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STARR TREK: THE UNFINISHED MISSION

Dale Gibson

In the celebrated Patty Starr case[1], the Supreme Court of Canada was asked to determine two important constitutional matters; (a) the extent of provincial competence to authorize investigation of allegedly criminal conduct by a commission of inquiry; and (b) the extent to which such investigations are constrained by the Canadian Charter of Rights and Freedoms. The majority of the Court completed the first part of the assignment, but declined to deal with the second, and probably more important, issue.

Patricia Starr was alleged to have diverted charitable funds to political parties and to have sought in return political favours on behalf of a corporation with which she was associated. Investigation of these allegations by the police and others was under way when the resignation of a high-ranking aide to the Premier of Ontario, in face of media claims that he was involved in the Starr affair, caused the Premier to appoint a Commission of Inquiry. Mr. Justice L. W. Houlden of the Supreme Court of Ontario was commissioned to investigate and report, on among other things, whether:

> there is sufficient evidence that a benefit, advantage or reward of any kind was conferred upon an elected or unelected public official or upon any member of the family of any elected or unelected public official, or ... that there was [an] agreement or attempt to confer a benefit, advantage or reward of any kind upon an elected or unelected public official or upon any member of the family of an elected or unelected public official. (Order in Council, 6 July 1989)

The Commissioner was prohibited from making any findings of guilt against anyone, but was empowered by the Public Inquiries Act of Ontario[2] to order any person to give evidence.

Ms. Starr objected that this potential obligation to testify conflicted with her right to stand silent in any criminal proceedings that subsequently might be commenced against her, and she sought a ruling from the courts that creation of the Commission of Inquiry violated the Constitution. After losing before both the Divisional Court and the Court of Appeal of Ontario, she was successful in the Supreme Court of Canada.

Starr's victory in the Supreme Court was based on a finding that the Commissioner's terms of reference extended beyond the province's constitutional jurisdiction over administration of justice in the province into the exclusively federal domain of criminal law and procedure.

In so ruling, Lamer J., who wrote for the majority, clarified previous rulings concerning the power of provincial legislatures to authorize public inquiries into matters touching upon criminal justice. He acknowledged that the provinces' responsibility for administration of justice in the province

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(Starr continued)
empowers them to legislate for the establishment of public inquiries concerning: the conduct of institutions and officers of justice[3]; the general state of crime and criminal investigation in the province[4]; particular crimes or alleged crimes (provided that particular persons are not accused)[5]; and the causes of unexplained deaths[6]. However, he explained, "the inquiry process cannot be used by a province to investigate the alleged commission of specific criminal offences by named persons". This is not to say that provinces may never authorize the investigation of specific crimes alleged to have been committed by particular individuals, but only that in those circumstances federally-established criminal procedures must be followed rather than the provincial inquiry process.

In the view of Lamer J. and his colleagues, the Starr inquiry attempted to intrude more deeply into the area of criminal investigation than these guidelines permit. After noting that the Commissioner's terms of reference expressed the allegations of wrongdoing in language that closely approximated Section 121 of the Criminal Code of Canada, and that it named specific persons, Patricia Starr and Tridel Corporation Inc., as being allegedly involved, Lamer J. continued:

> ...[T]he combined and cumulative effect of the names together with the incorporation of the Criminal Code offence... renders this inquiry ultra vires the province. The terms of reference name private individuals and do so in reference to language that is virtually indistinguishable from the parallel Criminal Code provision. Those same terms of reference require the Commissioner to investigate and make findings of fact that would in effect establish a prima facie case against the named individuals sufficient to commit those individuals to trial for the offence in Section 121 of the Code. The net effect of the inquiry, although perhaps not intended by the province, is that it acts as a substitute for a proper police investigation, and for a preliminary inquiry governed by Part XVIII of the Code, into allegations of specific criminal acts by Starr and Tridel.

He later observed that the inquiry had been established while a police investigation into the allegations was ongoing. Madame Justice L'Heureux-Dubé, who dissented, treated this third factor as being integral to the majority ruling, but this does not appear to have been the case. A few paragraphs after referring to the police investigation, Lamer J. reiterated that his conclusions were based on the "two key facts" that two accused persons were named, and that the allegations bore a "striking resemblance" to the wording of the Criminal Code.

L'Heureux-Dubé J. was of the view that the inquiry did not trench upon federal jurisdiction over criminal law. She pointed out in her dissenting opinion that the Criminal Code and the provincial order-in-council had "completely different objectives". While this observation is true it fails to take account of the fact that the effect of legislation is as important to its constitutionality as its objectives. She also accused Lamer J. of engaging in "semantic gymnastics" in order to distinguish the Starr inquiry from investigations that had been previously held to be within provincial jurisdiction. This was unfair. The case law was, for the most part, compatible with the majority's conclusion that provincial inquiries may investigate specific crimes so long as specific suspects are not identified; and that they may focus on particular suspects if the allegations concern matters under provincial jurisdiction rather than Criminal Code offences.

But what do the majority's distinctions accomplish in the long run? Do they materially advance the development of Canadian constitutional law? One way of attempting to answer this question would be to consider whether a provincial government faced with a future situation identical to the Starr imbroglio could carry out a provincial inquiry into the matter in spite of the ruling in the Starr case. I believe it could.

There are at least two ways in which a controversy like the Starr affair could be provincially investigated under terms of

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reference only slightly altered from those that were struck down in the Starr case.

The first of these expedients would be to avoid the language of criminal law when framing the accusations to be investigated, and focus instead on a subject clearly within provincial jurisdiction, such as the "ethical obligations" of provincial politicians and civil servants. The other would be to generalize the accusations of wrongdoing. Rather than being asked to look into specific crimes by specific people the inquiry could be directed to investigate such general matters as: "the extent to which politicians or civil servants have been subjected to attempts to influence the exercise of their responsibilities", or "the extent to which charitable organizations or their resources have been involved in attempts to influence the behaviour of politicians or civil servants." In short, the obstacles raised by the Starr decision to the use of provincial commissions of inquiry to investigate allegations of wrongdoing are capable, in large measure, of being surmounted by careful legal drafting.

Why then did the country's highest and hardest working court take such pains to re-articulate the parameters of the provincial investigatory power? Probably because it was concerned with the unfairness of subjecting identifiable suspects to public scrutiny without the safeguards, such as the right to stand silent, embedded in the normal procedures of criminal law. There are several hints in Lamer's reasons for judgment that the majority judges were motivated by such concerns.

If so, the majority's refusal to consider the impact of the Charter was most unfortunate. While it is true that a more diffuse public inquiry, with less emphasis on the language of criminal law and on the wrongdoing of specific persons, would be less likely than the Starr inquiry to undermine accuseds' rights, it is difficult to conceive of any meaningful public inquiry into allegedly criminal conduct that would not indirectly place those rights in considerable jeopardy. The Royal Commission of Inquiry into infant deaths at Toronto's Hospital for Sick Children in 1980-81, which led to the Ontario Court of Appeal decision in Re: Nelles and Grange[7], for example, resulted in so much public attention being focused on nurse Susan Nelles that the Court of Appeal's ruling preventing the Commissioner from "naming names" offered Ms. Nelles little real protection. Given the general public's inability to distinguish between the technical phraseology of criminal law and other accusatory language, the wording of the charges is not very significant. And, since even broadly-mandated investigations (such as the McCarthy-era witch hunts in the United States) can spotlight particular individuals, the requirement to generalize the questions under investigation offers only scant protection for the rights of potential accused persons. In view of their apparent concern for the fair treatment of such persons, the majority ought to have dealt with the issue frontally, by ruling upon Starr's arguments that the inquiry would violate her rights under

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DONALD V. SMILEY (1921-1990)

Donald Smiley, one of Canada's pre-eminent social scientists, died recently in Toronto. A member of the Centre for Constitutional Studies' Advisory Board, Smiley was at the time of his death a Distinguished Research Professor at York University in Toronto. He held faculty positions at the University of British Columbia (1959-1970) and the University of Toronto (1970-1976) before joining the Department of Political Science at York. A Fellow of the Royal Society of Canada, Smiley edited the well respected journal, Canadian Public Administration, from 1974 to 1979.

Smiley had close ties with the University of Alberta. He received three Alberta degrees including a Master of Arts in 1951 in what was then called Political Economy. He was proud of his affiliations with the university and was always interested in developments and happenings here. Smiley was particularly encouraged by the establishment of the Centre for Constitutional Studies which he saw as an important new part of the Canadian scholarly scene.

Don Smiley contributed enormously to our understanding of Canadian federalism. Throughout his scholarly career he was intrigued by the interplay between federalism, cabinet government and the resolution of complex public policy issues. He saw Canadian politics as being governed by three perennial dynamics–between Canada and the United States, between Québec and the rest of the country, and between the heavily populated industrialized centre and the outlying provinces. Smiley was also one of the first Canadian scholars to think deeply and creatively about the capacity of national political institutions to accommodate and to reflect regional political identities and aspirations. He was deeply concerned about the impact of "executive federalism" on the quality of democracy and governmental accountability. The frequent citation of his bountiful scholarship in the debate about the Meech Lake Accord attests to the breadth and the depth of his insights.

Like most outstanding scholars, Smiley was intellectually curious. He read broadly and remained interested in economics, law, and sociology as well as purely political matters. He was keenly interested in political developments abroad particularly, but by no means exclusively, in the other established federations, notably the United States and Australia. As a result, his scholarship ranged broadly to embrace such diverse topics as the role of the state in economic development, the politics of national political leadership conventions, nationalism, and democratic theory. Smiley also had an abiding interest in civil liberties and the changing constitutional, legal, and political relationships between individuals and governments in the face of the active state. Even with the advent in 1982 of an entrenched Charter of Rights and Freedoms, his classic 1969 essay entitled "The Case Against the Canadian Charter of Human Rights" deserves to be read carefully by thoughtful Canadians.

Donald Smiley's publications exerted an obvious and great impact on the perspectives, ideas and research agendas of a generation of Canadian scholars. But to assess his contribution exclusively by this criterion would be misleading. For Smiley made his presence felt in innumerable, less visible ways. He was a dedicated teacher, an effective graduate supervisor, and an enlightened contributor to the increasingly complex debates of professional associations. Honest, straightforward and often outspoken, he stimulated and invigorated those in contact with him, particularly junior scholars whose careers were bolstered by his enthusiasm and support. He will be missed.

