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*MARSHALL*ING THE RULE OF LAW IN CANADA: OF EELS AND HONOUR

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> Simply put, the constitutionalism principle requires that all government action comply with the Constitution. The rule of law principle requires that all government action must comply with the law, including the Constitution.[1]
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> Colouration is variable … since, in response to changing illumination, eels can alter their skin colouration by pigment redistribution within hours. A copious amount of mucus (slime) may be secreted.[2]

Tricky one, this story.[3] In what way is the Government of Canada like an eel?

Fourteen years ago, in *Simon* v. *The Queen*,[4] the Supreme Court of Canada ruled that the 1752 treaty between the British sovereign and Grand Chief of the Míkmaw Nation was still in force in Canada, creating a new framework for treaty implementation in which the burden of proving any extinguishment of treaty hunting or fishing rights rests on the Crown. Despite the persistent efforts of Míkmaw authorities to negotiate instruments clarifying the conservational and jurisdictional implications of *Simon* on treaty harvesting and trade, Ottawa and the Atlantic provinces resisted, dithering and nit-picking the Court's ruling while continuing to harass and prosecute Míkmaw hunters and fishermen.

Míkmaw treaty interpretation returned to the Supreme Court last year in *R.* v. *Marshall*,[5] which reaffirmed, clarified and broadened its ruling in *Simon*. Míkmaw people may fish without external regulation anywhere within the ancestral territory of the larger Wabanaki Confederacy to which they belong, and they may also sell their catch, provided that they satisfy themselves with a "moderate livelihood," and do not endanger the survival of stocks. The "moderate livelihood" of Míkmaw people thereby takes priority over all other uses of fish stocks, once the requirements of conservation have been met. By implication, marine conservation becomes a shared responsibility of Míkmaw leaders as well as the federal and provincial authorities.

The political response to *Marshall* on the docks, in Ottawa and in the Canadian press has been overwhelmingly negative, frequently threatening and occasionally violent. The responsible federal minister refused to meet with Míkmaw leaders for nearly two weeks while the situation on the docks deteriorated. By the time he offered to collaborate with First Nations leaders on an interim conservation program, a number of fishermen, both Míkmaw and non-Míkmaw, had lost confidence in federal and First Nations leadership and were taking matters into their own hands. The federal Opposition called on the House to "suspend" the Supreme Court's ruling, while one Atlantic fishermen's association petitioned the Court directly to stay its decision and reconsider. *Marshall* has arguably become Canada's *Roe* v. *Wade*,[6] a judicial decision so

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1 *Reference re: Secession of Québec* (1998), 161 DLR (4th) 285 (SCC), at 418 (para. 72).

2 J. G. Eales, *The Eel Fisheries of Eastern Canada*; Fisheries Research Board of Canada Bulletin No. 166 (Ottawa, 1968) at 2. We note that in surveying customary artisanal Atlantic fisheries of eels, Eales (no relation) makes no reference whatsoever to Aboriginal peoples; even when describing uniquely Míkmaw fishing practices and sites, he implies that the fishermen are white.

3 Any resemblance between the character of this essay and our friend Thomas King's *One Good Story, That One: Stories* (Toronto: Harper Perennial, 1993) is entirely intentional.

4 *Simon* v. *The Queen*, [1985] 2 S.C.R. 387 [hereinafter *Simon*].

5 [1999] S.C.J. No. 55 (QL) 177 D.L.R. (4th) 513 [hereinafter *Marshall*] (17 September 1999) rev'g (1997), 159 N.S.R. (2d) 186 (CA), 468 A.P.R. 186, 146 D.L.R. (4th) 257, affirming a decision of the Provincial Court, [1996] N.S.J. No. 246 (QL). For one participant's view of the trial proceedings, see William Wicken, "R. v. Donald Marshall Jr., 1993–1996" (1998) 28 Acadiensis 8.

6 410 U.S. 113 (1973) (constitutional right of women to seek an abortion during the first trimester of pregnancy). Unlike *Roe*, which was based on the "implied" constitutional right to privacy, *Marshall* is based on express treaty language and an

controversial that it tests the capacity of a democratically elected government to respect the rule of law.

Slippery Facts

Donald Marshall, Jr., the same Mikmaw man who was wrongfully imprisoned for a murder he did not commit,[7] was charged with catching and selling eels without a license, during a closed season and with illegal nets, according to federal fishery regulations. In his defence, he asserted a constitutional right to catch and trade fish under Georgian treaties between the Mikmaw Nation and the British Crown. The trial court rejected the treaty defence and convicted him on all three charges. Marshall's convictions were upheld by the Nova Scotia Court of Appeal, but reversed by the Supreme Court in a divided decision.[8]

Writing for the majority, Justice Binnie ruled that a 1760 treaty of peace and friendship with Mikmaw leaders recognized a right to fish, and a right to trade. Federal legislation enacted prior to 1982 had vested the minister of fisheries with wide regulatory discretion, but did not expressly authorize the minister to override Mikmaw treaty rights. As a result, the treaty rights still existed when section 35(1) of the *Constitution Act, 1982*,[9] came into force, shielding "existing aboriginal and treaty rights" from any future extinguishment.

At no point did the majority question the legitimate authority of the federal Parliament to extinguish Mikmaw treaty rights *prior* to 1982, or to regulate the exercise of Mikmaw treaty rights after 1982 where demonstrably necessary to preserve fish stocks. This is a crucial point in light of the subsequent refraction of the ruling by federal politicians and the press. The majority of the Court upheld a limited right which can be limited (albeit not irreversibly lost) if necessary for conservation, subject to appropriate compensation. Federal regulatory intervention could be forestalled as long as Mikmaw authorities themselves succeed in managing treaty fishing within biologically sustainable levels. Effective Mikmaw self-regulation can achieve conservation while according full respect to the underlying treaty right. Federal regulatory deference to First Nations law is well established in the United States,[10] and we are aware of no reason why it should not be practicable in Canada.

The precise content of the fishing right upheld by *Marshall* is less apparent, and the results of the Court's analysis less satisfactory to any of the parties. The majority construed the treaty's guarantee of Mikmaw people's right to hunt, fish, gather and trade for their "necessaries" as the right to provide for their own sustenance, "equivalent to a moderate livelihood."[11] The treaty may protect "a small-scale commercial activity," but not large profit-making or capital accumulation. "If at some point the appellant's trade and related fishing activities were to extend beyond what is reasonably required for necessaries, as hereinafter defined, he would be outside treaty protection, and can expect to be dealt with accordingly."[12]

Slippery Words

Canons of treaty interpretation are central to *Marshall*. The Supreme Court reaffirmed its previous rulings that treaties implicate the honour and integrity of the Crown, therefore reviewing judges must assume the Crown and its agents intended to fulfil their promises faithfully. The courts should not sanction any appearance of "sharp dealing" in the negotiations, the treaty text or in subsequent treaty interpretation.[13] Ambiguous words or phrases appearing in a treaty

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explicit constitutional guarantee of respect for treaty rights.

7 Nova Scotia, *Royal Commission on the Donald Marshall, Jr., Prosecution: Commissioners' Report — Findings and Recommendations*, vol. 1 (Halifax: The Commission, 1989).

8 Lamer C.J. and L'Heureux-Dubé, Cory, Iacobucci and Binnie JJ. for the majority; Gonthier and McLachlin JJ., dissenting.

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

10 See *Felix S. Cohens's Handbook of Federal Indian Law*, 1982 ed. (Charlottesville, VA: The Michie Company, 1982) at 456–58. Also see *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999) (unextinguished harvesting rights under an 1837 treaty); *National Farmers Union Ins. Co.* v. *Crow Tribe*, 471 U.S. 845 (1985) (federal court deference to tribal courts where both have subject-matter jurisdiction); *Iowa Mutual Ins. Co.* v. *LaPlante*, 480 U.S. 9 (1987) (federal court deference to tribal courts where both have personal jurisdiction).

11 *Marshall*, *supra* note 5 at para. 7. See *R.* v. *Badger*, [1996] 1 S.C.R. 771 [hereinafter *Badger*] at para. 41.

12 *Marshall*, *supra* note 5 at para. 8.

13 *Ibid.* at paras. 49–50, relying on *Badger*, *supra* note 11 at 794 per by Cory J.; *R.* v. *Taylor and Williams* (1981), 62 C.C.C. (2d) 227 (Ont. C.A.), leave to appeal refused, [1981] 2 S.C.R. xi; at 235–36; *Ontario Mining Co.* v. *Seybold* (1901), 32 S.C.R. 1 at 2 per Gwynne J. (dissenting); *The Dominion of Canada and Province of Quebec. In re Indian Claims* (1895), 25 S.C.R. 434 at 511–12 per Gwynne J. (dissenting).

drafted by the Crown's agents will likewise be construed against the drafters' interests (that is, *contra proferentem*) and not to the prejudice of Aboriginal parties, if another interpretation is reasonably possible.[14] In addition, the honour of the Crown demands that treaty terms should be interpreted "in a flexible way that is sensitive to the evolution of changes in normal practice."[15]

The majority's analysis of the 1760 treaty was nevertheless relatively narrowly focused on the English text of the negotiations and instrument, disregarding Míkmaw perspectives on the intent and meaning of the treaty, and Míkmaw customary laws relating to fishing and trade. The starting-point, both the majority and the dissenting justices agreed, is the facial meaning of the English text, ignoring any linguistic, historical and cultural factors that may have resulted in ambiguities or misunderstandings between the parties. If a facial or literal analysis fails to settle the interpretation of the text satisfactorily, the wider historical and cultural context of the treaty may be examined.[16]

The 1760 treaty followed five years of French military defeats in Acadia and New France. With French power in collapse, the chiefs of the Wabanaki Confederacy (including the Míkmaq, Maliseet and Passamaquoddy nations) who had remained within the French sphere of influence entered into treaties of reconciliation with the British Sovereign, and placed themselves under his protection.[17] When they were asked "whether they were directed by their Tribes to propose any other particulars to be treated upon at this time," the Maliseet and Passamaquoddy negotiators referred to truckhouses "for the furnishing them with necessaries in exchange for their peltry."[18] When Míkmaw chiefs met with the Governor of Nova Scotia in February 1760, they stated their desire to enjoy the same rights as their Wabanaki allies, and in his May 1760 report to the Board of Trade, Governor Lawrence observed that he had indeed treated with the Míkmaq on "the same terms."[19]

The English text of the 1760 treaty is at odds with these *travaux préparatoires*, however. Instead of obliging the Crown to build truckhouses, it obliges the Míkmaq not to "traffick, barter or exchange any commodities in any manner but with such persons or the managers of such truck houses as shall be appointed or established by His Majesty's Governor." Although this choice of words implies a *restriction* on trade, the trial judge in *Marshall* relied on the evident intention of the parties to *promote* trade, and ruled that the true meaning of the truckhouse clause had been to secure the right of Míkmaw people to sell the products of their hunting, fishing and gathering. However, the trial judge also ruled that the treaty right to trade ceased when the British Empire withdrew its network of truckhouses and licensed traders during the American Revolution.[20] On review, the Nova Scotia Court of Appeal reverted to the facial import of the truckhouse clause, ruling that it was nothing more than a "mechanism imposed upon them to help ensure that the peace was a lasting one, by obviating their need to trade with enemies of the British."[21]

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14 *Marshall*, *supra* note 5 at para. 51. The Supreme Court has been particularly generous in construing technical legal terminology in treaties in Aboriginal peoples' favour. See, generally, J. Y. Henderson, "Interpreting Sui Generis Treaties" (1997) 36 Alta. L. Rev. 46.

15 *Marshall*, *supra* note 5 at para. 53, citing *Simon*, *supra* note 4 at 402.

16 *Ibid.* at para. 5. The Court disregarded the third principle established in *Badger*, *supra* note 11 at para. 41, that any ambiguities or doubtful expressions in the wording of the treaty or document must be resolved in favour of the Indians. A corollary is that any limitations on the rights of Indians under treaties must be narrowly construed.

17 *Ibid.* at para. 3–4, 27. The Míkmaq and other Wabanaki nations continued to face in two directions between 1725 and 1760, maintaining amicable ties with French Acadia on the one side, and with the British colonies on the other. J. Y. Henderson, *The Míkmaw Concordat* (Halifax: Fernwood Press, 1997).

18 *Ibid.* at para. 29. The provision of truckhouses was expressly included in the 1752 Míkmaw treaty considered by the Supreme Court in *Simon*, *supra* note 4 at 393.

19 *Ibid.* at paras. 6, 28–29.

20 *Ibid.* at para. 6, Trial court at 116.

21 (1997), 159 N.S.R. (2d) 186 at 208. This reasoning was also adopted by the two dissenting justices of the Supreme Court. Compare the unilateral constitutional *quid pro quo* arguments that were deemed to have modified the treaty right to hunt commercially in *R.* v. *Horseman*, [1990] 1 S.C.R. 901 at 933–36.

Justice Binnie resurrected the trial court's analysis, explaining that the historical evidence, taken as a whole, "demonstrates the inadequacy and incompleteness of the written memorial of the treaty terms."[22] The honour and integrity of the Crown demand that courts vindicate what was originally promised. "Where the British-drafted treaty document does not accord with the British-drafted minutes of the negotiating sessions and more favourable terms are evident from the other documents and evidence the trial judge regarded as reliable," evidence of original intent trumps the final treaty text.[23] This does not represent "after-the-fact largesse," Justice Binnie stressed, but a just and reasonable means of using historical context "to make honourable sense of the treaty arrangement."[24]

Having concluded that the oral undertakings during the negotiations superceded the written text prepared by British representatives, Justice Binnie construed the oral agreement as more than the right to *sell* fish and wildlife freely. He reasoned that the right to sell necessarily implies the right to continue to *harvest* fish and wildlife for sale: that is, "a treaty right to continue to obtain necessaries through hunting and fishing by trading the products of those traditional activities."[25] In negotiation, Wabanaki leaders had emphasized their desire to obtain their "necessaries" through trade. Justice Binnie conceived that this aim was equivalent to earning a "moderate livelihood," and precludes the use of treaty trade to accumulate capital.[26]

The majority rejected the argument that the Míkmaw right to trade ceased when the British Empire discontinued its network of Crown truckhouses. "The concept of a disappearing treaty right does justice neither to the honour of the Crown nor to the reasonable expectations of the Mi'kmaq people."[27] Rather, it is the duty of the courts to give "effect" to the Crown's original promise. While Justice Binnie did not refer expressly to the principle of international law, *pacta sunt servanda* ("treaties must be given effect"), it would have required the same result.[28]

Turning to the disputed fishery regulations, the majority observed that they left the issuance of licences to the "absolute discretion of the Minister," without providing any explicit guidance for accomodating Míkmaw treaty rights.[29] Since the Crown bears unique fiduciary obligations towards First Nations, Parliament must include express standards in any administrative regime to respects and protect vested treaty rights, rather than relying entirely on the exercise of ministerial discretion.[30] The majority rejected the Crown's argument that treaty rights are "subject *ab initio* to regulations, without any justification required,"[31] moreover, ruling that all infringing federal regulations must meet the division of power test, the consistency

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22 *Marshall*, *supra* note 5 at para. 35. This was not new ground for the Court, but flowed logically from its broad contextual construction of the treaty at issue in *R.* v. *Sioui*, [1990] 1 S.C.R. 1025 at 1036.

23 *Marshall*, *supra* note 5 at paras. 22–44. The majority criticized the Nova Scotia courts for "giving excessive weight to the concerns and perspective of the British, who held the pen" — that is, for failing to apply the principle of *contra proferentem* in a case where the historical facts justified reading the final instrument with suspicion. "It would be unconscionable for the Crown to ignore the oral terms while relying on the written terms" under the circumstances. *Ibid.* at paras. 12 and 18; *Guerin* v. *The Queen*, [1984] 2 S.C.R. 335 at 388, per Dickson J. (as he then was); *Badger*, *supra* note 11 at para. 52 per Cory J.

24 *Marshall*, *supra* note 5 at para. 14, relying on *Sioui*, *supra* note 22 at 1049; *Simon*, *supra* note 4; *R.* v. *Sundown*, [1999] 1 S.C.R. 393; and *Taylor and Williams*, *supra* note 13. "The historical context, which has been used to demonstrate the existence of the treaty, may equally assist us in interpreting the extent of the rights contained in it." *Sioui*, *ibid.* at 1068, per Lamer J. (as he then was).

25 *Ibid.* at paras. 7 and 56.

26 *Ibid.* at paras. 58–59.

27 *Ibid.* at para. 40. In the dissent, Justice McLachlin stated that "The fall of the licensed trading system, marked the fall of the trading regime establish under the Treaties. This left the Mi'kmaq free to trade with whomever they wished, like all other inhabitants of the colonies" at para. 100. However, "other inhabitants" who wished to trade with the Míkmaw were not free at all, but regulated by the 1763 Proclamation, *infra* note 47.

28 Articles 26–27 and 31–32 of the Vienna Convention on the Law of Treaties, in Report of the United Nations Conference on the Law of Treaties, UN Doc. A/CONF.39/27 (1969). Also see *Elettronica Sicula Sp. A. (ELSI)*, 1989 I.C.J. Reports 15, at 51 (municipal law cannot override an international treaty obligation); *Right of Passage over Indian Territory*, 1960 I.C.J. Reports 6 (treaty must be construed in accordance with the legal system of the grantor of rights as it existed when the treaty was made); *US Nationals in Morocco*, 1952 I.C.J. Reports 212 (parties must take all necessary steps, in good faith, to implement treaty obligations through municipal legislation).

29 *Ibid.* at paras. 62–63, referring to the *Fishery (General) Regulations*, SOR/92–53, as amended, *Maritime Provinces Fishery Regulations*, SOR/93–55, and *Aboriginal Communal Fishing Licences Regulations*, SOR/93–332.

30 See *R.* v. *Adams*, [1996] 3 S.C.R. 101 at para. 54, and *Badger*, *supra* note 11 at para. 79 (Cory J.).

31 *Marshall*, *supra* note 5 at para. 55. Strictly speaking, infringement was not before the Supreme Court on this appeal. The Crown maintained that no treaty right still existed in 1982, and accordingly made no attempt to justify the imposition of federal regulations on Míkmaw eel fisheries.

test and the strict justification test set out in *Sparrow*[32] and *Badger*.[33] The silence of Parliament, in its sweeping delegation of discretionary licensing powers to the minister, render the fishery regulations inconsistent and thus unconstitutional on their face.[34]

The majority stressed that catch limits may be imposed on the treaty right for purposes of conservation,[35] but warned that limitations on the method, timing and geographical extent of the harvesting right would be unlawful.[36] Thus the closed season and prohibition on the sale of eels were inconsistent with Donald Marshall's treaty right as a Míkmaq to fish and trade to obtain his "necessaries."

SLIPPERY HISTORY

The majority would have reached a more far-reaching result had it considered Míkmaw oral traditions and laws, which would have been the basis for Míkmaw leaders' reasonable expectations and reliance interests in the trade clause of the 1760 treaty.[37]

The trial judge found that the Míkmaq had been trading with Europeans, including French and Portugese fishermen, for nearly 250 years prior to 1760.[38] British jurisdiction over Míkmaw territory was first recognized by European powers in the *Treaty of Utrecht* (1713),[39] article XV of which acknowledges the inherent right of native Americans to trade freely: "they shall enjoy full Liberty of going and coming on Account of Trade [and] shall, with the same Liberty, Resort, as they please, to the British and French Colonies, for Promoting Trade ... without any Molestation or Hindrance, either on the Part of the British Subjects or of the French."[40] There can be no doubt that Míkmaq were among the "subjects or friends to France" contemplated by this provision.

