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BUCKLE UP!

# ALBERTA'S SEAT BELT LAW REINSTATED

Bruce P. Elman

For almost a year, the future of Alberta's seat belt legislation was shrouded in uncertainty. On the 11th of December, 1989, the Alberta Court of Appeal removed that uncertainty, for the time being at least, by reinstating section 65(3)(a) of the Highway Traffic Act which provides for compulsory seat belt use. The story of the seat belt law's journey through the Alberta Court system begins with one Kim Maier.

Kim Maier is a bit of a maverick. He likes to take risks. A refrigerator repairman by occupation, Maier enjoys motorcycle jumping. Kim Maier doesn't like the government telling him how to live his life. Thus, it is not surprising that, on the 1st of July, 1987, he was extremely upset when the Highway Traffic Amendment Act was proclaimed into law. This statute made the use of seat belts compulsory in the Province of Alberta.

Mandatory seat belt use was a long time in coming to Alberta. Indeed Alberta was the last province to enact legislation of this sort. It never was Conservative government policy to require seat belt use. Ultimately, it took a private member's bill and strong lobbying from various quarters to make mandatory seat belt use a reality.

The statute requires all occupants of a motor vehicle to wear seat belts while the vehicle is being operated. It is also unlawful to operate a vehicle when a passenger under the age of 16 is not wearing a seat belt. Any contravention of the provisions of the Act is punishable by a maximum fine of $500.00 or imprisonment for up to 6 months, or both fine and imprisonment.

Kim Maier was so agitated by this new law that, on the very day that section 65(3)(a) the Highway Traffic Act came into force, he went "trolling for a ticket". Maier's antics on that day are described in the February 20, 1989 issue of Alberta Report as follows:

> First, he tried circling the Calgary police station with his seat belt hanging out the door. But city cops, who recognized him from his media appearances, refused to oblige him with a fine, so he put a sign on his truck announcing his misdeed to the world. Then he took to shouting at passing police cruisers: "Hey, I'm not wearing a seat belt. Give me a ticket."

Four days later, on July 5, 1987, after spending some eight hours taunting the Calgary police, Maier got a $25.00 ticket and a chance to challenge the law he considered an infringement of his freedom.

**The Trial:** Maier was tried before Associate Chief Judge H.G. Oliver in Provincial Court in Calgary. The case proceeded on the basis of a statement of admitted facts. In this statement of facts, Maier admitted: that on the 4th of July, 1987, he was operating a motor vehicle on a highway within the city of Calgary, in the Province of Alberta; that the motor vehicle was equipped with a seat belt assembly;

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that he was in the driver's seat of this motor vehicle; and that he was not wearing the complete seat belt assembly. He further admitted that these facts were sufficient for conviction. Of course, Maier was not in court to dispute the facts. He was there to challenge the right of the Alberta legislature to pass the law in the first place. Thus the trial entered a second phase.

Essentially, Maier's argument, or at least his legal argument, was that Alberta's mandatory seat belt law was a violation of his right to "life, liberty, and security of the person" as guaranteed by section 7 of the Canadian Charter of Rights and Freedoms. In support of this claim, the defence called a number of witnesses and submitted numerous documents.

Maier, himself, was the first witness. He claimed to have read extensively on the safety of seat belt use. From his reading, he was convinced that seat belt use can cause serious injury. Among other problems, Maier testified that lap belts could cause "submarining" or "bobbing under the belt" and whiplash. He also expressed concern about being trapped in a car because of a "belt release problem". He claimed to have talked to others who had been injured in this manner. In addition, he testified that he would not want to be a cyclist or a pedestrian confronted by a motorist wearing a seat belt because "car drivers feel safer and therefore drive faster and are not as careful".

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The central thrust of his testimony, however, was that seat belts could cause him injury and that he should not be forced to wear one. Whether to wear a seat belt was, according to Maier, "an intelligent decision he should make for himself".

The next three witnesses had all been involved in accidents. Essentially, their testimony was that in those accidents where they had not been wearing seat belts, they were saved from serious injury. In one of the accidents, where a witness had been wearing a seat belt, she suffered some broken vertebrae as a result of wearing the belt. This was anecdotal evidence which, given the potential number of individuals who could give contrary testimony, was probably of limited value.

The next two witnesses were William Grove, a professional stunt man, and Donald Stalker, who was described as a driver of "big trucks". Stalker had also been a fire chief in Fort St. James and a first aid instructor and accident investigator with Edmonton Fire and Rescue for 26 years. Both were accepted as experts and were, therefore, entitled to give their opinions on the safety of seat belt use.

William Grove was highly critical of the standard seat belt assembly. He testified that he modified them for his own use. He further testified that "seat belts are good and save people as well as killing them". "The best seat belt", he noted, "is to drive defensively".

Donald Stalker testified that he doesn't wear a seat belt because he doesn't feel safe in them. (When one drives "big trucks", seat belts may seem superfluous.) He estimated that in the thousand accidents he has seen, "fifteen to twenty percent of the drivers would have been injured if they had been wearing seat belts". Stalker had been to many accidents where the vehicle was demolished but the persons involved were walking around afterwards. He commented, "How they got out I don't know...I definitely would not want to tie that person into the drivers seat...I don't think they would have survived".

Two other expert witnesses testified on behalf of the defence. Marshall Paulo was qualified as an expert in "accident reconstruction specializing in restraint systems". He testified that he was an "advocate of seat belts" and that he "always wears a seat belt wherever I go". He was, however, critical of the lap belt systems in particular and seat belt design generally.

John Adams was accepted as an expert in "transport planning and road safety". He testified that he had studied jurisdictions where seat belt laws had been enacted and had found no "clear evidence of a net saving in lives and there is a fairly strong suspicion of an adverse effect in terms of a shift of the burden of risk from the people wearing seat belts to other vulnerable road users". In cross-examination, he admitted that his theory --- because one wears a seat belt,

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**(Alberta's Seat Belt Law Continued)**

one drives more carelessly --- could never be proved. This closed the case for the defence.

The Crown relied exclusively on expert evidence. The first witness was Murray Dance, an employee of Transport Canada. He was qualified as an expert in "accident reconstruction, seat belt performance, seat belt failure modes, and seat belt injuries". He testified that seat belts were the most effective safety device in the motor vehicle. He had attended about 600 fatal accidents in the previous 10 years. When asked if he had seen any cases where the person would have been better off if unrestrained, he replied, "maybe one or two, yes". Mr. Dance also expressed concern that unrestrained passengers might injure other persons in the motor vehicle by being propelled against them.

The same concern was expressed by the second Crown witness, Peter Keith, an automotive engineer. He noted, "Unrestrained occupants are like cannonballs". He testified that seat belts were, overall, "very effective". On the problem of "submarining", he noted a passage in the documentary evidence provided by the defence which stated: "It has been determined that abdominal injuries caused by classical submarining do not occur or are of such limited nature that no further study of the phenomenon is deemed necessary".

The third expert was Lauriston Keown, Assistant Director of Transportation Safety in Alberta. He challenged the substance and research methodology of Dr. Adams' theory that greater use of seat belts brought about a higher incidence of careless driving.

In analyzing the evidence presented at trial, Judge Oliver addressed two issues (See R. v. Maier (1987) 83 A.R. 194):

> First, does the mandatory seat belt legislation deprive a person of their rights under section 7 of the Charter, that is the right to life, liberty, or security of the person and the right not to be deprived thereof except in accordance the principles of fundamental justice?
>
> Second, is the mandatory seat belt legislation, pursuant to section 1 of the Charter, a reasonable limit demonstrably justified in a free and democratic country?

On the first question, Judge Oliver drew four conclusions:

1. On all the evidence in this case, seat belts and restraint systems reduce injury and death,
2. Misuse not proper use of lap belts cause injury or death, and there is strong evidence of more than adequate dissemination in Alberta of information regarding the proper use of restraint systems,
3. The accused's constitutional rights under section 7 of the Charter to life, liberty, and security of the person have not been infringed and the mandatory seat belt legislation in Alberta does not violate the principle of fundamental justice, and
4. The law is not inconsistent with section 7 of the Charter and the accused's challenge to its constitutional validity fails.

Because of his conclusions on the first issue, Judge Oliver was not required to address the second issue. Nonetheless, he did so. He concluded that the mandatory seat belt legislation was a reasonable limit which was demonstrably justified in a free and democratic society.

Maier, not being satisfied with this determination, appealed. As the matter involved a provincial offence, the appeal was heard by Justice Lutz of the Alberta Court of Queen's Bench.

**Queen's Bench Appeal:** In Justice Lutz's view, the appeal revolved around the answers to three questions (See Maier v. The Queen (1989) 94 A.R. 163):

1. Do seat belts cause injury?
2. If so, does the mandatory seat belt legislation contravene section 7 of the Charter?
3. If so can the legislation be justified under section 1 of the Charter?

In addressing the first question, Justice Lutz began with the conclusions reached by Judge Oliver at trial. The verdict at trial was, according to Justice Lutz, based upon the trial judge's finding of fact (misstated) that "a seat belt assembly does not cause injury". Justice Lutz considered this finding to be reviewable under Criminal Code section 613(1)(a)(i) [now section 686(1)(a)(i)] which provides that a verdict may be set aside if it is "unreasonable or cannot be supported by the evidence". From his review of the evidence presented at trial, Justice Lutz drew the conclusion that "a court could be satisfied, on a preponderance of probability that injuries are caused by use of a seat belt assembly even if worn properly." He continued: "In short, the factual findings of the trial judge were not those that a properly instructed judge, acting judicially, could reasonably have rendered".

Based upon his conclusion that "injuries are caused by use of a seat belt assembly even if worn properly", Justice Lutz found that the mandatory seat belt legislation violated Maier's security of the person. This is not sufficient, however, for a finding that the accused section 7 rights have been violated. The Court must still ascertain whether the accused was deprived of his right to security of the person in a manner which was not in accordance with the principles of fundamental justice. Before Justice Lutz could give a complete answer to the second question, therefore, his Lordship had to determine whether the violation of Maier's

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right to security of the person was in accordance with the principles of fundamental justice.

What does "fundamental justice" mean in the context of seat belt use? First, according to Justice Lutz, it meant that in pursuing a lawfully permitted activity, "no person ... must be subjected to penal sanction for refusal to comply with legislation regulating that activity when to comply would render one's person at risk of injury". Second, "no person must be denied the personal choice when to do so" would subject one to physical injury. In Justice Lutz's view, the mandatory seat belt law required the defendant to take "positive action which places him at risk" and was, therefore, a violation of section 7 of the Charter.

Was the mandatory seat belt legislation justified on the basis of section 1 of the Charter? Justice Lutz applied the test from Oakes. The legislation did not pass the proportionality element of the test. In particular, Justice Lutz disagreed with Judge Oliver's finding that "seat belts lead to protection of the public". "In my view", he commented, "this conclusion is not supported by the evidence". He also held that the objective of protecting the public could be achieved by less intrusive means and that the deleterious effects of the legislation outweighed the importance of the legislation.

In summary, then, Justice Lutz held that Alberta's mandatory seat belt legislation violated Maier's rights under section 7 of the Charter and that the violation was not reasonable and justifiable in a free and democratic society. He issued a declaration that the law was constitutionally invalid and overturned Maier's conviction under the statute.

The Crown did not accept this reversal and further appeal to the Alberta Court of Appeal was undertaken.

**Court of Appeal:** The Alberta Court of Appeal allowed the Crown appeal and reinstated the verdict of Judge Oliver. The Court held that Justice Lutz erred when he reversed the trial judge's findings of fact. Chief Justice Laycraft, speaking for the Court, noted that Justice Lutz had misstated Judge Oliver's finding of fact that "wearing a seat belt assembly reduces risk of injury or death". As well, the Chief Justice expressed the view that there was "ample, even overwhelming, evidence" to support Judge Oliver's conclusion that wearing seat belts leads to protection of the public. The Appeal Court was of the opinion that Judge Oliver was in a far better position to assess the evidence, both documentary and testimonial (including the expert witnesses), than was Justice Lutz. They overturned the declaration that the seat belt legislation was invalid, reinstated the law and Maier's conviction with it.