Allan Tupper
Professor and Chairman
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University of Alberta

(Starr continued)
Sections 7, 8, 11, and 13 of the Canadian Charter of Rights and Freedoms.

Because she was of the view that the inquiry did not invade federal jurisdiction over criminal law, Madame Justice L'Heureux-Dubé was forced to consider the Charter challenge in her dissenting opinion. She rejected that challenge.

So far as the corporate claimant was concerned, she was content to hold that corporations are not capable of exercising the Charter rights in question. She appears to have overlooked section 11 (d) of the Charter (the right to a "fair trial"), which was asserted in argument and which would seem as appropriate a protection for corporations as for human persons. So far as Ms. Starr was concerned, L'Heureux-Dubé J. acknowledged that the Charter was applicable, but found that no Charter rights would be violated by the inquiry. She rejected the argument that Starr's "liberty" under Section 7 of the Charter would be infringed because:

> if one were to accept this line of argument then all inquiries that may eventually be connected to some subsequent criminal proceedings would be constitutionally infirm.

The obvious flaw here is that since Section 7 is not absolute, and permits deprivations of liberty which do not offend "principles of fundamental justice", it would be only those inquiries which failed to observe fundamental justice that could be invalidated by Section 7. Justice L'Heureux-Dubé's failure to consider the question of "fundamental justice" at all deprives her conclusion about Section 7 of much weight.

The strongest Charter argument advanced on behalf of Ms. Starr was based on her right under Section 11 (d) of the Charter to "be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal." Although that right applies only to a "person charged with an offence" (in contrast to the guarantee of "fundamental justice" in Section 7 which is not restricted to criminal proceedings), the right would be a mockery if it could not be applied to prevent governmental actions taken prior to the laying of formal charges which had the effect of preventing a fair hearing once charges were laid. Compelling a potential accused person to testify before news media to which potential judges and jurors have uncontrolled access is surely inconsistent with the guarantee contained in Section 11 (d). At any rate, it is a question that deserves the earnest attention of the Supreme Court of Canada. The consideration that L'Heureux-Dubé J. gave to the question was almost as perfunctory as that which she gave to Starr's Section 7 argument:

> Concern was expressed as to whether Ms. Starr could ever hope to undergo a fair trial should criminal charges ever be brought, particularly as a result of her media exposure. Yet Ms. Starr was being discussed, if not accused, by the media well before the legislature contemplated setting up an inquiry or pursuing any investigation whatsoever. If anything, the flexibility of the inquiry would enable her to clear any alleged blemishes to her reputation as a result of media exposure. The Commission will have to hear her. The media owe her no such duty.

Even if one disregards the confirmatory and aggravating effect a public inquiry can have on media accusations (the McCarthy hearings again come to mind), this analysis is crucially deficient in overlooking the power of commissions of inquiry, which news media do not possess, to compel persons under investigation to testify.

The constitutionality of compelling potential accused persons to testify publicly about allegedly criminal behaviour before the laying of criminal charges was the most important legal issue raised by the Starr case, and the issue was fully argued before the Court. It is acutely disappointing, therefore, that only the dissenting judge faced the question squarely, and that she did so in a very casual fashion. The commission of inquiry in this case was sometimes described jokingly in the media as a "Starr Chamber". While the ruling of the Supreme Court put an end to the particular inquiry, it did little to protect against the dangers of future provincial Star Chambers. To shift puns, Starr-light sheds insufficient illumination on the rights of witnesses before provincial inquiry commissions. The Charter issues that were given such short shrift in the Starr case will have to be re-considered by the Supreme Court of Canada before those rights can be fully understood.

It is interesting to note that the majority and dissenting judgments in this case were authored by the two judges who, at the moment of writing, are the leading candidates to replace Brian Dickson as the Chief Justice of Canada. The reasons of Mr. Justice Lamer exhibit a libertarian impulse, but a rather short-sighted approach to constitutional decision making. Those of Madame Justice L'Heureux-Dubé indicate a disturbing insensitivity to the rights of individuals caught up in the inquiry process. The broadly expository and cautiously rights-conscious style that characterized the best constitutional decisions of the "Dickson Court" is not evident in either approach.

Dale Gibson, *Professor, Faculty of Law, University of Manitoba; Belzberg Visiting Professor of Constitutional Studies, University of Alberta, 1988-91.*

1. Starr, et al v. Houlden [1990] S.C.J., No. 30, April 5, 1990.
2. R.S.O. 1980, c. 411, s.7(1)
3. Keable v. Attorney General of Canada, [1979] 1 S.C.R. 218; O'Hara v. British Columbia, [1987] 2 S.C.R. 591.
4. Di Orio v. Warden of Montréal Jail, [1978] 1 S.C.R. 152.
5. Re: Nelles and Grange (1984), 46 O.R. 210 (Ont. C.A.).
6. Re: Nelles and Grange, ibid.; Faber v. The Queen ,[1976] 2 S.C.R. 9.
7. Supra, fn.5.

Soviet Constitutional Developments

ALEXANDER M. IAKOVLEV *in conversation with* L.C. GREEN

The following is an edited transcript of a conversation between Professor Alexander M. Iakovlev and Professor L.C. Green. Professor Iakovlev is Head of the Department of Theory and Sociology of Criminal Law, Institute of State and Law, Academy of Sciences of the U.S.S.R. He is a People's Deputy, and a member of the Congress of People's Deputies, of the U.S.S.R. and a member of the standing committees on the legislation, Criminal Justice Reform, and committee to draft a new soviet constitution under the Supreme Soviet of the U.S.S.R. Professor Iakovlev was at the University of Alberta in February 1990 to deliver the 1990 Ronald Martland Lecture. Professor Green is a renowned scholar in the law of international relations and University Professor at the University of Alberta. This conversation pre-dated a number of recent developments in the Soviet Union and therefore represents the state of affairs there as of February 1990. [ed.]

Green: Professor Iakovlev, I know that your real interests are in criminology but there are many issues in connection with the Soviet Constitution that would be of general interest and if you are agreeable, I would like to discuss some of these with you. Article 6, for example, guarantees the privileged position of the Communist Party within the Soviet Constitution. Reports now are that Article 6 is being amended or repealed. Would you agree that by requiring the amendment of Article 6, the entire Soviet Constitution requires amending?

Iakovlev: I think the amendment of this article is of no small significance. But I draw your attention to the fact that prior to 1977 there were no such provisions in the Soviet Constitution yet the party unquestionably was the one and only ruler.

G: The Congress of Deputies was called upon to consider the introduction of a presidential system. The rumour is that Mr. Gorbachev will cease to be Secretary General of the party and will become the Executive President. Is it intended that as President he would be in a role akin to President Bush or Prime Minister Thatcher, or more like Mr. Lee Kuan Yew in Singapore? Remember that Kuan Yew has made it very clear that he will be retaining all power to himself. What is the vision for the Soviet President?

I: First of all, about Mr. Gorbachev not being the Secretary General of the Party, I do not see any real possibility that he will resign, at least for the moment. He is one of the top figures reforming the country, and the leader in reforming the Party itself by transforming it into a democratic party which will compete with other parties on an equal footing. I think he will preserve, and I hope will remain the head of, the Communist Party. After all, the leader of the Labour Party might come to power and will not abandon his position as the political leader of the party. The main problem is whether the Communist Party will indeed become a democratic political party or remain a quasi-state body. That is the crucial question.

As for Gorbachev's role, at this time there is not sufficient information available. On previous occasions in the Supreme Soviet, some people proposed and pressed that he have this power but Gorbachev was strongly against it. He said "I do not want to hold this power. I do not want to be accused of trying to preserve my personal power." It was quite a natural and, from my point of view, a very dignified position. Now he is saying something different -- he is saying that times are changing. Perhaps his personal views are changing and that is as far as my information goes.

As for the kind of presidency, I can only discuss this in more or less abstract terms. My personal preference is to have a presidential power in a democratic society. It is, for me, very essential that we have an effective legislative power and independent court systems. That is, to develop simultaneously the three branches of government which would be equal and independent and equalize each other. It is particularly desirable to formulate a real effective legislative power that is the freely elected representative of Soviets from the top to the bottom. If the congress will function effectively, in this situation, the executive may be given a power comparable to the power of the American president. But if the president simultaneously will be usurping legislative power I will be against it.

G: That touches on the body that would be empowered to revise the Soviet Constitution. At the moment the method of selection of delegates to the Chamber of Deputies is done through a pre-selected process whereby you are left with virtually one candidate for every one seat. That means that if we are to have a democratic system, it cannot take place until there has been an amendment to the electoral law. Will the present Supreme Soviet be the body responsible or will there be an electoral commission, and will they be empowered to re-draft electoral laws as distinct from the Constitution?

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(Iakovlev continued)

I: I think that responsibility for redrafting the Constitution is within the power of the Supreme Soviet but is subject to the consequent approval of the Congress. Previous Congresses have considered the specific possibility of making needed improvements in electoral laws. Congress may approve or disapprove. But there is the possibility of changing the Constitution within the Supreme Soviet.

G: Let us assume that we have this very powerful post of Executive President and that Mr. Gorbachev, while Secretary General of the Party, were elected or appointed President. Also assume, for the moment, that the Party were to simultaneously lose an election. What then would be the President's position? With the Secretary General of the Party in a very powerful presidential post and an anti-party majority in legislative power, how would the system adjust or is this where we get to discuss your suggestion of a quasi-democracy?

I: I think that the position of President has some peculiarities attached to it. Consider what happens when the United States Congress is predominantly Democratic and the President is Republican. Even if the members of the Communist Party are not represented in every local Soviet, or other representative bodies, this will not deprive the possibility of the President being the General Secretary of the Party. Nor will he lose the legitimate basis for his being President. Although, of course, it depends on whether he will be elected by the Supreme Soviet, by the Congresses, or by the population at large.