The subsequent comprehensive Wabanaki compact (1725) with the British Crown affirmed these rights, "Saving unto the said Indians their own Grounds, & free liberty for Hunting, Fishing, Fowling and all other their Lawful Liberties & Privileges" as they existed prior to the hostilities between the French and British empires.[41] In 1726, the Míkmaw chiefs acceded to the Wabanaki compact at Annapolis Royal in a treaty which reaffirmed these liberties, with the Crown promising the Míkmaw people that they "shall not be Molested in their Person's, Hunting, Fishing, and [Shooting &] Planting on their planting Grounds nor in any other Lawfull Occasions."[42]

Article III of the *Treaty of Aix-la-Chapelle* (1748) reconfirmed the terms of the *Treaty of Utrecht* "as if they were therein asserted, word for word," and the Míkmaw compact (1752) with the British Sovereign reaffirmed once again that Míkmaw people "shall not be hindered from, but have free liberty of Hunting and Fishing as usual."[43] In addition, the Míkmaq were promised a truckhouse and the "free liberty to bring for Sale to Halifax or any other Settlement within this

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32 *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075, which involved an Aboriginal right to fish, not a prerogative treaty.

33 *Badger*, *supra* note 11. The infringement at issue in *Badger*, however, was the result of Imperial legislation, the *Constitution Act, 1930* and its schedules, rather than Canadian national legislation.

34 *Marshall*, *supra* note 5 at paras. 64–66; *Sparrow*, *supra* note 32, *Badger*, *supra* note 11.

35 *Ibid.* at para. 61.

36 *Ibid.* at para. 65.

37 See Wilson, J. in *Horseman*, *supra* note 21 at 907. In *R.* v. *Van der Peet*, [1996] 2 S.C.R. 507, at para. 263, Justice McLachlin argued the "golden thread" of British legal history was "the recognition by the common law of the ancestral laws and customs the Aboriginal peoples who occupied the land prior to European settlement." According to *Badger*, *supra* note 11 at para. 53, treaties must be interpreted in the light of the legal conceptions of the time the treaty was made. This is a familiar rule of international law. T. O. Elias, "The Doctrine of Intertemporal Law" (1980) 74 Am. J. Int. Law 285.

38 *Marshall*, *supra* note 5 at para. 38, referring to para. 93 of the trial court's judgment.

39 Compare *R.* v. *Côté*, [1996] 3 S.C.R. 139 at para. 48, and *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010 at para. 145.

40 Text in F. G. Davenport, vol. III *European Treaties Bearing on the History of the United States and Its Dependencies* (Washington, DC: Carnegie Institute, 1917–37) at 213.

41 Text in P. A. Cumming and N. H. Mickenberg, *Native Rights in Canada*, 2nd ed. (Toronto: General Publishing Ltd., 1972) at 297 in Art. 3.

42 The exchanges of promises made in 1725–1726 have not been published, but may be found in Public Archives of Canada, Manuscript Group 11 CO 217, Nova Scotia A, vol. 4 at 316–21, vol. 5 at 3–4, vol. 17 at 36–41; and vol. 38 at 108 and 116. Sixty-four Aboriginal signatures or totems were affixed to the document. Some copies omit the reference to "Shooting," underscoring the unreliability of the British documentation of what actually was promised.

43 Public Archives of Nova Scotia, RG1, vol. 430, doc. 2. The 1752 Míkmaw compact was apparently negotiated in French, the common language of the British and Míkmaw representatives and of the Míkmaw interpreter, Abbé Maillard, and it was first published in side-by-side English and French versions. The French original substitutes "par coutume" for "as usual," thus implying "according to their customs (or customary laws)." This is a substantive difference, similar to the interpretative issue in the Treaty of Waitangi, in which the Maori term for "the chiefs' jurisdiction" was incorrectly rendered into English as "the chiefs' titles" (i.e., their honorific names). I. Brownlie, *Treaties and Indigenous Peoples*, The Robb Lectures 1991 (Oxford: Clarendon Press, 1992) at 7.

Province, Skins, feathers, fowl, fish or any other thing they shall have to sell, where they shall have liberty to dispose thereof to the best Advantage."[44] The truckhouse clause in the subsequent 1760 treaty reaffirmed the 1752 compact's truckhouse clause, without expressly withdrawing or modifying its free-trade clause.[45]

Within months of the signing of a definitive treaty of peace between the British and French empires in 1763,[46] ending a century of bitter territorial competition in Acadia and Québec, George III issued the well-known *Royal Proclamation* of 7 October 1763. The proclamation prohibited any future encroachments on the lands of "those Nations or Tribes of Indians with whom We are connected,"[47] and imposed restrictions on British trade with Indians.[48] Justice Binnie observed that Whitehall never carried out its plan to consolidate all of the King's treaties with his Indian allies.[49] Mikmaw teachings assert that the consolidation was achieved, however. A great northern conference of the King's Indian allies was convened at Niagara Falls in 1764, with precisely the intent and effect of harmonizing the King's treaty obligations to the Wabanaki Confederacy and other allied Indian nations of the St. Lawrence River and Great Lakes.[50]

Harvesting and trade rights were reaffirmed to all allied Indian nations at Niagara, and free trade was reaffirmed once again as a right of all British Indian allies in the 1794 Treaty of Amity, Commerce and Navigation between the British sovereign and the United States (the Jay Treaty).[51] The Treaty of Ghent, ending the 1812–1814 British-American war, expressly preserved the prior treaty rights of the Crown's Indian allies.[52] After so many reiterations, it is a wonder to us that there could be any doubt of the Crown's intentions to protect Indian trade.

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44 *Marshall*, *supra* note 5 at paras. 15–16. Mikmaw may have expressed their desire for truckhouses in the 1760 negotiations after concluding that central, Crown truckhouses offered fairer terms of trade. *Ibid.* at paras. 32–34.

45 Compare Justice McLachlin's argument that the 1760 truckhouse clause implicitly extinguished the 1752 free-trade clause, *ibid.* at para. 105. Mikmaq view the 1760–61 treaties as adhesions to the 1752 Mikmaw compact, rather than new alliances. *Ibid.* at para. 26. Indeed, Marshall initially invoked the 1752 compact as the source of his treaty rights to fish and trade. The trial judge was convinced that the Mikmaq had abandoned their 1752 compact by assisting in the subsequent French defence of Cape Breton, however, and this persuaded Marshall to alter his legal strategy and rely instead on the 1760 treaty. *Ibid.* at para. 16. The Supreme Court had already rejected the trial judge's reasoning in *Simon*, *supra* note 5 at 404–06, so it is puzzling why the 1752 compact was ignored by the Supreme Court in *Marshall*. If the 1752 compact was in force when *Simon* was decided in 1985, it was certainly still in force when Marshall sold his eels. In any event, the Court has repeatedly ruled that an extinguishment requires clear and plain words. *Badger*, *supra* note 11.

46 *Treaty of Paris* (1763). Article II renewed and confirmed the *Treaty of Utrecht*, subject to the terms of the new treaty, and Article XXIII restored the former status and rights conquered countries or territories that were not specifically mentioned in the Treaty of Paris — such as Mikmaw territories that had been within the French sphere of influence until 1763.

47 R.S.C., 1985, App. II, No. 1. Rights confirmed by the Proclamation take precedence over other constitutional rights in accordance with s. 25 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (UK), 1982, c. 11, preserving their original priority as Royal prerogative grants.

48 The Royal Proclamation centralized the regulation of trade in Imperial authorities, required British subjects to obtain licenses from colonial governors to trade with Indians, and required security from the traders. Although trade was to remain "free and open to all our Subjects," any failure to observe the Imperial regulations would result in the forfeiture of traders' licence and security bonds.

49 *Ibid.* at paras. 5 and 26, referring to the Imperial Board of Trade's comprehensive plan of 1764 for "the future management of Indian affairs." On the Plan of 1764, see J. M. Sosin, *Whitehall and the Wilderness: The Middle West in British Colonial Policy, 1760–1775* (Lincoln: University of Nebraska Press, 1961) at 72–77. It differed very little from the consolidation plan proposed a decade earlier by Edmond Atkin. W. R. Jacobs ed., *The Appalachian Indian Frontier: The Edmond Atkin Report and Plan of 1755* (Lincoln: University of Nebraska Press, 1954).

50 See, e.g., J. Borrows, "Constitutional Law from a First Nation Perspective: Self-Government and the Royal Proclamation" (1994) 28 U.B.C. L. Rev. 1 at 10–15, 31–47; D. V. Jones, *License for Empire: Colonialism by Treaty in Early America* (Chicago and London: University of Chicago Press, 1982) at 58; R. S. Allen, *His Majesty's Indian Allies: British Indian Policy in the Defence of Canada, 1774–1815* (Toronto and Oxford: Dundern Press, 1992) at 35.

51 *Mitchell* v. *Canada (Minister of National Review)*, [1999] 1 C.N.L.R. 112 (F.C.A.). The United States regards the Jay Treaty's guarantee of Indians' "full liberty to pass and repass by land or inland navigation … and freely to carry on trade" still to be in force. See *Akins* v. *Saxbe*, 380 F.Supp. 1210 (D. Maine 1974). *The Royal Commission on Seals and the Sealing Industry: Seals and Sealing in Canada; Report of the Royal Commission*, vol. 2 (Ottawa: Minister of Supply and Services, 1986) at 267, recommended that Canada urge the US authorities to give full effect to this provision with respect to sales of Inuit marine-mammal products in US markets.

52 See *American State Papers, Foreign Relations* (Washington, DC: Gales and Seaton, 1832–34) vol. 3 at 705–25 for the original British proposals on this crucial point.

Justice Binnie acknowledged that none of the Míkmaw treaties had involved land cessions[53] or the extinction of any Aboriginal hunting and fishing rights.[54] He failed to take this finding to its logical conclusion, however. If nothing was surrendered, everything was retained. This is the position Míkmaw leaders have asserted since 1749 in treaty negotiations, and since 1973 it has been the basis for a comprehensive claim to all of the Atlantic region and its natural resources — a claim that Ottawa has refused to negotiate on the grounds that it was "superceded by [Provincial] law."[55] Under these circumstances, the Court was exceedingly modest in its holding that Míkmaw people enjoy merely the right to a "moderate livelihood" from commercial fishing.

Slippery Crowns

At the time of these treaties, British law affirmed that the sovereign cannot "legally disregard or violate the articles on which the country is surrendered or ceded," for they are "sacred and inviolable, according to their true intent and meaning."[56] The prerogative grant of a "liberty" to Indian nations was perpetually binding on British colonists, and lodged a fiduciary obligation of protection in the Sovereign and his servants.[57] Sir Matthew Hale wrote that "liberties or preeminences" were derived from the King's *jura regalia* and included Royal grants of exclusive rights to capture wild beasts (*ferae naturae*).[58] Other British jurists of the period also sometimes referred to Royal grants of exclusive rights to fish and hunt as "franchises," and concurred that a prerogative grant of this nature cannot be revoked by the Sovereign.[59] "[T]he King cannot take away, abridge or alter any liberties or privileges granted by him or his predecessors, without the consent of the individual holding them."[60]

The "liberties" of hunting, fishing and trade affirmed by the Sovereign were unsurrendered Míkmaq rights and responsibilities, and they became irrevocable, under British law, from the moment the treaties were made. As Lieutenant Governor Jonathan Belcher, first Chief Justice of Nova Scotia, assured the assembled Míkmaw chiefs at a treaty renewal ceremony in 1761, British laws "will be like a great Hedge about your Rights and properties, if any break this Hedge to hurt and injure you, the heavy weight of the Laws will fall upon them and punish their Disobedience."[61] Royal Instructions given to Belcher in 1761 stated that the Sovereign "was determined upon all occasions to support and protect ... [the Míkmaq] in their just rights and possessions and to keep inviolable the treaty and compact which have been entered into with them," and Belcher issued a proclamation one year later delimiting the Atlantic coastline where Míkmaw hunting and fishing were to remain forever unhindered.[62]

Justice McLachlin reasoned that the 1752 and 1760 treaties merely acknowledged that the Míkmaw people would enjoy the same right to trade as all British subjects in America.[63] If that had been the Sovereign's intent, the drafters of the treaty instruments could surely have found the words to express it. Other Indian treaties contain distinctly different terms which connote equal sharing rather than an exclusive right, for example "[t]he Rivers are open to all & you have an equal right to fish & hunt on them,"[64] and "[you] are received upon the same terms with the Canadians, being allowed …

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53 *Marshall*, *supra* note 5 at para. 21.

54 See *Simon*, *supra* note 4; *R.* v. *Isaac* (1975), 13 N.S.R. (2d) 460 (N.S.C.A.); *R.* v. *Cope* (1981), 132 D.L.R. (3d) 36 (N.S.C.A.); *R.* v. *Denny* (1990), 55 C.C.C. (3d) 322 (N.S.C.A.).

55 Hon. J. Hugh Faulkner, Minister of Indian and Northern Affairs, to Alexander Denny, President, Union of Nova Scotia Indians (2 October 1978); Hon. John C. Munro, Minister of Indian and Northern Affairs, to Stanley Johnson, President, Union of Nova Scotia Indians (11 August 1980) [authors' files].

56 *Campbell* v. *Hall*, (1774) 1 Cow. 204 at 208, affirmed by *R.* v. *Secretary of State*, [1981] 4 C.N.L.R. 86 at 91 (Eng. C.A.). Also see J. D. Chitty, *A Treatise on the Law of the Prerogative of the Crown and the Relative Duties and Rights of the Subjects* (London: Joseph Butterworths & Son, 1820) at 29.

57 *Badger*, *supra* note 11 at paras. 47 and 94; *Sioui*, *supra* note 22 at 1063; *Simon*, *supra* note 4 at 401.

58 Sir Matthew Hale, *Prerogatives of the King* (London: Selden Society, 1976) at 201, 227–240. Preeminences were sometimes called sovereignties. H. Broom, *A Selection of Legal Maxims: Classified and illustrated*, 10th ed. by R. H. Kersley (London: Sweet & Maxwell Ltd., 1939) at 17.

59 Chitty, *supra* note 56 at 119, 125; Sir William Blackstone, 2 *Commentaries on the Law of England* (London: Sweet, Maxwell and Stevens & Norton, 1844) at 417; B. Murdoch, 2 *Epitome of the Laws of Nova Scotia* (Halifax: J. Howe Publishers, 1832) at 64; *New Brunswick Power Company* v. *Maritime Transit Company*, [1937] 4 D.L.R. 376 (S.C.C.) at 395–96.

60 Chitty, *supra* note 56 at 119, 121, 125, 132.

61 *Marshall*, *supra* note 5 at para. 47.

62 *Simon*, *supra* note 4 at 405.

63 *Marshall*, *supra* note 5 at para. 85: "All inhabitants of the province of Nova Scotia or Acadia enjoyed a general right to trade. No treaty was required to confer such a right as it vested in all British subjects." This broad generalization lacks historical or legal support and is inconsistent with the express terms of the Royal Proclamation, *supra* note 46.

64 *Taylor and Williams*, *supra* note 13 at 235.

Liberty of trading with the English."[65] The principle *pacta sunt servanda* demands giving effect to what was stated or promised, which in this case was a "liberty to trade" without qualification. What was affirmed in the treaties was therefore an irrevocable franchise — rather than whatever right to trade British subjects might have enjoyed, which could be restricted by law at any time.

"Until enactment of the *Constitution Act, 1982*," Justice Binnie observed, "the treaty rights of aboriginal peoples could be overridden by competent legislation as easily as could the rights and liberties of other inhabitants."[66] Parliament regulated hunting and fishing notwithstanding Indian treaties until 1982,[67] and Canada's courts upheld Parliamentary supremacy in some of those cases.[68] In the light of more recent scholarship on Georgian diplomacy and Imperial law,[69] however, the constitutionality of those acts and rulings must be reconsidered. Prerogative grants, by treaty, to Míkmaq and other Indian nations were constitutionally irrevocable when made, as were the various Royal grants and charters to the British colonies. Indeed, the government of Nova Scotia was never formally established by imperial legislation; it functions to this day under an agglomeration of prerogative instruments that includes the Royal commissions, instructions and proclamations as well as various Georgian treaties.[70] Within the Imperial legal regime from which the Canadian legal system has evolved, prerogative acts take precedence over ordinary legislation — particularly where those prerogative acts consist of solemn promises by the Imperial Sovereign to the Indian nations that placed themselves by treaties under His Royal protection.[71]

The Supreme Court has repeatedly stated that it will not slavishly assume the lawfulness of pre-1982 legislation or regulations when it is interpreting the constitutional rights of Aboriginal peoples.[72] Chief Justice Lamer decried an "awkward patchwork of constitutional protection for aboriginal rights across the nation, depending upon the historical idiosyncrasies of colonization over particular regions of the country," for to do so would constitute "perpetuating the historical injustice suffered by aboriginal peoples at the hands of colonizers."[73] Justice Binnie should have taken courage and dared to give the Míkmaw nation the full measure of its original treaty rights.

Slippery Standards

We have argued that the "liberty" affirmed to Míkmaq by the Sovereign was an exclusive economic right under eighteenth-century law, and that what was originally intended and understood to be guaranteed is what should be upheld today. The Nova Scotia Court of Appeals had already concluded ten years ago that Míkmaq possess a constitutionally entrenched priority right to fish for their "legitimate food needs," after conservation has been taken into account.[74] Although the majority in *Marshall* upheld Míkmaw rights to fish

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65 *Sioui, supra* note 22 at 1031.

66 *Marshall, supra* note 5 at para. 48. We note that the learned Justice here uses the term of art "liberty" in its modern sense, i.e., to refer to a freedom in the sense of the *Charter of Rights and Freedoms*, rather than to the Royal grants of exclusive economic rights that eighteenth-century jurists would have understood.

67 *Sparrow, supra* note 32 at 1111.

68 E.g., *Sikyea* v. *The Queen*, [1964] S.C.R. 642, and *R.* v. *George*, [1966] S.C.R. 267, but see *Horseman, supra* note 21 at 914–16 (Wilson, J.).

69 E.g., *Delgamuukw, supra* note 39 at para. 145; B. Slattery, "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727 at 737–38 and "Aboriginal Sovereignty and Imperial Claims" (1991) 29 Osgoode Hall Law J. 681; K. McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989) at 110–16, 181–83; M. Walters, "British Imperial Constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw* v. *British Columbia*" (1992) 17 Queen's L. J. 350.

70 See e.g. P. W. Hogg, *Constitutional Law of Canada*, 3rd ed. (Toronto: Carswell, 1992) at 32; Read, "The Early Provincial Constitution" (1948) 26 Can. Bar. Rev. 621. Also see *MacCormick* v. *Lord Advocate*, [1953] S.C. 396 at 411 (per Lord Cooper) (effect of 1707 Articles of Union between England and Scotland on authority of the British Parliament over Scotland).

71 *Marshall, supra* note 5 at paras. 39–41 (Binnie J.); *Badger, supra* note 11 at para. 78 (Cory J.). Also *Sioui, supra* note 22 at 1053 and 1063, and *Simon, supra* note 4 at 401. Compare Justice Cory's analysis in *Horseman, supra* note 21 at 934, and *Badger* at paras. 46–48 (Imperial Parliament amendments to the *British North America Act* may modify treaty obligations to Indian nations).

72 *Sparrow, supra* note 32 at 1095–1101, 1106, 1111–19; *R.* v. *Côté, supra* note 39 at paras. 49–52; *Simon, supra* note 4 at 399; *Taylor and Williams, supra* note 13 at 364. See also, S. Henderson, "Interpreting Sui Generis Treaties" *supra* note 14 at 63–71; P. P. Frickey, "Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law" (1993) 107 Harv. L. Rev. 381 at 397–98.

73 *Côté, supra* note 39 at paras. 53–54.

74 *R.* v. *Denny, supra* note 54 at 339, cited with approval in *Sparrow, supra* note 32 at 1116–18. The majority in *Marshall* failed to distinguish between an Aboriginal right to fish and a treaty right to fish, both of which can legitimately be asserted by Míkmaq.

and to trade, it imposed a novel and vague ceiling on the enjoyment of those rights: attaining a "moderate livelihood." It is not impossible to extract this standard from references in the *travaux préparatoires* to Mikmaw people's desire to continue to secure their "necessaries" by harvesting and selling wildlife and fish, and the majority was no doubt searching for some basis to limit the treaty right, in a prescient awareness of the severe backlash that even a limited treaty fishery would provoke.