Maier, not surprisingly, remains unconvinced. In announcing his desire to appeal the matter to the Supreme Court of Canada, he said: "I like risk and I think seat belts reduce my enjoyment of life. I'm doing this so that my kids can enjoy life".

**Comment:** Although seat belt use had declined sharply (82 percent to 50 percent) after Justice Lutz's ruling, most Albertan's were pleased when the Alberta Court of Appeal reinstated the seat belt law. Automobile safety advocates such as the Alberta Motor Association, the Alberta Safety Council, and police departments in the province are all convinced that when motorists do not wear seat belts, their risk of injury increases. The medical profession is similarly convinced that mandatory seat belt use will result in a decrease in human misery and a lowering of health care expenses. All of these groups and individuals, as well as many others, will applaud the Court of Appeal's decision.

Lawyers, government policy makers, constitutional scholars, and Charter watchers will, most likely, find the judgment unsatisfying. This is because the province's highest court never addressed Kim Maier's challenge to the validity of the mandatory seat belt legislation on the merits. Rather, their decision rests upon a point of procedure, that is: when can an appeal court review and revise a trial judge's findings of fact?

Mandatory seat belt legislation is only one of the multitude of social welfare programs in place in this country. These social welfare programs are important for the functioning of Canadian society. The Maier case is an important one because it involves reconciling the rights of the individual with the welfare of society as a whole. Because other social welfare laws will, in the future, be the subject of Charter challenge, the lower courts require some direction on the balancing of these competing interests. As well, the public wants some indication from our highest courts as to which government initiatives are constitutionally permissible.

The determination of the constitutional validity of mandatory seat belt legislation is an important one. A strong statement from the Alberta Court of Appeal supporting the constitutional validity of this type of social welfare program, which benefits so many, would have been desirable. Unfortunately, none was forthcoming.

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Legislative Developments

# THE NEW ABORTION LEGISLATION

Sheilah L. Martin

## 1. Introduction

Bill C-43 seeks to establish a new Criminal Code (C.C.) abortion offence, following the Supreme Court of Canada invalidation of s.251 C.C. on the grounds it improperly infringed women's Charter rights. The proposed legislation makes it an indictable offence to "induce an abortion" unless "induced by or under the direction of a medical practitioner who is of the opinion that if the abortion were not induced, the health or life of the female person would be likely to be threatened". The Bill contains certain important definitions; "health" includes physical, mental and psychological health; a "medical practitioner" is left to provincial authorities to define; and "opinion means an opinion formed using generally accepted standards of the medical profession.

A constitutional challenge to Bill C-43 based on the argument that it is in pith and substance legislation in relation to health and therefore within provincial jurisdiction, or that Bill C-43 improperly delegates federal powers to the provinces, probably will be rejected because similar claims made in relation to previous abortion legislation have failed. The most likely constitutional challenges to Bill C-43 will be based on the Canadian Charter of Rights and Freedoms. Charter challenges can be expected to focus on two main issues: first, does the fetus have separate constitutional rights which Parliament has failed to respect by making certain abortions lawful; and second, does Bill C-43 infringe the Charter rights of women?

## 2. Does Bill C-43 Infringe the Constitutional Rights of the Fetus?

The constitutional status of the fetus under the Charter has never been specifically addressed by the Supreme Court. By the time the issue was heard in Borowski v. A.G. Canada[1], the abortion legislation under attack had already been invalidated in Morgentaler, Smoling et al. v. The Queen[2]. In the absence of a legal or factual context the Supreme Court held that the question of whether a fetus was an "everyone" with a right to life under s.7 of the Charter became moot and was too abstract to be pursued by a private citizen. Although the substantive question was not addressed in Borowski, the combination of dicta in Morgentaler and the reasoning in Daigle v. Tremblay[3] suggest a judicial preference for treating the legal status of the fetus as a question of a public "interest" rather than granting separate and independent Charter "rights" to the fetus. In Morgentaler, the majority stated that Parliament has a legitimate interest in the protection of fetal life, but they did not comment on when it arises or how far it extends. In a per curium unanimous judgment in Daigle v. Tremblay the Supreme Court held that the right to life conferred on "human beings" under the Quebec Charter of Human Rights and Freedoms was not intended to include a fetus. The Court affirmed that legal rights only vest at birth, under both the civil law, which was in issue, and the common law of other provinces, which was not. Birth has always been seen as the identifiable time when the physical individuation of the child from its mother makes rational and social concepts, like legal or constitutional rights, meaningful. Since the Supreme Court has stated that the Quebec Charter and the Canadian Charter should be construed in a similar fashion[4], it is unlikely the term "everyone" in s.7 under the Charter will be interpreted to include a fetus, although the Court did not expressly rule on this point. If a fetus had separate constitutional rights exercisable against the state the Court would be called upon to balance two complete and competing sets of constitutional rights within one body (that of the pregnant woman) and address the thorny issue of who can speak for the fetus. By allowing a Parliamentary interest in the protection of fetal life the Court may follow the accepted Charter paradigm under which the state interest asserted by way of government action (the protection of fetal life) must not unreasonably and unjustifiably infringe recognized constitutional rights (the Charter rights of Canadian women). This emerging, yet implicit, preference may make it extremely difficult to successfully challenge Bill C-43 on the ground it infringes the Charter rights of fetuses.

## 3. Does Bill C-43 Infringe the Constitutional Rights of Women?

Whether Bill C-43 infringes the Charter rights of women is less certain. The federal government obviously hoped constitutionally valid legislation would result if Bill C-43 was carefully tailored to cure some of the procedural defects of s.251 C.C. specifically outlined by certain justices in Morgentaler. Even assuming the soundness of this strategy, Bill C-43 may not be sufficiently different from s.251 C.C. to pass constitutional muster.

### A. Bill C-43 and s.251 C.C.

The old s.251 C.C. established two separate indictable offences. The offence of unlawfully performing an abortion could be committed whether or not the woman was pregnant and carried a maximum sentence of life imprisonment, whereas the offence of unlawfully having an abortion could only be committed by the woman if she was pregnant and carried a maximum penalty of two years imprisonment. Bill C-43 establishes a singular offence of "inducing" an abortion and sets the penalty at a two year maximum. Because it is

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awkward to refer to a woman inducing an abortion on herself there was some initial speculation that the new prohibition was directed solely towards medical personnel, but the explanatory notes provided by the Department of Justice and the natural meaning of the term "everyone" confirm that the pregnant woman can also be charged. Under Bill C-43 the Crown must establish that the women was pregnant before the offence can be committed, making the prohibition difficult to enforce and removing the procedural advantage conferred upon the Crown by s.251(1) C.C..

Both are Criminal Code prohibitions but they take different forms. Section 251 operated by way of a general prohibition against either performing or having an abortion and provided a statutory defence or exception for therapeutic abortions. Chief Justice Dickson in Morgentaler found s.251 constitutionally offensive because the unfair operation of the therapeutic abortion system meant that the defence established by Parliament was illusory. The same type of analysis could not be applied to Bill C-43 because the new Bill does not operate by way of prohibition and exemption, but attempts to draw lines between lawful and unlawful conduct. This may make it difficult to argue that a woman has a statutory right to an abortion if her physical, mental and psychological health is threatened by the continued pregnancy.

Despite these and other notable differences, there are major similarities between Bill C-43 and the invalidated s.251 C.C.. Bill C-43 repeats the regulatory model of s.251 C.C. because it criminalizes certain abortions throughout the pregnancy and it bases illegality on the reasons why a woman seeks to terminate her pregnancy (these reasons are often called "indications"). The government chose not to explicitly tie the legality of abortions to the stage of the pregnancy at which it is sought. This gestational age alternative was suggested by two judges in Morgentaler and underlies American constitutional jurisprudence on abortion. But the incorporation of the accepted standards of medical practitioners into the legal standard of when an abortion is lawful may indirectly affect the legality of late-term abortion. Current medical practice generally limits the availability of post-viability abortions to the late discovery of fetal abnormalities or circumstances involving a serious threat to the life or health of the woman (Statistics Canada reports that in 1987, 99.7 of abortions took place within the first twenty weeks of pregnancy).

### B. The Principles of Fundamental Justice

There are two important consequences of an indications-based regulatory model: the state usually establishes an administrative structure to police compliance while the imposed decision-making standard and ultimate decision-making authority is taken from the woman and given to someone else. Under both Bill C-43 and s.251 C.C. the medical profession decides when a woman is sufficiently ill to qualify for a legal abortion. While the apparatus established to externally review the legality of a woman's abortion is less complex under Bill C-43 than the therapeutic abortion committee system , it is no guarantee that it accords with the principles of fundamental justice or qualifies as a reasonable and demonstrably justified limitation on a woman's Charter rights.

Under s.251(4) C.C. a pregnant woman was obliged to apply to the "therapeutic abortion committee" of an "accredited or approved hospital" to obtain a certificate legalizing the abortion. A "committee" was comprised of three or more qualified physicians who could not, by law, be physicians who performed any abortions. A certificate could only be granted where a majority of committee members believed the continuation of the pregnancy would, or would be likely, to endanger the pregnant woman's "life or health". The term "life or health" was not defined in the statute with the result that different committees adopted working definitions of varying breadth. Individual committees were also free to establish their own procedures.

> **"Bill C-43 does nothing to promote or provide equitable and non-arbitrary access to lawful abortion because it leaves the matter entirely in the hands of the medical profession."**

In Morgentaler, Chief Justice Dickson and Justice Beetz explained how this committee system operated outside the procedural aspects of the principles of fundamental justice in s.7 because the statutory requirements created unnecessary delays and restricted access to abortion in an unfair and arbitrary manner. For example, the statutory requirement of applying to a committee of an "approved" or "accredited" hospital, requiring at least three physician to authorize and one to perform an abortion, reduced access to lawful abortions because it meant that a significant percentage of Canadian hospitals did not, by law, even qualify to have a therapeutic abortion committee. Because s.251 C.C. authorized, but did not require, the establishment of therapeutic abortion committees many hospitals chose not to establish a committee or did not require it to function. The burdens imposed on Canadian women as a result of limited and delayed access were presented to the Court as part of a full evidentiary record which explained how the committee system functioned in practice.

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By comparison, the one medical practitioner requirement of Bill C-43 does not appear as onerous or arbitrary as the layers of regulation imposed by s.251 C.C. There is no committee requirement; the one practitioner who must form the necessary opinion need not be a physician - for example, a province could authorize midwives to perform abortions; the practitioner can be a practitioner who performs abortions and can in fact perform the abortion in issue; abortions are lawful as long as they are performed under the "direction" of the authorized medical practitioner, which would extend to such things as women taking oral abortifacients under prescription or where an assistant performed a surgical procedure; there is no federal restriction requiring "approved" or "accredited" facilities; and abortion approvals are not tied to the facility where the abortion will be performed. But simply removing the obvious delay-generating impediments of s.251 C.C. many not suffice to have Bill C-43 withstand constitutional challenge.

A review of the procedural elements of the principles of fundamental justice will raise questions concerning the extent to which recriminalization will stigmatize abortion and have a limiting and chilling effect on its availability. Just like s.251(4) C.C., Bill C-43 does nothing to promote or provide equitable and non-arbitrary access to lawful abortion because it leaves the matter of access to lawful abortion entirely in the hands of the medical profession. While Bill C-43 defines the decision-making standard of "life and health" --- in an obvious response to Chief Justice Dickson's concern in Morgentaler that the same term in s.251 C.C. was too vague --- it is difficult to see how the qualifiers of "physical, mental and psychological" add a sufficient degree of certainty. The vagueness of the term "opinion" is also problematic because it infers the existence of an objective and customary medical standard on abortion which probably does not exist. In addition, Bill C-43 will also test the substantive context of the principles of fundamental justice because a state-imposed third party review on rights as fundamental as security and liberty of the person may be seen as inherently unreasonable.