G: At the moment it would appear that the reformist element of the Party seems to be holding on to control by virtue of the loyalty of both the army and the police and, apparently, to the extent that it is important, the KGB. In fact it appears that the KGB embraced democracy far sooner than some other elements of the administration. I want to compare this for a moment with what has been happening in South Africa in the last while. You may recall President DeKlerk said, "We will not use the police for political purposes" yet it appears that the police are somewhat deaf to the instructions of the President. The question is, how solid is the government's control over the police and the army, and how loyal are the police and the army? Is there the same reformist element in their leaderships?

I: First of all, I think that the South African situation is peculiar because of the way in which its society is sharply divided. The reaction of the police force is just a reflection of white supremacy both in the country and in the police force. There are no such distinctions in my country.

Even now we are seeing very good signs in KGB activities. First, the KGB has published the exact number of the people who were persecuted. They are responding to the demands of, and even helping, people who are organizing the memorial movement which commemorates the victims of Stalinist terror. The need to put an end to the uncontrolled activity of the KGB is on the agenda of the Supreme Soviet. I do not see any vested interests which will stimulate these forces to act against the Constitution. However, the KGB always deserves to be watched. Democracy is a process and process needs to be constantly reinforced. It is not a finished building. As political activity is on the rise, so will political activity continue and so will the activity of People's Deputies. It is in the political views of the people that lie the main hope and the main force to control any governmental body.

G: If there are all these constitutional changes it will obviously mean that there will be fundamental changes in, what you and I might describe as, Soviet jurisprudence; the legal philosophy of the State itself. Many of the books now being written on Soviet law, or just recently published, can be reviewed with one sentence: out-of-date. Particularly books that deal with the legal position of the Party. If there is a rejection of the current Soviet theory of law, what I might call the Vyshinsky theory of law or the international law of Tunkin fifteen years ago, is there any possibility of seeing a return to the legal theories of the transitional period? I have in mind, of course, Pashukanis with his Marxist theory of law, Korovin, and others who were victims of Stalin and now have been rehabilitated.

I: My impression, and my desire, is to see Marxism itself not as an all-embracing ideology but as a serious school of philosophical thought. We would study it exactly as we would any philosophical school. The history of Soviet law, if it merits being called law at all, would be studied as an attempt, or embodiment, of the Marxist interpretation of law. Look at Marx himself. In one of the Marx's earlier writings he wrote about the law as being a measure and the being of freedom - that is also Marx, if you like.

G: It has now been agreed that the Stalin/Hitler pact with regard to the Baltic countries was illegal. The argument at present is whether the three Baltic Republics, despite the fact that their annexation was illegal, nevertheless should remain parts of the Soviet Union. We are also seeing nationalist uprisings in Azerbaijan by the Armenians, and to a lesser extent in the Ukraine and in some of the Islamic Republics. How do these events fit in with conceptions of freedom, human rights, and self-determination? Will there be a right to secession? Will the Union become a federation?

I: This is the central problem for the future development of the whole State. I would like to mention at least three points. First, from a purely legal point of view, the right to separate should be stated unequivocally in the Constitution. Then one will not be able to deny the right of any republic to separate from the State. Secondly, there are no legal mechanisms for putting such a choice into effect, by making it workable, democratic, peaceful, and so on. We need legal instruments which will provide for the mutual regarding of the interests which may be involved in connection with this decision. A lot of different interests may be involved. Third, for better or for worse the Soviet Union was developed as a whole, united union and not as a federation. The economy was not developed in a way which reflected the local situations in certain Republics. It was centrally controlled, so that all parts of the Soviet Union are very tightly tied up in a predetermined fashion through economic channels which were laid out for them. For example, the oil from Siberia goes to Lithuania. The crop from the Ukraine goes to Azerbaijan, and the cotton from Uzbekistan is converted in Lithuanian factories into fabric, and so on. Just severing these ties will bring immeasurable and inevitable economic disaster. Of course, this reality must not be used as a pretext to refuse a right to separate. I hope that restructuring will create the basis for a real federation, moving through a false federation into real federation, and that we will discuss the conventions which may be the foundation for a new democratic state. We will develop these mechanisms for secession I have been speaking about, and simultaneously transform the economy by way of a free market economy. My hope is that all of the Union, as a common market, will produce a democratic way. From my point of view, the free market is the greatest liberator of nations.

G: That is an interesting statement.

I: It permits the preservation of serenity, political autonomy and cultural identity in Western Europe without paying special attention to borderlines. It is paradoxical that Europe is now striving to become a confederation. It would be quite illogical if its neighbour tried to separate into feudal models.

G: If you are moving towards this new democracy does this mean that we are now likely to see the Soviet Union abandon its old policy and become a party to the various international conventions on human rights. I refer back to Litvinov's statement with regard to the Permanent Court of International Justice as only a court, and that only archangels can judge the Soviet Union. Would this mean that your attitude towards international law in general, the International Court of Justice, human rights, and fundamental freedoms will move along the way in which we hope?

I: Exactly. I think the permanent and biggest results of the new thinking were achieved in two spheres: first, internal political freedom in my country, and, second, the quite new international relations outside the country. So, the era of Vyshinsky and other similar views, is practically at an end. Of course, other avenues are being explored. Now that our state, as well as Hungary and Poland, is being granted status as guests at the European Parliamentary Assembly, and I have attended one of its sessions, is a very good beginning. The idea of one whole European law, so to speak, is a very productive one.

One significant document is the draft foundation for criminal legislation. You may find there an article providing that any international treaties which were signed by the Soviet Union have authority, and that there is an obligation that this criminal law be in accordance with internationally recognized treaties. This was in the draft legislation and I think it will be preserved. I have in mind that this be transferred to the Constitution itself.

G: That would be wonderful because, as you know, one of Prime Minister Thatcher's big problems is that she refuses to enact legislation to give effect in England to the European Convention on Human Rights. This is why England is always being taken to the European Court and always losing.

I: When the channel is under storm, as Mrs. Thatcher might say, then Europe is isolated from England.

G: That is a good way in which to end our discussion.

On 13 March 1990, Article 6 of the Soviet Constitution was repealed and, two days later, Mr. Gorbachev was elected the Soviet Union's first President by the Congress of People's Deputies. On 3 April 1990 the Supreme Soviet passed a new law providing for secession by republics. It requires, among other things, a two-thirds majority vote of the population, approval of the Soviet legislature, and a five year transition period. [ed.]

Opinion

PARADISE POSTPONED

Allan C. Hutchinson
Andrew Petter

The decision of the Supreme Court of Canada in **Andrews v. Law Society of British Columbia** has been greeted with considerable rejoicing. Many commentators have given the distinct impression that just over the judicial horizon lies the promised land of a truly egalitarian society. Presented with the right kinds of cases, the courts can now usher the have-nots into the privileged ranks of the haves. Catherine MacKinnon, for example, has called the decision "superb", claiming that it "offers the possibility of addressing some of the deepest roots of social inequality of the sexes". While this is a tantalizing prospect, unfortunately it is far from realistic.

The **Andrews** case concerned the right of non-citizens to practise law in British Columbia. A majority of the Court held that the Charter gave them this right. The importance of the decision, however, lies in its pronouncements on equality.

Although the Charter lists clearly the rights to which people are entitled, their meaning is far from clear. Charter rights, like those to equality, are characterized by their indeterminacy: they mean different things to different people at different times. They are like empty sacks that cannot stand up until they are filled with political content.

Some in society want to fill the equality sack with a formal vision of equality that demands that all individuals be treated equally. Others urge a substantive vision of equality that looks to ensure that all individuals are made equal in their condition. These alternative visions are not only distinct, but potentially contradictory. How can the disadvantaged be made equal in condition to the advantaged if both groups must be treated alike? Thus while women's rights groups invoke a substantive vision of equality to support special programs for women, men's rights groups invoke a formal vision of equality to attack special programs for women.

The strength of the Supreme Court's decision is that it recognized the open-ended nature of equality rights and took steps to limit the use of those rights by corporations and other powerful interests. However, in Charter matters, it remains the case that behind every silver lining there lurks a cloud.

Speaking for the Court, Justice McIntyre set out a three-step approach to equality claims:

* First, complainants must show that legislation treats them differently or affects them adversely. Yet not every difference in treatment qualifies for Charter protection. Protection is limited to differences relating to an enumerated Charter ground -- "race, national or ethnic origin, colour, religion, sex, age or mental or physical disability" -- or to analogous grounds, like citizenship, "which involve prejudice or disadvantage".

* Second, complainants must show that the distinction or adverse effect is "discriminatory": that it imposes burdens or withholds benefits based on grounds relating to personal characteristics of an individual or group. "Distinctions based upon personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed."

* Third, a discriminatory law will survive Charter scrutiny if it represents a "reasonable limit" on equality rights within the meaning of section 1. The onus for satisfying this standard rests with those seeking to uphold the law, usually governments.

What does all of this amount to? In particular, what does it mean for the disadvantaged? The restriction of equality rights to enumerated and analogous grounds of discrimination is undoubtedly a positive development. Corporations and others are unlikely to be able to bring equality claims attacking all manner of regulatory distinctions. But the remainder of the decision is so strewn with uncertainties and contradictions that, like the concept of equality itself, it can be made to stand for virtually any proposition that one wants.

For example, some have interpreted the second requirement as restricting the benefit of equality rights to members of

socially disadvantaged groups. According to this interpretation, men would be unable to invoke gender equality to challenge special programs for women; whites would be unable to rely upon racial equality to attack legislation favouring natives. Yet it is not clear that this is what the Court is saying. To be sure, there is plenty of rhetoric about "disadvantage". However, the actual definition of discrimination adopted by McIntyre J. suggests that real disadvantage need not be shown in order to bring an equality rights claim. A formal disadvantage flowing from a legislative distinction may be enough.

Underlying this ambiguity is the fact that, while McIntyre J. purports to reject an Aristotlean conception of equality (one that requires that likes be treated alike and unalikes be treated differently), the division he embraces between "distinctions based upon personal characteristics" and those based upon "merits and capacities" is little more than a vacuous restatement of Aristotle's formula. Indeed, it was Aristotle who argued that equality requires "that awards should be 'according to merit' ".

The confusion is further heightened by a disagreement within the Court concerning the application of section 1. While Justice McIntyre was prepared to uphold the citizenship requirement as a "reasonable limit" on equality rights, the majority of judges were not. They struck the requirement down.

