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THE JUDICIAL CONCEPTUALIZATION OF CULTURE AFTER *DELGAMUUKW* AND *VAN DER PEET*

Michael Asch*

The author examines the current Canadian approach to the resolution of claims concerning Aboriginal rights and title. Discussion focuses on the Canadian law as enunciated by the Supreme Court of Canada in R. *v.* Van der Peet *and* Delgamuukw *v.* British Columbia, *as well as its historical development through selected Canadian and English jurisprudence.*

The author finds the central feature of the Supreme Court of Canada's approach to be the recognition of Aboriginal rights and title on the basis of "cultural distinctiveness." However, it is argued that the approach utilizes antiquated logic, which conflicts with contemporary anthropo-logical conceptions of culture. Furthermore, the author argues that the Supreme Court of Canada's emphasis on cultural components detracts from political issues surrounding Crown sovereignty in the context of Aboriginal rights. Consequently, the current Canadian approach to Aboriginal rights and title may lead to future results that are unpredictable and inconsistent.

Finally, the author suggests an alternative framework in which claims regarding Aboriginal rights and title may be resolved. Specifically, it is contended that the equitable resolution of Aboriginal claims may ultimately require the recognition of political rather than cultural rights.

L'auteur examine la démarche canadienne actuelle à l'égard du règlement des revendications des droits et titres des peuples autochtones. La discussion porte sur la loi canadienne représentée par la Cour suprême du Canada dans l'affaire R. contre Van der Peet et Delgamuukw contre la Colombie-Britannique, de même que l'évolution historique par des causes choisies de la jurisprudence canadienne et britannique.

L'auteur estime que l'approche de la Cour supr ême du Canada de reconnaître les droits et titres des peuples autochtones sur la base de la "spécificité culturelle" se trouve au centre du di scours. Cependant, on plaide que la démarche fait appel à une logique désuète contraire aux conceptions anthropologiques contemporaines de la culture. En outre, l'auteur estime que l'importance que la Cour suprême du Canada accorde aux éléments culturels nuit aux questions politiques entourant la souveraineté de la Couronne dans le contexte des droits des peuples autochtones. Par conséquent, la démarche canadienne actuelle à l'égard des droits et titres des peuples autochtones peut donner lieu à des situations imprévisibles et inconstantes à l'avenir.

Finalement, l'auteur suggère un cadre de rechange pour régler les revendications des droits et titres des peuples autochtones. Plus particulièrement, on invoque que le règlement des revendications des peuples autochtones exige la reconnaissance des droits politiques plutôt que culturels.

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I. INTRODUCTION

In an attempt to assist in the resolution of outstanding issues related to Aboriginal rights and title, the Supreme Court of Canada has developed an approach to the analysis of Aboriginal culture and, through it, the analysis of culture in general. At heart, the Court's approach is to ground recognition of Aboriginal rights on the basis of cultural "distinctiveness" — a concept probably unique to its understanding. As I will discuss below, this approach — including but not limited to the notion of distinctiveness — is flawed and, it is feared, reliance upon it in the longer term will lead to arbitrary decisions. In part, this will result from the Court's naive and outmoded conceptualization of the nature of culture. Perhaps, underneath it all, the difficulty is that a reliance on cultural difference *per se* provides an inappropriate frame within which to determine the content of Aboriginal rights.[1]

In this paper, I will outline the Supreme Court of Canada's approach to analysing Aboriginal culture and discuss its drawbacks when compared to contemporary anthropological theory of culture. My depiction will be based largely on two recent decisions, *Van der Peet*[2] and *Delgamuukw*,[3] which are the principle judgments upon which the theory has been constructed. I will also address the approach found in *In re Southern Rhodesia*,[4] the Privy Council precedent upon which the Supreme Court relies, as well as *Baker Lake*,[5] the first judgment to incorporate the rationale of the Privy Council decision into Canadian law. I will then compare the Supreme Court's concepts with those found in contemporary anthropology and outline certain ideas which might be useful in reformulating an approach which conforms more closely with contemporary understandings about the fundamental characteristics of culture. In my conclusion I will address the possibility that reliance on cultural difference in and of itself provides an inappropriate frame within which to determine Aboriginal rights and, therefore, regardless of the terms upon which it is based, is likely to lead to flawed, arbitrary and perhaps even capricious decisions.

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[1] This critique also applies to the manner in which the Court uses culture in the determination of Aboriginal title.

[2] *R.* v. *Van der Peet*, [1996] 2 S.C.R. 507.

[3] *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010.

[4] *In re Southern Rhodesia* (1919) AC 210 (PC).

[5] *Hamlet of Baker Lake* v. *Minister of Indian Affairs and Northern Development et al*, [1980] 1 F.C. 518, 107 D.L.R. (3d) 513, 5 W.W.R. 193.

II. THE CHARACTERISTICS OF CULTURE ACCORDING TO THE SUPREME COURT OF CANADA

As I have argued elsewhere,[6] the legal theory of culture rests primarily on an analytical frame provided by *In re Southern Rhodesia*, a decision by the Judicial Committee of the Privy Council in 1919. Initiated prior to World War I, this case was intended to determine the property rights of various parties after the conquest of an African kingdom by the British South Africa Company. In the course of its findings, the Privy Council was required to identify the interests, if any, of that kingdom after the conquest. To that end, the Privy Council asserted the following as a general principle in the analysis of culture:[7]

> The estimation of the rights of aboriginal tribes is always inherently difficult. Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or legal ideas of civilized society. Such a gulf cannot be bridged. It would be idle to impute to such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them. In the present case it would make each and every person by a fictional inheritance a landed proprietor "richer than all his tribe." On the other hand, there are indigenous peoples whose legal conceptions, though differently developed, are hardly less precise than our own. When once they have been studied and understood they are no less enforceable than rights arising under English law. Between the two there is a wide tract of much ethnological interest, but the position of the natives of Southern Rhodesia within it is very uncertain; clearly they approximate rather to the lower than to the higher limit.

Without questioning the contemporary relevance of this method of comparison, the approach was imported as a precedent into Canadian law in Justice Mahoney's 1979 judgment in *Baker Lake*.

To this method, Justice Mahoney added a "test" by which it would be possible to measure whether or not a culture had Aboriginal rights. This "test"

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[6] M. Asch, "Errors in *Delgamuukw*: An Anthropological Perspective" in F. Cassidy, ed., *Aboriginal Title in British Columbia: Delgamuukw* v. *The Queen* (Vancouver: Oolichan Books and The Institute for Research on Public Policy, 1992) 221; M. Asch and P. Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R.* v. *Sparrow*" (1991) 29 Alta. L. Rev. 498; C. Bell and M. Asch, "Challenging Assumptions: The Impact of Precedent in Aboriginal Rights Litigation" in M. Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity and Respect for Difference* (Vancouver: University of British Columbia Press, 1997) 38 [hereinafter *Aboriginal and Treaty Rights*].

[7] *In re: Southern Rhodesia, supra* note 4 at 233–34.

required a group seeking legal recognition of their Aboriginal title to establish the following:[8]

1) That they and their ancestors were members of an organized society.
2) That the organized society occupied the specific territory over which they assert the aboriginal title.
3) That the occupation was to the exclusion of other organized societies.
4) That the occupation was an established fact at the time sovereignty was asserted by England.

Of these points, the most crucial for understanding the legal theory of culture is the first: that they and their ancestors were members of an organized society. This requirement might appear to the unwary to mean that it is necessary to establish that the group was a society rather than an arbitrary collection of individuals; a perfectly reasonable requirement. In fact, it means something quite different. Following upon the rationale in *In re Southern Rhodesia*, the phrase in Canadian law has been taken to mean that "some tribes are so low in the scale of social organization," that they may not have any form of organization whatsoever; that their societies are based, rather, on instinct. Thus, in his trial judgment in *Delgamuukw*, McEachern asserts that:[9]

> I do not accept the ancestors "on the ground" behaved as they did because of "institutions." Rather I find they more likely acted as they did because of survival instincts which varied from village to village.

Or it might be argued, as Mahoney does in *Baker Lake*, that some societies may be only partially organized. As he states:[10]

> The fact is that the aboriginal Inuit had an organized society. It was not a society with very elaborate institutions but it was a society organized to exploit the resources available on the barrens and essential to sustain human life there. That was about all they could do: hunt and fish and survive.

In its recent decisions, the Supreme Court of Canada has had the opportunity to revisit, revise and expand upon the approach developed through *Baker Lake* and other earlier judgments. Of these judgments, the most useful for the purpose of this analysis is *Van der Peet*. This case dealt particularly with the assertion by the Sto:lo First Nation that they had an Aboriginal right to fish for food for exchange. These exchanges were intended to provide means to supplement

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[8] *Baker Lake*, *supra* note 5 at 557–58.

[9] *Delgamuukw* v. *British Columbia*, [1991] 3 W.W.R. 97, 79 D.L.R. (4th) 185 at 373.

[10] *Baker Lake*, *supra* note 5 at 559.

normal subsistence rather than as trade for commercial purposes. The exchanges were said to be significant for the domestic economy of the individuals concerned. The majority decided against the appellant. In the course of the judgment, Chief Justice Lamer further developed the legal theory of culture.[11]

The Lamer judgment in *Van der Peet* avoids reference to the conceptual frame developed in *In re Southern Rhodesia* and *Baker Lake*. However, it does not directly contradict it and, in fact, relies upon it in some respects, as I will discuss below. Explicitly, the judgment enlarges upon the relevant factors for assessing the character of an Aboriginal culture to determine whether it contains a particular Aboriginal right. In this regard, the judgment identifies two crucial factors. The first is that to understand the nature of Aboriginal rights, the stress is on the word "Aboriginal" and not on the word "rights." That is, as Lamer states:[12]

> *Aboriginal* rights cannot ... be defined on the basis of the philosophical precepts of the liberal enlightenment. Although equal in importance and significance to the rights enshrined in the *Charter*, aboriginal rights must be viewed differently from *Charter* rights because they are held only by aboriginal members of Canadian society. They arise from the fact that aboriginal peoples are *aboriginal*. ...
>
> The task of this court is to define aboriginal rights in a manner which recognizes that aboriginal rights are *rights* but which does so without losing sight of the fact that they are rights held by aboriginal peoples because they are *aboriginal* [emphasis in original].

In short, the crucial dimension on defining Aboriginal rights is the nature of Aboriginal culture. This leads to the second point of Chief Justice Lamer's view of how to assess whether Aboriginal cultures contain particular Aboriginal rights.

Lamer argues that to become an Aboriginal right, the custom, practice or tradition must be "distinctive" to that culture and must have been distinctive at a time before the arrival of Europeans. That is, as he says:[13]

> To recognize and affirm the prior occupation of Canada by distinctive aboriginal societies it is *to what makes those societies distinctive* that the court must look in identifying aboriginal rights. The court cannot look at those aspects of the aboriginal society that are true to every human society (e.g., eating to survive...) [emphasis in original].

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[11] Chief Justice Lamer's approach led to two strong dissents, by Justices L'Heuruex-Dubé and McLachlin, both for reasons with which I agree but will not discuss here. Rather, I will limit my discussion to the majority judgment.

[12] *Ibid.* at paras. 19–20.

[13] *Ibid.* at para. 56.

Lamer understands that the notion of "distinctive" is hard to grasp. He defines it here by differentiating between that concept and the idea of "distinct." As he states:[14]

> The standard which a practice, custom or tradition must meet in order to be recognized as an aboriginal right is *not* that it be *distinct* to the aboriginal culture in question; the aboriginal claimants must simply demonstrate that the practice, custom or tradition is *distinctive*. A tradition or custom that is *distinct* is one that is unique ... By contrast, a culture that claims that a practice, custom or tradition is *distinctive* ... makes a claim that is not relative; the claim is rather one about the culture's own practices, customs or traditions considered apart from the practices, customs or traditions of another culture. The person or community claiming the existence of an aboriginal right protected by s. 35(1) need only show that the particular practice, custom or tradition which it is claiming to be an aboriginal right is distinctive, not that it is distinct [emphasis in original].

Lamer also contrasts the term "distinctive" with "significant." He states:[15]

> A claim to an aboriginal right cannot be based on the significance of an aboriginal practice, custom or tradition to the aboriginal community in question. The definition of aboriginal rights is determined through the process of determining whether a practical practice, custom or tradition is integral to the distinctive culture of the aboriginal group. The *significance* of the practice, custom or tradition is relevant to the determination of whether that practice, custom or tradition is integral, but cannot itself constitute a claim to an aboriginal right [emphasis in original].