### C. The Validity of the Federal Government's Assumptions

Perhaps the fatal flaw of Bill c-43 is the government's assumption that constitutional abortion legislation can be achieved simply by responding to the Morgentaler decision. The government's legislative response has been a highly selective one - picking and choosing various elements from among the three different concurring majority judgments and selecting the evils to be remedied. While one must sympathize with the difficulty of outlining the ratio of the Morgentaler case from its various judgments, the process adopted by the federal government is far from trustworthy. Most justices limited their comments to the defects in s.251.C.C. and provided little guidance on the overall extent of Parliament's ability to legislate on abortion (in sharp contrast to the strictures of the trimester system enunciated by the U.S. Supreme Court in Roe v. Wade). There is always some risk attempting to infer what will work from what didn't, but that risk is increased when the judicial comments were cautious and intended to go no further than strictly necessary to invalidate the legislation. Morgentaler was also the first Charter case on women's reproductive rights to reach the Supreme Court and only one of a limited number of pivotal decisions on s.7. By contrast, the United States Supreme Court has been faced with over twenty-five abortion-related cases since its landmark decision in 1973 in Roe v. Wade and the contours of a woman's right in the abortion context have yet to be stated with precision.

For many reasons, it is unrealistic and unwise to act as if the Morgentaler case provides a comprehensive analysis. Although many sections of the Charter were invoked in argument against s.251 C.C., the focus of two of the majority judgments was confined to a woman's "security of the person" under s.7 (which protects life, liberty and security of the person). It would be a grave error to view their comments as establishing a code of women's rights on abortion or as precluding a constitutional challenge based on other Charter rights.

**"Bill C-43 clearly threatens women's liberty interest under s.7 and freedom of conscience under s.2."**

In this regard, Bill C-43 clearly threatens women's liberty interest under s.7 and freedom of conscience under s.2 as defined by Justice Wilson in Morgentaler. She concluded that the right to choose to terminate a pregnancy is based on individual autonomy and private decision-making as well as security of the person. In addition, she explained that the criminal law prohibition against abortion endorsed "one conscientiously held view at the expense of another" and therefore operated as an improper state interference with a woman's freedom of conscience.

Section 28 mandates that women must be accorded the equal right to security of the person, liberty and freedom of conscience as men and precludes the invocation of biological difference as the pretext for selectively placing burdens on women's rights.

The Supreme Court's recent recognition of pregnancy discrimination as sex based under the Manitoba Human Rights Code in Canada Safeway v. Brooks[5], and its rejection of the similarly situate equality standard for s.15 of the

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privacy of non-parties, such as children or witnesses. The appellate courts may have been concerned that any significant degree of protection of the privacy of parties would contravene the holding by the Supreme Court in the Attorney General of Nova Scotia v. MacIntyre that, "as a general rule, the sensibilities of the individuals involved are no basis for exclusion of the public from judicial proceedings".[24]

The majority and concurring judgements concluded that while protection of privacy was a legitimate objective, the permanent and mandatory publication ban was an overly restrictive measure to pursue that objective. Alternatives, such as a discretionary ban or a ban on the publication of identities only, would achieve the same objective in a less restrictive fashion. The dissent, as noted earlier, construed the scope of the publication ban more narrowly, was more sceptical as to the legitimate public interest in publication of evidence in matrimonial cases, and was willing to consider the objective of ensuring access to the courts in addition to the protection of privacy objective. These factors, as well as a less strict application of s.1, together with an express statement of deference to the legislature, gave rise to the different conclusion on s.1. With regard to s.30(2), all judges were agreed that while the objectives of protection of privacy and ensuring a fair trial were legitimate, the broad mandatory ban was overly restrictive.

An additional point was raised by the dissent relating to an exception found in s.30(3)(c) of the Judicature Act, pursuant to which matters might be reported if permitted by court order. The dissent was of the view that a court in its discretion could permit reporting "in those rare cases where the interest of the public in the publication of details overrode the right to privacy".[25] Indeed, as the case of Slaight Communications Inc. v. Davidson[26] indicates, a statutory discretion must be exercised in a manner that protects Charter rights and freedoms, so it might well be that a court order which did not permit publication in such circumstances would itself violate s.2(b).

These comments of the dissent raise one final point of interest, the question of constitutional exemption. The Alberta Court of Appeal had relied on this concept in refusing to strike down the Judicature Act provisions. The Court of Appeal found that where a Charter right was valid under s.1, "save that it was overly broad in that it unnecessarily caught a relatively small group of specially situated persons"[27], the court could leave the legislation in place and grant those persons on a case by case basis a constitutional exemption. The application of this remedy was not discussed in the Supreme Court decision. Presumably the majority would have found the constitutional exemption to be inappropriate in view of its conclusion that the publication bans created a broad and sweeping infringement on freedom of expression. The dissent did not need to create a constitutional exemption as it found that there already existed an appropriate statutory exemption.

However, the adequacy of either the statutory exemption or a constitutional exemption in the circumstances of this case can be seriously questioned. The statutory exemption creates a prior restraint on free expression. By the time a judicial order is obtained, and any appeal proceedings concluded, the newsworthiness of the subject information may well have passed. While the concept of a constitutional exemption does not create a prior restraint as such, in circumstances where its application is very difficult to predict, as would be the case here, the press could only be reasonably certain of avoiding prosecution by obtaining a declaration prior to publication. This would effectively create another form of prior restraint.

In summary, this decision is a significant step towards the establishment of a meaningful protection of freedom of the press under the Charter. The Court's comments on the importance of s.2(b), its broad examination of the purposes of an open court system, and its acknowledgement of the press' role as a surrogate for the public will be valuable in future cases. Further, its strict application of s.1 in this context provides further insight into the operation of that pervasive provision.

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1. The Supreme Court of Canada, unreported judgment, December 21, 1989.
2. R.S.A, 1980, c.J-1.
3. Edmonton Journal v. Attorney General of Alberta, [1986] 1 W.W.R. 453 (Alta. Q.B.); aff'd [1987] 5 W.W.R. 385 (Alta. C.A.).
4. The majority judgment was written by Cory J. and concurred in by Dickson C.J. and Lamer J.. Wilson J. concurred with separate reasons. La Forest J., writing for L'Heureux-Dubé and Sopinka JJ., dissented in part.
5. [1988] 2 S.C.R. 712.
6. [1989] 1 S.C.R. 927.
7. Supra, fn.1, at 12, per Cory J.
8. Ibid., at 5, per Cory J.
9. Supra, fn.6.
10. R. v. Edwards Books and Art Ltd. [1986] 2 S.C.R. 713.
11. Supra, fn.6, at 993.
12. Supra, fn.10, at 779.
13. Supra, fn.1, at 23, per Cory J.
14. The dissent implied such a characterization: "I should observe interstitially that recent cases of this Court recognize that in considering issues of this kind, the relative power of those whose activities are restricted and those for whose benefit the restriction is made is a relevant factor to weigh in the equation; ..." Supra, fn.1, p.13, per La Forest J.
15. Blackstone's Commentaries on the Laws of England (1768), Book III, .23, p.373, cited in supra, fn.1, at 7, per Cory J.
16. [1988] 2 S.C.R. 122.
17. Supra, fn.5.
18. Supra, fn.1, at 12, per Cory J.
19. Ibid., at 5, per La Forest J.
20. Ibid., at 13, per Cory J.
21. Ibid., at 14, per Cory J.
22. Supra, fn.3, (Alta. C.A.).
23. (1985) 17 D.L.R. (4th) 472 (B.C.C.A.).
24. [1982] 1 S.C.R. 175, at 185.
25. Supra, fn.1, at 17, per La Forest J.
26. [1989] 1 S.C.R. 1038.
27. Supra, fn.3, at 403 (Alta. C.A.).

# ABORTION INJUNCTION VACATED:
## Daigle v. Tremblay

A. Anne McLellan

On July 8, 1989 Chantal Daigle left her home in Chibougamau, Québec, with her brother, to drive to Sherbrooke, where she had made an appointment to have an abortion. As she began this trip, the purpose of which was intensely private, she had no idea that she soon would become, for both the pro-and anti-choice movements in Canada, symbolic of all that they believe to be wrong with the present state of the law regarding abortion. In a very few weeks, Chantal Daigle would go from being an unknown 21 year old to "newsmaker of the year"[1].

The "story" of Chantal Daigle is well known to everyone; her pregnancy, her failed relationship with Jean-Guy Tremblay, her decision to terminate her pregnancy, Tremblay's attempts to stop the abortion, the Québec courts' granting Tremblay's request for an injunction[2], her decision to have an abortion, in defiance of the order of the Québec Court of Appeal[3] and, finally, vindication from the Supreme Court of Canada when it allowed her appeal.[4]

This comment will focus primarily upon the decision of the Supreme Court of Canada, the result of which was rendered on August 8, but the reasons for which were released only on November 16, 1989. I will consider what, if anything, this decision adds to our knowledge and understanding of a women's right to choose to terminate her pregnancy, the rights of the foetus and the rights of fathers.

It should be pointed out that this case does not deal, strictly speaking, with "constitutional" issues.[5] The decision of the Supreme Court of Canada is an exercise in statutory interpretation, in particular, the interpretation of the Québec Charter of Rights and Freedoms. The task of the Court was to determine if the phrase "human being", as used in the Québec Charter of Rights and Freedoms, included a foetus. In answering this question, the Supreme Court of Canada relied primarily upon a consideration of the status of the foetus under the Civil Code of Québec.

The Supreme Court of Canada enumerated three arguments which were made by counsel for the Respondent, Jean-Guy Tremblay, to support the injunction: (1) that the foetus had a right to life under the Québec Charter of Rights and Freedoms; (2) that the Appellant, Chantal Daigle, would violate this right by having an abortion; (3) that an injunction was an appropriate remedy by which to protect this right.

Ultimately, the Supreme Court of Canada concluded that it needed to address only the first of these issues, since if there were no substantive rights of the foetus, upon which to base an injunction, it would be vacated. Therefore, two of the issues raised by the Appellant, in response to the Respondent's arguments, were never addressed by the Court; the appropriateness of the remedy of injunction, if the foetus were found to have rights of some sort, and the federalism argument, that an injunction would have the effect of prohibiting abortion, a matter within exclusive federal jurisdiction. The Court, exercising its characteristic judicial restraint[6], simply declared that it would answer no more questions than required to determine the appeal. Based on its decision that there were no substantive rights to justify the issuing of an injunction in the first place, the Court needed to go no further in its deliberations.

The Respondent argued that the substantive rights upon which an injunction could be based were: (1) that the foetus had a right to life, under the Québec Charter of Rights and Freedoms; (2) that the foetus had a right to life under the Canadian Charter of Rights and Freedoms; and (3) that the Respondent, as "potential father"[7], had a right to be heard in respect of decisions regarding his potential child.

It is the first of these three arguments to which the Supreme Court of Canada devotes most of its judgment. The Québec Charter guarantees that, "Every human being has a right to life... he also possesses juridical personality."[8] It should be pointed out that there is no reference in the Québec Charter to the foetus or foetal rights. In addition, the Court found no cases dealing with foetal rights under the Québec Charter.

Counsel for the Respondent made much of the linguistic interpretation of the phrase "human being", seemingly based on something akin to the plain meaning rule. The Respondent argued that "human" was in reference to the human race and that "being" related to the state of being in "existence", and that the foetus was included within both notions.

If this argument seems somewhat mechanistic and one-dimensional, do not be alarmed; the Court viewed it in much the same way. The Court makes it plain that the question which it was asked to resolve is a "legal" one, not a philosophical, theological, scientific or linguistic one,[9] although all might provide some assistance or background in resolving the "legal" issue. Indeed, the asserted linguistic approach would make strangely simple the most contentious of issues, that of the definition of human being. Questions of when life begins, and when a "life form" becomes a human

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**Continued)**
being, are deeply divisive and morally difficult issues which cannot be resolved by reference to a dictionary.