"Moderate livelihood" has no precedent in Canadian jurisprudence.[75] It was imported from a US Supreme Court decision on Indian treaty rights to fish "in common" with other citizens.[76] The American courts have never interpreted "moderate livelihood," however, because the Indian tribes concerned have been self-regulating, and in any event there have barely been enough fish in the affected area for a majority of Indian and non-Indian fishermen to subsist, and meet the debt-service payments on their vessels and gear.[77]

Canada,[78] the United States[79] and the International Whaling Commission[80] have struggled to define "subsistence" for the purpose of setting ceilings on Aboriginal peoples' harvests of fish and wildlife. On the whole, these exercises have converged conceptually with respect to some issues. Subsistence necessarily includes some possibility of barter or sale. Money is required to maintain or replace harvesting gear such as rifles, nets and boats, and to purchase ammunition and fuel. Trade within and between communities was traditionally pursued, moreover, both as a means of improving material living standards and as a form of social security. Trade and money may consequently be necessary for maintaining harvesting capacity, and getting the most material and social value out of what is harvested. At the same time, it has generally be argued that there is no room for capital accumulation in a subsistence-harvesting regime, i.e., for getting richer and re-investing the proceeds of harvesting in unrelated

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75 While "livelihood" has been defined for the purpose of determining what constitutes the "pursuit of a livelihood" without discrimination based on provincial residence, *Canadian Egg Marketing Agency* v. *Richardson*, [1998] 3 S.C.R. 157, the slippery undefined operative term in *Marshall* is "moderate."

76 *Washington* v. *Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658 (1979) at 686–87: "Indian treaty rights to a natural resource that once was thoroughly and exclusively exploited by the Indians secures so much as, but not more than, is necessary to provide the Indians with a livelihood — that is to say, a moderate living." The treaty at issue in *Washington* secured Indians' right to fish "in common" with other citizens, implying (as the US Court explained) a fair share, while the treaties at issue in *Marshall* refer to a "free liberty" of fishing, implying an unrestricted right.

77 R. L. Barsh, "Backfire from Boldt: The Judicial Transformation of Coast Salish Proprietary Fisheries into a Commons" (1991) 4 Western Legal History 85; also see the Indian tribal income, employment and fish-landing data in D. J. Cocheba et al., *Potential Effects of OCS Oil and Gas Exploration and Development on Pacific Northwest Indian Tribes: Final Technical Report, MMS 91–0056* (Washington, DC: US Department of the Interior, 1991).

78 *Report of the Royal Commission*, note 51 at 261 and 267. Under the *Inuvialuit Final Agreement* (Ottawa: D.I.N.A., 1987), for example, Aboriginal communities have a preferential right to hunt and fish for food, including personal and community use, and including the sale or barter of the inedible by-products such as hides, tusks and bone. *Ibid.*

79 The *US Marine Mammal Protection Act* of 1972 permits the harvesting of marine mammals by Aboriginal peoples for "nonwasteful" uses such as food and clothing, as well as the sale of handicrafts made from inedible by-products. The 1980 *Alaska National Interest Lands Conservation Act* (ANILCA) Pub. L. No. 96–487, 94 std. 2371 (1980) (codified at 16 U.S.C. §§ 3101–3233) (1982) devolved federal responsibility for wildlife conservation to the State of Alaska subject to a condition that the State establish and maintain a priority for "nonwasteful subsistence uses" of wildlife by Native and non-Native residents. The State defined "customary and traditional uses" as "direct personal or family consumption as food, shelter, fuel, clothing, tools or transportation, for the making of handicrafts" from inedible by-products, and for "customary trade, barter or sharing." See K. I. Atkinson, "The Alaska National Interest Lands Conservation Act: Striking the Balance in Favor of 'Customary and Traditional' Subsistence Use by Alaska Natives" (1987) 27 Natural Resources Journal 421; M. L. Bruzzese, "*US* v. *Alexander*: Defining and Regulation 'Subsistence Use' of Resources among Alaska Natives" (1993) 33 Natural Resources Journal 461.

80 M. M. R. Freeman, "The International Whaling Commission, Small-type Whaling, and Coming to Terms with Subsistence" (1993) 52 Human Organization 243 at 245. Freeman has defined subsistence as "a system or mode of production in which the allocation and procurement of resources and the distribution and consumption of products is organized around family and kinship groups," and in which production and distribution aim chiefly to maintain and enhance social relationships. M. M. R. Freeman, "Subsistence, Sustainability and Sea Mammals: Reconstructing the International Whaling Regime" (1994) 23 Ocean & Coastal Management 117 at 122.

income generating activities such as stocks or real estate.

The problem with this approach in the *Marshall* context is that moderate livelihood is more than "subsistence."[81] Moderate livelihood should permit some improvement of living standards and should not bar Míkmaw treaty harvesters from using their fishing income to diversify the economies of their communities in the same ways that are already permitted to neighbouring fishermen. Suppose, for example, that a group of Míkmaw fishermen decided to invest in a fish-processing plant. If successful, their venture would benefit all local fishermen, but it would also probably take the owners out of the category of "subsistence" harvesters as that term is generally understood.

There is an alternative basis for interpreting "moderate livelihood" by analogy to Míkmaw customary law. In Míkmaw jurisprudence, the duties of hunters and fishermen to respect animals as well as other human beings are captured by the concept of *netukulimk*, which may be rendered in English as "moderation and respect," or, as some Míkmaw elders have explained, "taking only what you need."[82] In October 1986, following the Supreme Court's *Simon* decision, the Míkmaq Grand Council proclaimed interim conservation guidelines based upon *netukulimk*, which were applied through the elected chiefs and a national arbitration board.[83] In *Van der Peet,*[84] Justice McLachlin (as she then was) and Justice L'Heureux-Dubé suggested in their concurring opinions that First Nations' customary laws were incorporated automatically into the common law at the moment of the Crown's accession to sovereignty over the territory.[85] By this reasoning, Míkmaw harvesting rights continue to be governed by Míkmaw customary law — the *lex loci*.[86] *Netukulimk* is not inconsistent with the Supreme Court's notion of "moderate livelihood."

Míkmaw authorities themselves should have a constitutional right to interpret the meaning of "necessaries." We think it reasonable to infer that Míkmaw leaders would have intended their descendants to live at least as well, on average, as their new British treaty allies and neighbours. A plausible (and, we believe, very modest) floor for the interpretation of the right to obtain their "necessaries," or a "moderate livelihood," would therefore be the *mean per capita income* of Atlantic Canada's non-Míkmaq households.[87] Surely, the Míkmaw nation did not place itself under British protection, nor open its vast coastal territory to British settlement, with the intention that its descendants live forever *more poorly* than their British guests. Such a result would fly in the face of the original intention of the Míkmaw chiefs to secure their "mutual advantage"[88] from the treaties.

Slippery Politicians

A similar treaty-rights decision was taken by the US Supreme Court nearly twenty years ago, in a west coast controversy that produced comparable levels of local violence.[89] In the American case, however, the federal government firmly defended the indigenous treaty-holders against the Washington State government

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81 "Bare subsistence has thankfully receded over the last couple of centuries as an appropriate standard of life for aboriginals and non-aboriginals alike." *Marshall*, *supra* note 5 at para. 59.

82 R. L. Barsh and J. B. Marshall, "Mi'kmaw (Micmaq) Constitutional Law" in B. E. Johansen, ed., *Encyclopedia of Native Legal Traditions* (Westport CT: Greenwood Press, 1998) at 192–209. In the Wabanaki treaty negotiation, this concept may have been put forward by the Míkmaq and then poorly translated by the English as "necessaries." A similar concept can be found in Cree jurisprudence. Hon. D. M. Arnot, Treaty Commissioner for Saskatchewan, *Statement of Treaty Issues: Treaties as a Bridge to the Future* (Saskatoon: Office of the Treaty Commissioner, 1998) at 13.

83 The text of the guidelines is set out in Union of Nova Scotia Indians, *The Mi'kmaq Treaty Handbook* (Sydney and Truro, NS: Native Communications Society of Nova Scotia, 1987) at 14–15.

84 *Van der Peet*, *supra* note 37.

85 *Ibid.* at 599–600 (L'Heureux-Dubé J.) and 642–44 (McLachlin J.). We welcomed this approach in R. L. Barsh and J. Y. Henderson, "The Supreme Court's Van der Peet Trilogy: Naïve Imperialism and Ropes of Sand" (1997) 42 McGill L. J. 993 at 1007–08.

86 In *Delgamuukw*, *supra* note 39 at paras. 147–48, the Lamer Court held that Aboriginal perspectives and laws are protected by s. 35(1) of the *Constitution Act, 1982*, *supra* note 9. Also see *Van der Peet*, *supra* note 37 at para. 41.

87 As explained *supra*, we believe that the best interpretation of the Míkmaq intent, and the terms agreed by the Crown, is an *exclusive* liberty or franchise to fish and hunt for sale. Setting mean per capita income as a floor reflects the idea of a just and equitable sharing of resources, which has been suggested elsewhere as a reasonable construction of the *post*-Confederation "numbered" treaties made in the west, with the inhabitants of the former Rupertsland. See *Statement of Treaty Issues*, *supra* note 82 at 12–16, 66–68, 87 (the "principle of mutual benefit").

88 *Marshall*, *supra* note 5, para. 3.

89 See F. G. Cohen, *Treaties on Trial: The Continuing Controversy over Northwest Indian Fishing Rights* (Seattle and London: University of Washington Press, 1986).

and the State's non-Indian licensees. In *Marshall*, federal support for Míkmaq has been equivocal at best. This contrast illustrates the crucial differences between American federalism and Canadian federalism, in principle and in practice. We question whether Ottawa retains sufficient power or legitimacy to enforce any provision of the national constitution, or any Supreme Court ruling interpreting the constitution, against a province or a vociferous sector of Canadian society. In other words, does constitutional supremacy and the rule of law persist in Canada?

Editorial opinion in the centrist *Globe and Mail* has been uncharacteristically antagonistic to Aboriginal Peoples, and to the Supreme Court as an institution. Accusing the Supreme Court of being "blind" to reality and creating "chaos," the editors argued that the 1760 treaty "clearly" did not contain a preferential right to harvest or trade fish.[90]

> The spectre of the Supreme Court functioning illegitimately to create an unintended right based on vague and quasi-historical interpretations is certainly raised by this judgment. It is an example of the court's oversensitivity to the burdens of history, and its desire to assume and ameliorate them, whatever the specific language of a law, treaty or even the Constitution itself.

Justice Binnie took the unusual step of defending the Court's integrity publicly,[91] while the Tory premiers of Alberta and Ontario made headlines by threatening to take political steps to "rein in" the judges.[92]

If the editors of the *Globe and Mail* represent Canada's relatively educated mainstream, constitutional supremacy and the rule of law are moribund. In accusing the Supreme Court of "illegitimacy," the editors seem to equate "legitimacy" with popular opinion. "Mr. Dooley" (the turn-of-the-century Irish American satirist Finley Peter Dunne) complained that "th' supreme coort follows th' iliction returns," rather than upholding the constitution."[93] By a curious twist of history, the Canadian national press *demands* that the Supreme Court bow down to the polls. Do Canadian journalists have any conception of judicial independence, the division of powers or the role of the judiciary in ensuring that we remain "a nation of laws and not of men"? Apparently not. Canadians do not yet appreciate what it means to have a constitutional system, as opposed to a government of privileged majorities and political bosses posing as democracy.

Although it is the constitutional fiduciary of the Míkmaw nation, the federal government equivocated on the Supreme Court's authority from the day of the ruling. In one of his only publicized comments on *Marshall*, the Prime Minister indicated that he was weighing the Reform Party's suggestion of asking the Court to suspend its judgment.[94] This was particularly ominous in light of the fact that Ottawa's refusal to implement *Simon* fully had led Míkmaq to relitigate their treaty rights in *Marshall*. The federal minister of fisheries dithered for three weeks before getting directly involved.[95] The federal minister of Indian affairs waited for more than a month, and then blamed the provinces for the delay in implementation talks with the Míkmaq.[96]

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90 "The burden of language in the Mi'kmaq case" *The Globe and Mail* (6 October 1999) at A10; "The Supreme Court all at sea" *The Globe and Mail* (5 October 1999) at A12. The francophone press accorded comparatively little attention to *Marshall*, although *Le Devoir* defended the Supreme Court's decision as "balanced," and squarely blamed the Míkmaq for the subsequent violence. Michel Venne, "Le prix de l'incurie" *Le Devoir* (5 October 1999) at A6.

91 Brian Laghi, "Top-court judge denies activism0 *The Globe and Mail* (21 October 1999) at A4.

92 John Ibbitson and Steven Chase, "Ontario joins Alberta: Rein in top court" *The Globe and Mail* (25 October 1999) at A1.

93 Louis Fuller, ed., *The World of Mr. Dooley* (New York: Collier Books, 1982) at 89. "A man that'd expict to thrain lobesters to fly in a year is called a loonytic," Mr. Dooley also observed, "but a man that thinks men can be turned into angels be an iliction is called a rayformer an' remains at large." *Ibid.* at 72. Preston Manning take note.

94 K. Cox and E. Anderssen, "Ottawa, Micmacs try to resolve fishing feud" *The Globe and Mail* (29 September 1999) at A4. Also see D. LeBlanc, "Ottawa gropes for response to fish battle" *The Globe and Mail* (5 October 1999) at A1; and B. Myles, "Confusion à Ottawa" *Le Devoir* (5 October 1999) at A1.

95 Two weeks after the *Marshall* ruling, the minister was still putting off meeting with Míkmaw leaders while he sought legal advice. "Ottawa, Micmacs try to resolve fishing feud" *supra* note 94. When direct meetings with DFO finally began on October 2, even non-Native leaders condemned the delay. K. Cox and D. LeBlanc, "Anger over fishing rights explodes" *The Globe and Mail* (4 October 1999) at A1.

96 H. Scofield, "Scope of aboriginal ruling in dispute" *The Globe and Mail* (23 October 1999) at A5. When Míkmaw boats and traps were destroyed and some area fish-packing plants wrecked because they did business with Míkmaq, the RCMP waited for ten days to lay charges, while DFO officers and the Coast Guard wasted no time impounding Míkmaq boats and gear for alleged infractions even after the *Marshall* ruling. The appearance (at least) of selective enforcement of the law was not lost on Míkmaw leaders. "Anger over fishing rights explodes" *supra* note 95; K. Cox, "25 charged in dispute over fishery" *The Globe and Mail* (13 October 1999) at A3; K. Cox,

The press has blamed judicial "ignorance" and Mikmaq "militancy" for a situation created by centuries of paternalism, the systematic exclusion of the Mikmaw from the commerical fishery and government mismanagement of marine resources. Ottawa has not only categorically refused to negotiate Mikmaw comprehensive treaty claims in the Atlantic region, when similar claims (and new treaties) have been in negotiation everywhere else in Canada,[97] but has meanwhile permitted *increases* in Atlantic fish landings,[98] and supported development projects undermining the Atlantic region's marine ecosystems.[99] Now that Atlantic fishermen are truly desperate, it is convenient for Ottawa to play the "race card," blame Aboriginal people for overfishing,[100] and accuse Aboriginal leaders of using or threatening violence.[101]

One month after *Marshall*, Mikmaw leaders won another treaty victory: barring completion of the Sable Island offshore oil project until environmental concerns are adequately addressed.[102] Belying their characterization as eco-vandals in the press and by

"Fisheries seizes native lobster traps" *The Globe and Mail* (23 October 1999) at A6.

97 Note 55, *supra*. The exclusion of most of the Atlantic region from Canada's comprehensive claims policy, as set out in Department of Indian and Northern Affairs, *In All Fairness* (Ottawa: DIAND 1981), was criticized by the Department's own Task Force to Review Comprehensive Claims Policy in its final report, *Living Treaties: Lasting Agreements* (Ottawa: DIAND 1986) at 45–46, but Ottawa still refuses to discuss Mikmaw comprehensive claims, "Scope of fishing ruling in dispute," *supra* note 96.

98 From 1952 to 1988 DFO allowed Atlantic landings to increase by two hundred per cent, from one to three billion pounds of fish and shellfish. There was evidence of declining cod, haddock, lobster and herring stocks by the 1960s, but the region's fishermen were encouraged to shift to relatively unexploited species such as capelin, which comprise the food for larger predators including cod. F. H. Leacy, ed., *Historical Statistics of Canada*, 2nd ed. (Ottawa: Statistics Canada, 1983) table series N12–24; *Canada Year Book 1999* (Ottawa: Minister of Industry, 1998) at 358.

99 There has been no thorough scientific assessment of the impacts on Atlantic coastal ecosystem and fisheries of industrial contamination (steel mills, coal mines, pulp and paper processing) or of construction in rivers and estuaries. In 1992 the Mikmaq Grand Council tried unsuccessfully to mobilize Native and non-Native Nova Scotians in a joint "Campaign to Protect the Bras d'Or Lake Ecosystem." By comparison, Ottawa has invested substantial effort in the assessment of industrial impacts on the Great Lakes. Health Canada, *State of Knowledge Report on Environmental Contaminants and Human Health in the Great Lakes Basin* (Ottawa: Health Canada, 1997).

100 Making scapegoats of Indians and foreigners also diverted public attention from the mismanagement of the West Coast salmon fishery in the past. R. L. Barsh, *The Washington Fishing Rights Controversy: An Economic Critique*, rev. ed. (Seattle: University of Washington, 1979) at 28–30; D. Newell, *Tangled Webs of History: Indians and the Law in Canada's Pacific Coast Fisheries* (Toronto: University of Toronto Press, 1993) at 171–74.

101 There has been a persistent use of terms such as "war" and "battle" in English press coverage of post-*Marshall* events, while the francophone press has been using images from the Mohawk confrontation at Oka. See e.g., "Ottawa gropes for response to fish battle" *supra* note 94, with its front-page photograph of "the flag of the militant Mi'kmaq Warriors Society;" Mark MacKinnon, "'We're not backing down': war chief" *The Globe and Mail* (11 October 1999) at A4; J. LeMont, "Lobster Wars" *MacLeans* (11 October 1999) at 20–21; and the editorial page cartoon "Homard à la canadienne" *Le Devoir* (5 October 1999) at A6. Similarly, the press characterized Mikmaq as "defiant" and aggressive during the 1988 dispute over Mikmaw moose harvesting. T. Bernard and P. J. Prosper, "Policy as Depicted in the 1988 Mi'kmaq Treaty Moose Harvest" in S. Inglis, J. Mannette and S. Sulewski, eds., *Paqtatek* (Halifax: Garamond Press, 1991) at 77–89.

102 B. Laghi, "Native ruling could delay megaproject" *The Globe and Mail* (22 October 1999) at A1; B. Laghi, "Mi'kmaq seek to halt Sable Island pipeline work" *The Globe and Mail* (23 October 1999) at A2; K. Cox, "The megaproject whose name is mud" *The Globe and Mail* (30 October 1999) at A20.

Ottawa,[103] Míkmaw authorities are using their constitutional standing under *Marshall* — something non-Native fishermen lack — to protect the marine environment.[104] In the days following the *Marshall* ruling, Míkmaw leaders had also approached non-Native fishermen with a proposal for a common conservation and allocation strategy.[105] In the ten years prior to *Marshall*, Míkmaw leaders had worked with their non-Native neighbours on a wide variety of conservation initiatives, from blocking the construction of gravel pits and landfills, to opposing the application of herbicides in coastal forests, to fighting the dredging of Sydney Channel and the dragging of the bottom of the Bras d'Or Lake.[106]

In the weeks that followed the Supreme Court's decision, however, Ottawa's actions have divided Atlantic fishermen along racial lines[107] and undermined the credibility and authority of Míkmaw traditional and elected leaders. The Míkmaq had offered to delay treaty fishing for thirty days in the wake of *Marshall*, but were rebuffed by Ottawa. Three weeks later, the federal minister took public credit for coaxing them to agree to the moratorium that they had originally proposed themselves.[108] By that late stage, both the minister and Míkmaw leaders had suffered a loss of trust on the docks, and two out of thirty-five Míkmaw communities refused to cooperate.[109] The minister chose to take firm action against these two communities over the objections of Míkmaw leaders, eliminating what little trust remained between Ottawa and the Míkmaq leadership, and between Míkmaq leadership and Míkmaw fishermen.[110]

Ironically, the press accorded their greatest sympathy to the federal minister of fisheries who was portrayed as a well-intentioned but misunderstood hyphenated Canadian, sandbagged by incompetent advisers in his own department.[111] By focusing on the irony that Canada's first Sikh federal cabinet minister stands accused of racism by Aboriginal leaders, the *Globe and Mail* diverted attention from the reality that ministers do not act as individuals, but on behalf of governments. We, too, sympathize with the minister, who may find himself in a conflict of personal beliefs and political loyalties. Excessive sympathy for elected officials elevates "men" over laws, however.