In short, while the case is helpful in limiting the scope of equality rights, it is singularly unhelpful in defining what those rights mean. On this key issue, the decision is a masterpiece of obfuscation. Equality means whatever future judges want it to mean.

On at least one point, however, the Court is all too clear. Although ignored by most commentators, it is a point whose painful effects the disadvantaged and underprivileged will recognize and continue to experience. The Court's decision is premised on the assumption that the Charter is concerned only with inequalities that can be linked to some legislative source.

Justice McIntyre insists that "discriminatory measures having the force of law" constitute the "evil" against which the Charter's equality guarantee is directed. The Charter "does not provide for equality between individuals or groups within society in a general or abstract sense, nor does it impose on individuals or groups an obligation to accord equal treatment of others".

In other words, oppression and inequality that flow from private conduct or from the seemingly natural operation of the market economy, lie beyond the scope of the Charter's remedies. By implication, the Charter places no obligation on governments to take positive measures to redress such inequalities. The underlying disparities in wealth and power that are the root cause of social inequality and the systemic practices that reinforce them remain safely hidden from Charter scrutiny.

At best, the courts will grapple with the symptoms, but not the causes, of widespread inequality in Canada. But how could it be any different? The courts have served too long as the guardians of our private property regime to be transformed into the instigators of its reform. Moreover, the operation and legitimacy of the judicial system is itself predicated on an assumption of formal equality. What kind of equality guarantee should we expect from a system that requires one to spend hundreds of thousands of dollars just to have one's equality claim decided by courts?

Measured against these realities, the decision of the Supreme Court is not nearly as disheartening as the reaction to it. The fact that the media and legal observers can hail as a victory for the disadvantaged an ambiguous judicial ruling allowing an American to practice law in Canada offers a sad commentary on the state of contemporary political sensibilites. At best, the decision will serve as a weak judicial shield against blatant attacks on progressive and egalitarian-minded legislation -- legislation that is only susceptible to challenge in the first place because of the Charter.

The homeless and disadvantaged will not be part of such celebrations. They will have to remain on the outside looking in for some time yet. If they are invited to share in the festivities, it is unlikely to be by the courts. Besides, even if a judicial invitation were issued, who among them could afford to attend?

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L'AFFAIRE MAHÉ:
LE JUGEMENT DE LA DECENNIE EN DROITS LINGUISTIQUES

Pierre Foucher

La Cour suprême du Canada vient de rendre un jugement dont on n'a pas fini d'explorer toute la portée juridique, constitutionnelle et scolaire. Il s'agit de Mahé et al c. Procureur général de l'Alberta et al. Les faits étaient fort simples: un groupe de parents, qualifiés en vertu de l'alinéa 23(1)a) de la Charte, réclamaient le droit à la gestion de leur école. La question était donc, elle aussi, claire: l'article 23 garantit-il un tel droit de gestion? Si oui, à qui et à quelles conditions?

La réponse de la Cour, est fondamentale: oui, l'article 23 garantit un droit de gestion aux parents francophones minoritaires. La Cour en profite pour clarifier des concepts de base autour de l'article 23 et poser les jalons de l'interprétation future. Il semble bien qu'en matière scolaire, l'approche prônée dans Société des Acadiens du Nouveau-Brunswick c. Association of parents for fairness in education, [1986] 1 R.C.S. 549, soit abandonnée. La Cour accepte de procéder prudemment mais rejette l'idée que l'article 23 doive être interprété de façon littérale et restrictive en raison de cette prudence judiciaire.

Nous traiterons d'abord des concepts de base entourant l'article 23, tels que développés par la Cour. Nous nous pencherons ensuite sur les modalités d'application de ces concepts.

Les concepts de base

En premier lieu, la Cour confirme que l'objet de l'article 23, c'est la dualité linguistique et culturelle du pays. On ne pourra plus dire que l'article 23 ne vise que la langue et non la culture, qu'on doit l'interpréter dans une optique multiculturelle. Cela n'est pas son but ni son objet. La langue est plus qu'un outil de communication, nous dit la Cour; c'est le mode par lequel un peuple exprime son identité. La Cour emprunte ici à sa conception des droits linguistiques développés dans les affaires entourant l'affichage au Québec, Ford et al c. Procureur général du Québec, [1988] 2 R.C.S. 712, et Singer et al c. Procureur général du Québec, [1988] 2 R.C.S. 790, qui retourne à une conception amorcée dans le Renvoi: droits linguistiques au Manitoba, [1985] 1 R.C.S. 721. L'optique considérant les droits linguistiques comme des droits de communication, développée dans Société des Acadiens par le juge Beetz, est donc inapplicable à l'article 23. Les articles 16 à 20 sont peut-être des droits destinés soit aux locuteurs ou aux auditeurs, selon le cas, visant ou bien l'expression (articles 17 à 19 de la Charte), ou bien la communication (articles 16 et 20 de la Charte); l'article 23 a une autre fonction, beaucoup plus collective. La Cour souligne aussi le rôle important des écoles de la minorité pour la vie sociale de la communauté. Les études des sociologues démontrent abondamment la véracité de cet énoncé.

En second lieu, la Cour reconnaît le caractère réparateur de l'article 23. Ce point est encore plus important que le premier. Le statu quo n'est plus acceptable. L'article 23 impose des changements à la hausse. Il ne faut pas que les choses restent comme elles sont, car sinon l'impact réparateur de l'article 23 ne jouera pas.

Troisièmement, la Cour précise qu'il existe un seul droit dans l'article 23: celui de recevoir l'instruction dans sa langue. L'idée de trois droits distincts semble donc rejetée - les notions de classes, d'écoles et de structures de gestion étant des mécanismes d'application de ce seul droit (et non plus des droits distincts). Cette approche graduée, souple, est préférable a celle des "deux droits" généralement suivie jusque-là depuis l'arrêt de la Cour d'appel de l'Ontario Re: Minority language education rights (1984), 10 D.L.R. 4d. 491. L'article 23 doit être appliqué en fonction d'une échelle: à l'extrémité inférieure se trouveraient de simples programmes, à l'extrémité supérieure un plein Conseil scolaire. Mais qu'il n'y ait pas de confusion: le droit, lui, reste le même, et c'est celui d'offrir aux enfants des parents de la minorité une instruction dans cette langue, leur permettant par le fait même de développer leur culture.

Quatrièmement, la Cour insiste sur l'importance de la gestion pour la minorité. La gestion fait partie intégrale du droit lui-même. Des décisions en apparence neutres ont un effet sur l'éducation en français. La Cour cite en exemple des questions d'allocation de fonds, d'embauche et de recrutement des enseignantes et des enseignants. Les communautés francophones doivent donc participer à ces décisions. Le degré de pouvoir dépendra, semble-t-il, de l'expansion du réseau: plus il y aura d'écoles et de classes, plus il y aura lieu d'accorder des pouvoirs importants aux communautés. En plus, la Cour réfute la position selon laquelle un Conseil scolaire autonome va au-delà de l'article 23.

Cinquièmement, la Cour accepte le principe d'égalité. Ce principe est inhérent à l'article 23 lui-même; on n'a pas à faire appel à d'autres parties de la Charte des droits pour l'invoquer. L'égalité visée ici est une égalité comparable. On ne traite pas la situation urbaine comme la situation rurale: les enfants de la ville ont souvent des services plus

avancés, d'où le besoin de regroupements. La qualité de l'éducation doit être la même, et l'Etat a toujours le devoir de s'en assurer; l'étendue des services dépendra cependant de chaque situation de faits.

Sixièmement, la Cour accepte le principe d'un financement adéquat pour les minorités. Elle dit à plusieurs reprises que les provinces doivent s'attendre à dépenser un peu plus pour le système francophone que pour le système anglophone, surtout dans les premiers temps du démarrage d'un programme. Cela s'inscrit dans l'idée de réparation derrière l'article 23. La question des coûts est délicate et litigieuse; on invoque souvent les coûts trop élevés pour nier certains services scolaires à une communauté. La Cour affirme que le financement devra se faire sur la base du coût par élèves, comme dans tout autre cas, mais qu'on peut s'attendre à un financement plus important surtout aux premiers stades du développement des services et en considérant la position plus précaire des minorités.

Enfin, on reconnaît, sans la préciser, l'obligation de légiférer des provinces. Les lois ne sont pas nulles à moins qu'elles n'aient pour effet de priver les communautés francophones de l'exercice de leurs droits. Il faudra donc démontrer que l'opération de telle loi empêche effectivement les francophones d'avoir accès à des écoles qu'ils gèrent, alors qu'ils y ont droit. La Cour condamne en termes explicites l'inaction des autorités. Les francophones n'ont pas droit à un régime législatif spécial; ils ont cependant droit à des services scolaires que le régime législatif ne doit pas avoir pour effet de nier.

Ce sont là des acquis importants. Tant dans l'objet de l'article 23 que dans les divers aspects de son opération, les principes définis ci-dessus devront continuer de guider les législateurs et les administrateurs. Les tribunaux saisis de futurs litiges devront s'en inspirer.

Examinons maintenant les modalités de mise-en-oeuvre des droits.

Modalités de mise-en-oeuvre

Signalons d'emblée que le jugement est beaucoup moins clair à ce chapitre. Tout d'abord, il ne traite que de gestion. La question d'accès aux classes, des conditions auxquelles on doit offrir soit des classes, soit des groupes de classes dans des écoles déjà établies, soit enfin des écoles homogènes, n'est pas abordée parce qu'à Edmonton, les francophones disposaient déjà d'une école. Il y a cependant quelques éléments de réflexion intéressants dans le jugement.

La question des nombres ne pouvait pas ne pas être abordée: elle est au coeur de la disposition elle-même. La Cour affirme que les nombres n'ont pas à être calculés strictement à l'intérieur des territoires actuels des Commissions scolaires; des regroupements doivent être faits, le transport et même le pensionnat sont des voies possibles. En second lieu, les nombres détermineront l'étendue des services. De petits nombres entraineront des services minimaux, des nombres plus importants entraineront des services plus grands. Quant au mode d'identification des nombres, la Cour avance qu'on devra se baser autant sur la demande connue que sur "l'évolution prévisible" de celle-ci. Ce critère est plus généreux que celui de la simple demande manifeste; mais il est vague à souhait. Considérons seulement le fait qu'à la date du procès dans Mahé, le nombre d'élèves à l'école Maurice Lavallée d'Edmonton était de 242; aujourd'hui, il y aurait près de 1000 élèves dans le réseau scolaire francophone de la région. Etait-ce une "évolution prévisible"? D'ailleurs, partout où l'on a ouvert récemment des écoles homogènes françaises, les autorités ont été surprises de l'augmentation rapide des nombres. La Cour n'a pas abordé le concept de l'offre active; c'est là, à mon sens, une voie essentielle au développement des droits scolaires. Les parents inscriront leurs enfants dans des écoles qui fonctionnent bien et offrent une gamme de programmes et de services intéressants à leurs enfants. Il faut d'abord mettre ces écoles sur pied.