In sum, Lamer asserts that:[16]

> A practical way of thinking about this problem is to ask whether without this practice, tradition or custom, the culture in question would be fundamentally altered or other than what it is. One must ask, to put the question affirmatively, whether or not a practice, tradition or custom is a defining feature of the culture in question.

Given these criteria, Lamer concludes that:[17]

> Aboriginal rights are not general and universal; their scope and content must be determined on a case by case basis. The fact that one group of aboriginal people has an aboriginal right to do a particular thing will not be, without something more, sufficient to demonstrate that another aboriginal community has the same aboriginal right. The existence of the right will be specific to each aboriginal community.

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[14] *Ibid.* at para. 71.
[15] *Ibid.* at para. 79.
[16] *Ibid.* at para. 59.
[17] *Ibid.* at para. 69.

Delgamuukw is the best known of the recent Supreme Court decisions. While it is of crucial import in terms of the practicalities of Aboriginal rights discourse, it adds little to the basic principles developed in earlier judgments, in particular *Van der Peet*. In *Delgamuukw*, the Supreme Court makes three central points with respect to determining the content of Aboriginal rights. The first point is substantive. The *Delgamuukw* judgment states that an Aboriginal society may be constituted in such a way as to include something akin to a property right in land as a "distinctive" feature that is "integral" to its culture. Where this is the situation, a First Nation, collectively, may hold a title that is roughly equivalent to fee simple title in the common law, with some exceptions (such as that surrender can only be to the Crown). Specifically, it would confer a right to the land itself[18] and a right to use the land for purposes that need not be "aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures"[19] so long as those "protected uses [are] not irreconcilable with the nature of the group's attachment to that land."[20] Aboriginal title would include mineral rights as well as surface rights[21] and Lamer's judgment in *Delgamuukw* concludes:[22]

> In keeping with the duty of honour and good faith on the Crown, fair compensation will ordinarily be required when aboriginal title is infringed. The amount of compensation payable will vary with the nature of the particular aboriginal title affected and with the nature and severity of the infringement and the extent to which aboriginal interests were accommodated.

The latter two points contained in the *Delgamuukw* decision relate to process: how to establish both Aboriginal title and Aboriginal rights. Both points follow from Lamer's judgment in *Van der Peet*. The first concerns oral testimony. Here the Court asserts that oral histories are to be given independent weight and to be held as important as written testimony, as Lamer states:[23]

> The laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with types of historical evidence that courts are familiar with, which largely consists of historical records.

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[18] *Delgamuukw*, *supra* note 3 at para. 138.
[19] *Ibid.* at para. 117.
[20] *Ibid.*
[21] *Ibid.* at para. 122.
[22] *Ibid.* at para. 169.
[23] *Ibid.* at para. 87.

The rationale for this proposition is that without the use of oral histories, evidence derived from Aboriginal cultures "would be systematically undervalued by the Canadian legal system...."[24]

The final point concerns the method of proof. In order to establish Aboriginal title, a First Nation must demonstrate that they had occupied the land prior to European sovereignty and their occupation had been exclusive,[25] a proposition derived directly from Mahoney's judgment in *Baker Lake*. Following the rationale laid out in *Van der Peet*, the proof of Aboriginal title also requires:[26]

> that account be taken of the "aboriginal perspective while at the same time taking into account the perspective of the common law" and that "(t)rue reconciliation will, equally, place weight on each."

Such proof might include laws an Aboriginal society might have made respecting land. Such relevant laws "might include, but are not limited to a land tenure system or laws governing land use."[27] As well, other methods of proof that could reconcile Aboriginal customs and common law might be adduced. These would include aspects of physical occupation such as "the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources."[28] Also, following Brian Slattery, it would be important to take into account "'the group's size, manner of life, material resources, and technological abilities and the character of the lands claimed.'"[29]

Following from this listing, proof of Aboriginal title as well as Aboriginal rights ultimately relies on a comparative framework based on degrees of similarity to western culture as found in *In re Southern Rhodesia*. Hence, notwithstanding the avoidance of specific language from that judgment in either the *Van der Peet* or *Delgamuukw* decisions, *In re Southern Rhodesia* still provides the framework for the analysis of Aboriginal culture in the legal reasoning in those judgments.

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[24] *Ibid.* at para. 98.
[25] *Ibid.* at para. 143.
[26] *Ibid.* at para. 148.
[27] *Ibid.*
[28] *Ibid.* at para. 149.
[29] B. Slattery, "Understanding Aboriginal Rights" (1987) 66 Can. Bar. Rev. 727 at 758.

III. A CRITIQUE OF THE LEGAL THEORY OF ABORIGINAL CULTURE

In my view, the judgment in *In re Southern Rhodesia* forms the basis for the legal approach to Aboriginal cultures taken by later decisions by the Supreme Court of Canada. As I have detailed elsewhere, the central difficulty with this approach is found in the comparison that the court makes between tribes that are "low on the scale of social organization" and those "whose legal conceptions, though differently developed, are hardly less precise than our own." The flaw is that the approach relies on invalid, ethnocentric logic. Ethnocentrism, as I have stated elsewhere,[30] refers to the belief that "one's own culture represents the natural and best way to do things"[31] and that it is valid to evaluate other cultures on the basis of the precepts of one's own.[32] This concept is elegantly described by Marvin Harris, a leading contemporary anthropologist, when he states that ethnocentrism is:[33]

> The belief that one's own patterns of behaviour are always natural, good, beautiful or important and that strangers, to the extent that they live differently, live by savage, inhuman, disgusting or irrational standards.

While this form of reasoning was dominant in 1919 when the *In re Southern Rhodesia* precedent was written, even in its own day social scientists debunked such an approach. For example, in response to the view that "some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or legal ideas of civilized society," Bronislaw Malinowski, one of the founders of contemporary anthropology, made the following reply:[34]

> Hence the Judicial Committee plainly regard the question of native land tenure as both beyond the scope of practicable inquiry and below the dignity of legal recognition. On the contrary, I maintain that there is no people "so low in the scale of social organization" but have a perfectly well-defined system of land tenure. It is absurd to say that such a system

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[30] Asch, *supra* note 6.

[31] A. Rosman and P. Rubel, *The Tapestry of Culture: An Introduction to Cultural Anthropology* (New York: Random House, 1998) at 4.

[32] D. Bates and F. Plog, *Cultural Anthropology* (New York: McGraw-Hill Publishing Company, 1990) at 17.

[33] M. Harris, *Culture, People, Nature: An Introduction to General Anthropology* (New York: Random House, 1988) at 125.

[34] B. Malinowski, "The Rationalization of Anthropology and Administration" (1930) 3 Africa 405 at 414–15.

"cannot be reconciled with the institutions or legal ideas of civilized society." To reconcile the two is precisely the task of Colonial statesmanship.

In today's social and political thought, ethnocentric forms of reasoning such as those employed in *In re Southern Rhodesia* are roundly condemned. One reminder can be found in the *United Nations Declaration on the Granting of Independence to Colonial Countries and Peoples* in which it is asserted that a presumption of backwardness cannot be used as a pretext to deny people the right of self-determination.[35] Such ethnocentric justifications are invalid and ought to be avoided at all costs.

The reasoning underpinning the test in the *Baker Lake* decision that Aboriginal title is dependent on people being "organized in societies" is also ethnocentric and, based on contemporary knowledge, represents an invalid perspective on the nature of society. Justice Mahoney and others in the judiciary, including the Supreme Court of Canada, may presume that it is possible for groups of humans to exist that are not organized or only partially organized. They may also deduce from this presumption that there must be an onus on the Aboriginal party to demonstrate that they lived in an organized society. However, the facts are well established. It is simply not possible for people to live in groups, but not live in society. As I developed elsewhere, the proposition that all human beings live in society is so well established that anthropology texts do not expend much effort to explain it.[36] It is a certainty that all human beings living today as well as for tens of thousands of years have lived in societies.

Similarly, it is not possible for societies to exist that are not "organized" or are only "partially organized." Indeed, the notion that a society could exist that was not organized is virtually a contradiction in terms for, in itself, the definition of society assumes organization. As Dr. Harris states, "society means an organized group of people who share a habitat and who depend on each other for survival and well-being. Each human society has an overall culture...."[37] Dr. Mair's view, although phrased differently is identical in meaning. As she states:[38]

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[35] *United Nations Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res. 1514 (XV) (1960).

[36] Bell and Asch, *supra* note 6 at 66.

[37] Harris, *supra* note 33 at 125.

[38] L. Mair, *An Introduction to Social Anthropology* (London: Oxford University Press, 1965) at 10.

> we think of the society ... as an orderly arrangement of parts, and that our business (as anthropologists) is to detect and explain this order. It consists in relationships between persons which are regulated by a common body of recognized rights and obligations.

Thus, it is not possible for a society to exist that is not organized. All societies are organized with respect to all aspects of social life. Therefore, it is the job of the person undertaking an analysis of a society to determine not *if* it is organized, but *how* it is organized. Consequently, to conform to these facts, the onus would need to be on the Crown to prove that a particular Aboriginal group does not exist in society, despite overwhelming evidence to the contrary. I am certain that the Crown would never attempt such an approach. Had the Crown sought to determine how Gitksan and Wet'suwet'en societies were actually organized, many of the problems in the *Delgamuukw* trial as well as most of the absurd remarks iterated in the trial judgment would have been avoided.

The *Van der Peet* judgment only adds to the difficulties already addressed. In using the term "distinctive," the Supreme Court has invented or, more accurately, reinvented an ancient concept about culture. The Court is likely attempting to discover a method to differentiate between what is central and what is peripheral to a culture. Yet we know that culture is a system and a process rather than merely items and arrangements. It is inappropriate to attempt to ferret out whether a practice, custom or tradition is "distinctive." If one is tempted to move in this direction, it is more appropriate to ask in what respects the practice, custom or tradition is distinctive and, in this regard, how it brings meaning and value to people's lives. However, even such an approach is inappropriate and will prove quite complex and difficult in practice.

While at some level of abstraction it might be possible to determine what is "distinctive" to a particular culture, it is extremely difficult and not at all straightforward. In the *Van der Peet* decision, the Court's presumption that exchange is not a distinctive institution because it is related to kinship makes absolutely no sense, except in an ethnocentric frame of reasoning.

IV. *Van der Peet, Delgamuukw* and the Limitations of the Judicial Approach

The pitfalls inherent in relying on ethnocentric reasoning and on seeking to determine what is "distinctive" can be seen in the reasoning the Court developed to dispose of the *Van der Peet* claim to an Aboriginal right to exchange fish for

other goods. The Court claims to have discovered such a right, only to reject it on the grounds that it was not a "distinctive" aspect of Aboriginal culture.

The Supreme Court's reliance on ethnocentric reasoning is illustrated in the following passage from *Van der Peet*. In conformity with the trial judge, the Court agrees:[39]

> that the Sto:lo were at a band level of social organization rather than at a tribal level. As noted by several experts, one of the central distinctions between a band society and a tribal society relates to specialization and division of labour. In a tribal society there tends to be specialization of labour — for example, specialization in the gathering and trade of fish — whereas in a band society division of labour tends to occur only on the basis of gender or age. The absence of specialization in the exploitation of the fishery is suggestive ... that the exchange of fish was not a central part of Sto:lo culture.

This statement relies on a form of logic which holds that Sto:lo culture had the salient disadvantage that it did not have separate institutions for trading. The statement is clear that the Sto:lo are disadvantaged because they are not organized in the manner of tribal societies, with institutions that are similar to our own. Such reasoning is clearly ethnocentric.

The addition of the "distinctive" test merely adds to the ethnocentric logic already in play. The idea that culture can be organized by "items" and that there is a relationship between the existence of an institution and its centrality to a culture is clearly debunked by any reading of contemporary anthropological literature. In the specific instance of the link between kinship and exchange in fish, the inappropriateness of the presumption that trading was not "distinctive" to the Sto:lo is found in the following quote from a 1949 book by the anthropologist, Claude Levi-Strauss, one of the major figures in contemporary social thought. In *The Elementary Structures of Kinship*, he discusses the issue of exchange among Nambikwara in western Brazil:[40]

> There is a link, a continuity, between hostile relations and the provision of reciprocal prestations [gifts]. Exchanges are peacefully resolved wars, and wars are the result of unsuccessful transactions. This feature is clearly witnessed to by the fact that the transition from war to peace, or at least from hostility to cordiality, is accomplished by the intermediary of ritual gestures, a veritable "reconciliation inspection." The adversaries inspect each other and, with gestures which still hint of combat, examine the necklaces, earrings, bracelets and feathered ornaments of one another with admiring murmurs.

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[39] *Van der Peet*, *supra* note 2 at para. 90.