What we have not heard is any public acknowledgment of past wrongs, regrets or sympathy from the politicians or press for the centuries of wrongful exclusion of the Míkmaq from the commercial fishery and their manufactured poverty. We have heard no redress or compensation package for the governmental mistakes in interpreting the treaties denying the Míkmaw the benefit of these rights. We hear no reconciliation of the past wrongs or any coherent partnership for sharing future that respects constitutional rights as much as colonial privileges.

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[103] Most press reports have given misleading impressions of the magnitude of the post-*Marshall* Míkmaw lobster fishery, for example by reporting that Míkmaq had taken 120,000 pounds of lobster out of season without clarifying (until a week later) that this represented barely 0.005 per cent of the region's average annual lobster landings. "Anger over fishing rights explodes," *supra* note 95; M. McAfee, "Even experts can't agree on lobsters" *The Globe and Mail* (11 October 1999) at A4. Only about one hundred Míkmaw actually went fishing for lobster in the weeks after the ruling, "Ottawa, Micmacs try to resolve fishing feud" *supra* note 94, but even if as many as 2,000 Míkmaq choose to exercise fishing rights in the future (K. Cox, "Figuring out a 'fair share' controversial and costly" *The Globe and Mail* (8 October 1999) at A7), it would represent only a ten per cent expansion of the Atlantic fleet.

[104] The Míkmaq have used their constitutional rights and standing in the past to protect the marine environment, *Union of Nova Scotia Indians* v. *Canada*, [1997] 4 C.N.L.R 280.

[105] K. Cox, "Tensions mount as natives use right to fish off-season" *The Globe and Mail* (29 September 1999) at A7; K. Cox, "East Coast fishery moves toward co-operation" *The Globe and Mail* (9 October 1999) at A10; K. Cox, "DFO blasted for seizing lobster traps" *The Globe and Mail* (22 October 1999) at A5.

[106] In a tragic twist of fate, many of the fishermen who have been mobilized against the Marshall ruling are descendants of the Acadians who were hidden from British troops by their Míkmaw neighbours. Tu Thanh Ha, "Indians once sheltered Acadians" *The Globe and Mail* (9 October 1999) at A10. What is even more ironic, the trial judge in *Marshall* reasoned that the military efforts of Míkmaq to protect their Acadian neighbours and kinsmen comprised a breach and renunciation of the 1752 concordat. *Supra* note 5 at para. 63.

[107] West Coast fishermen have recently accused the same federal minister of trying to divide them along racial lines. M. MacKinnon, "Fishermen threaten Ottawa with civil disobedience" *The Globe and Mail* (5 November 1999) at A8.

[108] K. Cox, "Native leaders propose fish truce" *The Globe and Mail* (7 October 1999) at A1.

[109] Tu Thanh Ha, "Natives defy call to stop fishing" *The Globe and Mail* (8 October 1999) at A1.

[110] K. Cox, "Native scrap lobster fishing moratorium" *The Globe and Mail* (14 October 1999) at A4.

[111] M. MacKinnon, "The minister on the hook" *The Globe and Mail* (23 October 1999) at A22. We have yet to hear any public or press sympathy for the poverty imposed on Míkmaw people for their wrongful exclusion from the fishery for many, many years.

Conclusion: Slipping Away

Míkmaq are quintessentially people of the sea.[112] Seafarers everywhere learn to read the subtle language of the ocean's changing colours and textures which speak to the wise of distant storms. When the wind turns and gales blow, it is too late to make safely to shore. A sailor who is deaf to the warnings of the sea will surely wreck.

Canadians have been adrift for centuries on a sea of ambivalent nationalism. As yet, no safe harbour has been found — not Meech Lake, nor Charlottetown, certainly not the empty posturings in Ottawa or Québec city. Only a residual colonial mentality with its strategy of authoritarianism and majority privilege provide a wretched compass.

As legal advisers to an indigenous nation, we fought Pierre Elliott Trudeau bitterly over his initial refusal to take First Nations seriously as constituent polities of Confederation. His formula for the survival of Canada as a state remains conceptually sound in our view, however.[113] Plural societies must choose one of two courses. They may adopt a transcendant national vision, which ultimately overwhelms their diverse identities and jealousies: the American melting pot, cooking on the fire of American self-confidence, exceptionalism and imperialism. Alternatively, a plural society may accept its diversity as a given, even as an asset, and stitch the seams of the state with an over-arching constitutional framework that guarantees the cultural security of each group and the personal security of every person: a minimal central state entrusted with enforcing the rule of law and protecting fundamental rights.[114]

The minimal Canadian central state grows ever more minimal, however, to the point that it is no longer capable of serving its protecting and unifying function. If *Marshall* is a bellwether — and we fear that it is — the federal government is growing unwilling or unable to cooperate with the Supreme Court in guaranteeing the constitutional rights of Aboriginal Peoples and Canadians. Ottawa has fumbled badly, and accused the Court of meddling and manufacturing violence in a case involving a few hundred angry fishermen, a minute share of the dwindling Atlantic fishery, and a great deal of misinformation. This is a retreat from constitutional supremacy and betokens ill for future constitutional controversies in which the political stakes may be even higher, such as a dispute over language rights in Québec, Aboriginal lands in British Columbia or privatizing health care in Alberta.

The current controversy over *Marshall* reminds us of another "Marshall" case: *Worcester* v. *Georgia,*[115] decided more than 150 years ago by the US Supreme Court under the direction of its outspokenly federalist Chief Justice, John Marshall. The State of Georgia had defied federal authority by seizing the lands of the Cherokee Nation and imprisoning Cherokee leaders in violation of the Cherokees' treaties with the United States. In *Worcester*, the relatively young Supreme Court flexed its constitutional muscles and declared the state's actions *ultra vires*. Chief Justice Marshall was concerned about the fate of the Cherokees, to be sure, but equally if not more so, the fate of the Union. As well he should have been: President Andrew Jackson refused to implement the court's ruling, choosing instead to use federal military power to force the Cherokees to leave their homeland. "The Union is in most imminent danger of dissolution," former President John Quincy Adams opined. "The ship is about to founder."[116] And founder it did, although the proximate cause of the bloody Civil War, nineteen years later, was enforcing federal laws against slavery rather than

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[112] C. A. Martijn, ed., *Les micmacs et la mer* (Montréal: Recherches amérindiennes au Québec, 1986).

[113] As best set out in his manifesto, *Le Fédéralisme et la société canadienne-française* (Montréal: Editions HMH, 1967), in English, *Federalism and the French Canadians* (Toronto: MacMillan, 1968).

[114] W. Kymlicka, *Finding Our Way* (Toronto: Oxford University Press, 1998) at 158, argues that Anglophone Canada has resisted relinquishing its majority privilege, exercised through Parliament, of defining and allocating the fundamental rights enshrined in the *Charter*.

[115] 31 U.S. (6 Pet.) 515 (1832); J. C. Burke, "The Cherokee Cases: A Study in Law, Politics and Morality" (1969) 21 Stanford L. Rev. 500.

[116] A. Beveridge, *The Life of John Marshall* (Boston: Houghton Mifflin, 1919) at 544.

upholding treaties with Indian tribes.[117] The Union survived and rebuilt, at the cost of half a million lives.

This is a cautionary tale for Canada. *Marshall* is a test of the existence of the rule of law in Canada — a country which relies even more fundamentally on constitutional supremacy and the rule of law as its unifying force, than ever did the United States.

"The Court has done its duty," US Supreme Court Justice Joseph Story wrote to a friend a few days after Chief Justice Marshall's *Worcester* decision. "Let the nation do theirs. If we have a government let its command be obeyed; if we have not, it is well to know at once, and look to consequences."[118] Tricky story, this one, for the rest of Canada.

POSTSCRIPT: A SLIPPERY COURT

> But the mystery of the colonial is this: while he remains alive, his instinct, always and forever creative, must choose a way to change the meaning and perspective of this ancient tyranny.[119]

Two months to the day after issuing its judgment in *Marshall*, the Supreme Court denied the motion of the West Nova Fishermen's Coalition to intervene and seek a stay of judgment and re-hearing. The motion was denied on procedural grounds[120] and the Court chided the applicant for misunderstanding its original ruling,[121] as well as making political rather than legal arguments for the suspension of a constitutional right.[122] Astonishingly, the Supreme Court then proceeded to rephrase its rulings and its reasoning in *Marshall* and address issues relating to the scope of federal regulatory authority which had not previously been raised or argued by the parties. The result is a further muddying of the conceptual waters and the dilution of the treaty rights that the Míkmaw people have enjoyed for a mere two months.

The *National Post* publicly congratulated the Justices for coming to their senses, listening to their critics and adopting "a new sense of judicial restraint and humility."[123] Never has the US or Canadian Supreme Court reversed itself so precipitously in the face of public criticism.

While advising its critics that it cannot fully define the scope of Ottawa's "power to regulate the treaty right" based upon the record before it, the Court in *Marshall II* reassures them of the *existence* of such a power, referring to *Badger*.[124] *Badger* involved reconciling Treaty No. 8 with the *Constitution Act, 1930*,[125] and concluded that treaty rights may be modified by the clear intent and express terms of a constitutional instrument.[126] *Badger* held that the licensing requirements of the applicable provincial *Wildlife Act* nonetheless constituted a *prima facie* infringement of the surviving, albeit modified treaty hunting right.[127] Since the Crown had submitted no evidence to justify limiting the treaty hunting right, the Court ordered a new trial on that issue, noting that any demonstrably legitimate "conservation component" of

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117 With his usual perspicacity, Alexis de Tocqueville observed in the wake of the *Worcester* case that either Indian tribes, or slavery, would be the cause of a bitter struggle over the future of the Union. *Democracy in America* (New York: Harper and Row, 1966) at 308–09, 344–45.

118 W. Wetmore Story, *Life and Letters of William Story* (Boston: 1851) at 87, quoted in R. L. Barsh and J. Y. Henderson, *The Road: Indian Tribes and Political Liberty* (Berkeley, CA: University of California Press, 1980) at 60.

119 G. Lamming, "The Pleasures of Exile" cited in S. Selmon and H. Tiffin, *After Europe* (Sydney, New South Wales: Kangaroo Press, 1989) at v.

120 *R.* v. *Marshall*, decided 17 November 1999; [1999] S.C.J. No. 66 (QL) 179 D.L.R. (4th) 193 [hereinafter *Marshall II*] at para. 9. The Court held that the Coalition lacked standing to seek post-judgment relief from a criminal proceeding to which it had not originally been a party. The judgment on the was issued per curiam (i.e. by "The Court"), yet curiously the opinion is written in the first person.

121 *Ibid.* at paras. 2 and 11.

122 I.e., that the exercise of the right would be disruptive. *Ibid.* at para. 45.

123 "Supremes retreat: Rather than clarifying rights, the court's ruling compromises them" *National Post* (19 November 1999) at A19. Compare K. Makin, "Top court issues rebuke in fish furor" *The Globe and Mail* (18 November 1999) at A1, which depicts the Court as angry and defiant.

124 *Marshall II*, at paras. 2, 14, 24–25, 31–32, 35–36; *Badger*, *supra* note 11.

125 R.S.C. 1970, App. II, No. 25; *Badger*, *supra* note 11 at paras. 47, and 100 (Cory J., with La Forest, L'Heureux-Dubé, Gonthier and Iacobucci JJ. concurring).

126 *Badger*, *supra* note 11 at paras. 46–47, 84. In *R.* v. *Horseman*, *supra* note 21 at 933, Cory J. opined that the Natural Resources Transfer Agreement (NRTA) had modified Treaty No. 6 by extinguishing the treaty right to hunt commercially, while expanding the geographic scope of the treaty right to hunt for food. Writing for the majority in *Badger*, Cory J. drew the same conclusion as to the effect of the *Constitution Act, 1930* on the hunting rights affirmed by Treaty No. 8.

127 *Badger*, *supra* note 11 at paras. 70, 74–94. The infringement could either have been a result of the NRTA, which transferred federal regulatory authority to the province, or of the provincial legislation which exercised the transferred authority.

the provincial licensing scheme would not necessarily infringe on the treaty right.[128]

Marshall II misapplies *Badger* to Míkmaw treaty rights.[129] Unlike Treaty No. 8, Míkmaw treaties did not expressly delegate any regulatory authority over hunting, fishing or trade to "the Government of the country."[130] Unlike the Prairie provinces, furthermore, the Atlantic region was never affected by Imperial enactments amending the Canadian constitution with respect to pre-existing Indian treaty rights. The federal *Maritime Provinces Fishery Regulations* do not have the constitutional status of the *Constitution Act, 1930*, if indeed they are truly federal laws at all.[131] Hence, while the Court's remark in *Badger* that treaty rights are "always subject to regulation" may be legally correct with respect to hunting under Treaty No. 6 and Treaty No. 8, it does not apply *ipso facto* to hunting, fishing and trade under the Míkmaw treaties in Atlantic Canada.

Marshall II goes even further than *Badger*, in fact, announcing that "regulations that do not more than *reasonably define* the Míkmaq treaty right" do not constitute an infringement of that right, and as such do not require any justification.[132] Even in the face of an express provision in Treaty No. 8 acceding to "regulations ... by the Government of the country," *Badger* ruled that any limitation as to the method, timing or extent of hunting would infringe on the treaty right and require clear justification.[133] It mystifies us how a constitutionally entrenched treaty right can be "defined" ministerially without changing it.[134] Still further, the Court in *Marshall II* redefines the concept of "moderate livelihood" invoked in *Marshall* as "equitable access" to the fishery, rather than as a priority right which must be satisfied before the non-treaty quota is allocated.[135]

Justice McLachlin has stated elsewhere that no part of the Constitution of Canada can be "abrogated or diminished" relative to any of the other parts.[136] Chief Justice Lamer has likewise explained that "[n]o single principle can be defined in isolation from the others, nor does any one principle trump or exclude the operation of any other."[137] "Aboriginal and treaty rights" are now integral parts of the Canadian constitutional edifice and their protection represents an important "underlying constitutional value."[138] This is why government must adequately justify any action that interferes with these rights and pay fair compensation for any infringement of them. As the Supreme Court concluded in *Delgumuukw*, "compensation for breaches of fiduciary duty are a well-established part of the landscape of aboriginal rights ... [i]n keeping with the duty of honour and good faith on the Crown."[139]

In *Marshall II*, however, the Court invites Ottawa to re-impose restrictions on the Míkmaw treaty right and to justify its actions by alleging that the restrictions are merely definitional, or are aimed at achieving what Ottawa considers an "equitable" balancing of Míkmaq and non-Míkmaq interests. A right reserved by treaty, and enshrined in the national constitution, has thereby been relegated to ministerial notions of equity in a

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128 *Ibid.* para. 90. The Court added that s. 88 of the *Indian Act* (applying provincial laws of general application to Indians) does not authorize provincial legislatures to restrict treaty rights.

129 *Marshall II*, *supra* note 120 at paras. 29, 32 and 43.

130 The phrase "the Government of the country" is ambiguous, and could have been understood by First Nations as referring to *their own* authorities.

131 The fishery regulations are drafted in cooperation with the provinces, although they are enacted as federal laws in accordance with a constitutional convention. See *Simon*, *supra* note 4.

132 *Marshall II*, *supra* note 120 at para. 37 [emphasis added]. Compare the Court's discussion, *ibid.* at paras. 24 and 32, of the strict justification test in Badger, *supra* note 11.

133 *Badger*, *supra* note 11 at paras. 90–94. The Court conceded that reasonable regulations aimed at ensuring the safety of other hunters, such as gun safety courses, would be justified and not infringe upon the exercise of the treaty right. *Ibid.* at para. 89.

134 Regrettably, the same mystical judicial reasoning characterized the majority judgment in *Van der Peet*, *supra* note 37, where it undermined the original test in *Sparrow* for the existence of an Aboriginal right. Barsh and Henderson, *supra* note 85; A. Zalewski, "From Sparrow to Van der Peet: The Evolution of a Definition of Aboriginal Rights" (1997) 55 U. T. Fac. L. Rev. 435.

135 *Marshall II*, para. 38. Also see para. 42, in which the Court admonishes Ottawa to embrace the principle of "proportionality" in allocating fish between Míkmaw and non-Míkmaw fishermen.

136 *New Brunswick Broadcasting Co.* v. *Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319 at 373 [hereinafter *New Brunswick Broadcasting*].

137 *Québec Secession Reference*, *supra* note 1 at para. 49; see also para. 91 on this concept of "symbiosis."

138 *Ibid.* at para. 82; also at para. 32. See, similarly, *Delgumuukw*, *supra* note 39 at paras. 174–75, and *Van der Peet*, *supra* note 37 at para. 28.

139 *Delgumuukw*, *supra* note 39 at para. 169.

highly charged political environment.[140] This is not a "right" at all. The Court has returned the treaty ball to Ottawa after its fumble, and left federal discretion barely hampered by vague judicial standards.

Marshall II thereby revives and legitimizes the process by which the Míkmaq originally lost the enjoyment of their treaty rights. It is even worse than a return to the parliamentary supremacy principle, which has been limited (at least in principle) by section 52 of the *Constitution Act, 1982*. *Marshall II* vindicates a kind of *administrative* supremacy over Aboriginal peoples, in which ministerial discretion can unilaterally override fundamental constitutional rights without the need for justification or compensation. As such, it is a cynical colonial wink to the Crown's attorneys and to the mandarins in Ottawa.

Ministerial discretion to define the quantum of *Charter* rights treads upon the principles of "equality before and under the law," and of "equal protection and equal benefit of the law,"[141] and is incompatible with the essential purpose of having a national constitution. The *Charter* itself guarantees the right to an "appropriate and just remedy" whenever fundamental rights have been "infringed or denied,"[142] so that even if a restriction on treaty harvesting rights can be justified on conservation grounds, compensation must be paid to the affected rights-holders. Compensation potentially serves as a check on abuses of government regulatory power, and it is simple justice to Míkmaw fishermen who should not bear the cost of the deterioration of fish stocks over the past century. Yet *Marshall II* is silent about compensability.

In a final gesture of deference to public opinion, moreover, the Court goes to great lengths to characterize the treaty right as *local* (community-by-community) rather than belonging to the Míkmaw nation as a whole,[143] and as *species-by-species*.[144] These rules will result in endless and inextricable confusion and litigation. They place an onus on each of the thirty-five Míkmaq communities in the Atlantic region to re-litigate *Marshall* not once, but many times — for lobsters, for salmon, for cod, for every tree and berry and herbal medicine they traditionally utilized. We doubt that there is money or energy enough in Míkmaw society to undertake such a task. Meanwhile, the federal minister has regained most of the regulatory discretion he exercised prior to *Marshall*. Is this an effective way to protect the rights enshrined in the *Charter*?

The only proper test for a constitutional right is *inconsistency*, as it is explicitly set out in section 52(1) of the *Constitution Act, 1982*. The courts have been charged constitutionally with the duty of determining consistency and nullifying "laws" that are not consistent with fundamental rights. In its original *Marshall* judgment, the Court struck down the *Fisheries Act* because it delegated regulatory authority to the minister without including a guarantee of Míkmaq treaty rights. In *Marshall emendatus*, the Court itself is delegating regulatory authority to the minister to "define" a constitutionally entrenched right. As a result, it is not (strictly speaking) a *right* at all.

Míkmaw people's Aboriginal rights to hunt and fish were recognized and protected at common law before they were expressly affirmed by treaty.[145] In our view, treaties converted the common-law rights into irrevocable prerogative "liberties," with constitutional security from the moment the treaties were executed.[146] If there is no difference in the regulability of Aboriginal rights and treaty rights, then the treaties were nullities; they had no effect on the inviolability of Aboriginal hunting and fishing practices. Surely, the Supreme Court did not intend to obliterate treaty rights by collapsing them into Aboriginal rights — or to render the treaties little more than evidence that Aboriginal rights existed at treaty time! Yet *Marshall II* appears to have this effect.