Terminons le chapitre des nombres en signalant que la Cour laisse ouverte l'épineuse question de l'autorité de décision. Qui décide des nombres? La Commission scolaire locale? Le ministère de l'Education? Faut-il un règlement du gouvernement? Les tribunaux d'appel ont tous indiqué que la décision ne devait pas être laissée à la discrétion des autorités locales (voir en particulier le renvoi Re: Education act, P.E.I., and Minority language educational rights (1988), 69 N. & P.E.I. R. 236).

L'autre élément de mise-en-oeuvre longuement abordé par la Cour est celui du modèle de gestion approprié. On reconnaît d'emblée que la Commission scolaire homogène est le véhicule le plus complet permettant à un groupe de gérer ses écoles, mais que ce n'est pas l'unique modèle approprié à chaque situation. La Cour estime toutefois qu'un Conseil scolaire ne va pas au-delà de la protection garantie par l'article 23, comme avaient semblé l'indiquer d'autres décisions antérieures; cette structure n'est que l'expression du "niveau supérieur de protection" qu'offre la Charte à ce chapitre.

A un niveau intermédiaire, la Cour s'inspire directement du renvoi ontarien de 1984 et du jugement de première instance en l'espèce, pour reconnaître la pertinence du concept de "représentation proportionnelle et garantie". En vertu de ce modèle, les francophones ont droit, lorsqu'ils

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(Mahé suite)
gèrent une école homogène française, à une représentation au sein de la Commission scolaire dont relève l'école. Cette proportion est calculée selon le nombre d'élèves francophones par rapport au nombre total d'élèves résidents de la Commission scolaire. Elle doit néanmoins être garantie à un niveau minimum - en Ontario, ce niveau fut établi à 3 conseillers. Un tel modèle s'applique tant aux Commissions scolaires séparées qu'aux Commissions scolaires publiques.

Ces sections francophones de la Commission scolaire doivent avoir une juridiction exclusive sur les questions touchant directement l'enseignement et la transmission des valeurs, dont le recrutement et l'embauche du personnel enseignant et administratif, l'établissement des programmes, la conclusion d'ententes, la dépense des fonds. Il est dommage que la Cour n'ait pas ajouté à cette liste les questions d'admission et de vérification de la qualité requise, de choix de sites d'écoles nouvelles, de transport. Toutefois, puisque la représentation des francophones leur permet de siéger aussi à la Commission scolaire, leur voix sera entendue sur ces questions. De plus, la liste énoncée par la Cour ne se veut pas limitative puisqu'elle formule comme règle générale que la juridiction vise "l'instruction dans sa langue et les établissements s'y rapportant" (p.47).

Il y a un niveau inférieur de gestion pour les cas où les nombres justifient l'institution de classes ou groupes de classes, mais non pas d'écoles complètement homogènes. La Cour suprême n'a pas précisé sa pensée à ce sujet, mais le jugement de la Cour d'appel de l'Ile-du-Prince-Edouard laisse entendre qu'il faut que les francophones participent directement à l'élaboration et à la prestation des programmes, tant au niveau du ministère de l'Education qu'au niveau de l'administration de la Commission scolaire. On pourrait envisager un mécanisme de consultation obligatoire des parents pour tout ce qui concerne les éléments identifiés par la Cour comme faisant partie du droit de gestion, et d'approbation par ceux-ci des programmes visant leurs enfants.

Les étapes ultérieures
Les législateurs doivent examiner attentivement leurs lois scolaires pour en vérifier la conformité à cette décision. Dans toutes les provinces de l'Ouest et dans les provinces atlantiques autres que le Nouveau-Brunswick et l'IPE (qui a déjà pris la décision d'étendre la juridiction de l'unité acadienne no.5 à toute l'instruction en français sur l'Ile), un travail considérable de révision doit être entrepris de toute urgence. La Cour n'a pas invalidé la loi scolaire, mais elle a enjoint l'Etat d'agir pour mettre en place le réseau d'instruction en français en Alberta. Cette reconnaissance d'une obligation de légiférer est sans doute l'aspect le plus novateur du jugement. Pour la première fois, nos tribunaux reconnaissent que l'Etat doit non seulement ne pas brimer des droits constitutionnels, mais doit agir positivement pour en assurer l'exercice.

On peut aussi s'attendre à d'autre litiges visant l'ouverture de nouvelles classes ou d'écoles, puisque ces questions ne sont pas directement abordées dans Mahé.

Au Nouveau-Brunswick, la dualité scolaire se trouve confirmée.

En Ontario, le système actuel de représentation proportionnelle et garantie devra sans doute faire place, à moyen terme, à un réseau complet de Commissions scolaires homogènes comme à Ottawa-Carleton ou à Toronto. D'autres régions pourraient déjà profiter du jugement pour revendiquer de telles structures.

Au Québec, la validité de la réforme prévue par la Loi 107, et visant à remplacer les Commissions scolaires confessionnelles (sauf celles qui sont protégées par l'article 93 de la Loi Constitutionnelle de 1867) par des Commissions scolaires linguistiques, vient à mon avis de prendre un pas d'avance. L'affaire est en délibéré devant la Cour d'appel du Québec et se dirigera sans doute ensuite devant la Cour suprême du Canada. L'enjeu est là aussi énorme: il s'agit de déterminer l'interaction entre les droits de gestion confessionnels, hérités du compromis de 1867, et les droits de gestion linguistiques émergeant de l'affaire Mahé. Devra-t-on créer quatre réseaux de gestion distincts? Peut-on réconcilier les deux dispositions en préservant l'autorité constitutionnelle des provinces en éducation?

Enfin, au niveau juridique, ce jugement ouvre des perspectives intéressantes au niveau des nouveaux recours judiciaires disponibles aux minorités. On verra sans doute des demandes d'injonction dirigées contre les gouvernements provinciaux pour les forcer à créer des écoles ou ouvrir des classes. L'article 23 nous fait entrer dans une nouvelle ère judiciaire. Les débuts seront modestes sans doute, mais une intervention judiciaire accrue n'est pas à écarter d'emblée.

Le jugement Mahé vient renforcer considérablement l'idée de dualité linguistique au Canada, comme l'affaire Ford avait reconnu la dualité Québec/Canada. Ces valeurs constitutionnelles imprègnent donc les dispositions précises de la Constitution et auront leur rôle à jouer dans l'évolution du débat constitutionnel après l'entente du Lac Meech, quel que soit le sort qu'on lui réserve.

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International Perspective

THE CONSTITUTIONAL DEBATE IN ISRAEL

David Kretzmer

In order to understand the present debate over constitutional reform in Israel one must have some knowledge of the historical background to Israel's present constitutional system.

Israel's Declaration of Independence of May 14, 1948 stated explicitly that the new state would have a formal constitution drawn up by a special constituent assembly. The constituent assembly was duly elected, but even before its election a debate had broken out over whether the time was indeed ripe for adoption of a formal constitution. The first prime minister, David Ben-Gurion, who headed the Mapai labour party, the dominant party at the time, saw very little reason for adoption of a constitution whose main objective would be to place limits on the powers of government. He argued that drawing up a constitution was premature, as only a small proportion of the Jewish people were in Israel and that those who were there could not decide on a constitution that would bind the Jewish state for all time. The opposition parties of the right and centre, who were to come to power in 1977, fully supported adoption of a formal constitution which they thought would provide some safeguards for the protection of their position in the fledgling democracy. But as always in Israeli politics there was a third force involved in the debate and this force was utterly opposed to any limits on the notion of parliamentary sovereignty. This third force was made up of the two main religious party groupings: the non-Zionist Agudat Yisrael party and the Zionist Mizrahi movement. The former argued that the Jewish people already had a constitution, the torah (meaning, in its wide sense, rabbinic law), and that it would therefore be presumptuous to call another document a constitution. The latter was afraid that adopting a constitution would inevitably place power in the hands of the judges, most of whom came from a secular-liberal tradition, and that this would upset the status quo in matters of state and religion, namely, the exclusive jurisdiction of the religious courts of the various communities (Jewish, Muslim and Christian) in matters of marriage and divorce and sabbath observance laws. The result of this debate was a compromise worked out in the constituent assembly, which had transformed itself into the first Knesset, Israel's parliament. According to this compromise, set out in a resolution known as the Harari resolution, Israel would have a formal constitution. However, that constitution would not be drawn up immediately in one document, but in a series of "basic laws" that would be prepared by the constitution and law committee of the Knesset and submitted to the Knesset for its approval.

On the strength of the Harari resolution a number of basic laws have indeed been enacted by the Knesset. These laws refer to the Knesset, Government, Judiciary, President, State Comptroller, Economy, Army and State Capital. However, two fundamental laws are missing: a bill of rights and a law defining the relationship between the basic laws and ordinary legislation. In the absence of the latter the Supreme Court has held that basic laws have no inherent superior status. It has also held, however, that the few entrenched clauses in the basic laws (i.e., clauses that expressly state that they may not be revoked or amended without a special majority) must be respected, and that legislation passed without the required special majority that is inconsistent with an entrenched clause is therefore invalid.

The two main attempts at constitutional reform that have caused controversy in Israel of late relate to adoption of a bill of rights and reform of the electoral system.

Over the years a number of proposals for a bill of rights have been submitted to the Knesset. The most recent was a bill drawn up by officials in the Ministry of Justice, who received some inspiration from the Canadian Charter. In an attempt to forestall expected political opposition, the bill included a number of concessions to expected opponents that most proponents of a bill of rights found hard to accept. First, while the bill provided that all parliamentary legislation would in theory be subject to judicial review, this would only apply to legislation passed after enactment of the bill. In other words, all existing parliamentary legislation would be immune from review. Second, the bill would not affect laws relating to marriage and divorce.