Much was made of the differing uses of the words "human being" and "person" in the Québec Charter. It is only to human beings that the right to life is guaranteed. Persons are guaranteed other, and arguably, lesser rights, such as respect for their private life and peaceful enjoyment of their property. Although the Court makes no final decision on this issue, it appears likely that the choice of words was dictated by a desire on the part of the Québec National Assembly to make clear that only natural persons or human beings possess the right to life, while artificial persons, such as corporate entities, might assert and enjoy the other rights guaranteed.

The Supreme Court of Canada quite reasonably concluded that the Québec Charter displayed no clear intent on the issue of who was to be included within the term "human being". Indeed, as the Court pointed out, one would expect that on such a controversial issue, if the National Assembly had intended to include protection for the foetus within this term, they would have explicitly said so.

"The Supreme Court of Canada quite reasonably concluded that the Québec Charter displayed no clear intent on the issue of who was to be included within the term 'human being'."

Since the language of the Québec Charter displayed no clear intent on the meaning of the phrase "human being", the Court turned to the Civil Code to see if the provisions of the Code, or its interpretation, offered an answer to this definitional problem. The Court involved itself in a lengthy analysis of various provisions of the Code[10] and ultimately concluded that the Code "does not generally accord a foetus legal personality".[11] Indeed, the Court suggested that a foetus is treated as a person under the Civil Code only where it is necessary to do so, in order to protect its interests after it is born.

The Court found further confirmation for its interpretation of the Civil Code in Anglo-Canadian common law, in which it has been recognized generally that, to enjoy rights, a foetus must be born alive and have a separate existence from its mother.[12] It is interesting that in its survey of Canadian law, the Court refers to three recent cases involving foetal protection under provincial child welfare legislation. In two of these cases[13], the Courts found that the foetus was a "child" in need of protection. In the third case, that of Baby R[14], the B.C. Supreme Court concluded that a foetus was not a child, for the purposes of such legislation. This latter case is in line with English authority, which has reached the same conclusion under similar legislation[15]. While the Supreme Court offers no opinion on the merits of these conflicting authorities, it is not unreasonable to suggest that the Court feels some discomfort, and likely disagreement, with the above-noted cases, which interpreted "child" as including the foetus.

After this fairly lengthy exercise in statutory interpretation, the Supreme Court of Canada concluded that for the purposes of the Québec Charter of Rights and Freedoms, the term "human being" did not include a foetus.

The Court quickly dealt with the remaining two substantive rights arguments of the Respondent. The first of these was that the Canadian Charter of Rights and Freedoms provided the foetus with an independent right to life, under s.7. Yet again, the Supreme Court of Canada avoided answering this question.[16] The Supreme Court invoked its decision in Dolphin Delivery[17], in which it concluded that the Charter did not apply to private disputes. It should be remembered that the facts of this case involve Jean Tremblay seeking an injunction against Chantal Daigle, a matter which the Court describes as a private civil dispute. There was no law to which Tremblay could point, nor any government action, which created the asserted violation of s.7. However, there may be an argument involving government "inaction", which the respondent could have invoked. The argument would be that, by not legislating to protect the rights of the foetus, either the Québec National Assembly or the federal Parliament was violating the right to life of the foetus. This raises an issue of major significance in the interpretation of the Charter, that of whether the Charter can be construed as imposing positive obligations upon government to act, in certain circumstances.[18]

The s.7 Charter argument raised by the Respondent was preemptively discarded by the Supreme Court of Canada, on the basis that none of the counsel present chose to offer arguments challenging the correctness of Dolphin Delivery. Hence, the Supreme Court saw it as a "full answer" to the Charter argument. It is interesting to speculate as to whether the Supreme Court is indicating that it would be receptive to arguments, questioning the broad proposition stated in Dolphin Delivery that the Charter does not apply to so-called private disputes.

The Supreme Court of Canada concluded its assessment of the substantive rights arguments by briefly addressing the

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**(Daigle v. Tremblay**
**Continued)**

father's rights issue. The Respondent argued that, since he had played an equal part in the conception of the potential child, he should have an equal say in that which happened to it. The Supreme Court found no case law to support this proposition, the practical effect of which would be to provide a "potential father" with a veto over a woman's decision in relation to the foetus which she was carrying.

The Supreme Court of Canada declined to answer many of the interesting Charter questions raised in this appeal. Some of them are: (1) the rights of the foetus, if any, under s.7 of the Canadian Charter of Rights and Freedoms, an issue which the Court has successfully avoided in both this case and Borowski; (2) the balance that must be struck between a woman's right to liberty and security and the rights or interest of the foetus; (3) the rights, if any, of potential fathers; (4) the possibility that the Charter may give rise to positive obligations upon government to act, at least in certain circumstances, to protect guaranteed rights and; (5) the possibility that the Supreme Court will reconsider its decision in Dolphin Delivery, in relation to the application of the Charter to private disputes.

In some ways, this was an easy case for the Supreme Court of Canada. Undoubtedly, it was correct that the Québec National Assembly did not intend to extend protection to a foetus when it used the expression "human being" in s.1 of the Québec Charter. Therefore, if there is no right to life recognized for a foetus, in either Québec human rights legislation or the Civil Code, then the only alternative would appear to be the Canadian Charter of Rights and Freedoms. The Court was able to deny the Charter's application to these facts in three short paragraphs. Further, the right of the "potential father" to assert a claim over his unborn progeny, notwithstanding the objections of the mother, is a claim that has virtually no support in English, Canadian, and American law and hence could be dismissed with even greater speed and certainty.

What do we know at the end of that which the Supreme Court of Canada referred to as the "ordeal" of Chantal Daigle? Simply, that neither the civil law of Québec nor the common law of the other nine provinces, recognizes the right to life of a foetus. In the absence of either provincial or federal law recognizing such a right, a woman's right to seek an abortion seems clear. Fathers' rights, in this context, are viewed as nonexistent. Therefore, we can conclude that, until the federal Parliament, or a provincial legislature, attempts to place new restrictions upon a woman's right to control her body, there will be no further "ordeals", such as that endured by Chantal Daigle.[19]

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*A. Anne McLellan, Professor of Law, University of Alberta.*

1. As described in Chatelaine, January, 1990.
2. An interlocutory injunction was granted against Daigle by Mr. Justice Viens of the Québec Superior Court, on July 17, 1989. An appeal from this decision was heard by the Québec Court of Appeal on July 20, 1989. It rendered its judgment on July 26, and in a 3-2 decision, denied the request of the Appellant to vacate the injunction.
3. In fact, the Québec Court of Appeal upheld the interlocutory injunction issued by Mr. Justice Viens. It stated, in part:
   > ... the Court grants the request for an interlocutory injunction, orders the Respondent to refrain, under threat of legal penalty, from having an abortion or taking recourse voluntarily to any method which directly or indirectly would lead to the death of the foetus which she is presently carrying.
4. During the summer recess, due to the urgency of the matter, five Justices of the Supreme Court of Canada heard the Appellant's application for leave to appeal, on August 1. Leave was granted the same day and the appeal was heard on August 8, before the entire Court.
5. There is a brief reference in the judgment to the inapplicability of the Canadian Charter of Rights and Freedoms. I suppose that if one views provincial human rights legislation as being of a "quasi constitutional" status, then, any interpretation thereof might be described as raising a "constitutional" question.
6. See Morgentaler (No.2), [1988] 1 S.C.R. 30; Borowski v. Canada [1989] 1 S.C.R. 342.
7. The language of "potential father" is that used by the Supreme Court.
8. Section 1 of the Québec Charter of Rights and Freedoms, R.S.Q., c.C-12. In addition, Section 2 of the Québec Charter states: "Every human being whose life is in peril has a right to assistance".
9. The question the Supreme Court had to answer was whether the Québec legislature had accorded the foetus personhood. I think the Court rightly suggests that classifying the foetus for the purpose of a particular law or for scientific or philosophical purposes may be fundamentally different tasks. The Court describes the ascribing of personhood to the foetus, in law, as a fundamentally normative task.
10. In particular, Civil Code of Lower Canada, arts. 18, 338, 345, 608, 771, 838, 945, 2543.
11. Unreported decision of the Supreme Court of Canada, File no. 21553, Nov. 16, 1989, at 23.
12. This view can be contrasted with that of Bernier, J.C.A., of the Québec Court of Appeal, where he states:
    > "He (the foetus) is not an inanimate object nor anyone's property but a living human entity distinct from that of the mother who bears him, ... and who from the outset has the right to life and to the protection of those who conceived him."
13. Re Children's Aid Society of City of Bellevile and T (1987), 590 O.R. (2d) 204 (Ont. Prov. Ct.); Re Children's Aid Society for the District of Kenora and J.L. (1981), 134 D.L.R. (3d) 249 (Ont. Prov. Ct).
14. Re Baby R (1988), 15 R.F.L. (3d) 225 (B.C.S.C.).
15. In Re F, [1988] 2 W.L.R. 128 (C.A.).
16. As it did in Borowski, supra, fn.6.
17. R.W.D.S.U. v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573.
18. See generally, Slattery, Brian, "A Theory of the Charter", (1987) 2 Osgoode H.L.J. 701.
19. Indeed, the reason offered by the Court for continuing the hearing, after Daigle's counsel announced that she had obtained an abortion in defiance of the terms of the interlocutory injunction, was "so that the situation of women in the position in which Ms. Daigle found herself could be clarified". Technically, the issues raised in this appeal became moot upon Daigle obtaining an abortion.

# Could the Meech Lake Accord Affect the Protection of Equality Rights for Women and Minorities in Canada?

Lynn Smith

*Constitutional Crisis?*

*On the one hand, passage of the Meech Lake Accord is seen as a serious threat to the Charter's guarantees of rights and freedoms. On the other hand, failure to receive unanimous provincial assent of the Accord is seen to have disastrous consequences for the future of the country. We have asked two participants in this debate, Lynn Smith and Peter Meekison, to present their views on the Meech Lake Accord. Each of their comments were originally delivered as lectures before different audiences at different stages of the debate. We thank them both for the valuable insights which follow. [ed.]*

The Meech Lake Accord, if ratified, would bring about profound changes in many areas of constitutional law, including the national spending power, immigration, appointments to the Senate and to the Supreme Court of Canada, and the constitutional status of the Supreme Court of Canada.

The motivating force behind the Accord, however, was the need for a reconciliation between the rest of Canada and Québec, which had not assented to (though it had been bound by) the constitutional changes of 1982, including the entrenchment of the Canadian Charter of Rights and Freedoms. A linchpin of the agreement and reconciliation with Québec is the so-called "distinct society clause". It would become section 2 of the Constitution Act 1867 [reproduced on opposite page]. Section 2 must be read in conjunction with section 16 of the Meech Lake Accord (Constitution Act 1987):

16. Nothing in section 2 of the Constitution Act, 1867, affects section 25 or 27 of the Canadian Charter of Rights and Freedoms, section 35 of the Constitution Act, 1982, or Class 24 of section 92 of the Constitution Act, 1867.

Before addressing the question whether the distinct society clause could have an effect on the protection of equality rights for women and minorities, we should address the question "what equality rights?" The rights referred to are those guaranteed in section 15 of the Charter (as well as sections 25, 17 and 28 of that document). Section 15 is the "working" equality rights guarantee: it states that "every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." Section 25 is an interpretive clause saying that the Charter is not to affect aboriginal or treaty or other rights pertaining to aboriginal peoples of Canada; section 27 says the Charter is to be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians; and section 28 says that notwithstanding anything in the Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

These are rights guaranteed to all Canadians, binding at least the federal and provincial levels of government (and perhaps all levels of government), and enforceable through the courts. The final arbiter of the meaning of the equality rights is the Supreme Court of Canada, to which appeals from all provincial court systems come.

The equality rights resulted from the efforts of numerous individuals and organizations, seeking to obtain meaningful guarantees of equality in the Charter after the unfortunate results which had followed from the Canadian Bill of Rights. Of course, the 1980-82 process was not the first time that women or minorities had attempted to seek constitutional changes or to affect the nature of changes - for example, as early as 1928 with the Persons Case, women had attempted to bring about change. What was new in 1980-82 was that there had actually been some participation in the process of women, disabled people, and representatives of other normally excluded groups, prior to the proposed wording being achieved.