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[140] The Court leaves the determination of what constitutes a "moderate livelihood" to ministerial discretion. *Marshall II*, *supra* note 120 at para. 39. It warns Ottawa that Míkmaw treaty rights cannot be wholly transformed without making new agreements (supplemental to the original treaties), involving consultation and negotiation with the Míkmaq, yet states that government ministers are not obliged to reach such agreements. *Ibid.* at paras. 19, 21 and 23.

[141] Section 15(1) of the *Charter*. Although s. 1 of the *Charter* subjects the exercise of fundamental rights to "such limits prescribed by law as can be *demonstrably justified* in a free and democratic society" [emphasis added], *Marshall II* assures Ottawa that limits on s. 35 rights need *not* be demonstrably justified — a clear case of *unequal* protection.

[142] Section 24(1) of the *Charter*. Also see *Delgamuukw*, *supra* note 39.

[143] *Marshall II*, *supra* note 120 at para. 17.

[144] *Ibid.* at paras. 20–21.

[145] *Van der Peet*, *supra* note 37; *Sparrow*, *supra* note 32. The Míkmaw Compact (1752) also contained express provisions for the justiciability of Míkmaw rights in British courts.

[146] The Court contends that Míkmaq always understood that their treaty rights would be regulated, relying solely on an opinion of the Crown's expert witness on colonial history. *Marshall II*, *supra* note 120 at para. 24. We are unable to detect any empirical foundation whatsoever for his inference. Must experts' opinions be accepted as true, if there is no evidence to support or reject them?

The greatest tragedy of this judicial retreat is its effect on the tentative coalition-building between responsible leaders of the Míkmaq and non-Native fishermen. The great majority of fishermen were working out their differences among themselves, in spite of the mixed signals and bungling of Ottawa. Now, the Court has explicitly put the mandarins back in control, casting the grassroots efforts of the past months into the sea. The lesson here is simple. Big government must prevail, however incompetent it has proven itself to be. Grassroots democracy is simply not Canadian. Compromise, muddling and changing the rules as you go along (while pretending to be a government) is apparently the essence of Canadian civics.

At the end of the day, the Supreme Court has proven that there is one and only one basic principle in Canadian constitutional firmament that never changes: "Don't put your balls in a vise over an Indian."[147]

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Both have served as advisers to the Míkmaq Grand Council for more than twenty years.

[147] 65 *Official Transcripts of the Royal Commission on the Donald Marshall, Jr., Prosecution* (Halifax 1986) at 1673. This was reportedly what Robert Anderson of the Nova Scotia Attorney-General's department told legal aid attorney Felix Cacchione, when the latter suggested re-opening Marshall's murder conviction.

BCGSEU: Turning a Page in Canadian Human Rights Law

Dianne Pothier

The Supreme Court of Canada's decision in *British Columbia Government and Service Employees' Union (BCGSEU)* v. *British Columbia (Public Service Employee Relations Commission)*[1] starts like a classic Lord Denning judgment. Within the first few lines, without even knowing what the legal issue really is, you know who is going to win because of how that person is presented. Justice McLachlin's judgment, speaking for a unanimous nine-person Court, begins by noting that the grievor, Tawney Meiorin, "did her work well" but nonetheless "lost her job."[2] It was that dissonance that made the facts of the case compelling for reinstatement. But what makes the decision a landmark ruling is how the Court reached that conclusion. The compelling facts helped the Court to focus on some serious conceptual problems in Canadian human rights law. The Court used the occasion to significantly reorient its approach to anti-discrimination law.

Although the case is about the interpretation of human rights legislation, it is not actually a human rights proceeding; the case is an unjust dismissal claim channelled through grievance arbitration under a collective agreement. Yet the relevance of human rights legislation is assumed without question. *BCGSEU* is further affirmation that arbitrators under collective agreements have not only the jurisdiction, but also the obligation, to apply human rights legislation.[3]

Facts and Rulings Below

Tawney Meiorin was first hired as an initial attack forest firefighter in the Golden District in 1992. Because the work is seasonal, she was laid off at the end of the season. She was hired again in 1993 and 1994. It was only starting in 1994 that the initial attack crew firefighters in Golden were required to pass the tests that became the subject of challenge.[4] Failure to pass the tests made the person ineligible to continue as an employee, irrespective of previous satisfactory job performance, which Tawney Meiorin had.[5]

> [T]he Government's "Bona Fide Occupational Fitness Tests and Standards for B.C. Forest Service Wildland Firefighters" ... required that the forest firefighters weigh less than 200 lbs. (with their equipment) and complete a shuttle run, an upright rowing exercise, and a pump carrying/hose dragging exercise within stipulated times. The running test was designed to test the forest firefighters' aerobic fitness and was based on the view that forest firefighters must have a minimum "VO2 max" of 50 ml. kg-1. min-1 (the "aerobic standard"). "VO2 max" measures "maximal oxygen

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1 (1999), 244 N.R. 145 (S.C.C.) [hereinafter *BCGSEU*]. I was a member of the *BCGSEU* subcommittee for the joint intervention in the Supreme Court of Canada of the Women's Legal Education and Action Fund (LEAF), the DisAbled Women's Network (DAWN Canada), and the Canadian Labour Congress (CLC). That involvement arose from my then position on the LEAF National Legal Committee and as a member of the DAWN legal committee.

2 *Ibid.* at 149.

3 The Supreme Court of Canada made it clear in *Ontario Human Rights Commission et al.* v. *The Borough of Etobicoke*, [1982] 1 S.C.R. 202 at 214 [hereinafter *Etobicoke*] that parties to a collective agreement could not contract out of human rights legislation. In *Central Okanagan School District No. 23* v. *Renaud*, [1992] 2 S.C.R. 970 at 984-87 [hereinafter *Renaud*] the Court further stipulated that compliance with a collective agreement was no defence at arbitration if the collective agreement did not conform to human rights legislation, and defending against such a grievance did not constitute undue hardship. In *Douglas/Kwantlen Faculty Assn.* v. *Douglas College*, [1990] 3 S.C.R. 570 and *Weber* v. *Ontario Hydro*, [1995] 2 S.C.R. 929 the Court also affirmed, where the employer is a government actor, the power and duty of arbitrators to apply the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

4 Although the letters of appointment in 1992 and 1993 indicated tests would be required, this did not happen in respect of the grievor or anyone else in the Golden Forest District before 1994; *Re British Columbia (Public Service Employee Relations Commission) and BCGSEU (Meiorin)* (1996), 58 L.A.C (4th) 159 at 162 (B.C.).

5 *Supra* note 1 at 151.

> uptake," or the rate at which the body can take in oxygen, transport it to the muscles, and use it to produce energy.

Ms. Meiorin passed all but the aerobic fitness test. After four tries she was unable to complete a 2.5 km run in eleven minutes; she was 49.4 seconds over.[6] She was laid off and her union grieved, claiming unjust dismissal as a result of sex discrimination.

The *prima facie* case of adverse effects discrimination based on sex was made out by evidence before the arbitrator that physiological differences between men and women are such that most men have higher aerobic capacities than most women and that while, with training, most men can pass the aerobic fitness test, most women cannot.[7] The arbitrator made the following further findings of fact:[8]

> I am persuaded the standard and the test itself constitutes a valid measure of physical fitness for Initial Attack Crew forest fire-fighters to perform the requirements of their job. ...
>
> [T]he employer has presented no cogent evidence, in my view, to support its position that it cannot accommodate Ms. Meiorin because of safety risks.
>
> I also think it is important not to lose sight of the fact that the 2.5-km run in 11 minutes or less is but one of the four fitness tests that apply to Initial Attack Crew candidates. Nor ought one to forget that she performed her job as a forest fire-fighter satisfactorily in previous years, without any concerns about her ability to perform her job safely and efficiently. She was considered by her supervisor to be a capable employee whom he did not wish to lose. Simply put, I am not persuaded the inability of Ms. Meiorin to run 2.5 km in less than 11 minutes 49 seconds would pose a serious safety risk to herself, fellow employees or the public at large.

The arbitrator ordered that Ms. Meiorin be reinstated, with backpay, but left unspecified the nature of the accommodation to be afforded her.[9]

The Court of Appeal, relying on the arbitrator's finding that the test was a valid measure of physical fitness for the job, overturned the arbitrator's decision, agreeing with the employer that "if individual testing is carried out, there is no discrimination."[10] The Supreme Court of Canada commented:[11]

> The Court of Appeal (mistakenly) read the arbitrator's reasons as finding that the aerobic standard was necessary to the safe and efficient performance of the work.

In restoring the arbitrator's decision, the Supreme Court of Canada relied instead on the arbitrator's finding that the employer had not shown that Ms. Meiorin was a safety risk. What neither the Court of Appeal nor the Supreme Court of Canada said directly was that the arbitrator had contradicted himself. If the test, which had been rationalized only as a safety measure, was valid, it did not logically follow that Ms. Meiorin was not a safety risk. His ultimate finding that she was not a safety risk undermined the initial assumption that the test was valid. Yet the arbitrator should perhaps be forgiven for this contradiction because the test he was applying, in respect of adverse effects discrimination, from the earlier Supreme Court of Canada jurisprudence, was itself inherently contradictory. The Supreme Court of Canada's failure to highlight the arbitrator's contradictions matched its reluctance to acknowledge its own contradictory analysis. Let me explain.

The Bifurcated Analysis

From the earlier jurisprudence, and particularly from Justice Wilson's majority decision in *Central Alberta Dairy Pool*,[12] the Supreme Court of Canada had fashioned a bifurcated analysis that drew a sharp distinction between direct and adverse effects discrimination. For direct discrimination, where the discrimination on the prohibited ground was explicit on

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6 Although it is not mentioned in the Supreme Court of Canada's decision, the 2.5 km run in eleven minutes was an alternate version of the aerobic fitness test. All previous hires had the option of the alternate version. Ms. Meiorin was exempted from the standard version because of knee problems; arbitrator's decision, *supra* note 4 at 163–64.

7 *Ibid.* at 206.

8 *Ibid.* at 202–03, 208.

9 *Ibid.* at 208.

10 *British Columbia (Public Service Employee Relations Commission)* v. *British Columbia Government Service Employees' Union* (1997), 37 B.C.L.R. (3d) 317 at 324 (C.A.).

11 *BCGSEU*, *supra* note 1 at 155.

12 *Central Alberta Dairy Pool* v. *Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489 [hereinafter *Central Alberta Dairy Pool*].

the face of the rule or policy, the two-part *Etobicoke* test (subjective and objective elements) for *bona fide* occupational requirement (*bfor*) applied. To be a *bfor*, the rule:[13]

> (1) must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the Code; and
>
> (2) it must be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public.

If this statutory justification test was not met, the rule would be struck down. There was no room for individual accommodation, but there was room for reasonable alternative rules.[14]

For adverse effects discrimination, "a rule that is neutral on its face but has an adverse effect on certain members of the group to whom it applies,"[15] a generally applicable *bfor* provision was not engaged. Instead, the *O'Malley*[16] test applied, whereby the employer has a defence if the impugned rule is:

> (1) rationally related to the performance of the job; and
>
> (2) there has been accommodation up to the point of undue hardship.

The first step of the *O'Malley* test is expressly a lower threshold than the *Etobicoke* test, but even the "rationally related" language was given short shrift. In *O'Malley*, Justice McIntyre said that, in cases of adverse effects discrimination, the rule itself "needs no justification."[17] In *Renaud*, the Supreme Court of Canada skipped over the "rationally related" part of the analysis and went straight to accommodation up to the point of undue hardship.[18] In *O'Malley*, the assumption was that the rule "will survive in most cases";[19] by the time of *Central Alberta Dairy Pool*[20] and *Renaud*,[21] the assumption was simply that the general rule would survive in cases of adverse effects discrimination and the only issue was exception by means of accommodation.

There was much criticism of the Supreme Court of Canada's position that there was no individual accommodation in cases of direct discrimination.[22] I have always thought, however, that the more significant flaw in the bifurcated analysis was the assumption that individual accommodation was the only issue in adverse effects discrimination.[23] In my assessment, the fact that the jurisprudence developed in the context of religious discrimination cases gave a distorted and limited perspective on adverse effects discrimination.

The justification given by Justice Wilson for why individual accommodation was not available in direct discrimination cases was that there could be no individual accommodation because any exception would undermine the rationale of the rule.[24] *Etobicoke*, which involved a successful challenge to mandatory retirement for firefighters at age sixty, illustrates the point. A mandatory retirement rule has to be justified in total, or not at all. An early mandatory retirement policy is only valid if it can be established that individual testing *cannot* distinguish between those who are and those who are not competent to continue working. If someone argues that they should not be subject to the rule, they are claiming that individual tests *can* identify

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13 *Etobicoke*, *supra* note 3 at 208.

14 *Central Alberta Dairy Pool*, *supra* note 12 at 514, 517–19.

15 *Ibid.* at 514.

16 *Ontario Human Rights Commission and O'Malley* v. *Simpsons-Sears Ltd. et. al.*, [1985] 2 S.C.R. 536 [hereinafter *O'Malley*].

17 *Ibid.* at 555.

18 *Renaud*, *supra* note 3 at 981.

19 *O'Malley*, *supra* note 16 at 555.

20 *Supra* note 12 at 515.

21 *Supra* note 3 at 918.

22 B. Etherington, "Central Alberta Dairy Pool: The Supreme Court of Canada's Latest Word on the Duty to Accommodate" (1993) 1 Can. Lab. L.J. 311 at 323–24; M. C. Crane, "Human Rights, *Bona Fide* Occupational Requirements and the Duty to Accommodate: Semantics or Substance?" (1996) 4 C.L.E.L.J. 209; W. Pentney, "Belonging: The Promise of Community — Continuity and Change in Equality Law 1995–96" (1996) 25 C.H.R.R. C/6 at C/11; M. D. Lepofsky, "The Duty to Accommodate: A Purposive Approach" (1993) 1 Can. Lab. L.J. 1; I. B. McKenna, "Legal Rights for Persons with Disabilities in Canada: Can the Impasse Be Resolved?" (1997–98) 29 Ottawa L. Rev. 153 at 168.

23 See also Etherington, *ibid.* at 324–25.

24 *Central Alberta Dairy Pool*, *supra* note 12 at 514.

those who are competent; if the argument has validity, it does not justify an exception to the rule but challenges the basis and logic of the rule itself. I agree with Justice Wilson that this is almost always the case in respect of direct discrimination. It can equally be true, however, in cases of adverse effects discrimination.[25] That is what the religion cases obscured.

The religion cases gave a distorted view of adverse effects discrimination precisely because they involved claims that did not challenge the logic of the general rule and were only seeking exceptions for reasons unrelated to the logic of the general rule. In seeking an exemption from Saturday work because of her Seventh Day Adventist religious objections to work on the Sabbath, Theresa O'Malley was not trying to convert anyone else to Seventh Day Adventism. She did not challenge the premise that Simpsons-Sears needed clerks to work on Saturdays, since a lot of customers want to shop on Saturdays. Her argument for a religious exemption could co-exist with a general rule of working on Saturdays because the logic of the rule and logic of the exception had different bases. The same applies to the arguments regarding work scheduling conflicts with religious beliefs in *Central Alberta Dairy Pool* and *Renaud*. Similarly, Bhinder's religion-based argument, as a Sikh, for not wearing a hard hat did not challenge the safety reasons for wearing one; rather, he was arguing that the religious reasons for Sikhs not wearing a hard hat were more important than the safety reasons for wearing one.[26] Again the arguments for and against had different bases.

The religion cases did not involve challenges to the general rules precisely because the claimants were only trying to defend their right to practice their own religion; no one was trying to proselytize their religion and hence no one was trying to challenge secular or other religious norms. But the fact that in these cases the general rules were uncontentious should not have been taken to mean that this was generally the case in adverse effects discrimination. It should not have been assumed that adverse effects discrimination was only concerned with tinkering by means of exceptions rather than challenging discriminatory norms. Yet that is precisely what the Supreme Court of Canada had done.

The religion cases involve claims where all practising members of the faith or faiths with similar beliefs are similarly affected and all other persons are unaffected. In other words, they are categoric exclusions, and in that context an exception to the general rule is the obvious solution. But the disproportionate impact cases such as *BCGSEU* are more complex. Where there is not a perfect correlation between the ground and the persons affected, the real issue is whether the norms themselves are discriminatory.

There were, among cases decided below the Supreme Court of Canada level, early examples of adverse effects discrimination cases based on disproportionate impact rather than categoric exclusion. The classic example is height and weight restrictions for police officers. The fact that men tend to be taller than, and weigh more than, women did not deny that some women could meet the requirements and that some men could not. The height and weight restrictions were still recognized as sex discrimination and held not to be valid job requirements.[27] In this instance the discrimination claim did directly challenge the logic of the job requirement. It was challenging a conception of the job of a police officer as based on male norms, not on what was actually necessary to do the job. The remedy sought and granted was to invalidate the rule, not create exceptions to the rule. To create exceptions to the rule for women would have been illogical because accepting that women of lesser height and weight could do the job was an admission that the higher height and weight stipulations were unnecessary to perform the job.

The Supreme Court of Canada has never denied that adverse effects discrimination covers the disproportionate impact cases. Indeed, in *O'Malley* the Supreme Court of Canada expressly relied on the leading American adverse effects discrimination case, *Griggs* v. *Duke Power Co.*,[28] which is a disproportionate impact case. In *Griggs*, the employment qualification was a high school diploma or equivalent. This was held to constitute race discrimination because blacks were less likely to have completed high school, and a high school education was irrelevant to the actual job requirements.

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[25] Etherington, *supra* note 22 at 324–25.

[26] *Bhinder et. al.* v. *Canadian National Railway Co. et. al.*, [1985] 2 S.C.R. 561. Although the majority of the Supreme Court of Canada found against Bhinder's claim on the basis that the hard hat rule was a *bfor*, i.e. both subjectively and objectively reasonably necessary for the performance of the job, that ruling was effectively overturned in *Central Alberta Dairy Pool*, *supra* note 12, where the majority ruled that the *bfor* analysis did not apply to adverse effects discrimination.

[27] *Coffer* v. *Ottawa Police Commission* (12 January 1979), (Ont. Bd. of Inq.) [unreported].

[28] 401 U.S. 424 (1971), cited with approval in *O'Malley*, *supra* note 16 at 549–50.

In other words, there could still be race discrimination even though some blacks did qualify for the job and some whites did not. Even though not universally true, the case was still based on the white norm of completing high school. And, again, the remedy was to invalidate the rule, not create exceptions to the rule, since the discrimination claim did directly challenge the rationale of requiring a high school education.

If the logic of the rule and the logic of the challenge to the rule directly contradict each other, an exception to the rule makes no sense because any exception undermines the basis of the rule. That was precisely the situation in *BCGSEU*. The employer's rationale for the aerobic fitness test was safety. The basis for the union's challenge to Tawney Meiorin's dismissal was that she could safely perform the job in spite of having failed the aerobic fitness test, i.e. that the test was not an accurate gauge of safety. Moreover, they were challenging the job requirements as based on male norms, reflecting the fact that firefighting has traditionally been a male occupation. The fact that she had satisfactorily performed the job for two years was compelling evidence on her side. Yet the previous Supreme Court of Canada jurisprudence told the arbitrator that, since this was a case of adverse effects discrimination, he was supposed to jump to the consideration of accommodation, i.e. exceptions to the rule, without seriously considering the validity of the rule first. That's how the arbitrator got himself into contradictory findings, by creating an exception that undermined the logic of the rule without a full examination of the rule itself. Although in *BCGSEU* the Supreme Court of Canada reconceptualizes adverse effects discrimination so as to avoid this inherent contradiction, the Court never actually acknowledges that it had created the contradiction in the first place.

