the case and not from the judge's reasons."[39] The question, therefore, must be one of law or mixed law and fact, and not one of pure fact.

Mr. Charkaoui argued that the ministers' questions failed the section 79 *IRPA* threshold because they were questions of fact that did not touch upon issues of "general importance."[40] Indeed, in *Suresh v. Canada (Minister of Citizenship and Immigration)*[41] the Supreme Court found that "the determination of what constitutes a 'danger to the security of Canada' is highly fact-based."[42] Generally, judges' conclusions on this matter centre on the nature of the evidence presented to them, viewed in proper factual context;[43] they do not decide the matter on the basis of abstract legal reasoning. In the case at hand, Mr. Charkaoui argued, Justice Tremblay-Lamer had simply found that the disclosure of certain information would, *in fact*, not be injurious to national security or the safety of any person. Mr. Charkaoui also took the position that the general, legal question of what criteria should be used when making these types of factual determinations had already been sufficiently answered in *Charkaoui II*.

Mr. Charkaoui's special advocates echoed these points, arguing that that the reviewing judge did not *balance* the values of secrecy and disclosure, but instead "reconciled" them.[44] If any such balancing had taken place, the special advocates conceded, the question would have been one of mixed law and fact. Justice Tremblay-Lamer had simply ordered the disclosure of information that she expressly decided would not compromise national security or the safety of any person. This was consistent with *Charkaoui II* and prior Federal Court jurisprudence.[45] The issue seemed solely to be whether Justice Tremblay-Lamer had made a factually correct determination, and not whether she had engaged in an improper balancing act.

Justice Tremblay-Lamer ultimately found that the ministers' questions were not serious or of general importance. Rather, the questions were part of an attempt to garner a second opinion on whether the disclosure of certain information would be injurious to national security or the safety of any person.[46] If the ministers had attained a favourable ruling on this question, they would have been able to re-submit the withdrawn evidence without Mr. Charkaoui having the benefit of expanded disclosure.

Just the Facts: Federal Court Judges on the Question of Disclosure

Can it be said that these were not serious questions of general importance? It is fair to say that *Charkaoui II* did not clarify the criteria judges should use in determining whether to order the disclosure of information to named persons. The Supreme Court left the matter to be handled by Federal Court judges applying the terms of the *IRPA*. However, it is also fair to say that the terms of the legislation suffice to guide reviewing judges in their approach to the scope of *Charkaoui II* disclosure. Again, section 83(1)(d) of the *IRPA* states:

> [J]udges shall ensure the confidentiality of information and other evidence provided by the Minister if, in the judge's opinion, its disclosure would be injurious to national security or endanger the safety of any person.

Section 83(1)(e) also clearly states:

> [T]hroughout the proceeding, the judge shall ensure that the permanent resident or foreign national is provided with a summary of information and other evidence that enables them to be reasonably informed of the case made by the Minister in the proceeding but that does not include anything that, in the judge's opin-

> ion, would be injurious to national security or endanger the safety of any person if disclosed.

There is no ambiguity here. Judges are simply not authorized to order the disclosure of information if they determine that a named person's or the public's interest in disclosure outweighs the government's interest in secrecy. It is hard to imagine the Federal Court of Appeal saying otherwise, had the ministers' questions been certified. If Justice Tremblay-Lamer did engage in this kind of reasoning when she ordered the release of certain information, certainly a redetermination of the facts would be in order. If reviewing judges consistently engaged in this kind of reasoning, a serious question of general importance might also be raised. Unfortunately for the ministers, Parliament only included a limited right of appeal in Division 9 of the *IRPA*.[47] Disagreements with factual determinations or a mere *suspicion* that an error of law has occurred do not form the basis of a right to appeal.

On closer inspection, there is little to suggest that reviewing judges have consistently applied faulty criteria in determining the scope of *Charkaoui II* disclosure. Post-*Charkaoui II* jurisprudence certainly demonstrates an expansive ministerial obligation to disclose sensitive information to reviewing judges and special advocates - quite correctly, given the Supreme Court's ruling to this effect. In the fall of 2008, for instance, the Federal Court required CSIS and the ministers to "file all information and intelligence related to Mohamed Harkat including but not limited to drafts, diagrams, recordings and photographs in CSIS' possession or holdings."[48] The government complied, disclosing approximately 2,000 documents (containing at least 8,000 pages) to the court and to Mr. Harkat's special advocates.[49] The government's compliance was to be expected, as the Federal Court's order followed the Supreme Court's ruling that the government is obligated to disclose to courts and special advocates "all information in its possession regarding persons named in a certificate."[50]