[40] C. Lévi-Strauss, *The Elementary Structures of Kinship* (Boston: Beacon Press, 1969 [1949]) at 67–8.

> And from being arrayed against each other they pass immediately to gifts; gifts are received, gifts are given, but silently, without bargaining, without any expression of satisfaction or complaint, and without any apparent connection between what is offered and what is obtained. Thus it is a question of reciprocal gifts, and not of commercial transactions. But a supplementary stage may be reached. Two bands which have thus come to establish lasting cordial relations can decide in a deliberate manner to join by instituting between the male members of the two respective bands the artificial kinship relationship of brothers-in-law. Given the marriage system of the Nambikwara, the immediate consequence of this innovation is that all the children of one group become the potential spouses of the children of the other group and vice versa. Thus a continuous transition exists from war to exchange and from exchange to intermarriage, and the exchange of brides is merely the conclusion to an uninterrupted process of reciprocal gifts, which effects the transition from hostility to alliance, from anxiety to confidence, and from fear to friendship.

So, in fact, there is a close, intimate relationship between trading goods and kinship. Indeed, the trading of goods is essential to the development of social relationships between groups. It is therefore not possible to assert that the mere fact that an institution exists as an occupational specialization (rather than being accomplished through kinship) is an indication of the importance of the practice, custom or tradition to that culture.

Further, I have argued elsewhere[41] that the Court is in conflict with contemporary understandings about the nature of culture when it suggests that Aboriginal rights do not include abstract political rights, such as the right to self-determination.[42]

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[41] M. Asch, "From *Calder* to *Van der Peet: Aboriginal Rights and Canadian Law,* 1973-96" in P. Havemann, ed., *Indigenous Peoples' Rights in Australia, Canada, and New Zealand* (Auckland: Oxford University Press, 1999) 428-446.

[42] In *R.* v. *Pamajewon*, [1996] 2 S.C.R. 821 at para 26 and 27 the court applied the Van der Peet standard, saying:

> [T]he most accurate characterization of the appellants' claim is that they are asserting that s. 35(1) recognizes and affirms the rights of the Shawanaga and Eagle Lake First Nations to participate in, and to regulate, gambling activities on their respective reserve lands.
>
> The appellants themselves would have this Court characterize their claim as to "a broad right to manage the use of their reserve lands." To so characterize the appellants' claim would be to cast the Court's inquiry at a level of excessive generality. Aboriginal rights, including any asserted right to self-government, must be looked at in light of the specific circumstances of each case and, in particular, in light of the specific history and culture of the aboriginal group claiming the right.

The court concluded that "the appellants have failed to demonstrate that the gambling activities in which they were engaged, and their respective bands' regulation of those activities, took place pursuant to an aboriginal right recognized and affirmed by s. 35(1) of

In terms of legal theory, the Supreme Court's decision in *Delgamuukw* is largely derivative in that it builds on the logical frame already outlined in *Van der Peet*. The primary innovation is the incorporation of a property right into the constellation of features that may be asserted as rights by indigenous peoples. The property right is differentiated from other rights on the basis of a distinction made between Aboriginal title and Aboriginal rights. According to the Court, it is possible for a society to have an institution sufficiently similar to a property right, yet sufficiently distinctive to be considered an Aboriginal right. If so, the Aboriginal society may make a claim to Aboriginal title.

Among the difficulties with the approach outlined in *Delgamuukw* is that the determination of Aboriginal title relies on ethnocentric logic. That is, the test to establish such a title is to prove some form of exclusive holding, as well as the presence of certain forms of law (or at least evidence of cultivation, settlement and/or intense land use). The courts are relying on the discovery of institutions similar to those in Western society, or to practices akin to the way property is held elsewhere in the world in order to establish a claim to Aboriginal title. A second difficulty with the decision in *Delgamuukw* is that the Court, following from *Baker Lake* and *Van der Peet,* concludes that it is possible to have a system akin to private property and yet no recognized political system. This is simply not possible. A society could not have a means to hold property exclusively without a political system that recognizes both property and exclusivity.

V. THE PROBLEM IN THE ABSTRACT

The tests developed in *Van der Peet* and *Delgamuukw* — which follow upon the logic of *Baker Lake* and ultimately *In re Southern Rhodesia* — will only lead to decisions about Aboriginal rights and title that are arbitrary and ethnocentric. These tests contain a basic contradiction, illustrated in an example of two hypothetical cultures:

> Hypothetical Culture 1: Assume that among First Nations cultures at the time of European contact (or the assertion of sovereignty), one or more cultures existed that were identical to that of the Europeans at that time.
>
> Hypothetical Culture 2: Assume that among First Nations cultures at the relevant time, there were one or more cultures that were so completely different that they bore no resemblance to European culture.

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the Constitution Act, 1982 protected by s. 35(1) of the *Constitution Act, 1982*" *ibid.* at para. 30.

From the tests established in *Van der Peet* and *Delgamuukw*, which culture would have more extensive Aboriginal rights and title? If the emphasis were on the aspect of the test that suggests that the institutions need to be reconciled in some way with Western institutions, the first hypothetical culture would have the advantage. However, if the "distinctive" aspect of the test were to take precedence, the first culture would look like a "normal" culture and not have any distinctive elements, and the second culture might be advantaged. I believe the decision would ultimately be arbitrary and, while unpredictable, it would likely be founded on ethnocentric reasoning. Accordingly, the first culture would automatically have an advantage. Following the reasoning underpinning the *Van der Peet* and *Delgamuukw* decisions, I would imagine the rights of the two cultures would be different.

Should the Aboriginal rights and title of the two hypothetical cultures be different? I would argue they should not. And that is the main point. Aboriginal rights ought not to be determined on the basis of similarity or difference with colonial culture. Aboriginal rights are defined in law as arising from the fact that Aboriginal societies existed prior to the arrival of Europeans and that the rights of these societies were not extinguished by the mere presence of colonists. Yes, they were distinctive. But certainly the salient fact is not that Aboriginal peoples were distinctive, but that they were here, living in organized societies (as Justice Judson stated in *Calder*[43]). Therefore, their rights should flow from that fact and not from whether or not they were distinctive culturally. That is, for the interests of justice to be served, both hypothetical cultures ought to have the same rights. That the reasoning in *Delgamuukw* and *Van der Peet* would avoid this conclusion lies at the heart of the problem.

VI. AN EXPLANATION OF THE ISSUE

In my view, the Court has moved to rely on culture to determine the content of Aboriginal rights in order to avoid exploration in another area: political relations. The Court is determined not to confront the issue of how legitimate sovereignty was acquired by the Crown.[44]

In English law, there are four ways to acquire sovereignty. The one that the Canadian system tends to rely upon is "settlement" or *terra nullius*, a thesis that

[43] *Calder* v. *A.G.B.C.*, [1973] S.C.R. 313 at 328.

[44] I have addressed this problem in a number of other articles, e.g., Asch and Macklem, *supra* note 6.

presumes no people inhabited the land prior to the arrival of the colonists. Yet there were people here long before the coming of the first colonists. In Canadian law, this conundrum is resolved by presuming that the people who were here at the time of colonization were too primitive to have had political institutions that required recognition by the Crown. As a result, Canada could be conceptualized as a *terra nullius*. The logic in Canadian law for such a proposition derives from incorporating the *In re Southern Rhodesia* precedent into the *Baker Lake* decision and later judgments. Justice McEachern, the trial judge in *Delgamuukw*, also relied on *In re Southern Rhodesia* as a precedent in excluding political rights. The Supreme Court had an opportunity to correct his error in its decision in *Delgamuukw*. It might have followed the reasoning of the Australian High Court in *Mabo*[45] by suggesting that the question of the acquisition of sovereignty was beyond the jurisdiction of the municipal court. Such a response would have been clean and, within the limited frame of legal logic, contain a measure of justice. Such a decision would have signaled that the appropriate venue to address such a fundamental matter, as a judicable issue, was at the international level.

But, in anticipation of *Delgamuukw*, the Court in *Van der Peet* decided to resolve the issue of determining the content of Aboriginal rights rather than avoid it. As I argue above, the Court accomplished this by manipulating fundamental political questions such as the Crown's acquisition of sovereignty out of the realm of Aboriginal rights as recognized by the Constitution. First, the Court suggested that Aboriginal rights do not include abstract political rights. Thus, by definition, such rights could not be adjudicated by the courts. Second, the Court asserted that the purpose of placing Aboriginal rights into the category of constitutional rights was to reconcile the existence of distinctive Aboriginal cultures with the sovereignty of the Crown. Since Aboriginal rights were intended to reconcile distinctive cultures with sovereignty, assertions of Aboriginal rights could not be used to challenge sovereignty and jurisdiction. These conclusions placed the load of the definition of Aboriginal rights as judicable rights on the word "distinctive" and thus shifted the terms of identifying such rights from the realm of the political to that of the cultural.[46]

[45] *Mabo* v. *Queensland*, [1992] 107 A.L.R. 1 at 20 (Aust. H.C.).

[46] A detailed analysis of this reasoning appears in Asch, *supra* note 41.

VII. CONCLUSIONS: ARE THERE ALTERNATIVES?

In principle, Aboriginal rights are more readily comprehended in political rather than cultural terms. In the instance of *Delgamuukw*, Aboriginal title makes more sense in terms of jurisdiction over a territory rather than as a peculiar form of a property. As a political right, the concept of Aboriginal title would refer to the political relationships between First Nations and their lands and the peoples who live on them. Were this the situation, to demonstrate title it would not be necessary to include such arcane issues as whether property was held in an exclusive way or the extent to which this "exclusivity" included other First Nations, nor concepts such as "communal ownership" of property. Rather, proof would rest on the establishment of the extent to which a First Nation had jurisdiction over certain lands and the people who lived on them.

To accept that Aboriginal rights are essentially political rights creates major difficulties. The acceptance of a political rights orientation would provoke a fundamental challenge to Canada's claim to have acquired legitimate sovereignty in the absence of treaties or adhesions in which Aboriginal peoples voluntarily surrendered their sovereignty, jurisdiction and underlying title. Such assumptions could raise serious questions about the jurisdictional arrangements between First Nations and various levels of Canadian government. Given the potential for destabilization, it becomes clear why courts on their own might wish to avoid accepting the proposition that Aboriginal rights are political rights. Hence, such concerns may offer an explanation for the decision of the Supreme Court to move to a cultural frame, however inappropriate, to define the content of Aboriginal rights and title.

How, then, can the conditions be created whereby Aboriginal rights will be understood as fundamental political rights? The Royal Commission on Aboriginal Peoples offered one practical suggestion: pass an amendment to the Canadian Constitution that would disallow the use of *terra nullius* as an argument for the legitimate acquisition of sovereignty.[47] This approach would confront ethnocentric reasoning directly. However, such an amendment alone may not create a decisive change in the post-*Delgamuukw* era, when Aboriginal rights are only considered in terms of cultural rights. In a recent paper, Zlotkin and I have argued for Canada to acknowledge that at the time of colonial contact Aboriginal peoples held sovereignty, and this sovereignty continues today in the absence of express language to extinguish it that is acknowledged by First

[47] Canada, *Royal Commission on Aboriginal Peoples Final Report*, Vol. 1 (Ottawa: Communication Group, 1996) Recommendation 1.16.2 at 696.

Nations.[48] Canadian sovereignty, then, would be founded on the acknowledgement of Indigenous sovereignty rather than its extinguishment. Of course, this approach would require extensive negotiations between parties to determine jurisdictional arrangements. But this is a matter to be resolved in the political, rather than the judicial, arena.

Finally, can the courts move to acknowledge that Aboriginal rights are political rights in the absence of express political will on the part of the state? It is unlikely, because the issue is too delicate and the Court has embarked on a particular path from which it will not likely be turned in the short term.[49] Hence, the courts will probably continue to frame Aboriginal rights as cultural rather than political rights until governments agree to fundamental changes in view. Here is where *Delgamuukw* is important. The legal theory behind this judgment derives from *Van der Peet*. However, *Delgamuukw* is singular in terms of practical impact. At least two implications of this decision are crucial. First, the notion that Aboriginal peoples may have title to vast areas of Crown land attracts much attention, especially in British Columbia where outstanding land issues are politically in the forefront. As a form of property, the expropriation of Aboriginal title necessitates compensation, both in the future and, even more to the point, in the past. In this context, it is quite possible that in exchange for a reduction in a compensation package (as well as for other reasons), the governments of Canada and, particularly, British Columbia, may well consider concessions in certain areas of jurisdiction. Second, the *Delgamuukw* judgment removes the traditional privilege given by jurisprudence to written evidence over oral recollections. Instead, it asserts that in cases related to Aboriginal rights and title courts must give serious consideration and weight to evidence based on oral transmission (even where the testimony refers to events long past) when such testimony derives from Aboriginal cultural traditions. As a consequence, governments can no longer rely on the presumption that written versions of events (such as written versions of treaties negotiated with First Nations) will

[48] M. Asch and N. Zlotkin, "Affirming Aboriginal Title: A New Basis for Comprehensive Claims Negotiations" in *Aboriginal and Treaty Rights in Canada, supra* note 6 at 208.