As is well known, despite the full public debate which had preceded it, the November Accord of 1981 (which resulted from a closed late-night meeting among some premiers and the federal representatives) left crucial guarantees for women and aboriginal peoples on the floor. The reinstatement of section 28 and section 35(1) (relating to aboriginal rights) in the final version of the Charter came about only after intensive lobbying and political pressure. One of the most commonly-expressed criticisms of the Meech Lake Accord relates to the similar way in which it was created: at a closed, all-night meeting at Meech Lake, the first ministers agreed on a package of amendments. There was no consultation with anyone outside a very limited number of advisors, and the package was then presented as a fait accompli, with no room for change unless "egregious errors" could be shown. (It is in the persistent unwillingness to countenance any changes to the Accord that the situation is different from that of the November Accord of 1981.)

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# THE MEECH LAKE ACCORD: THE END OF THE BEGINNING--OR THE BEGINNING OF THE END?

J. Peter Meekison

In 1965 the Royal Commission of Bilingualism and Biculturalism referred to the greatest crisis Canada had ever faced. The following is from the Commission's Preliminary Report:

> "The Commissioners, like all Canadians who read newspapers, fully expected to find themselves confronted by tensions and conflicts. They knew that there have been strains throughout the history of Confederation; and that difficulties can be expected in a country where cultures exist side by side. What the Commissioners have discovered little by little, however, is very different: they have been driven to the conclusion that Canada, without being fully conscious of the fact, is passing through the greatest crisis in its history.
>
> The source of the crisis lies in the Province of Québec ..."

I believe we are in a similar state of affairs today.

The title selected for this address is deliberately provocative, but to me it vividly portrays the dilemma in which Canadians now find themselves. Viewed as the "End of the Beginning", Meech Lake can be characterized as the end or culmination of the first major series of reforms to the Canadian Constitution since 1867. It represents the minimum agreement necessary for the Province of Québec to accept, politically, and thereby legitimize, the constitutional reforms which were proclaimed in April 1982. It must be remembered that the 1982 reforms were in large measure a response to the 1980 Québec referendum. Unfortunately Québec refused to sign the agreement and, in fact, rejected it.

The second title raises the spectre of continuing Québec concerns with Canada's Constitution. Who knows when or why another constitutional crisis with Québec might erupt? Without a firmly stated and formalized commitment to the nation's fundamental political document by the Government of Québec, the legitimacy of the Constitution to approximately one quarter of Canadians remains in doubt. To understand both views requires some understanding of the origins of Meech Lake. The government of Robert Bourassa cautiously entered the arena of constitutional reform by means of a speech by Gil Remillard, Intergovernmental Affairs Minister, in May 1986. The conditions for Québec's acceptance of the 1982 Constitution were clearly spelled out. They included:

(1) Recognition of Québec as a distinct society.
(2) A greater provincial role in immigration.
(3) A provincial role in appointments to the Supreme Court of Canada.
(4) Limitation in the federal spending power.
(5) A veto for Québec on constitutional amendments.

Once this speech was given, the stage was set. Throughout the next several months, private discussions or negotiations between Québec officials, ministers, and representatives of other governments took place. The first of these discussions took place in Edmonton during the 1986 Premiers' Conference at which time the idea of an agenda, limited to Québec's objectives (and this is important), with a commitment to future constitutional discussions, was endorsed. Step by step, the discussions led to Meech Lake.

Unlike earlier constitutional discussions which had been characterized by a series of intergovernmental conferences, the discussions leading to Meech Lake were primarily

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**THE MEECH LAKE ACCORD**
**DISTINCT SOCIETY CLAUSE**

2.(1) The Constitution of Canada shall be interpreted in a manner consistent with
(a) the recognition that the existence of French-speaking Canadians, centred in Québec but also present elsewhere in Canada, and English-speaking Canadians, concentrated outside Quebec but also present in Quebec, constitutes a fundamental characteristic of Canada; and
(b) the recognition that Quebec constitutes within Canada a distinct society.
(2) The role of the Parliament of Canada and the provincial legislatures to preserve the fundamental characteristic of Canada referred to in paragraph (1)(a) is affirmed.
(3) The role of the Legislature and Government of Québec to preserve and promote the distinct identity of Quebec referred to in paragraph (1)(b) is affirmed.
(4) Nothing in this section derogates from the powers, rights or privileges of Parliament or the Government of Canada, or of the legislatures or governments of the provinces, including any powers, rights or privileges relating to language.

**(The End of The Beginning**
**Continued)**

bilateral. They took place between Québec officials and ministers, or their counterparts, in the other governments. They also took place between representatives of the federal government and all provinces. The process was unusual but was a result of an abundance of caution; the last multilateral conference ended in failure. All governments accepted the fact that failure was not in anybody's interest and would probably lead to a refusal (or inability) of the Bourassa government to pursue the matter again. In other words, it was necessary to assess and weigh constantly the probability of success while realizing that the longer the process continued, the more difficult it would be to disengage without further damage to national unity.

On the road to Meech Lake there were a lot of questions, including: Where is the point of no return? Does the risk of failure increase as one goes from general principles to constitutional texts where differing interpretations abound and shades of meaning may become divisive? Would failure to reach agreement indicate to Québec that the rest of Canada was unwilling to negotiate a constitutional settlement? If there were a failure, would future constitutional demands from Québec be more or less extensive? Was Québec adamant on all five conditions? Regardless of the answers to these questions, after several months of essentially private bilateral discussions, the probability of success was considered reasonable but by no means assured and the Meech Lake conference was scheduled. There could be no turning back. One month later, a second meeting was held in the Langevin Block to finalize the agreement. The fact that it took all day and night to conclude an agreement indicates that the understanding reached a few weeks earlier was more fragile than one might have expected.

Constitutional reform has, in one way or another, been a fact of life of the Canadian political process for at least 100 years and the subject of extensive debate since 1968. Since 1981 constitutional change has been made problematical because Québec has refused to participate as an active member of constitutional discussions. For example, in 1983 Québec abstained from voting on the aboriginal rights amendment. That amendment was approved because it met the minimum requirements of the amending formula of two thirds of the provinces representing fifty percent of the population. That was the first (and to date only) amendment to the Constitution since 1982. Had the amendment been one requiring unanimity or one where Ontario had registered its dissent, the amendment would have failed. Thus, for practical reasons, it is important to have Québec fully involved in constitutional deliberations. It is also important for reasons of national unity to have Québec a full and active participant in any constitutional negotiations.

It should be recognized that all five items identified by Québec had previously been discussed at constitutional conferences which spanned more than five decades, ranging from a limited review of "distinct society" to the exhaustive analysis of the amending formula. In this respect there was nothing new, surprising, or unexpected about the five subjects.

Does the Accord meet Québec's five demands? The answer is yes, but there is also an important modification inserted at the insistence of Alberta and other provinces--the concept of provincial equality. First manifested in the 1982 amending formula, that principle has been carried forward into Meech Lake in both the preamble to the amendment and in its various provisions, especially the amendment to the amending formula, where every province is given a veto, not just Québec; in the provisions for First Ministers' Conferences where provinces are given an equal say at the table; and in the provisions on the spending power and appointments to the Senate and Supreme Court. In other words, Québec is not singled out for preferential treatment or special status.

The one area where there is a difference is in the first section dealing with distinct society. Here the difference is real but understandable. Québec is already different in terms of its constitutional status. This distinction was recognized and protected in 1867, both in terms of the language provisions (s.133) and the uniformity of laws provision (s.94) where Québec was exempted to maintain the civil law. The demography of the province was recognized in terms of fixed representation in the House of Commons. Later, there was a statutory requirement for three seats on the Supreme Court to go to Québec. Other differences can be identified but the reality is that Québec's distinctiveness was identified and given constitutional recognition and protection as long ago as 1867. To me, Meech Lake is a 1989 manifestation of that principle--it is not special status.

Viewed in this light, Meech Lake represents the end of the beginning. As of today, the House of Commons has twice given its approval to the Accord as have eight provinces. Because of changes in their governments, Manitoba and New Brunswick have not, and Newfoundland is threatening to withdraw, raising the possibility that the Accord may still not receive the unanimous consent that is required before it can come into effect. At this stage of the process, failure to ratify could have serious consequences for Canadian unity--the beginning of the end.

The fact that there may still be difficulties leads one to assess the nature of the criticisms which have been raised. There are many but they can be summarized as follows:

(1) the distinct society clause is seen to undermine the Charter and to grant special status to Québec,
(2) acceptance of decentralization and therefore balkanization of the federal system,

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**(The End of the Beginning Continued)**

(3) rigidity,
(4) the process.

Under the first criticism one can include, for example, the concern of women's groups and ethnic minorities that the distinct society clause may undermine the Charter. When the distinct society clause was drafted, two clauses in the Charter (both of them interpretation clauses) were specifically protected, thereby raising the question of the status of the others. What will the courts say? Nobody knows, but my own view is that the clause neither undermines the Charter nor confers special status. None of the three provincial reviews argued that special status will be established--and this after exhaustive and critical analysis.

The second line of reasoning attacks the section on the spending power and provincial involvement in the appointment of Supreme Court Judges and Senators. Essentially the argument here is that these significantly limit the ability of the federal government to establish national programs and control national institutions. To me, these provisions are neither unreasonable nor unrealistic in a federal system. For one thing, the spending power clause refers to areas of exclusive provincial jurisdiction.

The third criticism is aimed at the changes to the amending formula. Although the existing amending formula already has a few items which require unanimity before they can be changed, the proposed additions have created some controversy. For example, critics state that senate reform is, for all intents and purposes, dead. Senate reform will be difficult under any circumstance and in my view will not proceed without Québec's participation. It will certainly not be approved without Québec's agreement.

With respect to process, there is considerable criticism over the process of intergovernmental negotiation and the lack of public input. What was particularly galling to many was that the Accord, once it had been worked out by governments behind closed doors, could not be changed for fear the agreement would collapse. I, for one, share the view that any amendments now would destroy the agreement. Moreover, to argue that the Accord is a result of a single 20 hour negotiation distorts reality.

When an agreement is reached after long and sometimes difficult negotiations, it is usually based on a series of compromises and the recognition that perfection or absolutes may be impossible, but acceptable solutions are attainable. To pull on a particular thread could unravel the entire agreement because the delicate design, so carefully woven, can be easily destroyed. There will be future discussions. All of Canada's problems cannot be solved at once or, for that matter, through the constitutional process.

The frustration felt by many is reflected in the Report of the Ontario Committee which, while it recommended the agreement be accepted, was at the same time critical of the process by which it was reached.

There is no ready answer to these criticisms which are well-intentioned and, in most instances, well informed. Legal scholars differ on the impact on the Charter of the "distinct society" clause. The Charter already has reasonable limits and the courts have to balance the terms of section 1 of the Charter with this new interpretation clause. People who favour a balanced federal system with strong provinces feel that there has been too much centralization already and that these changes reverse that trend. Although unanimity is supposed to be impossible to achieve, it has been achieved several times in the past and, if Meech Lake is agreed to, it will be the result of unanimity. Finally, if Meech Lake is approved, a new era of constitutional change will emerge with an entirely new dynamic with respect to constitutional discussion.

"The risks associated with failure are to me greater than the fears expressed by the critics."

In assessing the criticisms, all of which are found in the Ontario, New Brunswick and Manitoba Committee reports, my view is that the arguments for national unity outweigh the specific criticisms of the accord. In other words, the risks associated with failure are to me greater than the fears expressed by the critics. Some of these can be overcome in the course of future constitutional discussions. One thing is clear to me. There will be no serious constitutional negotiations for a long time without the adoption of the Meech Lake Accord. For example, the Ontario, Manitoba and New Brunswick reports propose that aboriginal rights be discussed at future conferences. The chances of these discussions taking place without Meech Lake are virtually nil.