Reassessing the Bifurcated Analysis

Justice McLachlin prefaces her analysis in *BCGSEU* with the following:[29]

> Although this case may be resolved on the basis of the conventional bifurcated analysis this court has applied to claims of workplace discrimination under human rights statutes, the parties have invited us to reconsider that approach. Accepting this invitation, I propose a revised approach to what an employer must show to justify a prima facie case of discrimination.

For reasons explained in the previous section, I do not think the case could have been resolved on the basis of the previous bifurcated analysis without conceptual confusion. It is also interesting that the Court attributed the invitation to reconsider to the "parties," whereas the strongest such invitations actually came from the intervention of the British Columbia Human Rights Commission and the joint intervention of the Women's Legal Education and Action Fund (LEAF), the DisAbled Women's Network (DAWN Canada), and the Canadian Labour Congress (CLC).[30]

Justice McLachlin reviewed seven reasons why the bifurcated approach was problematic, and why a new unified approach was warranted, under the following headings:[31]

(a) Artificiality of the Distinction Between Direct and Adverse Effect Discrimination;

(b) Different Remedies Depending on Method of Discrimination;

(c) Questionable Assumption that Adversely Affected Group Always a Numerical Minority;

(d) Difficulties in Practical Application of Employers' Defences;

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[29] *BCGSEU*, *supra* note 1 at 150.

[30] British Columbia Human Rights Commission factum in *BCGSEU* (SCC); LEAF-DAWN-CLC factum in *BCGSEU* (SCC). (As noted above, I was a member of the LEAF-DAWN-CLC subcommittee in *BCGSEU* as a member of both the LEAF and DAWN legal committees.) The Appellant union's factum in *BCGSEU* made arguments about different treatment of accommodation in the context of gender compared to religion, based on challenging male norms, but did not directly challenge the bifurcated approach, at 28–30. The union did, however, argue that: "The standard of justification in a case of adverse effect discrimination must be no lower than if it were a case of direct discrimination, at 30. The Respondent employer's factum suggested a series of alternate approaches, all leading to the same result of validating the standard and the dismissal. The primary submission was that there was no discrimination at all, as held by the Court of Appeal. The secondary submission was a unified approach to direct and adverse effects discrimination that validated these kinds of tests, and the further submissions were more modest reassessments of the bifurcated approach. At the Supreme Court of Canada hearing, counsel for the British Columbia government did not strenuously press its case.

[31] *BCGSEU*, *supra* note 1 at 161–79.

(e) Legitimizing Systemic Discrimination;

(f) Dissonance Between Conventional Analysis and Express Purpose and Terms of *Human Rights Code*; and

(g) Dissonance Between Human Rights Analysis and *Charter* Analysis.

These reasons are substantially interconnected and are variations on the same themes. The key conceptual arguments are: (b) unwarranted differences in remedies and (e) improperly legitimizing systemic discrimination. Reasons (a), (c) and (d) are more geared to practical application and reasons (f) and (g) reinforce the earlier arguments.

The key concept throughout is the significance of challenging norms, as discussed above in my own critique of the bifurcated analysis. Justice McLachlin makes this point most forcefully in her discussion of legitimizing systemic discrimination.[32]

> Under the conventional analysis, if a standard is classified as being "neutral" at the threshold stage of the inquiry, its legitimacy is never questioned. The focus shifts to whether the individual claimant can be accommodated, and the formal standard itself always remains intact. The conventional analysis thus shifts attention away from the substantive norms underlying the standard, to how "different" individuals can fit into the "mainstream," represented by the standard.
>
> Although the practical result of the conventional analysis may be that individual claimants are accommodated and the particular discriminatory effect they experience may be alleviated, the larger import of the analysis cannot be ignored. It bars courts and tribunals from assessing the legitimacy of the standard itself. Referring to the distinction that the conventional analysis draws between the accepted neutral standard and the duty to accommodate those who are adversely affected by it, Day and Brodsky, *supra*, write at p. 462:
>
> > The difficulty with this paradigm is that it does not challenge the imbalances of power, or the discourses of dominance, such as racism, able-bodyism and sexism, which result in a society being designed well for some and not for others. It allows those who consider themselves "normal" to continue to construct institutions and relations in their image, as long as others, when they challenge this construction are "accommodated."
> >
> > Accommodation, conceived this way, appears to be rooted in the formal model of equality. As a formula, different treatment for "different" people is merely the flip side of like treatment for likes. Accommodation does not go to the heart of the equality question, to the goal of transformation, to an examination of the way institutions and relations must be changed in order to make them available, accessible, meaningful and rewarding for the many diverse groups of which our society is composed. Accommodation seems to mean that we do not change procedures or services, we simply "accommodate" those who do not quite fit. We make some concessions to those who are "different," rather than abandoning the idea of "normal" and working for genuine inclusiveness.
> >
> > In this way, accommodation seems to allow formal equality to be the dominant paradigm, as long as some adjustments can be made, sometimes, to deal with unequal effects. Accommodation, conceived of in this way does not challenge deep-seated beliefs about the intrinsic superiority of such characteristics as mobility and sightedness. In short, accommodation is assimilationist. Its goal is to try to make "different" people fit into existing systems.

I agree with the thrust of these observations. Interpreting human rights legislation primarily in terms of formal equality undermines its promise of substantive equality and prevents

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[32] *Ibid.* at 171-73, citing S. Day and G. Brodsky, "The Duty to Accommodate: Who Will Benefit?" (1996) 75 Can. Bar Rev. 433 and *Canadian National Railway Co.* v. *Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114.

> consideration of the effects of systemic discrimination, as this court acknowledged in *Action Travail, supra.*
>
> This case, where Ms. Meiorin seeks to keep her position in a male-dominated occupation, is a good example of how the conventional analysis shields systemic discrimination from scrutiny. This analysis prevents the court from rigorously assessing a standard which, in the course of regulating entry to a male-dominated occupation, adversely affects women as a group. Although the Government may have a duty to accommodate an individual claimant, the practical result of the conventional analysis is that the complex web of seemingly neutral, systemic barriers to traditionally male-dominated occupations remains beyond the direct reach of the law. The right to be free from discrimination is reduced to a question of whether the "mainstream" can afford to confer proper treatment on those adversely affected, within the confines of its existing formal standard. If it cannot, the edifice of systemic discrimination receives the law's approval. This cannot be right.

The link between challenging systemic discrimination and the issue of remedies is clear. If the starting premise is that combating systemic discrimination means questioning dominant norms, the follow-through remedy must involve consideration of invalidating or reassessing general standards, not merely after-the-fact tinkering.

As a sex discrimination case, *BCGSEU* is about challenging male norms, about challenging traditional assumptions about job requirements derived from the job having been a traditional male preserve. As noted in the Day and Brodsky comments approved by Justice McLachlin, that point has application in respect of other grounds of discrimination as well. I recently made the following comments which were critical of an American case in which a black women unsuccessfully argued sex and race discrimination in challenging American Airlines' policy against an all-braided hairstyle.[33]

> In rejecting the claim of race and sex discrimination, the Court in *Rogers* rejected the cultural significance of all-braided hair to black women. Because it found no discrimination at all, it gave only passing mention to American's business justification:
>
> > [T]he policy was adopted in order to help American project a conservative business-like image, a consideration recognized as a bona fide business purpose [at 233].
>
> The Court made no effort to look behind this claim. If the discrimination claim is conceptualized as fundamentally challenging norms, how might this be done? I would contend that American's policy really amounts to saying that black women can work for American as long as they act white, i.e. that only a certain amount of difference from the norm will be tolerated. I do not mean to suggest that whoever formulated the policy was actually thinking in those terms. Indeed I would assume they were not. The powerful impact of dominant norms is that they are invisible to those who fit them, because they assume the norms are just universal and totalizing truths.

Challenging able-bodied norms is also critical in dealing with disability discrimination,[34] which is why *BCGSEU* was an important case for DAWN Canada's intervention. Although disability often does require individualized special measures, and it is crucial to meet the individual needs of persons with disabilities,[35] inclusive design from the start can either avoid the problem entirely (e.g. level access) or make individual accommodation easier (e.g. easily conversable formats for printed documents). If taken at face value, Justice McLachlin has moved well beyond the Court's assumption in *Eaton* that all that is required to deal with disability discrimination is to "fine-tune society" through "reasonable accommodation."[36] Yvonne Peters comments:[37]

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[33] D. Pothier, "Connecting Interesting Grounds of Discrimination to Real People's Real Experiences," background paper to a plenary session on "Women at the Intersection: Addressing Compound Discrimination," as part of a conference on "Transforming Women's Equality: Equality Rights in the New Century" sponsored by West Coast LEAF, in Vancouver (4-7 November 1999) commenting on *Rogers et al.* v. *American Airlines Inc.* 527 F.Supp. 229 (1981).

[34] Lepofsky, *supra* note 22; McKenna, *supra* note 22.

[35] Lepofsky, *ibid.*; McKenna, *ibid.*; Crane, *supra* note 22; A. M. Molloy, "Disability and the Duty to Accommodate" (1993) 1 Can. Lab. L.J. 23.

[36] *Eaton* v. *Brant County Board of Education*, [1997] 1 S.C.R. 241 at 272.

[37] Y. Peters, "From Tinkering to Transformation: *Meiorin* Breathes New Hope into Reasonable Accommodation" at 4, part of an unpublished background paper for a workshop

> The Court's analysis in *Meiorin* represents a significant step forward in that it begins to redefine and reformulate the objectives of reasonable accommodation. ... *Meiorin* shifts the emphasis from the individual to the standard.

Yet there is a serious question as to how far Justice McLachlin really follows through on the challenging norms analysis, even in *BCGSEU* itself. To assess this, it is necessary to turn to the new unified approach.

THE NEW UNIFIED APPROACH

Justice McLachlin adopts a three-step test for a *bfor*, applicable to both direct and adverse effects discrimination, that is a "strict approach to exemptions from the duty not to discriminate."[38] The test is designed on the assumption, as is the case in the British Columbia legislation and most other Canadian human rights statutes, of a generally applicable *bfor* provision.[39]

> An employer may justify the impugned standard by establishing on the balance of probabilities:
>
> (1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;
>
> (2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
>
> (3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.
>
> This approach is premised on the need to develop standards that accommodate the potential contributions of all employees insofar as this can be done without undue hardship to the employer.

This new test is in fact an amalgam of the two former tests. Step one of the new test is similar to step one from *O'Malley*. Step two of the new test is the same as step one from *Etobicoke*. Step three of the new test is a combination of step two from each of *O'Malley* and *Etobicoke*.

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presented by F. Kelly, Y. Peters and S. O'Donnell on "The Duty to Accommodate: the promise, the reality, the limitations" at a conference on "Transforming Women's Equality: Equality Rights in the New Century" sponsored by West Coast LEAF, in Vancouver (4-7 November 1999).

[38] *BCGSEU*, *supra* note 1 at 179.

[39] *Ibid.* at 181–82. As pointed out by my colleague Peter Pilliounis, Justice McLachlin does not address the situation of how one should deal with a selective *bfor* provision, i.e. one tied to specific grounds or specific contexts. It is not at all clear what happens in circumstances not covered by a *bfor* in the following provisions of the *Saskatchewan Human Rights Code*, S.S. 1979, c. S–24.1:

> 16(1) No employer shall refuse to employ or continue to employ or otherwise discriminate against any person or class of persons with respect to employment, or any term or condition of employment, because of his or their race, creed, religion, colour, sex, sexual orientation, family status, marital status, disability, age, nationality, ancestry, place of origin or receipt of public assistance. ...
>
> (4) No provision of this section relating to age prohibits the operation of any term of a *bona fide* retirement, superannuation or pension plan, or any terms or conditions of any *bona fide* group or employee insurance plan, or of any *bona fide* scheme based upon seniority.
>
> (5) Nothing in this section deprives a college established pursuant to an Act of the Legislature, a school, board of education, or conseil scolaire of the right to employ persons of a particular religion or religious creed where religious instruction forms or may form the whole or part of the instruction or training provided by the college, school, board of education, or conseil scolaire pursuant to *The Education Act*. ...
>
> (7) The provisions of this section relating to any discrimination, limitation, specification or preference for a position or employment based on sex, disability or age do not apply where sex, ability or age is a reasonable occupational qualification and requirement for the position or employment. ...
>
> (10) This section does not prohibit an exclusively non-profit charitable, philanthropic, fraternal, religious, racial or social organization or corporation that is primarily engaged in serving the interests of persons identified by their race, creed, religion, colour, sex, sexual orientation, family status, marital status, disability, age, nationality, ancestry, place of origin or receipt of public assistance from employing only or giving preference in employment to persons similarly identified if the qualification is a reasonable and *bona fide* qualification because of the nature of the employment.

The real utility of step one of the new test is questionable, since it would seem to be subsumed in step three. The "rationally connected" threshold from step one is lesser than the "reasonably necessary" hurdle of step three. The distinction between steps one and three that Justice McLachlin draws is:[40]

> The focus at the first step is not on the validity of the particular standard that is at issue, but rather on the validity of its more general purpose.

That is how Justice McLachlin is able to say, without contradiction, that an employer can pass step one yet fail step three. This is the conclusion she reaches in *BCGSEU* itself. But it is not clear what is accomplished by isolating general purpose as a separate step. Such an approach was suggested by the Appellant,[41] but that seemed to have more to do with trying to rationalize away a problematic finding of the arbitrator when he was using the old, contradictory, bifurcated approach.

The one conceivable argument that including step one matters would involve a scenario where the employer's only argument was undue hardship because of cost. Consider an example where the premises were not wheelchair accessible but the job itself could readily be performed by someone in a wheelchair. Strictly speaking, one could say there was no rational connection to the performance of the job, so that the employer fails step one, and therefore never gets to step three to be able to argue undue hardship in making the premises accessible or in using alternate premises. Yet, given the global reference to undue hardship made by Justice McLachlin immediately after setting out the three-part test, and the history behind the undue hardship defence, it is highly doubtful that Justice McLachlin meant for step one to be interpreted so as to preclude the raising of an undue hardship defence. Even if it can be said that the undue hardship defence legitimizes systemic discrimination, avoiding the defence of undue hardship seems to be too much to expect.

Step two of the new test, the old step one from *Etobicoke*, is the subjective element, i.e. proof of intention. Step two does relate to the particular standard.[42] Proof of bad intention is fatal, but the absence of proof of bad intention simply moves the analysis to the next step. Given that judicial acceptance of the concept of adverse effects discrimination was in part to overcome problems in proving discriminatory intention,[43] it is not surprising that the subjective element is usually conceded to the employer,[44] as it was in *BCGSEU*. This makes the crucial part of the new test step three.

Step three starts with a "reasonably necessary" criterion for the standard itself. Thus it overcomes the previous problem in adverse effects discrimination that the standard itself was left unscrutinized. Yet the way step three is worded, it also jumps very quickly to the language of individual accommodation. Despite having earlier endorsed Day and Brodsky's critique of the concept of accommodation when conceived only as after-the-fact tinkering, Justice McLachlin discusses accommodation in the context of step three (both in general and as applied to the particular case) in a fairly conventional and uncritical way. Further references to systemic discrimination are conspicuously absent. In setting out the types of questions to ask, she phrases them in vague terms, leaving room for a range of degrees of strictness in interpretation.[45]

> Some of the important questions that may be asked in the course of the analysis include:
>
> (a) Has the employer investigated alternative approaches that do not have a discriminatory effect, such as individual testing against a more individually sensitive standard?
>
> (b) If alternative standards were investigated and found to be capable of fulfilling the employer's purpose, why were they not implemented?
>
> (c) Is it necessary to have *all* employees meet the single standard for the employer to accomplish its legitimate purpose or could standards reflective of group or individual differences and capabilities be established?
>
> (d) Is there a way to do the job that is less discriminatory while still accomplishing the employer's legitimate purpose?
>
> (e) Is the standard properly designed to

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[40] *Ibid.* at 184.

[41] Appellant's factum, at 32.

[42] *BCGSEU*, *supra* note 1 at 185.

[43] *O'Malley*, *supra* note 16 at 549.

[44] *Large* v. *Stratford (City)*, [1995] 3 S.C.R. 733.

[45] *BCGSEU*, *supra* note 1 at 187–88.

ensure that the desired qualification is met without placing an undue burden on those to whom the standard applies?

(f) Have other parties who are obliged to assist in the search for possible accommodation fulfilled their roles? As Sopinka J. noted in *Renaud, supra* at 992–96, the task of determining how to accommodate individual differences may also place burdens on the employee and, if there is a collective agreement, a union.

Her concluding remarks prior to applying the test to the particular case seem to convey mixed messages as to how broadly transforming her analysis is meant to be.[46]

> Employers designing workplace standards owe an obligation to be aware of both the differences between individuals, and differences that characterize groups of individuals. They must build conceptions of equality into workplace standards. By enacting human rights statutes and providing that they are applicable to the workplace, the legislatures have determined that the standards governing the performance of work should be designed to reflect all members of society, insofar as this is reasonably possible. Courts and tribunals must bear this in mind when confronted with a claim of employment-related discrimination. To the extent that a standard unnecessarily fails to reflect the differences among individuals, it runs afoul of the prohibitions contained in the various human rights statutes and must be replaced. The standard itself is required to provide for individual accommodation, if reasonably possible. A standard that does not allow for such accommodation may be only slightly different from the existing standard but it is a different standard nonetheless.

My concern is not the concept of individual accommodation itself, but the dangers of reaching that stage before a thorough analysis and critique of dominant norms.

Application to the Case on Appeal

The fact that *BCGSEU* involved significant physiological differences between men and women made the *prima facie* case of discrimination easy to prove, and the Supreme Court of Canada does not elaborate on what is necessary to prove disproportionate impact adverse effects discrimination. That issue will have to await future cases.

In terms of the employer's *bfor* defence, the government easily passes steps one and two, but fails step three. Justice McLachlin finds two fatal flaws in the methodology of the experts who developed the tests, flaws that precluded a finding that the aerobic fitness standard as designed was reasonably necessary for the performance of the job.

First, the methodology was primarily descriptive, describing the aerobic capacity of test subjects, who were mostly male firefighters.[47] Thus, this was replicating, rather than scrutinizing, the male norm.

Second, the tests "failed to distinguish the female test subjects from the male test subjects."[48] Justice McLachlin raises, but does not ultimately resolve, the question of whether there should be standards differentiated by gender. Part of the complication is that it was never entirely clear what aerobic capacity is supposed to measure. Unlike some of the other tests, the direct connection to the job is not obvious. If the claim is that a specific aerobic capacity is necessary to be a firefighter, gender differentiated standards would be hard to justify. If, however, the claim is that a general level of fitness is necessary to the job of firefighting, and the same level of fitness was measured by different aerobic capacities between women and men, gender differentiated standards would be required.

In concluding that the government had not met step three of the *bfor* test, Justice McLachlin relied on the arbitrator's findings, expressed in terms of accommodation up to the point of undue hardship. Although his findings were made pursuant to the old bifurcated analysis, she does not suggest they need to be recast to fit the new unified analysis. That contributes to the uncertainty as to how far the new test really goes in challenging dominant norms.

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[46] *Ibid.* at 189. I think the "not" in the last sentence is in error.

[47] *Ibid.* at 192.

[48] *Ibid.* at 192–93.

Since the case arose out of grievance arbitration, the only remedy available was reinstatement, with backpay, of the grievor. Had it been a human rights proceeding, however, it is clear the aerobic fitness standard as framed would have been struck out. That is the most obvious implication of abandoning the bifurcated approach, since on the Supreme Court of Canada's previous adverse effects analysis, such a remedy would not have been available.

Conclusion

BCGSEU marks a significant turning point in Canadian human rights law. In a unanimous nine-person decision, the Supreme Court of Canada extricated itself from the rut it had previously created with the bifurcated approach which distinguished between direct and adverse effects discrimination. Although I think the *BCGSEU* judgment downplayed the difficulties of the prior approach, the Court unequivocally turned a page.