Still, the precise scope of *Charkaoui II* disclosure is hotly contested in court. In the case of Mr. Harkat, the government redacted significant portions of the documents it was ordered to disclose to Mr. Harkat's special advocates, based on its assessment of relevance as well as privilege.[51] In March 2009, the Federal Court lifted most of the redactions in 67 contested documents, after it found that disclosing this information to special advocates would not be injurious to national security or endanger the safety of any person.[52]

At the opposite end of the spectrum, the Federal Court has refused to fully apply criminal law principles in *Charkaoui II* disclosure proceedings. In the criminal context, the government generally must disclose to the accused any and all information in its possession that is *relevant* to the defence. This comparatively low threshold of relevance is premised on the principle that the accused's right to a fair hearing requires the opportunity to make full answer and defence to charges against him. Although the Supreme Court expressly identified this principle in *Charkaoui I* and *II*, reviewing judges have interpreted *Charkaoui II* as entitling special advocates only to such information as is "*necessary* to examine and verify the accuracy of the information submitted" to court.[53]

Generally speaking, when reviewing judges have expressly applied criminal law principles, they have done so in order to narrow the scope of *Charkaoui II* disclosure. In one of the *Harkat* proceedings, the Federal Court denied special advocates' request for access to the employment records of a former CSIS officer who had testified against Mr. Harkat. Relying on *R. v. O'Connor*,[54] special advocates had argued that these records were likely to be relevant to the proceeding and, since they were obligated to maintain the confidentiality of any disclosed information, third parties in possession of this information had no reasonable expectation of privacy.[55] The ministers responded that *Charkaoui II* renders criminal law principles applicable to certificate proceedings and that relevant common-law rules of privilege therefore also apply. The Federal Court agreed with the ministers, holding that the employment records were not necessary to verify the accuracy of available evidence.[56]

In a similar motion, special advocates for Mr. Harkat sought an order compelling the

ministers to produce for cross-examination covert human intelligence sources that had provided information about Mr. Harkat to CSIS.[57] The special advocates argued that cross-examination was necessary to test the credibility of the information and to corroborate elements of Mr. Harkat's testimony. Invoking the Supreme Court's ruling that criminal law principles are applicable to both certificate proceedings and civilian intelligence activities, the ministers responded that police informer privilege, a recognized exemption from the duty to disclose in criminal proceedings,[58] is applicable to certificate proceedings and to sources recruited by civilian intelligence agencies. The Federal Court recognized the merit of both sides, ruling that disclosure of a covert human intelligence source requires proof that disclosure is necessary to "prevent a flagrant denial of procedural fairness which would bring the administration of justice into disrepute."[59] It further held that the fact that certificate proceedings are closed does not, by itself, override common-law privilege or the policy on which it is based.[60] This judgment highlights how criminal law principles can be effectively used to *limit* the government's obligation to disclose.

Conclusion: The Constitutional Dimensions of Disclosure

The concept of balance structures much of our thinking about the human-rights dimensions of national security law and policy. Legislators, lawyers, judges, academics, and the public may have different conceptions of the proper balance between national security and human rights, but all agree that the concept itself should help frame the debate. Indeed, at an abstract level, the nature and rhetorical use of the concept of national security presupposes a balance between the preservation of existing governmental institutions and respect for rights and the rule of law. This is because in Canada, the protection of national security is inseparable from the protection of institutions of *democratic* governance. One cannot speak meaningfully about national security without engaging with conceptions of balance and proportionality.

On another level, balance refers also to the checks and balances characteristic of our constitutional order. Among these are the imperfect ways in which we have separated the functions of the legislatures, the executive, and the judiciary. The executive has been the dominant branch in structuring our national security law and policy, until recently without meaningful parliamentary and judicial review. Led by the Supreme Court, the judiciary has begun to reassert balance, reviewing law, policy, and associated practices for consistency with core constitutional values. This movement has been echoed in some measure by the work of parliamentary committees and in the government's legislative response to judicial rulings and international criticisms.[61] We are beginning to see the reassertion of balance, a move towards parity in the influence exerted by our three branches of government in the national security field.

Re Charkaoui affords us a glimpse of this process at work, and it also reveals the anxieties that accompany shifts in balances of power. Given the indelible influence of the notion of balance on our thinking, it comes as no surprise that a particular kind of balance should have been the central issue of the case. However, the philosophical, political, and ideological contours of this larger debate find no expression in the legal issues at hand. Contrary to the government's claims, reviewing judges have not generally (or, on the evidence, singularly) exceeded their authority by balancing the value of national security with concern for improper or invalid counter-values. They have restricted their determinations about issues of disclosure to criteria that are explicit in legislation and were illuminated by *Charkaoui II*.