[49] My only thought is that one might follow the kind of logic that the Constitution uses with respect to the relationship between *Charter* rights and democratic freedoms and to have the court attempt to determine the extent to which an assertion of an Aboriginal right might be compatible with the expression of democratic forms. This might produce a useful range within which Aboriginal political rights might be acknowledged by Canada prior to governments agreeing to negotiate on fundamental political relations. It might also provide a means by which Canadians might begin both to think about and to implement Aboriginal rights as political rights.

prevail in court. Rather, they now need to account for the possibility that oral versions of these events may prevail, even when they differ greatly from written accounts.[50] As oral versions of treaty negotiations often refer to the maintenance of indigenous governance and virtually never include agreement to provisions extinguishing political or territorial rights, these interpretations may also have a significant impact on government policy toward Aboriginal political rights. Hence, as inappropriate as they are in terms of cultural theory, provisions regarding Aboriginal rights and title in *Delgamuukw* and *Van der Peet* may nonetheless create the conditions that prod Canada into acknowledging that Aboriginal rights concern matters of jurisdiction and other fundamental political rights.

[50] For example, the Court in the recent Marshall decision put more weight on the Mi'kmaq version of the *Mi'kmaq Treaty of 1760–61*, which was derived from oral transmission, than on the written version, *R.* v. *Marshall*, [1999] 3 S.C.R. 456.

LES PROCÉDURES DE MODIFICATION CONSTITUTIONNELLE DANS LES FÉDÉRATIONS

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By world standards, the search for an amending formula in Canada, and the debates thereon, have been exceptionally long-lasting and intense. Minimal consideration has been given to the amending procedures in force in other federations. Following a review of the literature, seven normative assumptions as to what a federal amending procedure should include have been identified. This paper checks whether federations actually comply with these assumptions.

Constitutional amendment procedures are found to differ widely among federations. The principle that central governments should not be excluded from the process is the only one that is almost universally respected. The idea that States should be involved in one way or another is challenged by almost one-third of federations. While all central governments are endowed with the right to initiate amendments, States are in only half of federations. Referendums are found to be compulsory in less than one-quarter of federations. Three frequently advocated techniques for protecting particular States — unanimity, personal vetoes and opting-out — are very rarely found as part of the standard procedure, even in heterogeneous federations. Free and democratic federations do not differ markedly from more authoritarian ones, except by the greater incidence of referendums.

Les discussions qui ont eu lieu au Canada dans le cadre de la recherche d'une procédure de modification constitutionnelle paraissent uniques au monde par leur durée et leur intensité. Elles ont été menées avec un minimum d'intérêt pour les procédures en vigueur dans les autres fédérations. À partir de la littérature et des débats, cette communication identifie sept postulats quant à la formule idéale, et vérifie dans quelle mesure les autres fédérations s'y conforment.

Par delà la grande diversité des procédures en vigueur, on constate qu'un seul postulat, celui qui donne un droit de veto aux instances centrales, est respecté de façon quasi universelle. Le principe exigeant un consentement quelconque des États membres est ignoré dans près du tiers des fédérations, et seulement la moitié confère aux États membres l'initiative alors que toutes l'accordent aux instances centrales. Le référendum n'est obligatoire que dans le quart des fédérations. Trois techniques couramment avancées de protection des États membres — l'unanimité, le veto personnel et le droit de retrait — ne se rencontrent que de façon exceptionnelle à titre de procédure standard, et ce, presque toujours dans des fédérations hétérogènes. Les fédérations libres et démocratiques ne se distinguent pas nettement de celles qui ne le sont pas, sauf par le recours à l'initiative populaire et aux référendums.

«Le temps est le plus grand des innovateurs» selon Bacon. Comme toutes les lois, les constitutions doivent être adaptées à des réalités changeantes. C'est la

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raison pour laquelle ces documents prévoient les procédures à suivre pour leur propre modification, procédures normalement plus exigeantes que celles suivies dans le cas des lois ordinaires.

Dans la détermination de ces procédures, les constituants naviguent entre Charybde et Scylla. Comme l'écrivait le comité Beaudoin-Edwards,

> «il faut, pour maintenir la stabilité du droit fondamental du pays, une certaine résistance au changement. Cette résistance est aussi nécessaire pour faire en sorte que les modifications soient examinées à fond et ne résultent pas d'emballements passagers. D'un autre côté, une trop forte résistance au changement crée de la rigidité et empêche une constitution d'évoluer de pair avec les priorités et les besoins du public» (Rapport du Comité mixte spécial du Sénat et de la Chambre des communes 1991, 26).

À côté de ces procédures formelles existent des procédures informelles (interprétation judiciaire, pratique politique) qui permettent de contourner la rigidité caractéristique des procédures formelles de modification. Dans certaines fédérations où les changements formels se sont avérés très difficiles à réaliser, ces procédures informelles sont même devenues la voie royale du changement.[1] Livingston (1956, 13) maintient toutefois que la procédure formelle demeure la plus importante, et c'est elle qui fait l'objet de notre étude.

Le débat sur la formule de modification constitutionnelle qui a eu lieu au Canada détonne à l'échelle internationale par sa durée et son intensité. Il a été mené avec un minimum d'intérêt pour les pratiques en vigueur dans les autres fédérations (Banting et Simeon 1985, 3).[2] Nous croyons que celles-ci pourraient éclairer le débat.

Notre communication se situe à l'intersection du normatif et de l'empirique, du «droit tel qu'il devrait être» (selon les théoriciens) et du «droit tel qu'il est.» Après avoir identifié un certain nombre de postulats normatifs avancés dans la littérature à propos des formules de révision constitutionnelle dans les États

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[1] Par exemple, Leslie Zines (1991, 32:53) va jusqu'à dire qu'en Australie la Haute Cour a fait preuve d'une telle «générosité» dans son interprétation des pouvoirs fédéraux qu'elle a pratiquement accordé au gouvernement fédéral ce que le peuple avait refusé de lui octroyer lors de référendums sur des modifications constitutionnelles.

[2] Le Livre blanc du gouvernement fédéral sur la Modification de la Constitution du Canada (Canada, 1965) reproduisait en annexe les procédures de modification constitutionnelle en vigueur aux États-Unis, en Australie, en Suisse et en Allemagne. Dans le cadre de ses travaux, le comité mixte spécial du Sénat et de la Chambre des communes sur le processus de modification de la Constitution du Canada (Beaudoin-Edwards) a entendu en 1991 des experts en provenance de ces mêmes pays, auxquels fut ajoutée la Belgique.

fédéraux, nous allons vérifier dans quelle mesure les procédures en vigueur dans les fédérations respectent ces postulats. Assez souvent, les auteurs présentent leurs opinions comme autant de préceptes découlant de la nature même d'un fédéralisme «authentique.» Nous estimons que les fédérations existantes constituent un ensemble valable permettant de vérifier dans quelle mesure ces postulats reflètent un large consensus pragmatique.

Pour les fins du présent article, nous considérons comme fédération tout État composé où le gouvernement central ainsi que les États membres jouissent d'un pouvoir décisionnel ultime dans leurs domaines respectifs de compétences. Cette définition exclut aussi bien les cas de simple dévolution de pouvoirs (par exemple, l'Écosse et le Pays de Galles au sein du Royaume-Uni) que les confédérations d'États souverains comme l'Union européenne ou la Communauté des États indépendants.

Nous sommes d'accord avec Livingston (1956, 301) que les procédures de révision ne constituent pas nécessairement un indice infaillible du caractère fédéral d'une constitution. Nous croyons cependant qu'une telle comparaison jette un éclairage intéressant sur la nature de l'équilibre intergouvernemental propre à chaque fédération.

I. SEPT POSTULATS

Une revue de la littérature nous a permis d'identifier sept postulats normatifs exprimés quant à la formule de révision idéale. Certains ont trait à l'équilibre intergouvernemental, d'autres au degré d'implication du peuple dans le processus, et d'autres encore à la protection des collectivités minoritaires.

a. L'équilibre intergouvernemental

1. Le gouvernement central ne devrait pas pouvoir procéder à une modification constitutionnelle sans un assentiment quelconque des États membres. Ce rejet de l'unilatéralisme central découle pour certains auteurs de la nature même du fédéralisme. Selon l'avis majoritaire des juges de la Cour suprême du Canada, «le principe fédéral est irréconciliable avec un état des affaires où l'action unilatérale des autorités fédérales peut entraîner la modification des pouvoirs législatifs provinciaux.» (Re: Résolution pour modifier la Constitution, [1981], 1 RCS 753, 905–6).

L'idée qu'aucun ordre de gouvernement ne devrait avoir le monopole en la matière suscite un très large consensus dans la littérature sur le fédéralisme

(Bryce 1901, 211–2; Rogers 1934, 478; Burdeau 1949, 417; Durand 1955, 90; Livingston 1956, 14; Friedrich 1962, 526; Wheare 1963, 55; Livingston 1967, 35; Sharma et Choudry 1967, 21; Kantor 1968, 196; Reagan 1982, 13; Duchacek 1987, 230; Elazar 1987, 173; Croisat 1992, 59; Watts 1998, 98).

Tout en estimant indispensable un assentiment quelconque des États membres, les auteurs ne croient cependant pas que ce consentement devrait nécessairement être exprimé par les *gouvernements* ou les *parlements* desdits États. S'il est possible d'isoler chez certains auteurs (Wheare 1951, 126; Livingston 1967, 35) quelques lignes révélant une préférence pour l'implication des organes législatifs ou exécutifs des États membres, une lecture attentive révèle que même pour ces auteurs, le principe fédéral est sauf dès lors qu'un consentement quelconque est exprimé au niveau des États membres: nous n'avons trouvé aucun auteur qualifiant d'antifédéraliste la solution du référendum à double majorité (nationale et régionale) retenue en Australie ou en Suisse.

2. **Le pouvoir central ne devrait pas être exclu du processus de modification**. Cette proposition est acceptée par la quasi-totalité de la littérature consultée. La proposition contraire, excluant le pouvoir central du processus, est rarement avancée (*Toronto Globe*, 9/3/1888; Faribault 1971). On peut y voir un prolongement logique de la théorie du pacte qui fut si populaire au Canada. De l'axiome d'Ernest Lapointe (cité par Groulx, 1960, II, 292) selon lequel «le pouvoir fédéral est l'enfant des provinces; il n'en est pas le père,» on pourrait en effet déduire (ce que Lapointe ne faisait pas) que les «créatrices»,» soit les provinces, devraient pouvoir rectifier à leur guise l'union contractée antérieurement, sans que ne s'interpose leur «créature» (c.-à-d. l'État central).

3. **L'initiative d'une modification constitutionnelle devrait être attribuée à chaque ordre de gouvernement, non être réservée à l'État central.** Cette proposition découle logiquement du rejet de l'unilatéralisme central ou provincial. On peut penser en effet que l'octroi aux instances centrales d'un monopole en matière d'initiative constitue un atout de taille leur permettant de tuer dans l'œuf toute proposition susceptible de leur nuire. Un droit d'initiative monopolisé par les États membres suscite la même remarque. À l'inverse, un droit d'initiative plus largement distribué, tout en consacrant l'égalité des ordres de gouvernement caractéristique du fédéralisme classique, permet l'élaboration d'un programme de réforme constitutionnelle faisant davantage droit aux préoccupations et griefs de chacun. Dans la littérature, seul McWhinney (1954, 799) rejette ce principe en raison de la difficulté pratique d'action simultanée et concertée de la part des États membres.

b. Le référendum

4. **La ratification de la modification par le peuple, statuant par référendum, devrait être obligatoire**. Le peuple étant à la source de tous les pouvoirs, il est indispensable qu'il puisse se prononcer de façon finale sur tous les changements proposés. Rarement énoncée dans la littérature traditionnelle (Durand 1955, 90), cette opinion a été plus fréquemment exprimée au cours des vingt dernières années. Au Canada, le recours au référendum a été proposé soit pour briser les impasses résultant du refus de certains premiers ministres d'entériner les propositions fédérales,[3] soit en tant qu'outil démocratique par excellence d'éducation populaire (Commission de l'unité canadienne 1979; Stevenson 1984). L'absence de consultation populaire préalable a occupé une place de choix parmi les griefs des opposants à l'accord du Lac Meech (Cairns 1989, 109–124). Certains doutent de la capacité des référendums à briser les impasses (Massicotte 1992, 25:32) ou craignent que de telles consultations populaires n'ébranlent la cohésion des fédérations en dressant les populations des États membres les unes contre les autres (Verdussen 1998, 67), tout en rendant encore plus aléatoire tout changement constitutionnel.

c. La protection des collectivités minoritaires au sein d'une fédération

Cet objectif peut être atteint d'au moins trois façons.