The political climate and mood has shifted considerably in the two and one half years since Meech Lake was agreed to by First Ministers. To me, perhaps the greatest change is the climate in Western Canada. Not only is there an apparent indifference to the issue but also there is growing hostility to Québec. After the Parti Québécois election in 1976 and the spectre of a referendum, there was an outpouring of affection. Questions such as, "What can we

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**(The End of the Beginning Continued)**

do?", "What does Québec want?", "What have we done?" were asked. Petitions were circulated in shopping centres to demonstrate our affection and concern.

Today one does not find that. Instead one is more inclined to hear, "let them go if they want to". The most obvious manifestation of this are the debates at a recent convention of the Reform Party. Another is a letter I received this past week from the Western Independence Association of Canada complete with a draft constitution for the west and proclaiming the west as unilingual English. The use of the notwithstanding clause by Québec last year in Bill 178, and the decision to award the CF-18 contract to a Québec firm, have had a profound impact on the west. There is no avoiding this reality.

At the same time there is little understanding of what Meech Lake means or includes. Lise Bissonnette's recent column in the Globe and Mail referring to the distinct society clause as a "monster" is an accurate description of the many misperceptions which have arisen. This reality was clearly demonstrated recently at the November First Ministers' Conference.

Having said all of this, what of the future? From the recent First Ministers' Conference it is clear that the future of Meech Lake is tenuous.

I, for one, subscribe to the fact that Mr. Bourassa is in a very difficult situation and cannot readily agree to amend the Accord. Québec's demands are very modest and reasonable. Consequently, it will be necessary to convince the Provinces of Manitoba, New Brunswick, and Newfoundland that there is more to lose than to gain by rejecting the Accord and to see if a parallel accord can be put together.

What should that accord contain? First, it should give a strong commitment to Senate Reform - something Mr. Wells referred to at the November conference. I would argue that progress on Senate reform could be the key that unlocks the door to progress. It is an item that all four western provinces have addressed positively as have three of the four Atlantic provinces.

Another suggestion is some agreement on the process of future change, i.e., after an agreement is reached on future amendments, public hearings should be held in Ottawa and in those provinces who choose to do so. No resolutions should be given final approval until this public process has been completed.

Another suggestion is an amendment clarifying the effect of the clause that limits the spending power on the equalization provisions in the Constitution (s.36(2)). Other changes would provide for Supreme Court and Senate appointments from the territories.

Another suggestion is to expand the scope of intergovernmental agreements to include communications--a proposal going back to 1976. Not only would this be of interest to Québec but also to Manitoba, which has denounced recent federal legislation in this area. This approach parallels the one already in place on immigration.

These are but a few ideas. I am sure there are others that can be considered. Many of them can be found in the committee reports.

What if Meech Lake is not agreed to in time? I, for one, believe that failure will bring to an end for the foreseeable future any chance of bringing Québec back to the constitutional table. We will have worked ourselves into, not out of, a constitutional stalemate. I can only hope that, during this period of discontent, there are no language crises such as the gens de l'air dispute of 1976 or the furor last year over Québec's use of the notwithstanding clause. It should also be recognized that any future negotiations will, in all likelihood, take place in a period of crisis. Consequently, one can surmise that the ante will be upped. One can also expect that the next Québec election will focus primarily on the question of independence.

What is most disconcerting is that while these problems are so obvious to those who are students of this subject, large segments of the public are either indifferent or ill-informed. We are sleepwalking towards a disaster. To avert it will require patience, hard work and all the diplomatic and negotiating skills our leaders can display. Despite my concern, I remain convinced that a solution will be found because I believe that common sense and goodwill will ultimately prevail.

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*J. Peter Meekison, Vice-President (Academic), University of Alberta. (This is the text of a speech for the University of Alberta Alumni Association delivered at the Ottawa Branch Event, Sunday, November 19, 1989, 253D Centre Block, Parliament Hill).*

**(Equality Rights for Women**
**Continued from Page 12)**

It may be asked whether we are talking about something principled here, or just about "special interest groups" seeking to advantage themselves. In other words, should the level of public participation in the formation of the 1982 Constitutional amendments (prior to and after the November Accord) be seen as a model of some kind or as just a happenstance of the 1980's? What is wrong with leaving statecraft up to the statesmen, and leaving constitution-making up to the "modern fathers of Confederation"? Clearly the First Ministers who signed the Accord saw nothing wrong in the closed-door process -- in fact, executive-level decision-making in closed meetings appears to be a preferred option, judging from the fact that it has been followed more and more frequently in recent years and would be constitutionalized and made compulsory on an annual basis by the Meech Lake Accord (section 50). And (through some amazingly distorted reasoning) the fact that women and aboriginal people managed, at the end of the day, to achieve reinstatement of their rights in the final version of the 1982 Constitution Act has been cited to show how powerful they are and, indirectly, to support a closed-door process.

I would suggest that in thinking about this issue, we should bear in mind three things. First, the individuals who created the November Accord in 1981 and the Meech Lake Accord in 1987 were geographically representative of Canadians (with the exception of those who live in the Yukon or Northwest Territories), but were demographically representative of Canadians only if one assumes that all Canadians are white, male, able-bodied, middle-aged and Christian. That assumption of course is ill-founded since the majority of Canadians are female, and when you add to that majority the number of men who are not white, or are disabled, non-Christian or elderly you come to a very high percentage of the Canadian population. Thus, with reference to the drafting of the terms of equality rights, the term "special interests" to refer to the great majority of the population seems inapt. And what happened with the November Accord shows exactly what can happen when the demographics are so skewed -- the interests of those not "at the party" are overlooked.

Second, the history of legal inequality in Canada is such that women, the disabled, members of racial minorities, and others, have real concerns about constitutional wording that leaves issues open for debate: one need only remember the wartime internment of Japanese Canadians, the treatment of native people, the disenfranchisement of women, the racial segregation in public places sanctioned by law, and the systematic overlooking of disabled people's needs. Even when the Canadian Bill of Rights section 1(b) was in effect from 1960 onward (it provides for equality before the law and the protection of the law without discrimination), there was no improvement since the courts interpreted its wording so narrowly. Thus, the concerns about legal inequality and the need for strongly worded guarantees against it were not imaginary.

Third, Charter equality rights exist on a national plane; various individuals and groups worked to achieve them at a national level. Thus, in some sense, more people now than previously identify nationally with members of their ethnic or religious group, or on the basis of race or gender, rather than wholly with their co-provincialists or fellow French or English speakers. The process which led to the creation of the section 15 equality rights was important. Allan Cairns has commented that it amounted to a new method of constitution-making in that it involved a great many ordinary Canadians -- at least, Canadians who were neither First Ministers nor advisors to First Ministers. And the participation in the process led the organized representatives of the equality-seeking groups to consider that they had a specific interest in those parts of the Charter which they had worked to accomplish, and that they had set a precedent for future constitution-making processes, i.e. that there would be consultation at least to the extent of 1980-82.

The terms of the distinct society clause have been set out above [p.13]. They require that the Constitution of Canada be interpreted in a manner consistent with the recognition of two things: first, that it is a fundamental characteristic of Canada that there are French-speaking Canadians centred in the Province of Québec but also present elsewhere, and that there are English-speaking Canadians concentrated outside Québec but also present there; second, that the Province of Québec constitutes within Canada a distinct society. It goes on to say that both Parliament and the provincial legislatures have a role in preserving linguistic duality and that the Québec government and legislature have a role in preserving and promoting the distinct identity of Québec. Finally, it clarifies that these statements do not derogate from existing powers of Parliament or the legislatures.

> **"The argument that the first minister's statements about their intentions should end the debate amounts to 'Trust us'."**

The question, then, is whether the distinct society clause might affect the equality rights in the Charter. I will first describe the debate about this issue as a political phenomenon, and then illustrate the legal arguments about it through giving an example of a case in which the distinct society clause might be used.

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**(Equality Rights for Women Continued)**

The first ministers who were signatories, when the possible impact of the distinct society clause on equality rights has been urged, have reacted by saying "No -- we didn't mean it to have an effect -- our advisors tell us it won't." However, the opinions of those advisors have not been made public. Further, although some leading constitutional scholars have said that it is unlikely that the Accord will affect equality rights and that the risk of opening up the Accord and losing the consensus is not worth taking, others (probably equal in number and stature) disagree.

The argument that the first ministers' statements about their intentions should end the debate amounts to "Trust us". Equality-seeking groups do not see this as a preferred option, given past experience and given the Supreme Court of Canada's consistent refusal to give much weight to the statements of intention of the framers in construing the meaning of the Charter's provisions. These groups therefore contend that the Accord should be amended to make it clear that there is to be no effect.

The response from the supporters then begins with a concern that the Accord will fall apart and moves to a discussion of how liberal the Supreme Court of Canada has been in its interpretation of the Charter. This amounts to "Trust them". Again, this is not a preferred option, given that times change and courts change, and whether or not constitutional scholars predict a certain judicial interpretation, such predictions often prove inaccurate. For example, the Morgentaler decision came as a surprise to a great many observers. In any event, as described earlier, the predictions are mixed, depending upon the constitutional scholars making them.

For the balance of this discussion I will focus on the potential effect of the equality rights on women, although most of the arguments will be applicable to the cases of other equality-seeking groups such as the disabled and racial and religious minorities. The debate has not been a particularly civilized one, and has included the Prime Minister calling national women's groups "anti-Québec" for raising concerns about the wording of the Accord, and pointing out that some of the Québec women's groups have publicly stated that they are not concerned. First, it must be remembered that every national women's group stated its support for the recognition of Québec as a distinct society. The characterization of these groups as Trojan horses for anti-Québec forces was highly inaccurate. Second, one must resist leaping to the conclusion that, at least with respect to the effect of the distinct society clause on women's equality, the rest of Canada should respect the autonomy of Québec women and mind its own business. There are Québec women and women's groups supportive of the view that there is a threat to women's equality and that changes should be made. They argue that the position of the other groups is based on an unrealistically rosy picture of the situation of Québec women today and on the premise that backsliding is impossible. As well, the interpretation of sections 15 and 28 equality rights for women arising in the Québec context in the Supreme Court of Canada could have an impact across Canada even though the distinct society clause itself applies only in Québec.

> **"There is no doubt that equality rights for women and minorities could be affected by the addition of the distinct society clause to the constitutional equation."**

I will address a specific example in which the distinct society clause could be invoked, in order to bring out some of the legal issues. Let us assume that Québec matrimonial property legislation excludes business assets from the definition of "property" divisible between spouses upon divorce, and that this legislation is part of Québec's Code Civile. Let us also assume that the effect of the exclusion of business assets is to disadvantage women, since many more women than men are the home-making partners in marriage who forego the opportunity to acquire business assets in their own names.

A Québec woman now wishes to challenge the exclusion of business assets from matrimonial property, using section 15 of the Canadian Charter of Rights and Freedoms. She claims that she is denied equality under the law and the equal protection and equal benefit of the law because of her sex, and leads evidence to show that the exclusion of business assets has a highly disproportionate impact on women. (The Supreme Court of Canada in its first Charter equality rights decision - Andrews v. Law Society of B.C. - indicated fairly clearly that unintended effects as well as the purpose of legislation will be susceptible to section 15 review). The government or the husband may choose to defend the legislation on the basis that it does not violate section 15 -- it is "reasonable and fair" in the circumstances taking into account the fact that it relates to the internal arrangements of families, which are fundamental institutions of society both for linguistic and cultural purposes, and further taking into account the fact that the legislation is part of the unique and distinct civil law system. Alternatively, they might argue that even if the legislation is inconsistent with section 15 of the Charter, it is saved by section 1, which allows governments to limit Charter rights where the limits are demonstrably justified in a free and democratic society. Either way, the distinct society clause could be invoked as indicating a result which would uphold the legislation.

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**(Equality Rights for Women Continued)**

The wife might argue that the distinct society clause should not be taken into account either in determining whether there is a violation of section 15 or under section 1 -- for example, she might argue that the wording "distinct society" in the context of the Accord refers only to a limited range of linguistic issues. The government and the husband could answer that many commentators, including representatives of the Québec government, have indicated a much wider reading of the clause, encompassing cultural and social matters in general, and in particular, matters such as the Code Civile.