For a Court that usually hesitates to reverse itself, and usually hesitates to acknowledge that it is moving in a new direction, *BCGSEU* is a remarkable judgment. A lot has changed in human rights law over the last fifteen years. In 1985 the Court first embraced adverse effects discrimination in *O'Malley*, but the majority in *Bhinder* limited the significance of that in holding that a *bfor* was not subject to individual accommodation. That barrier was removed in 1990 in *Central Alberta Dairy Pool* when the Court, although somewhat equivocally, walked away from *Bhinder*. That equivocation from the majority in *Central Alberta Dairy Pool* produced the bifurcated approach, which itself has now been abandoned. Although the concepts of direct and adverse effects discrimination are still helpful in understanding the different ways in which discrimination can happen,[49] they have properly been disregarded as mandating differential legal treatment.

The Court accepts in *BCGSEU* that, in all types of discrimination, the analysis has to start with scrutinizing the general rules or standards claimed to be discriminatory. The Court understood that the particular case was about challenging a job definition constructed around traditional male norms, and that had to be directly confronted in order to advance equality for women. Yet there are mixed messages from the judgment as to how far anti-discrimination law can go in challenging dominant norms.

Even if the extent of its reach is not yet clear, a breakthrough is still a breakthrough. And we didn't even have to wait for the new millennium for it to happen.

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For help in developing my thoughts on this case, I would like to thank members of the subcommittee for the joint intervention of LEAF-DAWN-CLC in the SCC, participants in the Atlantic Feminist Workshop in Halifax on 15–16 October 1999, and participants in the workshops on duty to accommodate and on adverse effects discrimination at a conference on "Transforming Women's Equality: Equality Rights in the New Century" sponsored by West Coast LEAF, in Vancouver, 4–7 November 1999.

A few passages in this article first appeared in an unpublished background paper I prepared for the adverse effects discrimination workshop in Vancouver referred to above.

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[49] K. Watkin, "The Justification of Discrimination under Canadian Human Rights Legislation and the *Charter*: Why So Many Tests?" (1992) 2 N.J.C.L. 63 at 87.

Equality Rights and the Allocation of Scarce Resources in Health Care: A Comment on *Cameron* v. *Nova Scotia*

Barbara von Tigerstrom

On 14 September 1999, the Nova Scotia Court of Appeal released its decision in *Cameron* v. *Nova Scotia (Attorney General)*,[1] unanimously upholding the decision of the trial judge[2] that the province's failure to fund in vitro fertilization (IVF) and intra cytoplasmic sperm injection (ICSI, a variant of IVF) does not violate the *Canadian Charter of Rights and Freedoms*.

The case is an important one for a number of reasons. The funding of innovative medical technologies and treatments will continue to be a contentious issue as the availability of a growing array of new and often expensive modalities challenges those responsible for allocating limited health care budgets in a fair and efficient manner.[3] As a result, clarification of the legal framework for the equitable allocation of resources in this context is an important endeavour of more than academic interest. In addition, the decision raises a number of potentially significant questions of *Charter* interpretation; for example, what is the meaning of "disability" in section 15(1) and when, if at all, may a shortage of resources be sufficient to justify an infringement under section 1? As one of the first appellate decisions to apply the Supreme Court of Canada's decision in *Law* v. *Canada (Minister of Employment and Immigration)*,[4] the reasons of the Nova Scotia Court of Appeal both demonstrate the utility of *Law*'s restatement of principles and remind us that there are still many unresolved questions in the interpretation of "the *Charter*'s most conceptually difficult provision."[5]

Facts

The appellants, Alexander Cameron and Cheryl Smith, have not been able to conceive because of "severe male factor infertility." After several other procedures were unsuccessful, the appellants' physicians referred them for ICSI, a variant of IVF in which the sperm is implanted in the egg and which has been more successful in cases of male factor infertility than conventional IVF. Four cycles of ICSI, two in Toronto and two in Calgary, were unsuccessful. At the relevant time ICSI was not available in Nova Scotia. The appellants claimed reimbursement of the medical hospital costs of these procedures (amounting to $23,402.00) from the Nova Scotia Health Care Insurance Plan (the "Plan"), but were informed that IVF and ICSI were not insured procedures.

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1 *Cameron* v. *Nova Scotia (Attorney General)* (1999), 177 D.L.R. (4th) 611; [1999] N.S.J. No. 297 (QL) [hereinafter *Cameron (CA)*, cited to D.L.R.].

2 *Cameron* v. *Nova Scotia (Attorney General)* (1999), 172 N.S.R. (2d) 227; [1999] N.S.J. No. 33 (N.S. S.C.) (QL) [hereinafter *Cameron (NSSC)*, cited to N.S.R.].

3 Controversies surrounding allocation of resources in health care have given rise to a number of legal claims in Canada; past cases include *Brown* v. *British Columbia (Minister of Health)* (1990), 66 D.L.R. (4th) 444; *Ontario Nursing Home Assn.* v. *Ontario* (1990), 72 D.L.R. (4th) 166 and *Eldridge* v. *British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, and there have been recent reports of a legal challenge in Ontario regarding funding for programs for autistic children (see "Parents sue for right to autism therapy" *The Globe and Mail* (25 November 1999) A7.) Similar issues have often received media attention as well: see e.g. C. Abraham, "Breast-cancer drug creates cost dilemma" *The Globe and Mail* (17 August 1999) A1; "Cancer treatment curbs 'costing lives'" *BBC News* (21 October 1999), online: BBC News Homepage < http://news. bbc.co.uk/hi/english/uk/scotland/newsid_481000/481057.stm>.

4 *Law* v. *Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, 170 D.L.R. (4th) 1 [hereinafter *Law*, cited to D.L.R.].

5 *Ibid.* at 6.

The legislation governing public health insurance in Nova Scotia is the *Health Services and Insurance Act*.[6] This Act creates two categories of insured services: "insured medical services" which are services provided by physicians and "insured hospital services" which include all other services (e.g. diagnostic or laboratory services) delivered on an inpatient or outpatient basis. Section 3 of the Act establishes the right to receive insured hospital services and the right to insurance for the cost of insured medical services to the extent of the tariffs established by the Province. Payment for insured hospital services provided to Nova Scotia residents in other provinces is also provided for in regulations under the Act, in accordance with bilateral agreements with other provinces.[7] The key aspect of the legislative scheme, for our purposes, is that hospital or medical services that are "medically required" are insured services.

Insured medical services are further subject to tariffs which are set by a process of joint review and negotiation by the Minister (formerly the Health Services and Insurance Commission) and the provincial Medical Society.[8] The total amount of the tariffs is limited by a cap system which means that new fees or services may be introduced only at the expense of existing ones.[9]

Some medical procedures relating to the diagnosis and treatment of infertility are covered by the Plan, but IVF is not covered in Nova Scotia or elsewhere in Canada except Ontario, where limited coverage is available in certain cases.[10] IVF is expressly excluded under Nova Scotia's agreements with other provinces for reimbursement of services.

The appellants, in addition to seeking reimbursement of the costs of their procedures, sought a declaration that IVF and ICSI are insured services under the Act. They also sought punitive damages and an order directing the Minister to establish a tariff for payment of IVF and ICSI procedures.

Decision of the Nova Scotia Supreme Court

Although the plaintiffs did not use conventional IVF, they were granted standing to challenge the failure to cover IVF and ICSI. They advanced a twofold argument: first, that under the Act and applicable regulations, as properly interpreted, IVF and ICSI must be insured services and therefore the denial of coverage was unlawful; and second, that the Province's refusal to provide coverage violated their rights under the *Charter*. Specifically, the plaintiffs argued that the refusal breached the *Charter* because it discriminated against them on the basis of physical disability. An argument that the denial of coverage also constituted a violation of their section 7 rights was summarily dismissed at trial[11] and was not pursued on appeal.

At trial, Kennedy C.J.S.C., after reviewing the complex legislative structure of the Plan, addressed the plaintiffs' argument that IVF and ICSI are "medically required" and must be covered under the Province's law. He held that IVF and ICSI are not "medically required" or "medically necessary," despite being "medically indicated" or "standard medical procedure."[12] In making this determination, he noted that other options existed, that the success rate of the procedures was limited and that there were risks inherent in the procedures.[13]

The plaintiffs claimed that denial of payment for these procedures constitutes a denial of equal benefit under the law in violation of section 15(1) of the *Charter*. However, Kennedy C.J.S.C. held that the decision not to fund IVF and ICSI was based on the nature of the treatments, not the personal characteristics of those seeking the treatments. The procedures simply failed to meet the criteria necessary for coverage. As a result, it was not necessary to determine whether infertility could be classified as a disability or as an analogous ground under section 15(1). There was no discrimination against the plaintiffs and thus no breach of section 15(1).

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6 R.S.N.S. 1989, c. 197 [hereinafter the "Act"].

7 *Cameron (NSSC)*, *supra* note 2 at 237.

8 *Ibid.*

9 *Ibid.* at 236; *Cameron (CA)*, *supra* note 1 at 624.

10 *Cameron (CA)*, *supra* note 1 at 618. In Ontario, three cycles of IVF are covered when the female partner has total bilateral blockage of the Fallopian tubes (*ibid.*). The Canadian armed forces also reportedly pays for IVF in similar cases; A. Leader, "New reproductive technologies: Why are we limiting choices for infertile couples?" (1999) 161 CMAJ 1411 at 1411.

11 *Cameron (NSSC)*, *supra* note 2 at 250.

12 *Ibid.* at 240–41.

13 *Ibid.* at 241–43.

Decision of the Nova Scotia Court of Appeal

The Justices of the Nova Scotia Court of Appeal were unanimous in their conclusion that the appeal should be dismissed, but differed in their reasoning. Chipman J.A., with whom Pugsley J.A. concurred, was of the opinion that there was a violation of section 15(1), but that it was justified under section 1, while Bateman J.A. found no violation.

Judgment of Chipman J.A., Pugsley J.A. Concurring

The first question to be addressed was whether IVF and ICSI were insured services under the Act. All three justices[14] agreed that the trial judge had not erred in finding that these were not insured services. The services were not insured either as out-of-province hospital services or as insured hospital or medical services within the province unless they were "medically required." The appellants failed to establish that the trial judge had erred in finding that the services were not medically required.

The analysis of this point required the court to consider the meaning of "medically required" or "medically necessary."[15] Chipman J.A. rejected Kennedy C.J.S.C.'s narrow interpretation of medically necessary which required a "medical end" and therefore excluded procedures which were directed to the non-medical end of having a child. He also dismissed the argument that the existence of other choices meant that the procedures were not medically necessary. Therefore, the procedures "*could* qualify as being medically necessary."[16] However, considering a number of factors, including costs, success rates and risks, the finding that IVF and ICSI "were not shown to be medically required, as a matter of interpretation of the *Act*, the Regulations and the administration of the policy has not been shown to be in error."[17]

In reaching this conclusion, Chipman J.A. also rejected the appellants' argument that coverage for services must be "comprehensive" in the sense of being "all-inclusive;" rather, he said, coverage is limited to treatments that are medically required in the judgement of those administering the scheme.[18] As long as their decisions are made in good faith, comply with the *Charter* and are not "clearly wrong," the courts have no jurisdiction to overturn them.[19]

Chipman J.A. then turned to consider the *Charter* argument. The analysis of section 15(1) was based on the recently released decision of the Supreme Court of Canada in *Law*, which set out a three-step analysis:[20]

> (a) Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?
>
> (b) Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds?
>
> and
>
> (c) Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?

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[14] Bateman J.A. agreed with the two other judges on this first question and only delivered separate concurring reasons dealing with the *Charter* issue; see *Cameron (CA)*, *supra* note 1 at 669.

[15] Both Kennedy C.J.S.C. and Chipman J.A. treated the two terms as equivalent and interchangeable; see *ibid.* at 631.

[16] *Ibid.* at 634 [emphasis in original].

[17] *Ibid.* at 636.

[18] *Ibid.* at 637.

[19] *Ibid.* at 638–39.

[20] *Law*, *supra* note 4 at 38.

This inquiry is to be undertaken using a comparative approach[21] and taking account of contextual factors including pre-existing disadvantage, the relationship between the grounds and the claimant's characteristics or circumstances, the ameliorative purpose or effects of the impugned provision and the nature of the interest affected.[22] It is also to be purposive, requiring the claimant to show that the purpose of section 15 has been infringed by the impugned law.[23]

The argument of the appellants was that the denial of coverage for IVF and ICSI amounted to discrimination on the basis of the personal characteristic of infertility. Chipman J.A. was of the opinion that the Act and the Province's policy were neutral on their face, and he therefore turned to the question whether there is distinction in the impact of the policy based on a personal characteristic of the appellants.[24]

Chipman J.A. found that there was a distinction between the fertile, who had unrestricted access to a "full array of services for reproduction" and the infertile, who did not have such access.[25] Although certain services for infertility were covered under the Plan, the infertile were denied access to a medically recommended, appropriate treatment, and thus were unequally treated.

Having found this distinction, Chipman J.A. also held that it was based on an enumerated ground, since he found that infertility is a disability.[26] This brought him to the third question, whether the distinction constituted discrimination. Again, he concluded in the affirmative. Considering the four factors referred to in *Law*, he focused on the first, the presence of a pre-existing disadvantage. In this context, the negative view of infertile persons historically and by some members of society, and the social stigma and personal trauma that can result from infertility, led him to conclude that although the infertile do not suffer disadvantage to the same extent as some disabled persons, they are subject to a pre-existing disadvantage.[27] Finally, he concluded that the "impact of the denial of these procedures to the infertile perpetuates the view that they are less worthy of recognition or value. It touches their essential dignity and self-worth."[28] Therefore, the third part of the test was also satisfied, and he found that there was a violation of the appellants' section 15(1) rights.

In Chipman J.A.'s opinion, however, the violation could be justified as a reasonable limit under section 1. In undertaking the section 1 analysis, he noted that it must be conducted flexibly, and that governments will be allowed considerable latitude in allocating scarce resources, although "the leeway granted is not infinite."[29]

The objective of the policy was described as "provid[ing] the best possible health care coverage to Nova Scotians in the context of limited financial resources."[30] Included within this objective are the specific objectives of cost containment and protection from potentially harmful treatments, the stated goals of the policy of denying funding for IVF and ICSI. Chipman J.A. emphasized the difficulty of the task of allocating scarce health care resources and the resulting deference which should be shown to allocation decisions. It was also relevant that the policy was not "for all time" but was a reasonable approach at present.[31] After a brief review of rational connection, minimal impairment and proportionality, Chipman J.A. concluded that the policy was justified under section 1 and the appeal should therefore be dismissed.[32]

Judgment of Bateman J.A.

Bateman J.A., concurring in the result, took the view that "the appellants are not, by reason of the male appellant's infertility, disabled nor is the denial of funding for the medical procedures discriminatory."[33] There was a distinction drawn on the basis of a personal characteristic, as the lack of funding did have an adverse effect on the appellants due to their infertility.[34] However, the differential treatment, according to Bateman J.A., was not based on an enumerated or analogous ground, if interpreted in a purposive and contextual manner. After reviewing statements of the Supreme Court of Canada on the subject of disability, she concluded that although infertility could be viewed as a disability in some contexts, whatever suffering the

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21 *Ibid.* at 24–25.
22 *Ibid.* at 27–32.
23 *Ibid.* at 32.
24 *Cameron (CA)*, *supra* note 1 at 646–47.
25 *Ibid.* at 651, 654–55.
26 *Ibid.* at 648, 655.
27 *Ibid.* at 658–59.
28 *Ibid.* at 660.
29 *Ibid.* at 663–64.
30 *Ibid.* at 664.
31 *Ibid.* at 667–68.
32 *Ibid.* at 668–69.
33 *Ibid.* at 669.
34 *Ibid.* at 671–72.

appellants experienced as a result of the condition did not compare to the marginalization common to other disabilities.[35] Nor could infertility be considered an analogous ground.[36]

Although the analysis could have ended there, Bateman J.A. went on to explain that even if infertility could have constituted an enumerated or analogous ground, the appellants had failed to show that the denial of funding was discriminatory. The refusal to fund these procedures under the circumstances did not "promote the view that the infertile are less capable or less worthy of value." This did not mean that a denial of funding could never constitute discrimination; in this case, however, it did not.[37] Bateman J.A. found, therefore, that Kennedy C.J.S.C. had not erred in finding that the policy was not discriminatory.

ANALYSIS

"Medically necessary"

The first issue in this appeal required the Court of Appeal to confront the notoriously difficult task of defining and applying the concept of "medically necessary." This concept is of central importance in the Canadian health care system because it determines, through its inclusion in the *Canada Health Act* and provincial health insurance legislation, what services must be insured under public health plans.[38] A comprehensive review of this subject is beyond the scope of this comment[39] but the analysis in this case raises some important questions.

For example, should the existence of alternative means be considered relevant to the judgement of necessity? Should the decision about medical necessity be a purely medical decision made by a medical professional alone or should other factors such as cost, risk and success rates enter into the decision-making process at a policy level?[40] It may be increasingly difficult to separate these two kinds of decision-making.

Another important question is whether "medically necessary" procedures should be restricted to those which are medical means serving a medical end, as the respondents argued,[41] and if so, how should a "medical end" be defined? Chipman J.A. expressed the view that "the end of all medical treatment is to improve the quality of life."[42] Especially given the current emphasis on prevention, holistic health and wellness, as opposed to the mere treatment of dysfunction and disease, as the goal of health care, it is increasingly difficult to distinguish between medical and non-medical *ends*. The growing influence of alternative medicine and interest in "determinants of health"[43] may also challenge the boundaries between medical and non-medical *means*. In light of these developments, we may need to undertake a reexamination of the meaning of medical necessity.

If the result of this reexamination is a broader scope of potentially insurable health care interventions, even more will be at stake in attempting to draw distinctions between those which should, in fact, be insured and those which need not be. It may be increasingly difficult to see the decision as a purely medical one without considering broader policy questions including cost effectiveness, risks, etc. In this

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35 *Ibid.* at 676.

36 *Ibid.* at 676–78.

37 *Ibid.* at 683–84.

38 *Canada Health Act*, R.S.C. 1985, c. C–6; the definitions of hospital services and physician services in s. 2 are qualified as those which are "medically necessary" and "medically required," respectively; these services, along with surgical-dental services, are defined as insured health services under the Act, and according to s. 9, all "insured health services" must be insured by the provincial health care insurance plan. The provinces may (and do) insure some services which may not be "medically required" but the criterion of comprehensiveness in s. 9 of the *Canada Health Act* requires that at least medically required physician or hospital services must be included. The *Alberta Health Care Insurance Act*, R.S.A. 1980, c. A–24, for example, defines "insured services" in s. 1(n) as: "(i) all services provided by physicians that are *medically required*, (ii) those services that are provided by a dentist in the field of oral surgery and are specified in the regulations, and (iii) any other services that are declared to be insured services pursuant to section 2" [emphasis added].

39 For a discussion of some of the issues surrounding the interpretation of "medically necessary" see T. A. Caulfield, "Wishful Thinking: Defining 'Medically Necessary' in Canada" (1996) 4 Health L. J. 63.

40 Caulfield suggests that decisions regarding medically necessary services should consider criteria such as appropriateness and effectiveness, cost-effectiveness, the choices of the individual patient, community and individual values and ethical and legal implications. *Ibid.* at 84.

41 *Cameron (CA)*, *supra* note 1 at 634.

42 *Ibid.*

43 See e.g. Federal, Provincial and Territorial Advisory Committee on Population Health, *Toward a Healthy Future: Second Report on the Health of Canadians* (Ottawa: Health Canada, 1999).

case, Chipman J.A. specifically rejected the arguments accepted by Kennedy C.J.S.C. at trial[44] and preferred the "approach ... that in the scheme of things — in the order of priorities — these two procedures, having regard to costs, the limited success rate and the risks do not, at this time, rank sufficiently high to warrant payment for them from public funding."[45]

This raises the further issue of how the first question of determining medical necessity relates to the second question of compliance with the *Charter*, and what this means for the fair allocation of scarce resources among an ever-growing pool of eligible services. Given that medical necessity is the fundamental criterion for health services to be insured, one might ask why, if it is accepted that IVF and ICSI are not medically necessary, consideration of the claim should even reach the section 15 analysis? If the procedures are not medically necessary, how can one claim that the failure to fund them is discriminatory? The answer to this may depend in part on how we define medically necessary. The *Charter* might, in some cases, require provinces to insure services even when they are not medically necessary by some definitions.[46] Alternatively, one could argue that the interpretation of the medically necessary standard itself should take into account *Charter* rights. However, the same criteria that may be used to judge medical necessity, such as risk and cost-effectiveness, may play into the section 1 analysis under the *Charter*. The relationship between these two questions is complex and requires further investigation.