In spite of the above concessions, the bill met with fierce opposition from the same political forces that had objected to adoption of a formal constitution in 1948, namely the religious parties. Their main concern was not with the details of the bill, but over the whole notion of judicial review of parliamentary legislation. Much of the legislation favoured by these parties, such as legislation strengthening the jurisdiction of the religious courts and bolstering sabbath observance laws, can only be passed by making support for such legislation a condition for joining the parliamentary coalition needed for one of the larger parties to govern. The religious parties realise that the mere existence of a vehicle for judicial review, such as the proposed bill of rights, could enable the secular majority on the Supreme Court to overrule such legislation.

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(Constitutional Debate continued)

In the present political climate in Israel, in which both of the major parties, the Likkud on the right and Labour on the centre-left, are totally dependent on the religious parties for any prospective parliamentary coalition, the political opposition of the religious parties ensured that the bill would not be passed. When the Minister of Justice agreed not to present the bill to the Knesset in order not to alienate the religious parties, the same bill was submitted as a private member's bill by an opposition member. The bill passed the preliminary reading required for all private member's bills, but under a political deal reached between the Likkud Minister of Justice and the religious parties it has since been frozen in committee.

The second point on which there has been demand for constitutional reform, especially in recent months, is the electoral system. The present system is the proportional representation system that existed in the Zionist movement in the pre-state era, and that once was fairly prevalent in some European countries. Voting in Knesset elections is for party-lists. Each list which receives at least 1% of the vote is entitled to a share in the 120 Knesset seats proportionate to the number of votes it received. This has meant that as many as fifteen parties are represented in the Knesset. No one party has ever received an absolute majority and every government has had to rely on a coalition in which the smaller parties, generally the religious parties, have an inordinate say relative to their proportion of votes.

The present system is entrenched under the Basic Law: the Knesset. This means that an absolute majority is required for all three readings of any bill amending the system. Attaining such a majority has proved formidable. The main opposition comes from the smaller parties, which have everything to lose and nothing to gain by changing the system, even if, as suggested, the new system were to be a mixed system along the lines of the German system rather than the constituency system of Britain or Canada. Although both of the large parties theoretically favour electoral reform, they cannot afford to alienate the religious parties by supporting it. Furthermore, many of the politicians in the larger parties are reluctant to support electoral reform which may weaken their personal chances of being elected. It seems, therefore, that the chance of change in the electoral system in the near future is not high.

With all this said and done, I should point out that it is by no means certain that changing the electoral system would free the system of the present need to rely on coalition governments. There are three main forces in Israeli politics: the Likkud and satellite parties of the right; the Labour and satellite parties of the left; and the religious parties. Support for Labour and Likkud is more or less equal and neither has a chance of achieving a parliamentary majority without support of the religious parties. Unless the system were amended in such a way as to destroy the religious parties, which would be regarded as unacceptable as it would deny a sizeable proportion of the public of representation, the religious parties would probably retain their strategic strength under the new system. While deputies elected by voters in a given district might prove to be more responsive to public opinion than at present, the change in the system would probably not radically alter the weaknesses in Israel's political system. These weaknesses are more a function of the schisms in Israeli society itself than of the particular electoral system.

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Chapter Update

SUPREME COURT OF CANADA IN BRYDGES EXPANDS RIGHT TO COUNSEL

Bruce P. Elman

On the 29th of March, 1979, Elizabeth MacLeod, a retired school teacher, was murdered in her own home in Edmonton. For six and a half years, no arrests were made in connection with the case. On the 16th of December, 1985, William Brydges, a twenty-two year old Albertan, was in Strathclair, Manitoba visiting with his step-father. Brydges had only a minor criminal record: one conviction for impaired driving and another for failing to appear for fingerprinting in relation to the same offence. Detective Ron Harris of the Edmonton City Police was also in Strathclair on that day. He was there to arrest Bill Brydges for the murder of Elizabeth MacLeod. Harris' interrogation of Brydges following his arrest formed the facual context for an important Supreme Court of Canada decision on the scope of the right to counsel.

The Interrogations:

After his arrest in Strathclair, Brydges was transported to the R.C.M.P. detachment in Brandon. Upon their arrival in Brandon, Detective Ron Harris began his first interrogation of Bill Brydges. It went as follows:

Ron: Okay Bill, this is your copy of the warrant I was telling you about okay. ... There is a couple of things I want to go over with you. Okay first of all ah, you acknowledge the fact that... I placed you under arrest for this murder.
Bill: Um hum.
Ron: Ah I informed you there that ah, it was our duty to inform you that you had the right to instruct counsel. And I asked you if you understood what that meant. And you said yes.
Bill: Yeah.
Ron: Okay. Ah...You didn't want to phone a lawyer out there. Ah you can phone one from here if you want. **If you know one.**
Bill: I don't know of any.
Ron: Did you want to try and get a hold of one here.
Bill: Well. Do they have any free Legal Aid or anything like that up here?
Ron: I imagine they have a Legal Aid system in Manitoba. I'm ...
Bill: (Unintelligible)
Ron: ...not familiar with it but...
Bill: Won't be able to afford anyone, heh? That's the main thing.
Ron: Okay. You feel ah there's a reason for you maybe wanting to talk to one right now.
Bill: Not right now no.
Ron: Okay. Ahh. I'm gonna read from this blue card again.
Bill: Okay. [Emphasis Added]

Detective Harris read the standard police warning to the accused. Brydges acknowledged that he understood the warning. Then the questioning regarding the circumstances of the offence began. According to the Crown, a number of inculpatory statements were made by the accused. Brydges, however, interrupted the flow of questioning and the following exchange took place:

Bill: I just think that I should talk to someone. Maybe from Legal Aid or something then I. (Pause) Is that gonna be possible for me to get a hold of someone.
Ron: I can try and arrange it, sure.
Bill: I'd like to try to talk to someone first.
Ron: Okay.
Bill: And that way, I might feel, feel a little bit easier about talking.
Ron: About what happened?
Bill: About everything, yeah.
Ron: Okay. I don't know if I can get a hold of a Legal Aid lawyer.
Bill: I can't afford anyone else.
Ron: But well, what, I don't think their gonna charge you for advise. (Pause) Do you want me to try and get one?
Bill: Yeah, if you can get a Legal Aid, first.
Ron: Do they have Legal Aid in Manitoba?
Bill: I don't know, I don't know.
Ron: Okay, I'll check.

Following this conversation, the detective obtained a list of Legal Aid lawyers and contacted one who attended at the detachment and interviewed Brydges. After this consultation, Detective Harris tried to continue his interrogation of Brydges. Brydges, on the advice of counsel, refused to answer any further questions.

The Trial:

Brydges' trial before Justice Wachowich of the Alberta Court of Queen's Bench, sitting with a jury, began on the 12th of January, 1987 and concluded on the 20th of the same month. As the trial opened, the prosecution led circumstantial evidence implicating the accused in the murder of Elizabeth

(Continued on page 16)

(Brydges continued)
MacLeod. On the fourth day, the trial entered a voir dire to test the admissibility of the statements made by Brydges to Detective Harris. These statements were the heart of the Crown's case against Brydges. At the conclusion of the voir dire Justice Wachowich excluded the statements. Justice Wachowich was of the view that Brydges, in spite of some equivocation, had requested the assistance of counsel but was unsure if he could afford one, not knowing whether Legal Aid was available. The trial judge held that Detective Harris, in not advising Brydges regarding the availablity of Legal Aid, failed to provide the accused with a reasonable opportunity to exercise his Charter right to retain and instruct counsel. Furthermore, Justice Wachowich determined that the admission of the statements in these circumstances would bring the administration of justice into disrepute. Consequently, he excluded the statements from evidence. At this point, the prosecution concluded its case offering no further evidence. Defence counsel applied to have the case taken away from the jury on the basis that there was no evidence upon which a reasonable jury, properly instructed, could reach a verdict of guilty. Justice Wachowich instructed the jury to return a verdict of not guilty, which they did after a short deliberation.

The Court of Appeal:
The Crown appealed Justice Wachowich's decision. The Alberta Court of Appeal, Justice Herradence dissenting, overturned the trial verdict and ordered a new trial. The Court's decision was based upon three propositions. First, the Court concluded that there had been no restriction on Brydges' right to counsel. The majority disagreed with the trial judge's finding that the accused had requested counsel and that he had been concerned about the affordability of such counsel. They were of the opinion that the accused had failed to prove that there had been a breach of his rights. Furthermore, as far as the majority was concerned, when the accused said "Not right now, no" he had clearly waived his right to counsel and "elected to go it alone".

The second proposition advanced by Justice McClung, writing for the majority, was that before the evidence could be excluded under section 24(2) of the Charter a causal connection between the violation of the right and the obtaining of the evidence had to be established. The majority found no causal connection. Finally, the majority held that considering the merits of exclusion, the evidence, in any event, ought not to have been excluded.

Justice Herradence dissented. In his view, it was unnecessary to consider whether Brydges had been permitted a reasonable opportunity to retain and instruct counsel because the police had failed in their duty to properly inform the accused of his rights. When the accused indicated that he could not afford a lawyer without Legal Aid, Detective Harris should have immediately looked into the availability of Legal Aid and promptly advised Brydges of how he could contact a lawyer. Justice Herradence noted: "The alacrity with which counsel was produced after the Respondent's statement was recorded demonstrates that such information was readily at hand".

Having adopted this view of the case, the issue of the accused's waiver of his rights was simplified. In Justice Herradence's opinion, Brydges could not waive his right to counsel because he had never fully understood the extent of the right. He concluded by holding that the evidence was properly excluded by the trial judge. Justice Herradence's dissent provided Brydges with his appeal as of right to the Supreme Court of Canada.

The Supreme Court of Canada:
The Supreme Court of Canada overturned the decision of the Alberta Court of Appeal and re-instated the decision of Justice Wachowich. The Court unanimously held that there was ample evidence to support the trial judge's finding that Brydges had requested counsel but was under the impression that his inability to pay for a lawyer precluded him from retaining one. All members of the Court were of the opinion that, in the circumstances of this case, the police were under a duty to inform Brydges of the existence of Legal Aid and duty counsel. Detective Harris' failure to do this was a denial of the accused's right to counsel.