The wife might argue that section 28 of the Charter "trumps" anything else, including the distinct society clause, because it says that notwithstanding anything in the Charter, the rights and freedoms in it are guaranteed equally to male and female persons. The government and the husband could riposte by pointing out that the distinct society clause is not in the Charter, but in an arguably more fundamental constitutional document, the Constitution Act, 1867. In any event, they could say, section 16 of the Meech Lake Accord makes it clear that section 28 is not to have that role. Section 16 expressly states that parts of the Charter (regarding multicultural and aboriginal rights) are to be unaffected by the distinct society clause. By inference, other parts of the Charter (such as sections 15 and 28) are to be affected.

The wife would have some answers to these arguments, and some others to make, but the point here is that the dispute would be a serious one. The existence of the distinct society clause could clearly make a difference to the court's conclusion about the particular case, and about the nature and extent of the equality rights guaranteed in section 15 of the Charter.

Because the Charter does apply to all provinces and territories, as well as to the federal government, judicial decision about the nature and extent of Charter rights in one province are influential in arguments about the meaning of the Charter wherever the issues arise. And since the Supreme Court of Canada is the final court of appeal for all provinces, it does not make sense to think that whatever limiting effect the distinct society clause might have on equality rights will be confined to one province.

As a final point in assessing whether the distinct society clause could affect equality rights outside Québec as well as internally, consider the importance of symbolic statements. The very raison d'etre of the Meech Lake Accord is the symbolic reconciliation between Québec and the rest of Canada. Unfortunately, the process leading up to and following the Meech Lake Accord, in which equality-seeking groups were first excluded and then ignored and told it was too late to change anything (absent egregious errors), and the wording of section 16 of the Accord, clearly allowing for a hierarchy of rights to be recognized (in which women's rights are not given priority), make a negative statement at the symbolic level. When values are important enough, steps are taken to protect them even if the steps are quite likely redundant (see, for example, section 29 of the Charter, protecting rights or privileges with respect to denominational, separate or dissentient schools). By inference, when steps are not taken to protect values where there is a reasonable basis to consider them at risk, those values are unimportant or less important than others.

In conclusion, there is no doubt in my mind that equality rights for women and minorities could be affected by the addition of the distinct society clause to the constitutional equation. Despite section 16, multicultural and aboriginal rights are still at risk as well because the sections said not to be affected are interpretive rather than substantive; the problem is that section 15 (the working equality section) is excluded.

The Special Joint Committee of the Senate and the House of Commons, although supportive of the Accord, said that indeed the distinct society clause would come into play, at least at the section 1 stage of Charter review, and would be "balanced" against competing interests such as equality rights of women and minorities. However, the Committee said, there is really no change because there has always been a balancing process contemplated under section 1. (This is like saying there is no change in a game being played on the teeter-totter when an extra player is made available to one side.)

Given that there is reasonable cause for concern that the distinct society clause will directly or indirectly tend to restrict the scope of Charter equality rights, both inside and outside Québec, why not amend to make it clear that the clause is not to have such an effect? The answer that it would imperil the Accord to open it up only increases the concern, since it leads one to suspect even more strongly that the impairment of Charter equality rights is intended and is seen as necessary and desirable -- otherwise, there could be no difficulty in making the desired change. When arguments are made that the country is on the brink of falling apart unless the Accord is ratified in its original form (and how can you women be so selfish as to protest that your Charter rights might be at risk?), it must be remembered that women (and others who seek changes to the Accord) did not create the timing. The leaders of the various governments of the day adopted a wholly closed process, chose the timing, elected to stonewall when problems with the Accord were pointed out, and cannot now be heard to blame others for a different state of affairs.

## ADDENDUM

In March, 1988, when this talk was prepared, there seemed little chance that the Accord would not come into effect.

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**(Equality Rights for Women Continued)**

The betting is now running the other way. Newfoundland, Manitoba and New Brunswick (in order of strength) have supported the need to make changes or create a parallel Accord to eliminate the possibility of weakening the equality rights. In Ottawa, Québec, and some other provinces, the stonewall against change (even minor change to rectify the error in omitting reference to section 28 in section 16 of the Accord) is still in place. Of course, so was the Berlin Wall until it suddenly came down.

From another direction, the British Columbia government has begun an initiative to deal with the Accord's amendments in stages, and to recognize each province (and territory?) as a "distinct society". Without having had the opportunity to read the proposal aside from newspaper commentary, I would venture the comment that it could lead to two possibilities, both of which seem unacceptable;

(1) Any doubt about the potential effect of the "distinct society" clause on equality rights outside Québec would be eliminated. Each and every province and territory would have available the alleged need to preserve distinctly British Columbian/Albertan/whatever values, mores, ways of life, as an argument against claims of violations of equality rights. The matrimonial property issue, for example, could be played out in every province and territory in the way described above,

(2) the "distinct society" clause would become quite meaningless in terms of what it was designed to accomplish -- it may be as meaningless to say that each province or territory is a distinct society as it would be to say that everyone equally has the right to equality. If you are trying to move from inequality to equality, you don't get there by adding the same amount to each side of the balance. Instead, you right the balance by adding to the side that has been lacking. To fulfil Québec's aspirations for distinct recognition within Canada, you cannot say "Yes, yes, all provinces and territories are distinct, including you."

Based upon the newspaper commentary, the British Columbia agenda has "equality rights" set down for the third stage -- which would be around 1993. It is difficult to know what this envisions. The point is not that women want the Meech Lake Accord to improve upon what is already in the Charter -- they just don't want it to make things worse. If that point is understood, there is little sense in putting the issue on the agenda for the somewhat distant future, long after the deed has been done.

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*Lynn Smith, Professor of Law, University of British Columbia.*
*(This is the text of a public lecture sponsored by the Centre for Constitutional Studies and delivered at the University of Alberta, March 10, 1988)*

**(The New Abortion Legislation Continued from Page 8)**

Charter in Andrews v. Law Society of British Columbia[6], also invites an analysis of women-specific legal prohibitions in equality terms. In fact, equality rights analysis promises to be an important part of a distinctly Canadian approach to women's rights in reproduction-related matters. While the application of a woman's rights may become more complex if she is pregnant, any accommodation or balancing with Parliament's interest in fetal life should be done at the s.1 stage and not constructed as an inherent limitation on a woman's vested and inalienable Charter rights.

**4. Conclusion**

If Bill C-43 becomes law there may not be the race to the courts which many people anticipate. Proponents of constitutional rights for the fetus may be discouraged by the Supreme Court's decision in Daigle v. Tremblay. As well, groups advocating that women's constitutional rights apply in the abortion context may wish to wait and see how the legislation works in practice - to build the evidentiary record which will be so necessary to support claims that the law operates outside the principles of fundamental justice (s.7), places a disadvantageous and unequal burden on women (s.15), or is an improper fit between legislative means and ends (s.1).

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1. [1989] 1 S.C.R. 342.
2. [1988] 2 S.C.R. 1
3. Unreported, Supreme Court of Canada, No. 21533, November 16, 1989.
4. Ford v. Attorney-General of Québec (1988), 54 D.L.R. (4th) 577.
5. [1989] 1 S.C.R. 1219.
6. [1989] 2 S.C.R. 143.

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**(National Security continued from page 22)**

1. The Canadian Security Intelligence Service Act, RSC 1985, c.C-23, ("CSIS Act").
2. See Canada, Commission of Inquiry Concerning Certain Activities of the RCMP (the "McDonald Commission"), Freedom and Security Under the Law, Second Report and Certain RCMP Activities and the Question of Governmental Knowledge, Third Report (Ottawa: Supply and Services, 1981).
3. While some of the most intrusive techniques of surveillance require judicial authorization, judges determine whether the circumstances fall within the statutory criteria for permissible surveillance, not whether they believe there is a genuine threat to Canada's security.
4. While there is subsequent exemption for "lawful advocacy, dissent or protest" in section 2 of the CSIS Act, it is unclear whether the exemption would prevent CSIS from monitoring such lawful activities as fundraising or commercial negotiations.
5. Security Intelligence Review Committee, Annual Report, 1988-1989 (Ottawa: Supply and Services, 1989) p. 34.
6. Ibid. p. 32.
7. Ibid. p. 34.
8. McDonald Commission, Freedom and Security Under the Law, Second Report, Vol. 1, pp. 414-415, 432.
9. Ibid. p. 433.
10. Ibid. p. 43.

Opinion

# STRIKING THE BALANCE: NATIONAL SECURITY V. THE CHARTER

Catherine Gilbert

Are you now, or, in the past five years, have you been a member of a Canadian peace group? If so, Canada's spy agency may have tapped your phone, opened your mail or secretly searched your home. How can this happen in our democracy which prides itself on a system of government characterized by the freedoms of political dissent and association? It happens in the name of national security and it is a reality that deserves a closer look.

Canada's spy agency, the Canadian Security Intelligence Service (CSIS), was created in 1984 as a civilian security agency separate from the Royal Canadian Mounted Police (RCMP) and with no law enforcement responsibilities.[1] CSIS is monitored by an independent review committee (SIRC) and is now undergoing parliamentary review, five years after its creation.

The spy agency was established in response to the central recommendation of the McDonald Commission. This federal Commission of Inquiry was created in 1977 to determine the extent of illegal acts carried out by the RCMP and to make recommendations for the restructuring of Canadian intelligence operations. During the four year inquiry, Canadians learned that members of the RCMP were involved in a number of illegal activities, including burglary, arson, theft, mail opening, and invasion of tax files. The McDonald Commission recommended that a security intelligence agency should be established by an Act of Parliament which would define the agency's mandate and powers, and provide for accountability and review.[2]

CSIS's primary functions are to collect information on activities constituting "threats to the security of Canada" and to report this information to the government (s.12). How does CSIS collect such information? It can use open sources such as newspapers and published government reports. But CSIS is also authorized to use a number of techniques commonly referred to as intrusive surveillance. Under a judicial warrant, CSIS is authorized to wiretap conversations, open mail, gain access to confidential files, and secretly search property. Without any warrant, CSIS may use covert informants and infiltrators (s.21(3)).[3]

In Canada, the Charter of Rights and Freedoms sets out our democracy's basic rights to freedom of expression and association, the right to security of the person and the right not to be subject to unreasonable search and seizure. Canadians are entitled to exercise these rights without interference, subject only to reasonable limits that can be demonstrably justified in a free and democratic society.

The freedoms expressed in the Charter may be limited by the intrusive surveillance powers of CSIS. Clearly, there are arguments to be made that a Canadian's right not to be subject to an unreasonable search might have been infringed when a governmental spy agency covertly searched his home, or that the right to security of the person might have been violated when conversations were wiretapped, or that the right to freedom of association might have been limited when a member of CSIS infiltrated an organization for the purpose of informing. Powers of surveillance undoubtedly have a chilling effect on the exercise of such freedoms. Citizens become fearful of participating in meetings, signing petitions or voicing their opinions when they believe these activities could render them subject to surveillance.

If CSIS's intrusive surveillance powers limit Canadians' rights under the Charter, are they justifiable as reasonable limits on our freedoms?

The justification for giving CSIS the right to exercise these powers is national security. CSIS is authorized to use its powers of intrusive surveillance to monitor activities only when it considers such activities to be "threats to the security of Canada". What are these "threats"? Generally, the Act defines four categories: (a) espionage and sabotage, (b) foreign influenced activities, (c) violence for political objectives and, (d) subversive activities intended ultimately to lead to the overthrow of Canada's government (s.2). But these definitions are worded so broadly that CSIS has the right to wiretap phones, open mail and search homes even where there is no suggestion of illegal activity or a threat to our national security.[4]

We can look at one of the definitions for an example. Section 2(b) allows CSIS to use intrusive surveillance to monitor "foreign influenced activities...that are detrimental to the interests of Canada and are clandestine or deceptive". "Influence" can cover a wide range of activities. And what does it mean to be "foreign influenced"? If a Canadian subsidiary receives directions from its American parent, is it foreign influenced? And what is the meaning of "detrimental to the interests of Canada"? Cultural interests, political interests, economic interests? If the Canadian subsidiary receives instructions which enable it to negotiate a contract with the Canadian government on terms which favour the American business, might this not be considered "detrimental to the interests of Canada"? Could the Canadian company's officers be subjected to wiretapping, covert searches and mail opening? Of course, these activities must also be "clandestine or deceptive", but there are elements of secrecy and even deception in many commercial transactions.