Given the Federal Court's historic reluctance to infuse criminal law principles into certificate proceedings, the government may be surprised at how quickly and forcefully the tides have changed. The executive branch certainly needs to adapt to a different, less hospitable climate. However, there are no constitutional grounds for challenging the current trajectory of judicial decision-making on the scope of *Charkaoui II* disclosure. The balance that emerges from the recent spate of security certificate cases is, if

anything, an overdue endorsement of core values of Canadian constitutionalism.

Notes

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1 Sweeping changes to criminal law were initiated through the *Anti-terrorism Act*, S.C. 2001, c. 41.

2 Certificate provisions are governed by Division 9 of the *Immigration and Refugee Protection Act,* S.C. 2001, c. 27 [*IRPA*].

3 *Canada (Minister of Employment and Immigration) v. Chiarelli*, 1992 CanLII 87 (S.C.C.), [1992] 1 S.C.R. 711.

4 *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350 (CanLII) [*Charkaoui I*].

5 *An Act to amend the Immigration and Refugee Protection Act (certificate and special advocate) and to make a consequential amendment to another Act*, S.C. 2008, c. 3, ss. 83-87, amending *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, Part 1, Division 9.

6 *Charkaoui v. Canada (Citizenship and Immigration)*, 2008 SCC 38, [2008] 2 S.C.R. 326 (CanLII) [*Charkaoui II*].

7 2009 FC 1030 (CanLII) [*Re Charkaoui*].

8 *IRPA*, *supra* note 2, ss. 4, 77(1). The Minister of Public Safety was formerly styled the Minister of Public Safety and Emergency Preparedness; the Minister of Citizenship and Immigration is now styled the Minister of Citizenship, Immigration and Multiculturalism.

9 *Ibid*., ss. 4(2)(c), 77(1).

10 *Ibid*., s. 80.

11 *Ibid*., s. 83(1)(a), (h).

12 *Ibid*., s. 83(1)(c)-(d).

13 *Ibid*., s. 83(1)(e), (i).

14 *R. v. Stinchcombe*, 1991 CanLII 45 (S.C.C.), [1991] 3 S.C.R. 326; *R. v. Egger*, 1993 CanLII 98 (S.C.C.), [1993] 2 S.C.R. 451; *R. v. O'Connor*, 1995 CanLII 51 (S.C.C.), [1995] 4 S.C.R. 411; *R. v. La*, 1997 CanLII 309 (S.C.C.), [1997] 2 S.C.R. 680.

15 R.S.C. 1985, c. C-5, 2001, c. 41 [*CEA*], as amended by *Anti-terrorism Act*, S.C. 2001, c. 41, s. 43. The constitutionality of this provision was upheld in *Canada (Attorney General) v. Khawaja*, 2007 FCA 388, [2008] 4 F.C.R. 3 (CanLII), leave to appeal to S.C.C. refused 32397 (3 April 2008), 166 C.R.R. (2d) 375.

16 *CEA*, *ibid*., s. 38.04(5)(a)-(d).

17 *Ibid*., s. 38.04(2)(c).

18 *Ibid*., s. 38.06.

19 Such a ruling was made in *Khadr v. Canada (Attorney General)*, 2008 FC 549, 329 F.T.R. 80 (CanLII).

20 The principled basis for this application was established in *Dehghani v. Canada (Minister of Employment and Immigration),* 1993 CanLII 128 (S.C.C.), [1993] 1 S.C.R. 1053 at 1077. For academic commentary on this point, see Hamish Stewart, "Is Indefinite Detention of Terrorist Suspects Really Constitutional?"(2005) 54 University of New Brunswick Law Journal 235.

21 *Charkaoui* I, *supra* note 4 at para. 29.

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

23 *IRPA*, *supra* note 2, ss. 85.1 (1)-(2), 85.2.

24 *Ibid*., ss. 85.4(2)-(3), 85.5.

25 For criticisms of the Canadian model, see Craig Forcese and Lorne Waldman, *Seeking Justice in an Unfair Process: Lessons from Canada, the United Kingdom, and New Zealand on the Use of "Special Advocates" in National Security Proceedings* (Ottawa: University of Ottawa, 2007), online: University of Ottawa <http://aix1.uottawa.ca/~cforcese/other/sastudy.pdf>. For criticisms of the United Kingdom model upon which the Canadian model was premised, see: United Kingdom, House of Commons and House of Lords, Report of the Joint Committee on Human Rights, *Review of Counter-terrorism Powers* (July 2004) at para. 40; United Kingdom, House of Commons, Report of the Constitutional Affairs Committee, *The operation of the Special Immigration Appeals Commission (SIAC) and the use of Special Advocates* (March 2005).