Furthermore, the entire Court was of the opinion that there could be no waiver of the right to counsel in this case as the accused did not fully understand the extent of his right to counsel. Therefore, Brydges was not in a position to carefully weigh the consequences of waiving his right to retain and instruct counsel at that time.

Finally, the Court was also unanimous in holding that the evidence was properly excluded pursuant to section 24(2) of the Charter. In discussing this issue, the Court made two important points. First, under section 24(2) there is no requirement that the accused demonstrate a causal connection between the violation of the right and the obtaining of the impugned evidence. According to the Court, section 24(2) arises whenever a rights violation occurs during the course of gathering evidence. Second, the mere fact that the charge is a serious one provides no justification for admitting the evidence if the violation is a serious one and the fundamental fairness of the trial is at stake.

The judgement of the Supreme Court did not end here, however. In an unusual twist, a majority of the Court (Justice LaForest excluded) placed police forces on notice

that as part of the informational component of the constitutional guarantee of the right to counsel, any person arrested or detained must be advised of the existence and availability within the jurisdiction of Legal Aid and duty counsel systems. A thirty day grace period was provided to police forces to implement this ruling.

Observations:
This is a most important judgement on the extent of the constitutional guarantee of right to counsel in Canada. The Court has essentially expanded the scope of the duty upon the police when informing an accused of his right to counsel. Police are now obliged to inform the detainee of the existence of Legal Aid schemes and how to make use of them. This is a recognition of the fact that most individuals coming before our criminal courts are indigent and must rely on the applicable Legal Aid or duty counsel system. As a corollary, it is an acknowledgement of the fundamental role played by provincial Legal Aid plans in the administration of justice. At its heart the Court's judgement says: If you do not inform the detainee about Legal Aid, you are not really informing him/her about the right to counsel.

This judgement is equally important on the exclusion of evidence issue. The Court indicates, in the strongest possible terms, that section 24(2) of the Charter does not require a causal connection between the violation of a constitutionally-protected right and the impugned evidence. It will be sufficient if the accused shows that the violation occured during the gathering of the evidence. Secondly, the Court indicates that it is no bar to a successful section 24(2) application that the offence charged is a serious one. Trial courts and provincial courts of appeal can no longer use these arguments to restrict the scope of exclusion of evidence under section 24(2).

The Supreme Court has, once again, demonstrated its concern with the scope and integrity of the constitutional guarantee of the right to counsel. **Brydges v. The Queen** will have important consequences in the administration of our criminal justice system.

Bruce P. Elman is Professor of Law, and Chair of the Centre for Constitutional Studies, University of Alberta.

GREFFE v. THE QUEEN: JUST BECAUSE EVIDENCE IS REAL DOESN'T MEAN IT IS ADMISSIBLE

The Supreme Court of Canada recently overturned another Alberta Court of Appeal decision concerning the exclusion of evidence pursuant to section 24(2) of the Charter. Based upon confidential information received from the R.C.M.P., Customs officers searched Marc André Greffe upon his arrival from Amsterdam at Calgary International Airport. They suspected that Greffe was transporting heroin into Canada. The officers conducted a search of the accused's clothing and baggage and then a strip search. These visual and personal searches produced no drugs.

Only at this point in time was the accused arrested, for outstanding traffic warrants, and advised of his right to counsel. He was also informed that he would be taken to a hospital where a doctor would perform a body search. During the course of the doctor's search a condom containing heroin was removed from the accused's anal cavity. The accused was charged with one count of unlawfully importing heroin into Canada and one count of unlawful possession of heroin for the purpose of trafficking.

On the evidence presented at trial, it was generally accepted that there had been a denial of the accused right to counsel (s.10(b)) as well as a violation of his right to be free from unreasonable search and seizure (s.8). Thus the trial turned on whether the evidence of the heroin -- obtained as it was after the accused's s. 10(b) and s. 8 rights had been infringed -- should be excluded. The trial judge excluded the evidence and an acquittal followed. The Crown appealed and the Alberta Court of Appeal overturned the trial judge's decision. The Supreme Court of Canada, by a 4 - 3 majority, re-instated the trial judge's ruling.

Although there is much of interest in the case, perhaps the most significant aspect of the Supreme Court of Canada's judgement concerns the treatment of "real evidence". Much had been made at the Court of Appeal of the fact that the tainted evidence (the heroin) was "real", or physical, evidence which existed irrespective of the rights violations. The proposition that the admission of real evidence is less constitutionally problematic than the admission of other types of evidence had its origin in an obiter statement in the case of **Collins v. The Queen** [1987] 1 S.C.R. 265. The reasoning ran something like this: the purpose of excluding illegally obtained evidence under section 24(2) of the Charter is, at least in part, to ensure a fair trial. To admit evidence, such as a confession, which depends upon a Charter violation for its existence would be unfair. On the other hand, it is not unfair to admit real evidence, such as drugs, the existence of which pre-dates the Charter violation.

In this case, the drugs found in Greffe's anal cavity were excluded even though their existence pre-dated the violations of the accused's rights. The majority in the Supreme Court noted that "fairness" is only one factor to be considered. In this case, according to the majority, special emphasis should have been placed upon the seriousness of the violations. And the majority was of the opinion that there had been very serious violations of Greffe's constitutional rights. Thus the majority re-instated the trial judge's ruling to exclude the evidence of the heroin found as a result of the anal search.

The message is clear: Just because evidence is real doesn't mean it is admissible. In determining admissibility under s.24(2) a trial court must, regardless of the type of evidence presented to it, balance the following concerns: the fairness of the trial, the seriousness of the rights violation, and the effect of exclusion on the integrity of the administration of justice. Therefore, notwithstanding the heinous nature of the offence, the Court was duty bound in this case to exclude the evidence. **[B.P.E.]**

Response

UNDERSTANDING INEQUALITY: A REPLY TO DALE GIBSON

Legal Theory Students, University of Victoria

In vol. 1, no. 1 of Constitutional Forum there is an article by Professor Dale Gibson entitled "The Nature of Equality: Apples and Oranges/Chests and Breasts". This article was discussed by students in the Legal Theory class at the law school at the University of Victoria. We recorded the comments that were made about the article and wrote them up in the form of the following response. We did not all agree with everything that was said and cannot, of course, speak with one voice on this. But we have agreed that the following commentary does accurately summarize our discussion, and the conclusions stated are ones upon which there was fairly widespread agreement.

As we understand Professor Gibson's argument, human equality is not a descriptive or mathematical concept, but a normative and relativistic one. He accepts Artistotle's definition of equality as "treating likes alike; unalikes differently", and concludes that because people are in fact different, the crucial question is what differences may justifiably be used as the basis for different legal treatment. Professor Gibson argues that we can take neither a purely descriptive approach nor a purely prescriptive approach to answering this question: "If we permit a simple description of prevailing norms to justify in perpetuity the way a particular society treats its women, we rule out progress... On the other hand, if we adopt a relentlessly prescriptive approach, we overlook societal inertia".

Professor Gibson therefore suggests that it is necessary to strike a balance between prevailing social norms and egalitarian aspirations. Whether different treatment is justified depends upon how we understand the differences between people in light of the purpose and context of the law. The mere fact that as a matter of description there is a socially recognized difference is not enough to justify different treatment. The question a judge must ask is whether the difference between two groups is as important as their similarities for the purpose of the particular law and "what is determinative is the respective weights of the similar and dissimilar factors, measured on the scale of contemporary, but forward-looking, public opinion".

Professor Gibson applies this approach to a number of hypotheticals. So, for example, in discussing a law prohibiting public sunbathing by black persons, he suggests that while there may be differences between black and white persons those differences "are not nearly as important as the relevant similarities in the opinion of most Canadians". On the other hand, when he turns to a law prohibiting topless sunbathing by women, he states that it is "highly pertinent" that "our society attributes considerably more sexual significance to women's breasts than to men's chests". He then concludes that when we "weigh relevant gender resemblances and differences in accordance with prevailing progressive social standards" we would conclude that "the problems associated with attitudinal sensitivities about female breasts over-balance the benefits of topless sunbathing in public places by women".

Our class shared a sense of unease about these hypotheticals and we began to explore what we found wrong with them as a way of probing Professor Gibson's overall argument. In the first place, he seems to concede an awful lot to the status quo of inequality. Gender specific laws regarding clothing are acceptable. And while laws prohibiting black sunbathing are no longer acceptable they "probably would have been thought perfectly justifiable a century ago". We immediately thought about South Africa where such laws are still thought to be acceptable. Perhaps the problem is that while Professor Gibson recommends that we should look to "forward-looking public opinion" to determine social values, he seems too ready to accept simply the dominant opinion. At this point we tried a thought experiment. Would any dominant group, satisfied with the status quo, disagree with Professor Gibson's analysis? We found it difficult to think of one.

Why does the analysis produce these results? Many of us disagreed with Professor Gibson's assessment of progressive social standards. He concludes that when we "weigh relevant gender resemblances and differences in accordance with prevailing progressive social standards" we would conclude that a law prohibiting female topless sunbathing would be justified because of "attitudinal sensitivities". Many of us simply disagreed with this statement. And while we may personally choose not to sunbathe topless we might make this decision because we do not want to be viewed as sexual objects, or run the physical risks that stem from current social attitudes towards women. But is there a good reason why the law should entrench or build upon such repressive social attitudes?

We spent some time exploring the assumptions that seemed to be at work in the argument. Several of us questioned whether it is accurate to say that there is a difference between men's and women's breasts. And if there is a difference is it true to say that society attributes more significance to women's breasts than to men's chests? While we were not all agreed that women are fixated upon men's chests to the same extent that men are fixated upon women's, we were agreed that the "society" to which Professor Gibson turns to discover the significance of the difference between men and women must be one that is made up primarily of heterosexual men. The

rhetorical structure of the article seemed occasionally to reflect this same perspective. Phrases such as "women resemble men in many respects" made many of us feel that men are being used as the baseline against which women are to be measured. Similarly, in discussing the black sunbathing example, Professor Gibson writes about the way in which "blacks have less need for tanning than whites". We recognized that the point he is making here is that this difference should not be relevant. But even to articulate the difference in this way shows how the needs and experiences of one group (blacks who want to go shirtless) are almost inevitably interpreted in terms of the consciousness of another (whites who want a tan).