And what other "foreign influenced activities" might be considered "threats to the security of Canada"? What

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**(National Security v. The Charter Continued)**

political or social movements might be vulnerable to surveillance? Consider the activities of a Canadian environmental group which meets with its British counterpart to learn of methods for eliminating Canada's fur trade and strategically keeps its new-found methods quiet. Would this environmental group be considered to be carrying on foreign influenced activities which are detrimental to Canada's interests because it is attempting to eliminate one of our industries?

The discussion of surveillance of Canadian social movements is not purely hypothetical. SIRC recently reported that CSIS had invoked the "foreign influenced activities" definition of threats to the security of Canada to monitor members of the Canadian peace movement.[5] Apparently, when CSIS inherited RCMP files on many Canadians who belonged to peace groups, CSIS concluded that nearly all the inherited files fell within its mandate because of suspicion of foreign influence, specifically Communist influence.[6] While a number of changes have been made in the last two years to limit the number of files on ordinary Canadians, and in particular those within the peace movement, SIRC suggests that some CSIS investigators still believe that "espousing the views of the Soviet Union, particularly if it is done in an apparently covert way, is automatically detrimental to Canadian interests and therefore targetable". These investigators view anything that can be construed as reflecting Communist influence as, in itself, dangerous to Canada's security.[7]

Democracies have traditionally restricted the use of intrusive surveillance unless law breaking was involved. Under Canada's Criminal Code, for example, there cannot be wiretaps, entries, searches, or seizures without reasonable grounds to believe the matters under investigation are actually criminal offences.

The "foreign influenced activities" previously described do not appear to be illegal. If the traditional standard to be met before intrusive surveillance powers are used is a likelihood of illegal activity, why do these activities render Canadians vulnerable to intrusive surveillance? And how can these limits on our rights be justified in the name of national security, when, as indicated above, some of the activities vulnerable to intrusive surveillance are not serious threats to our security?

This is not to suggest that "foreign influenced activities" do not require any surveillance. The McDonald Commission indicated the need for monitoring when it described the underhanded tactics used by foreign agents in their efforts to influence Canada and its political processes: threatening reprisals against overseas relatives of ethnic leaders in Canada, blackmailing politicians, attempting to acquire scientific information for international trade competitors and secretly employing Canadian governmental officials to support the interests of certain foreign governments.[8]

However, these activities are for the most part already unlawful or could be made so with minor amendments. There are prohibitions in the Official Secrets Act and Criminal Code provisions on treason, extortion, bribery and secret commissions. If we permit intrusive surveillance by CSIS only when activities are likely illegal, CSIS would still be able to monitor such foreign influenced activities. And, even if, in order to ensure that more trivial breaches unrelated to security are not invoked, we limited CSIS's ability to monitor activities only where there are serious security-related breaches of the law involved, CSIS would still be able to monitor the tactics used by foreign agents.

The McDonald Commission described another measure used by foreign governments, that of secretly funding a political party, movement or group.[9] This tactic would not appear to meet a standard of serious security-related illegal activity. But is it justifiable to use intrusive surveillance to monitor citizens because they take money or directions from outside the country? This kind of activity may be capable of harming our political institutions to a certain extent. But, unless the citizens are breaking the law, could they not be dealt with through democratic debate? Perhaps we should have more confidence in our democratic processes and allow such citizens to be openly condemned by political adversaries rather than subjected to secret surveillance.

By illustrating some of the weaknesses in the legislation which governs CSIS, I am not suggesting that Canada does not need a CSIS or that CSIS should not be authorized to use powers of intrusive surveillance. This would be naive. Our country is just as vulnerable to espionage or terrorism as others.

But the challenge for a security intelligence agency in any democratic society is "to secure democracy against both its internal and external enemies without destroying democracy in the process".[10] In Canada, in particular, the challenge is to meet the test of the Charter by putting, for reasons of national security, only reasonable limits on the rights Canadians are entitled to exercise in our democracy.

CSIS's ability to monitor intrusively the lives of Canadians strikes at the very heart of our democracy. It deserves our closest attention as we strive to find the best balance between national security and fundamental freedoms.

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Recent Developments

# EDMONTON JOURNAL v. ATTORNEY GENERAL OF ALBERTA

June Ross

The value to our society of freedom of the press received an important acknowledgement by the Supreme Court in the recent decision of Edmonton Journal v. Attorney General of Alberta.[1] While the direct result of the case will have little impact, as it involved an archaic and generally ignored law, the Court's emphasis of the importance of this freedom and of the public reporting of court proceedings will hopefully influence future decisions pertaining to more controversial issues.

The case involved challenges to two provisions of the Alberta Judicature Act[2]: a permanent publication ban relating to matrimonial court proceedings in s.30(1), and an interlocutory publication ban relating to all civil proceedings in s.30(2). Both had been upheld by the Alberta Queen's Bench and Court of Appeal.[3] Both were struck down by the Supreme Court of Canada. All seven judges who took part in the decision agreed that s.30(2) was unconstitutional, and four of the seven reached the same conclusion with regard to s.30(1).[4]

The first constitutional question before the Court was whether the publication bans infringed s.2(b) of the Charter. The Trial Judge had found that s.2(b) was not infringed, or in the alternative, that any infringement was justified under s.1. The Court of Appeal disagreed with the first conclusion, applying a "valued activity" test to find that the guarantee in s.2(b) extended to protect reports of judicial proceedings. By the time the case was argued in the Supreme Court the Court had issued its decision in Ford v. Attorney General of Quebec[5] which, together with the subsequent case of Irwin Toy Ltd. v. Attorney General of Quebec[6], established a broad definition of the scope of freedom of expression. It is thus not surprising that the Attorney General conceded this point, nor that the majority judgment of Cory J. found that "there [could] be no doubt" that s.2(b) had been infringed.[7]

The first issue addressed in the majority judgment was the importance of s.2(b) and the reporting of court proceedings. The reason for this discussion is not clear, given the concession referred to above. What seems likely is that the majority implicitly recognized, as Wilson J. explicitly stated in her concurring judgment, that a guaranteed right or freedom may have different degrees of importance or value in different contexts, and that these can affect the application of the s.1 test. The implicit acceptance of this notion is supported by the following points in the majority judgment:

(1) The fact that the judgment included a substantial discussion of the value of s.2(b) in context, when an infringement had been conceded, suggests that the value and the context must be relevant to the only remaining issue, namely the application of s.1.

(2) The majority focused on the relationship of freedom of expression to the proper functioning of democratic institutions, including the courts, and held in this context that s. 2(b) rights should "only be restricted in the clearest of circumstances".[8]

(3) The application by the majority of the s.1 test was strict, including a detailed review of both purported objectives and potential alternative measures. Evidence was found to be required and absent, and no deference to the legislature was indicated.

(4) Both the Irwin Toy[9] and Edwards Books[10] decisions were distinguished with regard to their less strict application of s.1. The majority justified this distinction on the basis that the legislation in issue was different than that in the Irwin Toy and Edwards Books cases which struck "a balance between the claims of competing groups"[11] or attempted to improve "the condition of less advantaged persons".[12] In contrast, the Judicature Act required a balancing of "the interest of society as a whole in freedom of expression and the right of the public to know of court proceedings against the bans imposed on publication".[13] Yet, surely this legislation could have been characterized as protecting a vulnerable group, namely those persons required to resort to the courts for the resolution of matrimonial disputes with interests in privacy, from a group with competing interests, namely the media or the interested public.[14] It seems that the different approaches to s.1 cannot be wholly explained by the nature of the challenged legislation, and that the nature of the affected right or freedom may also be relevant.

Two additional important points were made in the discussion of the value of s.2(b) and the reporting of court proceedings. Firstly, with regard to the purposes served by an open court system, Cory J. considered the public interest in observing the operation of the courts, not only from an external perspective, but also its internal significance to the courts themselves. An open examination of witnesses is "more conducive to the clearing up of truth" than would be private proceedings.[15] This point was further elaborated in the decision of Wilson J., who noted that openness improves the quality of testimony in two ways: by the pressure of public opinion; and by the fear of exposure of false testimony should informed persons hear of it and provide contradictory evidence.

This willingness to look at the purposes of an open court system broadly within the context of s.2(b) contrasts with the approach in Canadian Newspapers v. Attorney General of Canada.[16] In that case the Court, in overturning an Ontario Court of Appeal decision that a mandatory ban on the disclosure of a rape complainant's name unjustifiably

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**(Edmonton Journal v. Attorney General Continued)**

interfered with freedom of the press, refused to give any weight to the possibility that publication of the name of the complainant might bring forth witnesses with helpful testimony. The Court held that this would be of relevance only when determining the degree of impairment of an accused's right to a fair trial and not when considering an infringement of freedom of the press. The position in the Edmonton Journal case better protects the broad public interest in open courts, which foster not just public knowledge and the public ability to criticize, but also the fair and proper operation of the courts.

Secondly, while the Supreme Court did not suggest that freedom of the press conferred any different or greater rights than freedom of expression, the press' role as a surrogate for the public was emphasized. Through the press, and largely only through the press, is the general public able to exercise its right to receive information, in this instance about the court system, a right which is equally protected under s.2(b) as is the right to communicate information.[17] The position of the press as a surrogate, and the need for it to be able to fulfil this role effectively, may form the basis for special applications of s.2(b) relating, for instance, to the use of recording devices or cameras.

The Court then turned to the effect of the publication bans. The majority found that the permanent ban on the reporting of matrimonial proceedings had a sweeping effect, as it would encompass proceedings pertaining to custody of, or access to, children, division of property, and payment of maintenance. Relating to these issues of public importance, the ban would prevent the public from learning what kind of evidence was likely to be called and what kind of questioning could be expected. Even comments of counsel and the presiding judge would be excluded from publication. Thus the public might be prevented from discovering improper or biased remarks that suggest that the legal system is not reflecting enlightened social policy. With regard to the interlocutory publication ban for civil proceedings, the Court found that this created "an almost total restriction on providing information pertaining to pleadings or documents filed in civil proceedings", including those involving matters of administrative law or constitutional law, even though these may have "a vital impact on the lives of all the residents of the province".[18]

The dissenting judgment of Laforest J. construed the effect of the permanent publication ban applicable to matrimonial proceedings more narrowly, as "confined to the broad publication of details of particulars of the evidence",[19] and not applicable to comments of counsel or judges. This construction was essential to the dissent's conclusion that the ban was justified under s.1.

The final issue addressed was the application of s.1. The Attorney General submitted there were three objectives of s.30(1) of the Judicature Act. Firstly, it was intended, at least historically, to protect public morals. The majority found that this objective "must be reviewed by current standards" and did not "remain pertinent in today's society".[20] The dissenting judgment also did not rely on this objective in its s.1 analysis.

The second objective was to ensure access to the courts by persons wishing to litigate matrimonial matters who might be deterred by the knowledge that their cases could be publicized. Again there was evidence that this was historically an aim of the legislation, and also that the legislation may have at one time been successful in pursuing that aim. However, while the dissent was prepared to take judicial notice that the "inhibitory effect of publicity ... continues to be a relevant factor"[21] the majority was not prepared to take account of this objective in the absence of evidence that elimination of the ban would deter litigants in modern circumstances.

The third objective, the protection of privacy, was recognized by all judges to be of self-evident importance. It is interesting that all of the judges felt that this was an important objective as it related not only to the privacy of children and witnesses, but also to the privacy of the parties to the proceedings. This contrasts with the Court of Appeal decision in the case,[22] and with the British Columbia Court of Appeal in Re Hirt and College of Physicians and Surgeons of British Columbia,[23] both of which focused on the

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