5. **Tous les États membres devraient consentir au changement proposé**, ou, pour dire les choses plus négativement, chaque État membre devrait avoir un veto. Cette théorie, dite de l'unanimité, a été longtemps soutenue au Canada (Loranger 1881; Ferguson 1930). Elle découle de ce que James Tully estime être la plus ancienne des conventions du constitutionnalisme, *Quod omnes tangit ab omnibus comprobetur* («ce qui concerne tous et chacun doit être approuvé par

[3] Cette approche trouva son expression juridique dans le projet de résolution portant sur le rapatriement de la Constitution canadienne déposé par le gouvernement Trudeau en octobre 1980: en cas de refus des provinces, le pouvoir fédéral pouvait provoquer la tenue d'un référendum délibératif à l'échelle canadienne, et l'adoption sans le consentement des provinces d'une modification ayant recueilli la majorité dans chacune des quatre régions. La possibilité n'était cependant pas ouverte aux provinces de recourir au même mécanisme pour faire appel au peuple d'un éventuel refus fédéral de leurs propositions. Critiqué pour sa partialité, ce mécanisme fut abandonné par ses promoteurs en novembre 1981.

tous et chacun») (Tully 1995, 74).[4] Bien qu'aucun texte constitutionnel ne l'exigeât explicitement avant 1982, plusieurs politiciens et intellectuels soutenaient, en l'absence d'une formule explicite, que, puisque la constitution canadienne était le fruit d'un pacte conclu entre les provinces d'origine, toute modification au pacte devrait avoir l'approbation de chacune des provinces, y compris les provinces admises ou créées après le pacte initial. La théorie fut sévèrement critiquée (Rogers 1931), et la Cour suprême du Canada, malgré l'existence de plusieurs précédents récents en ce sens, refusa de lui reconnaître le statut d'une convention constitutionnelle en 1981. Cette vision offre une protection hors pair pour les petites provinces, et pour les groupes ethnolinguistiques ou religieux minoritaires qui constituent la majorité dans au moins une province.

À l'extérieur du Canada, cette théorie fait l'objet d'un rejet unanime chez les auteurs qui en traitent (McWhinney 1954, 799; Durand 1955, 90; Livingston 1956, 14; Friedrich 1962, 527; Livingston 1967, 35; Croisat 1992, 59). On fait observer notamment que le niveau d'intégration qu'implique une fédération est incompatible avec un principe aussi caractéristique d'une ligue d'États souverains, une confédération.[5]

6. **Le consentement de certains États membres devrait être nommément exigé.** En d'autres termes, certains États devraient disposer d'un veto «personnel» en raison de leur poids numérique ou de leur qualité d'assise d'un groupe ethnolinguistique ou religieux minoritaire. Confrontés à l'objection que l'unanimité constitue une exigence exorbitante, les partisans des droits minoritaires proposent parfois de tourner la difficulté en avançant cette position de repli. Certains considèrent qu'il y a des États membres distincts (ou à tout le moins plus distincts que les autres) à cause de certaines caractéristiques de leurs résidents, et que cette protection est indispensable, vu la tendance présumée des autres partenaires à se liguer contre eux. C'est au nom de ce principe que certains estiment que si l'unanimité n'est pas exigible, le Québec, à titre d'assise d'un des deux «peuples fondateurs» devrait à tout le moins disposer d'un veto

[4] Tully ne prétend pas que l'unanimité soit requise pour modifier la constitution. Une majorité d'États membres peut suffire dans la mesure où chacun a préalablement donné son consentement à la formule de modification constitutionnelle (Gagnon 1993, 30).

[5] L'exigence de l'unanimité figurait aux États-Unis dans les Articles de Confédération de 1777 (art. XIII) et est inscrite pour l'Union européenne à l'article 48 du Traité d'Amsterdam de 1997.

personnel sur les changements constitutionnels (Laforest 1992, 68; Robertson 1982, 14).[6]

L'octroi d'un veto personnel à quelque province canadienne que ce soit a été récusé à compter de 1976 par les provinces de l'Ouest, qui y voyaient la concession d'un privilège intolérable faisant des autres provinces des membres de deuxième classe de la fédération (Meekison 1983, 103).

7. **Tout État membre en désaccord avec la modification acceptée par les autres devrait pouvoir se retirer du champ d'application de cette mesure, et même être compensé financièrement pour ne pas être pénalisé par son choix**. En l'absence de l'unanimité ou de veto personnel, le droit de retrait, s'il est assorti d'une juste compensation, permet de protéger les minoritaires, en leur permettant non seulement de ne pas subir la loi de la majorité, mais de le faire sans pénalité financière. Les dissidents se voient conférer un veto qui ne vaut que pour eux-mêmes, sans empêcher la majorité d'obtenir ce qu'elle veut. Cette approche permet l'émergence à long terme d'un fédéralisme asymétrique engendrant selon les uns un régime mieux adapté à la situation particulière de chaque partenaire, et conduisant de l'avis des autres à la balkanisation.

Cette approche est de source exclusivement canadienne, et les comparatistes l'ignorent. Tout en jugeant le droit de retrait plus facile à manier par le Québec que le droit de veto, Claude Morin (1988, 214–8) y voyait une extension souhaitable du droit au désengagement sans pénalité favorisé par les gouvernements québécois depuis les années 1960. René Lévesque (1986, 439) y discernait même une façon discrète de bâtir à la pièce l'État associé qui avait été rejeté par les Québécois lors du référendum de 1980. Cette approche a été vertement dénoncée par Garth Stevenson (1982, 219) comme une réédition du

[6] Robertson proposait qu'une modification nécessite le consentement du Parlement fédéral, du Québec et de six des neuf autres provinces, et précisait sa position en des termes qui méritent d'être cités: «It would have eased the problem of an appropriate amending formula enormously if we, the English-speaking Canadians, living outside Quebec and the governments that represent us, could have accepted reality and stopped pussy-footing around it. Quebec cannot be expected to accept an amending procedure that does not protect it in some way from the risks of future constitutional changes. It would have no security against the English-speaking majority of Canada if it did. Recognition of that reality would have made it possible for the principle of provincial equality to be applied to the provinces that can reasonably be treated as 'equal' in the sense that they do not have the genuine case that Quebec does for specific protection.»

droit de nullification revendiqué par la Caroline du Sud avant la Guerre de Sécession.

Ces sept postulats n'épuisent pas toutes les dimensions possibles de la procédure de modification constitutionnelle, mais ils identifient des enjeux importants. Dans quelle mesure sont-ils respectés par les formules de modification existantes?

II. MÉTHODOLOGIE

Notre univers de référence est constitué de 22 fédérations: Afrique du Sud, Allemagne, Argentine, Australie, Autriche, Belgique, Brésil, Canada, Émirats arabes unis, États-Unis, Éthiopie, Inde, Malaisie, Mexique, Micronésie, Nigéria, Pakistan, Russie, Saint-Kitts-et-Nevis, Suisse, Venezuela, Yougoslavie. Nous avons adopté la liste dressée par Watts (1998, 11) à trois exceptions près. Nous y avons ajouté la Micronésie, fédération ayant acquis sa souveraineté en 1986, et retranché l'Espagne et les îles Comores.[7]

Nous avons examiné la procédure formelle de modification constitutionnelle en vigueur dans chaque fédération[8] et, le cas échéant, les lois et usages qui les complètent, dans les cas où ils nous étaient connus. En cas de sectionnement du texte constitutionnel en plusieurs parties sujettes à des formules distinctes, nous avons privilégié la formule applicable au partage des pouvoirs législatifs, disposition fondamentale dans une fédération. Nous avons cependant tenu compte des autres procédures si elles confirmaient, au moins en partie, un des postulats énoncés.

Pour uniformiser la terminologie, nous avons dû prendre quelque distance avec le vocabulaire utilisé dans les divers pays. Ainsi, la Constitution américaine parle de «proposition» et de «ratification.» La première expression désigne non

[7] Aux îles Comores, la sécession *de facto* en 1997 de deux des trois partenaires rend purement artificiel le caractère fédéral du pays. Bien que cette sécession ne soit pas reconnue par la communauté internationale, le pouvoir fédéral n'avait toujours pas réussi trois ans plus tard à réintégrer l'île d'Anjouan. Même si certains auteurs considèrent l'Espagne comme une fédération, nous nous sommes rangés à l'avis majoritaire des auteurs espagnols qui voient dans cet «État des autonomies» un État unitaire décentralisé.

[8] Pour le texte de la formule de modification constitutionnelle en vigueur dans chaque fédération, nous avons consulté les fascicules les plus récents de Blaustein et Flanz. La plupart de ces constitutions sont également disponibles sur les sites Internet suivants: http://www.nhmccd.cc.tx.us/contracts/lrc/kc/constitutions-subject.html, et http://www.urich.edu/~jpjones/confinder/const.htm.

seulement la présentation, mais aussi l'adoption par les deux chambres du Congrès, d'une modification constitutionnelle destinée à être soumise aux États pour ratification. Nous distinguons pour notre part trois étapes:

a. L'initiative: le pouvoir de proposer à un organe décisionnel, à l'un ou l'autre palier de gouvernement, un projet de modification;

b. La ratification par l'État central: l'adoption de la mesure proposée par les organes décisionnels de l'État central;

c. La ratification par les États membres: l'adoption de la mesure proposée par les organes décisionnels des États membres.

Chacune de ces trois étapes fait l'objet d'un tableau couvrant les 22 fédérations (voir tableaux 1, 2 et 3).

Les procédures de démocratie directe (initiative et référendum) ne font pas l'objet d'un tableau distinct. Elles figurent plutôt dans les tableaux pertinents en fonction du cadre géographique dans lequel elles sont utilisées. Par exemple, le référendum exigé en Australie sera mentionné aux tableaux 2 et 3, puisque la modification requiert une double majorité référendaire: dans l'ensemble du pays et dans la majorité des États, alors que l'initiative populaire suisse figure au tableau 1.

III. CONSTATS

C'est la variété des procédures qui frappe d'abord le regard (voir tableau 4). S'il existe des similarités, par exemple entre les procédures suisse et australienne, ou entre les procédures en vigueur en Allemagne et en Afrique du Sud, on peut dire qu'aucune formule n'est rigoureusement semblable à une autre. Le titre du volume de Valerie Earle, *Federalism. Infinite Variety in Theory and Practice*, est ici confirmé.

a. La prépondérance des instances centrales

Contrairement au postulat de la nécessaire implication des deux ordres de gouvernement, ou même au postulat plus minimal excluant l'action unilatérale de l'un d'eux, les procédures de modification tendent à privilégier l'État central. Ceci se manifeste notamment de trois façons:

En premier lieu, **dans plusieurs fédérations, les États membres sont privés du droit d'initiative** en matière de révision constitutionnelle. Alors que toutes les fédérations octroient à l'État central le droit d'initiative, moins de la moitié (10) le concède également aux États membres.[9] Deux autres fédérations, la Suisse et la Micronésie, tempèrent le privilège fédéral par une procédure d'initiative populaire à laquelle les citoyens d'un État membre particulier peuvent recourir, bien que l'initiative populaire soit exercée dans le cadre géographique de la fédération et non pas exclusivement à l'intérieur de chaque État membre.

Deuxièmement, il est **très rare que le gouvernement central ne joue qu'un rôle passif**. En d'autres termes, une règle très courante permet aux instances centrales de bloquer les modifications qui leur déplaisent. On ne relève que trois exceptions. Aux États-Unis, les législatures des deux tiers des États peuvent obliger le Congrès à convoquer une convention constitutionnelle nationale chargée de «proposer» une modification destinée ensuite à être ratifiée par les législatures des trois quarts des États ou par des conventions élues au sein des États.[10] De même en Suisse, il est possible de contourner les chambres fédérales en provoquant par voie d'initiative populaire la tenue d'un référendum. L'Assemblée fédérale (parlement) peut répliquer par une contre-proposition, mais doit s'incliner devant la décision référendaire. Dans ces deux pays, le contournement des autorités centrales ne constitue qu'une possibilité parmi d'autres,[11] non la seule voie possible. La Micronésie est la seule fédération où le Congrès ne peut aucunement bloquer une réforme constitutionnelle, puisque des référendums tenus dans les divers États suffisent à l'entériner. Le Congrès partage l'initiative avec d'autres acteurs, mais comme il est possible de provoquer la tenue de référendums constitutionnels par voie d'initiative populaire, il est possible de vaincre l'opposition éventuelle du Congrès.[12]

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[9] Encore faut-il préciser que l'initiative des États, lorsqu'elle est autorisée, doit souvent s'exercer de façon collective, ce qui la rend plus malaisée: si un seul État suffit au Canada, en Russie et en Yougoslavie, il faut le quart des États membres au Venezuela, le tiers en Éthiopie, la majorité au Brésil et les deux tiers aux États-Unis.