Section 15

It should be uncontroversial that the denial of funding for IVF and ICSI results in differential treatment based on the personal characteristic of infertility. Kennedy C.J.S.C.'s determination that the distinction was based on the nature of the treatments rather than a personal characteristic effectively ignores the possibility of adverse-effect discrimination. Therefore, the first important question in the section 15 analysis is whether infertility can be considered a disability for the purposes of the *Charter* or, alternatively, whether it is an analogous ground. This question had not previously been considered by Canadian courts, and indeed there is little discussion in the section 15 jurisprudence as to how to define the meaning and scope of "disability."[47]

The US case law on this question in the context of the *Americans with Disabilities Act*[48] is divided and, although to some extent the analysis is specific to the ADA provisions, it sheds some light on the definition of "disability" and its application to infertility.[49] Title I of the ADA prohibits discrimination in employment against "a qualified individual with a disability"[50] and defines an "individual with a disability" as one who has "a physical or mental impairment that substantially limits one or more of the major life activities of such individual."[51] Infertility is a physical impairment and substantially limits reproduction: the essential question is whether reproduction is a "major life activity." This term is not defined in the ADA but the *Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act* give as examples "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and

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44 *Cameron (CA)*, *supra* note 1 at 634.

45 *Ibid.* at 635.

46 For example, restriction of funding for assisted reproduction services to cases where there is a biological cause of infertility to the exclusion of, for example, same-sex couples could be a s. 15 violation. Restricting funding on the criterion of age could also attract a s. 15 challenge (as has been proposed in the UK, based on evidence of declining effectiveness of the treatments for older women; see "Age limit for NHS fertility treatment" *BBC News* (23 August 1999) online: BBC News Homepage <http://new.bbc.co.uk/hi/english/health/newsid_427000/427831.stm>).

47 There is some discussion of what constitutes a disability in cases considering federal and provincial human rights legislation. See e.g. *Ede* v. *Canada (Canadian Armed Forces)* (1990), 11 C.H.R.R. D/439 (Cdn. Human Rights Trib.); *Ouimette* v. *Lily Cups Ltd.* (1990), 12 C.H.R.R. D/19 (Ont. Bd. Inq.); *Imperial Oil Ltd.* v. *Ontario (Human Rights Commission) (re Entrop)* (1998), 108 O.A.C. 81; [1998] O.J. No. 422 (Div. Ct.) (QL), leave to appeal granted [1998] O.J. No. 1927 (C.A.). For a discussion of some of these cases, see R. W. Zinn and P. P. Brethour, *The Law of Human Rights in Canada: Practice and Procedure*, looseleaf (Aurora, Ont.: Canada Law Book, 1998, updated 1999) at 5–9ff.

48 42 U.S.C. §§ 120101–12213 (1988 & Supp. IV 1992) [hereinafter ADA].

49 For a discussion of these cases, see K. C. Morgan, "Should Infertility be a Covered Disability Under the ADA?: A Question for Congress, not the Courts" (1997) 65 U. Cin. L. Rev. 963; D. K. Dallmann, "The Lay View of What 'Disability' Means Must Give Way to What Congress Says it Means: Infertility as a 'Disability' Under the Americans With Disabilities Act" (1996) 38 Wm. & Mary L. Rev. 371; S. M. Tomkowicz, "The Disabling Effects of Infertility: Fertile Grounds for Accommodating Infertile Couples Under the Americans With Disabilities Act" (1996) 46 Syracuse L. Rev. 1051.

50 ADA, *supra* note 48, § 12112(a).

51 *Ibid.* § 12102(2)(A). The definition of "individual with a disability" also includes those who have a record of, or are regarded as having, an impairment: § 12102(2)(B), (C).

working."[52] The *Interpretive Guidance on Title I of the Americans with Disabilities Act* issued by the Equal Employment Opportunity Commission (EEOC) states that major life activities are "those basic activities that the average person in the general population can perform with little or no difficulty."[53]

The first decision to consider infertility under the ADA, *Pacourek* v. *Inland Steel Co.*, held that reproduction could be considered a major life activity and denied the defendants' motion to dismiss on that basis.[54] This conclusion was again reached in a later decision of the same court.[55] However, two other courts rejected this reasoning and held that although infertility was an impairment within the meaning of the ADA, it did not substantially limit a major life activity.[56] Compared with the examples of major life activities in the regulations, reproduction did not qualify; it was not engaged in with the same frequency as actions such as walking and breathing[57] and could best be described as a lifestyle choice, rather than a major life activity.[58] More recently, however, the US Supreme Court held in *Bragdon* v. *Abbott* that asymptomatic HIV positive status does constitute a disability under the ADA and that reproduction is a major life activity.[59]

This analysis suggests that, at least in some cases, infertility could be considered a disability. Although the details of the analysis under the ADA are not directly transferable to the Canadian context, the analysis and its conclusions may be useful. In Canada, the *Charter* itself provides no definition of physical or mental disability. Definitions can be found in, for example, provincial human rights legislation or insurance documents. The Alberta *Human Rights, Citizenship and Multiculturalism Act* defines physical disability as:[60]

> any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes epilepsy, paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, and physical reliance on a guide dog, wheelchair or other remedial appliance or device.

Given that the list of examples is not exhaustive, infertility could be included within the broad definition of "any degree of physical disability, infirmity ... that is caused by bodily injury, birth defect or illness," although it might also be argued that infertility is not analogous to the examples given and therefore should not be covered.

The precise scope of disability covered in each piece of legislation or legal instrument may depend on the context and intent of the provision: for example, the concept of disability may be linked to one's ability to work in contexts where the provision relates to benefits or other compensation flowing from one's inability to work. In the context of human rights legislation and the *Charter*, however, the definition should not be unnecessarily limited:[61]

> An important factor in determining whether a particular condition amounts to a disability is the principle that *Charter* guarantees should be given a broad and liberal construction, and not be interpreted in an unduly technical, contorted or restrictive manner. Thus, if a court is in doubt as to whether a particular condition counts as physical disability, it

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52 29 C.F.R. § 1630.2(i) (1995).

53 29 C.F.R. § 1630, App. (1995).

54 *Pacourek* v. *Inland Steel Co.*, 858 F. Supp. 1393 (N.D. Ill. 1994).

55 *Erickson* v. *Board of Governors*, 911 F. Supp. 316 (N.D. Ill. 1995).

56 *Zatarain* v. *WDSU-Television, Inc.*, 881 F. Supp. 240 (E.D. La. 1995) [hereinafter *Zatarain*]; *Krauel* v. *Iowa Methodist Medical Center*, 915 F. Supp. 102 (S.D. Iowa 1995) [hereinafter *Krauel*].

57 *Zatarain*, *ibid.* at 243: "A person is required to walk, see, learn, speak, breath [sic], and work throughout the day, day in and day out. However, a person is not called upon to reproduce throughout the day, every day." See also *Krauel*, *ibid.* at 106.

58 *Krauel*, *ibid.*: "Some people choose not to have children, but all people care for themselves, perform manual tasks, walk, see, hear, speak, breathe, learn and work unless a handicap or illness prevents them from doing so."

59 118 S. Ct. 2196 (1998) at 2207. HIV status has also been recognized as a disability in Canada; see e.g. *Canada (Attorney General)* v. *Thwaites* [1994] 3 F.C. 38 (T.D.).

60 R.S.A. 1980, c. H–11.7, s. 38(1)(i).

61 M. D. Lepofsky and J. E. Bickenbach, "Equality Rights and the Physically Handicapped" in A. F. Bayefsky and M. Eberts, eds., *Equality Rights and the Canadian Charter of Rights and Freedoms* (Agincourt, Ont.: Carswell, 1985) 323 at 345. This chapter contains a very useful discussion of the definition of physical disability at 343–46.

> should resolve its doubt in the plaintiff's favour. Having done so, the court ought to turn to the core question under s. 15, namely, whether the *Charter* plaintiff was denied equality rights on account of his or her physical disability.

There are sufficient indications, based *inter alia* on the ADA jurisprudence, that infertility could be considered a disability. Given the need for a broad, purposive interpretation of *Charter* provisions, physical disability should include infertility for the purposes of section 15. Bateman J.A.'s refusal to recognize infertility as a physical disability or analogous ground was largely based on a perceived need to narrow the ambit of potential claims in health care:[62]

> To create an analogous ground in the broad sense suggested by the appellants would unreasonably expand the ambit of s. 15(1) ... When a procedure or treatment is not funded some person or group will inevitably suffer disadvantage. Every such decision would conceivably be a distinction based upon a new analogous ground or, in the appellants' submission, a "disability."

These concerns, however valid they may be, can be better addressed in the later stage of the analysis, in considering whether the denial of funding or other distinction is discriminatory within the meaning of section 15(1) or whether it can be justified under section 1.

Is the Denial of Funding for IVF and ICSI Discriminatory?

Assuming, then, that the denial of funding for IVF and ICSI results in differential treatment based on an enumerated or analogous ground, it remains to be determined whether that differential treatment constitutes discrimination. It is well established that not every distinction on an enumerated or analogous ground is discriminatory[63] and that "the existence of a conflict between an impugned law and the purpose of section 15(1) is essential in order to found a discrimination claim."[64] The Supreme Court recently described this purpose as follows:[65]

> the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.

A law will violate this purpose where differential treatment on the basis of an enumerated or analogous ground "has the effect of perpetuating or promoting the view that the individual is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society."[66] This will be assessed by reference to contextual factors such as the presence of pre-existing disadvantage, the relationship between the grounds and the claimant's characteristics or circumstances, the law's ameliorative purpose or effects and the nature of the interest affected.[67]

Chipman J.A. applied the analytical framework set out in *Law* and held that the differential treatment in this case did constitute discrimination in this sense. The focus of his analysis is on the first contextual factor, pre-existing disadvantage.[68] Ample evidence was brought to show that infertile persons have historically suffered and continue to suffer a degree of disadvantage in society. However, Chipman J.A.'s further conclusion that the denial of funding for these procedures "perpetuates the view that [the infertile] are less worthy of recognition or value" and "touches their essential dignity and self-worth"[69] is problematic. It is important to note that in *Law*, Iacobucci J. specifically warned that he was not suggesting "that the claimant's association with a group which has historically been more disadvantaged will be conclusive of a violation under section 15(1), where differential treatment has been established. ... There is no principle or evidentiary presumption that differential treatment for historically disadvantaged persons is discriminatory."[70] Chipman

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62 *Cameron (CA)*, *supra* note 1 at 678.

63 See e.g. *Law*, *supra* note 4 at 18, citing numerous other statements of this point by the Supreme Court of Canada.

64 *Ibid.* at 19–20, 39.

65 *Ibid.* at 23, 39.

66 *Ibid.* at 23.

67 *Ibid.* at 27–32.

68 *Cameron (CA)*, *supra* note 1 at 656–60.

69 *Ibid.* at 660.

70 *Law*, *supra* note 4 at 29.

J.A. does appear to rely on such a presumption, however.[71] Furthermore, although the analysis includes a subjective element since the matter must be considered from the perspective of the claimant, "a court must be satisfied that the claimant's assertion that differential treatment imposed by legislation demeans his or her dignity is supported by an objective assessment of the situation."[72] Chipman J.A.'s suggestion that an infertile person's sense of dignity and self-worth would be affected by the exclusion of IVF and ICSI is not supported by any objective factors. His analogy to the *Vriend* case,[73] which dealt with the denial of basic human rights protection for gays and lesbians, is a dubious one in this context.

Faced with a growing array of treatments and limited (even shrinking) budgets, governments will have to make difficult decisions about payment for treatments. They do not, of course, have unlimited discretion in making these decisions and, in some cases, a policy choice may be properly said to be discriminatory:[74]

> If, for example, it was the government's policy not to fund any medical services for the infertile (assuming them to be "disabled"), without regard to the nature of the service, it is likely that such a policy would be seen to promote the view that such persons were less worthy of recognition or value as a human being or as a member of Canadian society. Such would likely be the case, as well, with a policy that denied all medical treatment specific to gays and lesbians or all treatments which only women required. Regardless of the language of such policy, if its existence led inevitably to the conclusion that its effect was to send a message that these persons or groups were less worthy of recognition it would likely not withstand the s. 15(1) scrutiny and require justification under s. 1.

As noted earlier, it seems unlikely that the denial of public health insurance funding for a treatment judged not to be medically necessary could be considered to be discrimination. On the other hand, denial of funding for a treatment which is medically necessary and for which there are no significant concerns with respect to effectiveness or risk, might be vulnerable to a charge of discrimination. It cannot be the case, however, that whenever funding is denied for a treatment or procedure that is specifically relevant to or required by persons with a particular medical condition or disability, the mere fact of the denial will be sufficient for a finding of discrimination. There may be grounds for a claim that the provincial government is in violation of its obligations under the *Canada Health Act* to provide comprehensive health services.[75] It is perhaps unfortunate that these obligations cannot be enforced by individuals under the current system, but this does not justify a claim that the denial is discriminatory unless the indicia of discrimination as set out in *Law* are indeed present.

Section 1

Chipman J.A. found that there was discrimination contrary to section 15(1), but that it could be justified under section 1 of the *Charter*. Although I disagree with his conclusion on section 15(1), it is important to consider the section 1 analysis because it has potentially serious implications. Assuming, then, that the denial of funding could be described as discrimination on the ground of physical disability, can it be justified under section 1?

The primary, if not exclusive, basis for Chipman J.A.'s finding of section 1 justification was the existence of "extreme" budgetary pressures on the Nova Scotia health care system. Although there is brief mention of "protection of those receiving the procedures from the potential harms of treatments not adequately proven safe"[76] as part of the policy's objective, the analysis turns entirely on the question of allocation of scarce resources. Although Supreme Court jurisprudence suggesting that "financial considerations alone may not justify Charter infringements"[77] is acknowledged, that is essentially what is permitted by Chipman J.A.'s analysis. Great emphasis is placed on the need to show deference to decisions involving

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71 *Cameron (CA)*, *supra* note 1 at 656, 660.
72 *Law*, *supra* note 4 at 26.
73 *Vriend* v. *Alberta*, [1998] 1 S.C.R. 493.
74 *Cameron (CA)*, *supra* note 1 at 683–84.
75 See *supra* note 38.
76 *Cameron (CA)*, *supra* note 1 at 664.
77 *Ibid.* at 663, quoting *Eldridge*, *supra* note 3 at 685, which in turn refers to *Schachter* v. *Canada*, [1992] 2 S.C.R. 679 at 709.

resource allocation and the possibility of incremental measures. The government is merely required to "show a reasonable basis for concluding that it has complied with the requirement of minimal impairment in seeking to attain the objectives."[78]

Similar issues were raised in the *Eldridge* decision,[79] but because the denial of funding for sign language interpreters, which was dealt with in that case, so clearly failed the minimal impairment test, there was no need to confront the other aspects of the section 1 analysis. La Forest J., writing for the Court, assumed, without deciding, that controlling health care expenditures could be a pressing and substantial objective for the purposes of section 1.[80] He also found it "unnecessary to decide whether in this 'social benefits' context, where the choice is between the needs of the general population and those of a disadvantaged group, a deferential approach should be adopted."[81]

The Supreme Court has thus left the door open for a justification of discriminatory treatment in health care or other social services based solely on reasons of financial constraints, subject to rational connection, minimal impairment and proportionality tests. In this case, where the government's argument on minimal impairment is much stronger,[82] these questions must be squarely addressed.

Since Canadian courts have often referred to international human rights law to assist in assessing "reasonable limits"[83] and "pressing and substantial objectives"[84] under the *Charter*, it may be illuminating to note the manner in which similar questions are dealt with in the international human rights law literature. The right to health and other social rights are guaranteed in a number of international legal instruments, including the *International Covenant on Economic, Social and Cultural Rights*.[85] Predictably, financial constraints and difficulties of resource allocation are commonly raised as objections to the fulfilment of states' obligations under these instruments. The ICESCR accommodates these concerns by providing that states undertake to "take steps ... *to the maximum of its available resources*, with a view to *achieving progressively* the full realization of the rights recognized in the present Covenant."[86] This does not mean that states can defer progress immediately, pleading a lack of resources; they are required to begin immediately to take steps toward the fulfilment of rights.[87] They must also make effective use of the resources that are available[88] and give due priority to the realization of rights when allocating resources.[89] However, states are not expected to achieve the impossible when only limited resources are available. The right to health, specifically, is framed as the right to the "highest attainable standard of physical and mental health."[90]

However, the *ICESCR* also requires states to "guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind."[91] These obligations of non-discrimination, unlike the substantive rights in the Covenant, are not to be achieved progressively but rather impose immediate obligations on the state to fulfil rights — to whatever degree they are fulfilled — without discrimination.[92]

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78 *Ibid.* at 664.

79 *Supra* note 3.

80 *Ibid.* at 685.

81 *Ibid.* at 686.

82 Indeed, comments in *Eldridge* (*ibid.* at 689) which contrast the facts in that case with a claim "that the government provide them with a discrete service or product, such as hearing aids, that will help alleviate their general disadvantage," seem to suggest that the latter might satisfy the minimal impairment test.

83 See W. A. Schabas, *International Human Rights Law and the Canadian Charter*, 2nd ed. (Scarborough, Ont.: Carswell, 1996) at 114–18.

84 See *ibid.* at 125–28.

85 *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3; Can. T.S. 1976 No. 46 [hereinafter *ICESCR*].

86 *Ibid.*, art. 2(1), emphasis added.

87 See e.g. *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, UN Doc. E/CN.4/1987/17, Annex, reprinted in (1987) 9 Hum. Rts. Q. 122 [hereinafter *Limburg Principles*] at para. 21.

88 *Ibid.* at para. 23, 27.

89 *Ibid.* at para. 28.

90 ICESCR, *supra* note 84, art. 12(1).

91 *Ibid.*, art. 2(2). The list of enumerated grounds does not include disability, but the list is not exhaustive as it includes "other status" (see also *Limburg Principles*, *supra* note 86, para. 36). The Committee on Economic, Social and Cultural Rights has stated that this requirement, "based on certain specified grounds 'or other status' clearly applies to discrimination on the grounds of disability"; Committee on Economic, Social and Cultural Rights, "Persons with disabilities" (General Comment No. 5), 9 December 1994, UN Doc. E/1995/22 at para. 5.

92 Committee on Economic, Social and Cultural Rights, "The nature of States parties obligations (art. 2, para. 1 of the Covenant)" (General Comment No. 3), 14 December 1990, UN Doc. E/1991/23 at para. 1: "while the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes various

This approach to the analysis is compelling, since the notion that it could be reasonable in a free and democratic society to make one group, especially a disadvantaged group, bear a disproportionate share of the burden in the event of resource scarcity seems to run contrary to the basic principles of justice and fairness that the *Charter* was designed to protect. If a denial of funding truly is discriminatory, it is difficult to accept that it could be justified on the sole basis of financial restrictions. However, the decision in this case adopts this approach and the Supreme Court of Canada has certainly not foreclosed the possibility of allowing such a justification.

Conclusion

This brief analysis has attempted to highlight the importance of the issues in this case which raise fundamental questions of *Charter* interpretation and the legal restrictions on resource allocation decisions. As of the date of writing, the appellants were awaiting the outcome of their application for leave to appeal to the Supreme Court of Canada.[93] If leave is granted, the Supreme Court's decision could provide much-needed guidance in this area.

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obligations which are of immediate effect ... One of these ... is the 'undertaking to guarantee' that relevant rights 'will be exercised without discrimination.'" See also Y. Klerk, "Working Paper on Article 2(2) and Article 3 of the International Covenant on Economic, Social and Cultural Rights" (1987) 9 Hum. Rts. Q. 250; *Limburg Principles*, *supra* note 86 at para. 35.

93 Application for leave to appeal was filed on 9 November 1999. Supreme Court of Canada, *Bulletin of Proceedings* (19 November 1999).