Professor Gibson admits that many differences between men and women (and presumably other groups) are culturally determined. We agreed with this. But we also thought that the cultural nature of "difference" may be part of the problem rather than the solution. Groups such as women and blacks often suffer precisely because of the way "society" constructs their differences. It may be true that "our society attributes considerably more sexual significance to women's breasts than to men's chests". For many of us, this is simply one more example of the objectification of women. It explained, but did not justify to us, why women should be treated differently. A recognition that "differences" are socially constructed may help us to understand the problem of inequality, but it does not seem to suggest a solution. Indeed, many of us felt that any analysis that depends so heavily upon the dominant understanding of social differences merely perpetuates inequality.

Towards the end of our discussion we were struck by another apparent dilemma. Professor Gibson is seeking to provide some guidance for judges in interpreting section 15 of the Charter. The adoption of the Aristotelian formula of "treating likes alike and unalikes differently" appears to offer a precise form into which equality discourse may be channeled. Yet Professor Gibson also recognizes that this form is not perfectly determinate because the question of "justifiable" difference is a normative one that will change over time. Nevertheless he does offer judges "determinative" guidance, being "the respective weights of the similar and dissimilar factors, measured on the scale of contemporary, but forward-looking, public opinion."

The problem that this raised for us is one that is common to Charter adjudication, indeed to all adjudication. If judicial decisions are to be rational and different from "political" decisions, if adjudication is somehow different from legislation, there must be some fixed standards by which decisions are to be reached. But how are we to determine what is "forward-looking public opinion"? How much "weight" do we give to particular similarities and differences? Who gets to decide? We began to discuss ways in which judges might make this decision. Should they simply consult their own views on the assumption that they represent progressive social opinion? Perhaps the question should be left to juries. Or the court might do a public opinion poll. But if so, who should be on the jury? Who should be polled? Presumably, only that sector of society that is "forward-looking" and "progressive".

This portion of the discussion revealed what appeared to us to be an irony. Because there is public disagreement about "social standards" we generally make social choices through democratic processes in which "public opinion" may express itself. But because we do not always trust democratic processes and public opinion we have enacted a Charter of Rights and Freedoms to guard against the excesses of majority rule. But the only check on the politics of majority opinion seems to be the politics of minority (progressive, judicial) opinion.

It is not just that we disagree with Professor Gibson on the appropriate way to evaluate "progressive social standards". Nor simply that this concept is so vague. What his analysis of the sunbathing cases revealed to us was the fact that lawyers and judges are the only ones that will be participating in the process and that their view of these matters will inevitably be partial. Part way through reading the article, one of us asked "is something missing from this?" We know that the groups who suffer most from inequality have notoriously little say in the development of law, especially in courts. Solutions to problems of inequality cannot be solved by consulting popular opinion or elites, no matter how "progressive". While we certainly did not arrive at a unanimous opinion on what "equality" means, we did agree that the application of the analysis demonstrated very well why we would be uncomfortable leaving the courts to articulate a theory of equality along the lines suggested by Professor Gibson.

Finally, while we knew it was not intended, many of us found the article alienating right from the outset. While the article did provide a good basis for our discussion, we felt that its title, and the hypotheticals chosen, trivialized the facts of inequality and the experience of women. The article's treatment of a formal law of no great importance ignored the real sources of women's inequality and the way power is exercised in society. And some of us thought that the title felt like a "cheap shot". Men and women have both breasts and chests, but the article basically divided us into two groups, thus changing the meaning of those words and altering the nature of our relationship with one another. This is not what dialogue about equality should do.

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*Submitted by **Jamie Cassels**, Associate Professor of Law, on behalf of the **Students in Legal Theory**, Faculty of Law, University of Victoria.*

CENTRE FOR CONSTITUTIONAL STUDIES
Report of Activities for 1989 - 90

I thought it appropriate at this time to review for you the activities which have taken place at the ***Centre for Constitutional Studies*** *during the past year. I believe these past twelve months have been the most productive in the Centre's three years of existence.*

In the past year we have instituted two new publications. ***Constitutional Forum constitutionnel*** *represents an attempt to bring to the public, in a timely fashion, information regarding important constitutional issues and events. I believe that the* ***Forum*** *has been a resounding success.*

The Centre produced its first issue of ***Constitutional Studies / Études constitutionnelles****, featuring articles by such well-known constitutional scholars as Ronald Dworkin, Dale Gibson, and John Whyte.* ***Constitutional Studies*** *will appear annually as a supplement to the* ***Alberta Law Review****.*

The Centre's third national conference was held in mid-April. This year's topic was Freedom of Expression and Democratic Institutions. The conference covered a wide range of topics and was a great success.

The Centre hosted a number of Visiting Scholars during the 1989 - 90 academic year. Professor Mark Tushnet of Georgetown University was this year's McDonald Constitutional Lecturer. The Lecture is named in honour of Justice David C. McDonald, a staunch supporter of the Centre.

In conjunction with Professor Tushnet's visit, the Centre co-sponsored the "Western Canadian Legal Theory Symposium." Representatives from a number of western Canadian law schools attended this symposium.

Recent visiting scholars were Professor Frederick Schauer of the University of Michigan and Professor David Kretzmer of the Hebrew University of Jerusalem. Other visitors to the Centre included Professors Cheryl Saunders of the University of Melbourne, Naomi Black of York University, Lorenne Clark of Dalhousie University, and Mr. David Lepofsky of the Ontario Attorney General's Department. Each of them addressed various audiences and contributed greatly to our role in public legal education. In this same vein, the Centre, in conjunction with the University of Alberta Political Science Department, sponsored a forum for senatorial candidates prior to Canada's first Senate election.

I am pleased to announce that Professor Dale Gibson will be continuing as the ***Belzberg Chair of Constitutional Studies*** *for the coming year. Although Professor Gibson will be taking up residence in Winnipeg shortly, he will be returning to the Centre at regular intervals during the coming year.*

We have enjoyed the generous support of the ***Alberta Law Foundation*** *and the* ***University of Alberta*** *through the good offices of Vice-President Peter Meekison.*

I am grateful for continuing support of members of the Management Board: Dean Tim Christian, Professors Anne McLellan, Dale Gibson, and Gerald Gall of the Faculty of Law, Dr. Allan Tupper of the Political Science Department, Dr. Roderick C. MacLeod and Dr. Ronald Hamowy of the History Department, and Dr. Peter Meekison.

It was a very successful year indeed. This success is due to the enormous efforts of our Executive Director, David Schneiderman. Without him, our activities would have ground to a halt. David was ably assisted throughout by Christine Urquhart.

Bruce P. Elman, Chair
May 1, 1990.

CENTRE D'ÉTUDES CONSTITUTIONNELLES
Revue des activités 1989-90

Il m'a paru indiqué de procéder, à ce point-ci, à un tour d'horizon de l'activité du Centre d'études constitutionnelles au cours de 1989-90 – la plus productive de ses trois années d'existence selon moi.

Ainsi, nous avons institué deux nouvelles publications: Avec ***Constitutional Forum constitutionnel****, nous nous efforçons d'apporter au grand public, de manière opportune, les renseignements relatifs aux questions et événements constitutionnels importants. Le succès de* ***Forum*** *est à mon avis concluant.*

Le Centre a également produit le premier numéro de ***Constitutional Studies / Études constitutionnelles****, qui contient les articles de spécialistes bien connus, tels Ronald Dworkin, Dale Gibson et John Whyte.* ***Études constitutionnelles*** *paraîtra annuellement en supplément à l'****Alberta Law Review****.*

La troisième conférence nationale du Centre a eu lieu à la mi-avril. Intitulée "Liberté d'expression et institutions démocratiques" et traitant de sujets fort variés, elle a remporté un franc succès.

Le Centre a reçu de nombreux Professeurs invités au cours de l'année universitaire 1989-90. Le Professeur Mark Tushnet de Georgetown University a donné la Conférence McDonald annuelle, ainsi dénommée en l'honneur du juge David C. McDonald, solide partisan du Centre.

Conjointement à la visite du Professeur Tushnet, le Centre a co-patronné le "Western Canadian Legal Theory Symposium", événement auquel ont assisté les représentants de plusieurs écoles de droit de l'Ouest du Canada.

Parmi nos invités récents figurent les professeurs Frederick Schauer de la University of Michigan et David Kretzmer de la Hebrew University of Jerusalem, ainsi que Cheryl Saunders de la University of Melbourne, Naomi Black de l'Université York, Lorenne Clark de l'Université Dalhousie et Monsieur David Lepofsky du bureau du Procureur général de l'Ontario. Chacun d'eux s'est adressé à des auditoires variés et a grandement contribué à notre rôle d'éducateur du grand public en matière de droit. Dans le même esprit et de concert avec le département des Sciences politiques de l'Université de l'Alberta, le Centre a organisé un forum pour les candidats au Sénat avant la première élection sénatoriale du Canada.

J'ai le plaisir d'annoncer que le Professeur Dale Gibson continuera à occuper la Chaire Belzberg d'études constitutionnelles pour l'année à venir. Bien qu'il soit sur le point de s'établir à Winnipeg, le Professeur Gibson reviendra au Centre à intervalles réguliers.

*Nous avons bénéficié du soutien généreux de l'****Alberta Law Foundation*** *et de l'****Université de l'Alberta*** *grâce aux bons offices de Peter Meekison, Vice-président.*

Je suis reconnaissant aux membres du Conseil administratif de leur constant soutien: au Doyen Tim Christian, aux Professeurs Anne McLellan, Dale Gibson et Gerald Gall de la Faculté de droit, Allan Tupper du département des Sciences politiques, Roderick C. MacLeod et Ronald Hamowy du département d'Histoire, et à Peter Meekison.

L'année a donc été des plus réussies. Ce succès, nous le devons aux efforts considérables de notre Directeur exécutif, David Schneiderman, sans qui nos activités n'auraient pu se poursuivre et qui est lui-même efficacement et fidèlement secondé par Christine Urquhart.

Bruce P. Elman, Président
1er mai 1990