[10] Cet outil n'a jamais été utilisé dans l'histoire américaine, mais la menace d'y recourir contribua à convaincre le Congrès d'adopter lui-même l'amendement XVII (1913) prévoyant l'élection directe des sénateurs, une mesure qui suscitait peu d'enthousiasme parmi les sénateurs alors en fonction.

[11] Et, pourrait-on ajouter, une voie peu courante.

[12] La meilleure sauvegarde des prérogatives du Congrès réside dans l'exigence, lors du référendum, d'une majorité des trois quarts dans les trois quarts des États.

Troisièmement, dans plusieurs fédérations, **les instances gouvernementales ou parlementaires des États membres ne sont pas impliquées dans la ratification**. Seulement 11 fédérations respectent une vision essentiellement gouvernementale du fédéralisme en exigeant le consentement d'un nombre déterminé d'assemblées parlementaires soit directement, soit par l'intermédiaire d'une deuxième chambre contrôlée par les États membres. Ajoutons que dans l'une d'entre elles, les États-Unis, le Congrès peut contourner une éventuelle opposition prévisible des législatures des États en ordonnant que l'amendement soit ratifié par des assemblées constituantes (*constitutional conventions*) spécialement élues à cette fin par la population des États membres.[13]

Au consentement des parlementaires des États membres, quatre autres fédérations (Suisse, Australie, Saint-Kitts-et-Nevis, Micronésie) substituent le consentement du peuple de ces États, exprimé par voie de référendum. L'expression de la volonté d'un État membre par voie de référendum ne garantit pas à son gouvernement une protection aussi hermétique qu'un veto accordé à son assemblée parlementaire.

Finalement, on dénombre sept fédérations (Autriche, Belgique, Argentine, Brésil,[14] Émirats arabes unis, Malaisie[15] et Pakistan) ne requérant *aucun* consentement spécifique législatif, gouvernemental ou référendaire des États membres.[16] Force est de constater la vulnérabilité dans laquelle se trouvent les États membres dans un nombre étonnamment élevé de fédérations.

[13] Cette voie de ratification ne fut prescrite qu'une seule fois dans l'histoire américaine, dans le cas du XXI[e] amendement (1933), abrogeant l'amendement sur la prohibition.

[14] La constitution brésilienne protège le caractère fédéral du pays en déclarant irrecevable toute proposition de modification tendant à abolir «la forme fédérative des États.»

[15] Sous réserve de l'approbation nécessaire des gouvernements de Sabah et de Sarawak en certaines matières.

[16] L'absence d'implication des parlements des États membres aux Émirats arabes unis ne revêt guère d'importance, puisque cinq des sept émirs doivent consentir *ante facto* au stade de l'initiative.

Une remarque méthodologique s'impose ici. Sauf en Allemagne[17] et en Afrique du Sud,[18] où la seconde chambre peut être considérée comme une émanation des gouvernements des États membres, nous ne considérons pas que l'approbation d'une modification constitutionnelle par la seconde chambre vaille consentement de la part des instances politiques des États membres. Aucun des auteurs consultés ne soutient d'ailleurs cette idée, et l'un d'entre eux (Durand 1955, 91) s'inscrit explicitement en faux contre elle. Les secondes chambres élues au suffrage universel direct représentent les électeurs des États membres, non les gouvernements ou les parlements de ceux-ci, et le fait que leurs membres soient élus dans le cadre de circonscriptions électorales coïncidant souvent avec les limites territoriales des États membres ne fait aucunement d'eux les mandataires du gouvernement ou du parlement de l'État. Même lorsqu'ils sont désignés par les parlements des États membres, comme en Inde et en Autriche, les membres des secondes chambres sont d'abord et avant tout des parlementaires fédéraux, élus pour un mandat non révocable, votant individuellement. Rien ne garantit la conformité de leurs vues sur une modification constitutionnelle avec celles des parlementaires qui les ont désignés. Notons d'autre part le constat quasi universel à l'effet que les membres des secondes chambres fédérales agissent non en mandataires des gouvernements des États membres, mais primordialement en fonction de leur allégeance partisane nationale (Zines 1991, 32:44; Linder 1998, 47–8; Douin 1977, 211–6 et 226–33) ou de leurs opinions propres comme aux États-Unis.

Comme on pouvait s'y attendre, l'exigence d'une quelconque majorité qualifiée est presque de rigueur au sein des premières chambres du parlement central: seuls la Suisse, l'Australie, le Canada et le Venezuela se contentent d'une majorité des voix ou des membres. La majorité qualifiée requise est

[17] Le Bundesrat est composé de membres des gouvernements des Länder, qui les nomment et les révoquent à volonté. Chaque Land vote en bloc. Selon Watts (1998, 99), «l'appui par une majorité qualifiée au Bundesrat équivaut au consentement correspondant parmi les gouvernements des Länder.»

[18] Sous l'empire de la Constitution de 1996, le Conseil national des provinces se compose de délégations de dix membres désignés à la proportionnelle des groupes parlementaires par la législature de chacune des neuf provinces. Chaque délégation inclut, en plus du premier ministre de la province, trois autres délégués spéciaux membres de la législature provinciale, et six délégués permanents ne pouvant siéger à la législature provinciale. À première vue, cette composition relève de l'élection indirecte. Toutefois, c'est le premier ministre de chaque province qui en dirige la délégation, et surtout qui émet en son nom le vote unique dont dispose la province. De plus, les délégués sont révocables par la législature et par leurs partis respectifs. On a présumé que le parti ou la coalition au pouvoir jouait un rôle prépondérant dans la détermination de ce vote.

toujours celle des deux tiers des voix ou des membres, sauf au Brésil où elle est abaissée aux trois cinquièmes. La Belgique exige en plus, pour le vote des lois spéciales qui définissent notamment les pouvoirs des conseils régionaux et communautaires, la majorité au sein de chaque groupe linguistique. Même scénario pour les secondes chambres lorsqu'elles existent et sont appelées à se prononcer avec effet délibératif ou suspensif.[19]. La séance commune des deux chambres statue aux deux tiers au Mexique et à la majorité simple au Venezuela, tout comme l'Assemblée constituante argentine.

b. La rareté des procédures de démocratie semi-directe

Autre constat susceptible d'en étonner plusieurs: **la grande majorité des procédures de modification constitutionnelle ne comportent pas de référendum obligatoire. L'initiative populaire est encore plus rare.**

Seulement trois fédérations (Suisse, Micronésie et Yougoslavie) reconnaissent l'initiative populaire. Quant à la ratification par voie de référendum, elle n'est requise de façon impérative que dans quatre fédérations: l'Australie, la Suisse, la Micronésie et Saint-Kitts-et-Nevis. L'Autriche ouvre la voie à la tenue d'un référendum de ratification, mais seulement si le tiers des membres de l'une des deux chambres fédérales le demandent.[20]

D'autres fédérations prévoient le recours au référendum, mais uniquement dans des circonstances bien identifiées. Une révision *générale* doit obligatoirement faire l'objet d'un référendum au Venezuela (tout comme en Autriche), et peut le faire en Russie si l'assemblée constituante en décide ainsi. L'Éthiopie et le Nigéria le prévoient pour former un nouvel État membre. En Allemagne, la modification des limites territoriales des Länder requiert la tenue d'un référendum et une majorité consentante dans chacune des portions territoriales affectées, et une initiative populaire peut déclencher un tel processus.

L'élection d'une assemblée constituante, prévue notamment en Belgique et en Argentine, peut-elle être considérée comme équivalant à un référendum constitutionnel national? Un auteur le suggère (Gérin-Lajoie 1950, 276). Nous

[19] Toutefois, le Conseil de la Fédération russe statue aux trois quarts de ses membres, alors qu'à la Douma les deux tiers suffisent.

[20] Dans la pratique, les très nombreuses modifications apportées à la constitution autrichienne n'ont pas été sanctionnées par des référendums. La seule exception paraît l'adhésion à l'Union européenne en 1994.

ne partageons pas ce point de vue. En Belgique, la révision de la constitution débute par l'adoption par les deux chambres du parlement central d'une déclaration à l'effet qu'il y a lieu de réviser la constitution et indiquant les dispositions à modifier. Les chambres sont alors immédiatement dissoutes, prétendument dans le but de permettre à la population de se prononcer sur le sujet lors des élections qui suivront, puisque seules les chambres alors élues détiendront le pouvoir constituant. Nous ne considérons pas qu'il s'agisse d'un substitut valable à un référendum en bonne et due forme pour deux raisons. Premièrement, n'est adoptée avant l'élection qu'une résolution indiquant les dispositions à modifier, non la substance des modifications envisagées, destinée à faire l'objet de négociations postélectorales entre les partis. Deuxièmement, la réforme constitutionnelle s'inscrit dans le contexte d'une campagne électorale et ne constitue qu'un enjeu parmi d'autres, qui en pratique, par le passé, n'a jamais dominé la campagne (Alen 1992, 32–3). En Argentine, où l'assemblée constituante est élue à la seule fin d'adopter une réforme constitutionnelle, on peut s'attendre à ce que la campagne porte plus spécifiquement sur la réforme envisagée.[21] Toutefois, rien ne garantit l'homologie de vues entre le vœu majoritaire d'une constituante et celui d'une population, comme en témoigne le rejet par le peuple français en mai 1946 d'un projet de constitution adopté par une assemblée constituante élue par ce même peuple quelques mois plus tôt.[22]

Lorsqu'un référendum est tenu, on exige le plus souvent une majorité aussi bien au niveau de l'ensemble du pays qu'au niveau des États. Tel est le cas en Suisse, en Australie et à Saint-Kitts-et-Nevis, mais non en Autriche, où une majorité nationale suffit, et en Micronésie, où une majorité au niveau des États est suffisante. Le consentement est le plus souvent exprimé à la majorité des votes valides. Cette pratique n'est cependant pas universelle: les deux tiers des votes sont exigés dans chacune des deux îles de Saint-Kitts-et-Nevis, et la Micronésie fracasse tous les records de rigidité connus de nous en élevant aux

[21] En 1994, la loi 24.309 portant déclaration de nécessité de révision partielle de la constitution adoptée par les deux chambres fédérales comportait non seulement une liste d'articles à réformer, mais le texte d'un accord préalablement conclu entre les principaux partis politiques détaillant les modifications à apporter (Sagüés 1995, 280–91).

[22] Il est également possible que le système électoral utilisé pour l'élection des constituants déforme la volonté populaire au point de donner la majorité à un parti qui n'a même pas la *pluralité* du suffrage. Au référendum québécois de 1995, le OUI, minoritaire dans l'ensemble du Québec, était en tête dans 80 des 125 circonscriptions.

trois quarts des votes valides dans chaque État consentant le seuil décisionnel exigible.[23]

La situation canadienne sur ce point est complexe, voire confuse. La Loi constitutionnelle de 1982, sans interdire le référendum, n'en prévoit pas la tenue et n'envisage l'intervention que de corps législatifs. Toutefois, le parlement fédéral a adopté en 1992 une loi permettant la tenue de référendums sur la Constitution.[24] Il appartient au parlement de décider la tenue d'un tel référendum, le gouvernement déterminant alors si le référendum sera tenu dans une ou plusieurs provinces, ou à la grandeur du pays. Finalement, de tels référendums n'ont techniquement que valeur consultative. Par ailleurs, la Colombie-Britannique et l'Alberta prescrivent la tenue de référendums sur toute modification constitutionnelle,[25] la seconde obligeant même le gouvernement à respecter le verdict populaire.

En théorie, ce dispositif laisse beaucoup de liberté aux gouvernements, puisque la tenue de référendums n'est obligatoire que dans deux provinces et le résultat ne s'en impose au gouvernement que dans une seule. Il est légitime de croire cependant que l'évolution politique a rendu les référendums impératifs, d'envergure nationale et délibératifs.