26 *Charkaoui II*, *supra* note 6 at para. 2.

27 *Ibid*.; see *IRPA*, *supra* note 2, s. 85.4(1).

28 *Charkaoui II*, *supra* note 6 at para. 2.

29 *IRPA*, *supra* note 2, s. 83(1)(d).

30 *Charkaoui II*, *supra* note 6 at para. 63.

31 *IRPA*, *supra* note 2, ss. 83(1), 85.1(2)(a).

32 *Ibid*., s. 83(1)(e).

33 *Re Charkaoui*, *supra* note 7, Appendix "A".

34 *IRPA*, *supra* note 2, s. 83(1)(j).

35 *Re Charkaoui*, *supra* note 7 at paras. 23-28.

36 *Ibid*. at para. 49.

37 *IRPA*, *supra* note 2, s. 83(1)(a).

38 *Varela v. Canada (Citizenship and Immigration)*, 2009 FCA 145, 391 N.R. 366 (CanLII) [*Varela*]; *Zazai v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 89, 247 F.T.R. 320 (CanLII); *Gallardo v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 45, 230 F.T.R. 110 (CanLII); *Bath v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 8549 (F.C.), (1999) 90 A.C.W.S. (3d) 461 (F.C.T.D.); *Canada (Minister of Citizenship and Immigration) v. Liyanagamage* (1994), 176 N.R. 4 (F.C.A.); *Baldizon-Ortegaray v.*

Canada (Minister of Employment and Immigration) (1993), 20 Imm. L.R. (2d) 307, 64 F.T.R. 190 (F.C.T.D.).

39 *Varela*, *supra* note 38 at para. 29.

40 *Re Charkaoui*, *supra* note 7 at para. 57.

41 2002 SCC 1, [2002] 1 S.C.R. 3 (CanLII).

42 *Ibid*. at para. 85.

43 *Re Harkat,* 2005 FC 393, 261 F.T.R. 52 at paras. 81-89 (CanLII); *Re Almrei*, 2009 FC 322, 342 F.T.R. 11 at paras. 54-59 (CanLII).

44 *Re Charkaoui*, *supra* note 7 at para. 62.

45 *Re Harkat*, *supra* note 43 at para. 89.

46 *Re Charkaoui*, *supra* note 7 at para. 92.

47 *IRPA*, *supra* note 2, s. 82.3.

48 *Re Harkat*, 2009 FC 340, 339 F.T.R. 129 at para. 4 (CanLII).

49 *Ibid*. at para. 7.

50 *Charkaoui II*, *supra* note 6 at para. 2.

51 *Re Harkat*, *supra* note 48 at para. 7.

52 *Ibid*. at para. 9.

53 *Re Harkat*, 2009 FC 203, 339 F.T.R. 60 at para. 12 (CanLII) (emphasis added).

54 *R. v. O'Connor*, *supra* note 15.

55 *Re Harkat*, *supra* note 53 at para. 5.

56 *Ibid*. at paras. 11-12.

57 *Re Harkat*, 2009 FC 204, 306 D.L.R. (4th) 269 (CanLII).

58 *R. v. Leipert*, 1997 CanLII 367 (S.C.C.), [1997] 1 S.C.R. 281; *Bisaillon v. Keable*, 1983 CanLII 26 (S.C.C.), [1983] 2 S.C.R. 60; *Canada (Solicitor General) v. Royal Commission (Health Records)*, 1981 CanLII 33 (S.C.C.), [1981] 2 S.C.R. 494; *Marks v. Beyfus* (1890), 25 Q.B.D. 494 (C.A.).

59 *Re Harkat*, *supra* note 57 at para. 35.

60 *Ibid*. at para. 55.

61 House of Commons, Report of the Standing Committee on Public Safety and National Security, *Rights, Limits, Security: A Comprehensive Review of the Anti-terrorism Act and Related Issues* (March 2007); Senate, Report of the Special Senate Committee on the Anti-terrorism Act, *Fundamental Justice in Extraordinary Times* (February 2007); House of Commons, Report of the Standing Committee on Citizenship and Immigration, *Detention Centres and Security Certificates* (April 2007).