En 1992, les gouvernements signataires de l'Accord de Charlottetown ont en effet jugé nécessaire la tenue d'un référendum sur un accord qui techniquement, dans huit provinces, aurait pu entrer en vigueur sur la seule base de ratifications parlementaires. L'Accord a été rejeté par une marge substantielle. La preuve a alors été faite qu'un texte endossé par tous les gouvernements du pays, les leaders autochtones et les trois principaux partis fédéraux d'alors pouvait néanmoins ne pas refléter le sentiment populaire. Plusieurs auteurs ont depuis exprimé l'idée que le précédent de Charlottetown rend politiquement inconcevable une réforme majeure qui n'ait préalablement été entérinée par référendum (Boyer 1992, 236; Russell 1993, 234; Massicotte 1993, 136;

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[23] En Allemagne, les référendums portant sur des remaniements territoriaux exigent une majorité de OUI représentant le quart de l'électorat.

[24] *Loi référendaire*, Statuts du Canada 1992, chap. 30.

[25] Pour la Colombie-Britannique, voir le *Constitutional Amendment Approval Act*, S.B.C. 1991, chap. 2; et pour l'Alberta le *Constitutional Referendum Act*, S.A. 1992, chap. C–22.25. L'Ontario envisage l'adoption d'une loi semblable. Notons qu'aux États-Unis, l'arrêt de la Cour Suprême dans l'affaire *Hawke* v. *Smith* en 1920 a interdit aux États de subordonner la ratification d'une modification constitutionnelle à la tenue d'un référendum (Schechter 1985, 170).

Woehrling 1998, 337–8). Depuis cette date, une seule des cinq modifications à la constitution canadienne adoptées, celle de 1997 portant sur les écoles confessionnelles du Québec, n'a pas fait l'objet d'un référendum à un stade ou l'autre.[26]

Il est difficile de faire la part, dans cet enthousiasme pour l'outil référendaire, de ce qui relève du perfectionnisme démocratique et de ce qui découle d'une simple volonté de rendre pratiquement inaltérable l'ordre constitutionnel issu du rapatriement de 1982. Constatons simplement que le Canada pourrait très légitimement être ajouté à la liste des fédérations où la tenue d'un référendum est inévitable. Cet ajout ne porte toutefois la liste qu'à cinq fédérations, soit moins du quart des pays retenus pour examen.[27] Il ne faut pas attribuer à l'ancienneté des constitutions fédérales cette tiédeur à l'égard de la démocratie semi-directe: seulement sept des constitutions fédérales examinées sont antérieures à 1945 (et trois de celles-ci permettent ou prescrivent un référendum).

c. La protection des minorités

Les trois techniques de protection des minorités et des petits États membres sont fort peu répandues, y compris dans des fédérations hétérogènes, où elles sont cependant plus fréquentes.

L'unanimité des États membres est exigée de façon rarissime. Elle ne constitue une exigence générale que dans deux fédérations, Saint-Kitts-et-Nevis et la Yougoslavie, par voie référendaire dans le premier cas, par voie législative dans le second. De façon révélatrice, ce sont les seules fédérations ne comptant que deux partenaires. Comme il est impossible de dégager une majorité d'États membres dans une telle situation, l'unanimité s'impose logiquement.

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[26] La modification de 1993 sur la reconnaissance de la communauté acadienne faisait partie de l'Accord de Charlottetown, qui lui-même avait été approuvé par la population du Nouveau-Brunswick. Celle de 1993 concernant l'Île-du-Prince-Édouard éliminait un obstacle constitutionnel gênant la construction d'un lien avec la terre ferme, projet qui avait été entériné par les insulaires lors d'un référendum en 1988. Enfin, les deux modifications relatives aux écoles confessionnelles de Terre-Neuve (1997 et 1998) ont été toutes les deux précédées de référendums tenus dans la province.

[27] Dans la même veine, observons que des 22 constitutions fédérales examinées, seulement cinq (Australie, Éthiopie, Micronésie, Russie et Suisse) ont fait l'objet d'un référendum préalablement à leur entrée en vigueur.

Ailleurs, l'unanimité constitue une exigence exceptionnelle. En Éthiopie, elle ne s'applique que pour les droits et libertés ainsi que pour la formule de modification constitutionnelle. L'admission au sein des Émirats arabes unis d'un autre État arabe indépendant requiert le consentement de chacun des sept émirs.[28]

Au Canada, l'unanimité, confinée par le texte de la Loi constitutionnelle de 1982 à des domaines bien précis, a été étendue par la pratique politique à d'autres domaines. À première vue, elle n'est exigée que pour cinq sujets: la charge de Reine, celle de gouverneur général et celle de lieutenant-gouverneur; la clause sénatoriale; l'usage du français ou de l'anglais au niveau fédéral; la composition de la Cour suprême du Canada; et la formule de modification elle-même.

Toutefois, à deux occasions (accords du Lac Meech en 1987 et de Charlottetown en 1992), les premiers ministres fédéral et provinciaux ont choisi d'intégrer en un seul texte des modifications requérant le consentement les unes de sept provinces, et les autres de toutes les provinces. L'opinion commune a alors voulu que l'exigence d'unanimité s'étende, par une sorte d'effet de contamination, à l'ensemble du texte. En conséquence, l'absence de ratification dans deux provinces comptant environ 8% de la population canadienne a suffi en 1990 pour faire échouer certaines mesures qui, considérées isolément, avaient bel et bien franchi les seuils applicables à leur cas.[29]

Si l'unanimité des États membres n'est généralement pas exigée, les constitutions fédérales fixent des seuils majoritaires dont la sévérité est fort variable. Aucun de ces seuils n'a pour effet de conférer un veto personnel *de facto* au plus peuplé des États membres. Le seuil des trois quarts des États, établi aux États-Unis et en Micronésie,[30] paraît exceptionnellement exigeant. À l'autre extrême, l'Inde se contente d'exiger «pas moins de la moitié» des États membres, ce qui constitue le seuil le moins exigeant de tous, au moins lorsque

[28] L'exigence belge d'une majorité au sein de chacun des deux groupes linguistiques pour la modification des lois spéciales constitue un cas apparemment analogue, mais on remarquera que cette exigence s'applique non aux organes des États membres, mais aux *parlementaires fédéraux* des deux chambres membres de chaque groupe linguistique.

[29] La possibilité fut évoquée en 1990, dans l'impossibilité de recueillir le consentement de toutes les provinces, d'une proclamation partielle limitée à ces mesures: notamment la clause reconnaissant le caractère distinct aurait pu être adoptée de la sorte, à condition que la constitutionnalité du procédé soit reconnue par les tribunaux. Toutefois, le Premier ministre du Québec estimait un tel compromis politiquement indéfendable (Bourassa 1995, 187–9).

[30] La Micronésie ne comptant que quatre États membres, il y est impossible d'obtenir une majorité d'États sans exiger le consentement de trois d'entre eux.

le nombre des États est pair[31]. La majorité absolue (soit plus de la moitié) est requise en Australie, en Suisse[32] et au Mexique, alors que les deux tiers sont exigés en Afrique du Sud, en Russie, au Venezuela, en Éthiopie et au Nigéria. Dans deux autres fédérations, la majorité des deux tiers est assortie d'un correctif tenant compte des différences de taille entre les États membres. Le Canada ajoute que les provinces consentantes doivent compter au moins la moitié de la population de toutes les provinces, ce qui exclut toute modification n'ayant l'aval ni de l'Ontario ni du Québec. L'Allemagne exige les deux tiers des voix au Bundesrat, organe au sein duquel le poids de chaque Land est pondéré en fonction de sa population:[33] cette particularité permet aux quatre Länder les plus peuplés d'écarter à eux seuls — de justesse — une modification approuvée par les douze autres.

Les vetos personnels sont rares. L'absence de vetos personnels en bonne et due forme dans la constitution canadienne en déçoit plusieurs. À l'échelle internationale, c'est plutôt leur présence qui paraîtrait insolite.

La constitution de la Malaisie confère à deux États membres un veto personnel qu'elle refuse aux onze autres. Les gouverneurs des États de Sabah et de Sarawak, agissant sur l'avis de leurs Cabinets respectifs, doivent obligatoirement donner leur consentement à toute modification relative à la citoyenneté malaise de leurs résidents, aux pouvoirs législatifs des États membres et aux arrangements financiers en vigueur dans la fédération, à la Haute Cour de Justice de Bornéo, à langue et à la religion au sein de l'État. Ces deux États sont doublement privilégiés, puisqu'ils doivent consentir nommément à certaines modifications constitutionnelles et qu'ils sont les seuls États à intervenir dans un processus qui relève normalement des seules autorités fédérales.

Aux Émirats arabes unis, des vetos personnels sont conférés non au niveau de la ratification, mais à celui de l'initiative, puisque toute décision en la matière du Conseil suprême regroupant les sept émirs doit avoir l'appui de cinq des sept

[31] L'Inde compte actuellement 25 États.

[32] La formule suisse comporte un léger correctif de population, puisque chacun des six demi-cantons ne compte que pour une demi-voix dans le calcul des consentements cantonaux, contre une voix pleine pour chacun des 20 cantons.

[33] Les Länder comptant moins de 2 millions d'habitants ont trois voix, contre quatre pour les Länder ayant entre 2 et 6 millions d'habitants, cinq pour ceux en comptant entre 6 et 7 millions, et six voix pour les Länder ayant plus de 7 millions d'habitants. Chaque Land vote en bloc.

souverains, incluant obligatoirement ceux des émirats les plus peuplés, soit Abu Dhabi et Dubaï.

Un peu plus fréquents sont les vetos conférés à l'électorat ou au parlement local de *chacun* des États membres sur des modifications affectant une disposition très spécifique applicable à tous. Par exemple, aucun État américain ne peut être privé sans son consentement d'une représentation au Sénat égale à celle des autres États. Une protection analogue est accordée à chaque État australien concernant ses limites territoriales et sa représentation proportionnelle au sein des chambres fédérales. Les provinces pakistanaises et les Länder autrichiens sont également protégés contre les modifications frontalières.

Dans ce domaine, le législateur fédéral canadien a choisi d'ajouter à la procédure de modification des exigences qui n'y étaient pas prévues. L'octroi de vetos personnels aux deux provinces les plus peuplées constitua un aspect capital des projets de réforme constitutionnelle du gouvernement fédéral de 1971 à novembre 1981. Dans la foulée du référendum québécois de 1995, le fédéral est revenu à cette approche, moyennant une modification: aux deux principales provinces s'est ajoutée la Colombie-Britannique.[34] La *Loi de 1996 sur les vetos régionaux*,[35] qui a introduit cette exigence, n'a cependant pas modifié la Loi constitutionnelle de 1982; elle a simplement interdit au gouvernement fédéral de ratifier une modification n'ayant pas l'aval des provinces requises, ce qui équivaut à en bloquer l'adoption. Il s'agit d'une loi ordinaire susceptible d'être modifiée ou abrogée à volonté par le parlement fédéral, et dont les dispositions procédurales pourraient être aisément tournées. Ne pouvant convaincre ses partenaires constitutionnels de l'opportunité d'accorder un droit de veto au Québec, le gouvernement fédéral s'est contenté de cet expédient dont la portée pratique reste à démontrer, et qui pour l'heure a pour effet d'accentuer la rigidité extrême du processus de révision constitutionnelle au Canada (Massicotte 1996).[36]

[34] Est en plus requis le consentement de deux des quatre provinces de l'Atlantique incluant 50% de la population de cette région, et de deux des trois provinces des Prairies comptant 50% de la population des Prairies: cette dernière exigence a pour effet de conférer *de facto* un droit de veto personnel à l'Alberta, aussi longtemps que celle-ci comptera à elle seule plus de la moitié de la population de la région.

[35] Lois du Canada 1996, chap. 1.

[36] Dans cette veine, on pourrait ajouter le cas des dispositions de la Constitution canadienne applicables à certaines provinces seulement: n'est alors exigé, en plus du consentement des chambres fédérales, que celui de l'assemblée législative de chaque province à laquelle s'applique la modification envisagée.

La rareté du veto personnel dans les fédérations souligne l'attrait qu'exerce dans les fédérations la doctrine dite de l'égalité des États membres. En Malaisie, les circonstances qui ont entraîné son octroi aux États de Sabah et de Sarawak méritent d'être évoquées. Ces deux États, géographiquement bien distincts des autres puisqu'ils sont situés dans l'île de Bornéo et non dans la péninsule malaise, ont été admis dans la fédération en 1963, soit bien après sa fondation (1946). L'obtention de garanties spéciales ainsi que d'un veto sur la révision de celles-ci faisait partie des conditions préalables posées par leurs gouvernants pour adhérer à la fédération malaise (Chung 1986, 97). Au Canada, la Loi des vetos régionaux fut adoptée dans les mois qui suivirent le référendum québécois de 1995, remporté de justesse par l'option fédéraliste. Tout se passe, est-on tenté de conclure, comme si de tels privilèges ne pouvaient être obtenus qu'à la suite d'une menace de ne pas entrer dans la fédération... ou d'en sortir!

Finalement, **le droit de retrait, avec ou sans compensation financière, est unique au Canada**.

Évoqué dès 1936 (Gérin-Lajoie 1950, 304), le droit de retrait pour les modifications dérogatoires à la compétence législative et aux droits de propriété d'une province fut mis de l'avant par l'Alberta à titre d'élément de la procédure de révision constitutionnelle en 1979 et devint en avril 1981 la position commune des huit provinces opposées au rapatriement unilatéral de la constitution. S'y greffa à cette occasion, à l'insistance du Québec, l'idée d'octroyer une juste compensation à tout gouvernement exerçant son droit de retrait (Morin 1988, 218–25). Elle a fait son entrée dans la constitution actuelle à l'occasion des négociations de novembre 1981, moyennant une amputation qui provoqua l'ire du Québec, soit l'élimination (à l'insistance du gouvernement central) de la compensation financière en cas d'exercice du droit de retrait. Le Premier ministre fédéral recula peu après sur ce point et consentit à une compensation financière limitée aux transferts de compétence en matière d'éducation ou d'autres matières culturelles. Jamais utilisée depuis, cette disposition figure toujours dans la constitution actuelle.[37]

Comme plusieurs auteurs l'ont noté (Robertson 1982; Stevenson 1984, 269), aucune autre fédération n'accorde un droit de retrait aux États membres, y compris les fédérations multilingues.

[37] Les Accords de Meech et de Charlottetown auraient éliminé cette restriction et étendu la compensation financière à *tout* exercice du droit de retrait.

IV. LES FÉDÉRATIONS LIBRES ET DÉMOCRATIQUES SE DISTINGUENT-ELLES DES AUTRES FÉDÉRATIONS?

Jusqu'ici, nous avons examiné la situation prévalant dans chacune des fédérations retenues. Il est notoire que le fédéralisme prévaut dans plusieurs pays qui ne sont pas reconnus comme des démocraties libérales, et plusieurs auteurs tendent à écarter de tels pays de leurs examens comparatifs pour cette raison. Surgissent donc deux interrogations. Les fédérations libres et démocratiques se distinguent-elles des autres à ce chapitre? Les nombreuses atteintes relevées au principe fédéral classique et la rareté des procédures référendaires résulteraient-elles simplement de la présence parmi les fédérations de régimes semi-démocratiques ou carrément autoritaires?

Les obstacles dans la détermination du caractère libre et démocratique d'un régime politique sont familiers aux comparatistes. Pour les surmonter, nous nous en sommes remis aux analyses de Freedom House (1998). Cet organisme évalue sur une base annuelle l'étendue effective des droits politiques et le respect des libertés civiles dans chacun des pays du monde. Pour chaque rubrique, les pays sont rangés sur une échelle allant de 1 à 7. Par exemple, le Canada et les États-Unis se voient décerner la cote 1 tant pour les droits politiques que pour les libertés civiles et sont proclamés «pays libres,» alors que l'Irak et la Corée du Nord avec la note 7 sous chaque rubrique, sont estimés «non libres.»

Nous avons choisi de considérer comme fédérations libres et démocratiques celles qui en 1997 avaient obtenu la cote 1 ou 2 sous chacune des deux rubriques. Cette sélection nous amène à retenir 10 pays: Afrique du Sud, Allemagne, Australie, Autriche, Belgique, Canada, États-Unis, Micronésie, Saint-Kitts-et-Nevis, Suisse.[38]

Les fédérations libres et démocratiques ne se démarquent pas de façon nette des autres à plusieurs égards. L'initiative y est conférée aux deux ordres de gouvernement dans 4 cas sur 10, contre 6 sur 12 pour les autres. Un

[38] À l'exception de l'Afrique du Sud, tous les pays retenus ont obtenu des cotes 1 et 2 pendant toute la période couverte par les relevés antérieurs de Freedom House, soit depuis 1972. Précisons que les 12 autres fédérations présentaient en 1997 des degrés très inégaux d'autoritarisme: la Yougoslavie (6 et 6), le Nigéria (7 et 6), ainsi que les Émirats arabes unis (6 et 5) font figure de régimes autoritaires, alors que les autres régimes présentent des portraits plus nuancés. Un classement allant du moins au plus autoritaire irait de l'Argentine et du Venezuela (2 et 3), de l'Inde (2 et 4), de la Russie, du Mexique et du Brésil (3 et 4), au Pakistan, à la Malaisie et à l'Éthiopie (4 et 5).

consentement gouvernemental, législatif ou référendaire des États membres y est requis dans 8 cas sur 10, contre 7 sur 12 pour les fédérations plus autoritaires. Envisagés à titre d'exigences normales (et non exceptionnelles), l'unanimité se rencontre une seule fois dans chacun des deux groupes, le veto personnel seulement une fois sur 10 dans les fédérations démocratiques, 2 fois sur 12 dans les autres; le droit de retrait ne se rencontre que dans une seule fédération libre et démocratique, et nulle part ailleurs.

Deux indicateurs paraissent affectés, à un degré inégal, par le caractère libre et démocratique d'un État. Les trois seules fédérations où sont exclues du processus les instances fédérales sont toutes libres et démocratiques. Cette différence nous paraît peu significative, en ce qu'on voit mal en quoi la démocratie exige que le gouvernement central soit réduit à un rôle de pur spectateur. Hautement révélateur en revanche nous paraît le contraste entre les deux groupes de fédérations au chapitre du recours au référendum. Celui-ci est obligatoire dans 4 fédérations et possible (Autriche) ou probable (Canada) dans 2 autres, pour un total de 6 sur 10, contre *aucune* des 12 fédérations plus autoritaires.

V. CONCLUSION

Aucun des postulats de départ ne ressort totalement confirmé de la confrontation avec la réalité empirique des fédérations actuelles. Un seul fait figure de règle quasi universelle, soit le rejet de l'unilatéralisme des États membres. Par contre, le rejet de l'unilatéralisme central, tout en étant le cas le plus fréquent, souffre d'exceptions trop nombreuses pour être ignorées. Dans plus de la moitié des fédérations, les États membres sont privés du droit d'initiative.

Dans l'ensemble, les procédures en vigueur dans les fédérations contemporaines privilégient l'ordre central de gouvernement et sont loin de correspondre à l'équilibre intergouvernemental postulé par l'approche de K. C. Wheare, encore que les fédérations classiques s'en rapprochent davantage. Loin de constituer une norme universelle, le recours au référendum fait figure d'exception. Il est cependant révélateur que les fédérations qui le pratiquent soient toutes libres et démocratiques.

Finalement, les procédures visant à protéger les collectivités minoritaires ne sont guère répandues. Très peu de fédérations, y compris des fédérations hétérogènes, comportent les mécanismes de protection que nombre de Québécois jugent indispensables. Que les trois modalités envisagées (unanimité, vetos

personnels, droit de retrait) se retrouvent *toutes* à des degrés divers dans le processus en vigueur au Canada, sans vraiment satisfaire ceux qu'elles cherchent à protéger, ne fait que renforcer le sentiment de futilité qu'inspire à plusieurs le résultat de décennies de discussions constitutionnelles.

NOTE: La texte porte sur les constitutions fédérales en vigueur au début de 1999. Depuis cette date, la Suisse et le Nigeria se sont dotés de nouvelles constitutions (en avril et en mai 1999 respectivement) dont les dispositions en matière de modification constitutionnelle sont identiques à celles analysées ici. Le Venezuela a adopté (décembre 1999) une nouvelle constitution, qui s'éloigne sur des points importants de celle de 1961. Notamment, les assemblées législatives des États sont désormais exclues du processus de modification constitutionnelle, l'initiative populaire (15% de l'électorat) est introduite en cette matière, et un référendum national d'approbation devient obligatoire pour toute modification. Ce nouveau développement confirme deux tendances identifiées dans l'article, soit que l'exclusion des États membres du processus de modification constitutionnelle dans les fédérations est plus fréquente en pratique que ne l'enseigne la doctrine, et que les processus de démocratie directe demeurent le lot d'une minorité de fédérations, tout en gagnant en popularité.

Tableau 1 : L'initiative

Pays	1ère chambre du Parlement fédéral		2e chambre du Parlement fédéral	État membre	Population	Gouv. central	Convention	Chef d'État
Afrique du Sud	X		X	X[1]		X		
Allemagne	5% des membres		X	X[2]		X		
Argentine	⅔ des membres	ET	⅔ des membres					
Australie	X		X					
Autriche	X		X			X		
Belgique	Majorité des votes	ET	Majorité des votes					
Brésil	1/3 des membres		1/3 des membres	Majorité des États				X
Canada	X		X	X				
Émirats Arabes Unis								X[3]
États-Unis	X		X	⅔ des États				
Éthiopie	⅔ des votes		⅔ des votes	1/3 des États				
Inde	X		X					

Malaisie	X	X					
Mexique	X	X					
Micronésie	X			X		X	
Nigéria	X	X					
Pakistan	X	X					
Russie	1/5 des membres	1/5 des membres	X		X		X
Saint-Kitts-et-Nevis	X						
Suisse (#1)	X	X					
Suisse (#2)				100 000			
Venezuela	1/4 des membres	1/4 des membres	1/4 des États				
Yougoslavie	30 membres		X	100 000	X		

1) En Afrique du Sud, le Conseil national des provinces est une émanation directe des gouvernements et des législatures provinciales.
2) En Allemagne, le Bundesrat est une émanation directe des gouvernements des Länder.
3) Aux Émirats Arabes Unis, le Conseil suprême, composé des sept émirs, statue par décision de 5 membres, incluant obligatoirement les deux émirats les plus peuplés (Abu Dhabi et Dubaï).

N.B. Une mention (ex. “X” ou “5% des membres”) indique que l'organe jouit **individuellement** du droit d'initiative, à moins d'indication contraire (Belgique et Argentine).

Tableau 2: La ratification par l'Etat central

Pays	1ère chambre du Parlement	2e chambre du Parlement	Séance commune des 2 chambres	Référendum	Assemblée constituante	Pas requis
Afrique du Sud	2/3 des membres	2/3 des Etats				
Allemagne	2/3 des membres	2/3 des votes				
Argentine					Majorité	
Australie	Majorité des membres	Majorité des membres (veto suspensif)		Majorité des votes		
Autriche	2/3 des votes	2/3 des votes[1]		Majorité des votes[2]		
Belgique	2/3 des votes[3]	2/3 des votes[3]				
Brésil	3/5 des membres	3/5 des membres				
Canada	Majorité des votes	Majorité des votes (veto suspensif)				
Émirats Arabes Unis	2/3 des membres présents					
Etats-Unis	2/3 des votes	2/3 des votes				
Éthiopie			2/3			
Inde	2/3 des votes	2/3 des votes				
Malaysia	2/3 des membres	2/3 des membres				
Mexique			2/3 des membres présents			

Micronésie				X
Nigeria	⅔ des membres	⅔ des membres		
Pakistan	⅔ des membres	⅔ des membres		
Russie	⅔ des membres	¾ des membres		
St. Kitts-Nevis	⅔ des membres			
Suisse (#1)	Majorité des votes	Majorité des votes		Majorité des votes
Suisse (#2)				Majorité des votes
Venezuela	Majorité des votes	Majorité des votes	Majorité des votes[4]	
Yougoslavie	⅔ des membres			

1) En Autriche, les ⅔ des voix exprimées à la 2e chambre ne sont requises que lorsque la modification restreint le pouvoir législatif ou exécutif des Länder.

2) En Autriche, un référendum est tenu seulement à la demande de 1/3 des membres d'une chambre fédérale.

3) En Belgique, pour modifier les lois énumérant les pouvoirs des Conseils communautaires et régionaux, il faut non seulement les ⅔ des voix dans chaque chambre, mais aussi la majorité des voix dans chacun des deux groupes linguistiques dans chaque chambre.

4) Au Venezuela, en cas de désaccord entre les deux chambres, la décision finale est prise par les deux chambres réunies en séance commune.

N.B. Pour chaque pays, le consentement de TOUS les organes énumérés est nécessaire.

Tableau 3: La ratification par les Etats membres

Pays	Parlements	Référendum	Convention cons.	Pas requis
Afrique du Sud	note [1]			
Allemagne	note [2]			
Argentine				X
Australie		Majorité des votes dans 4/6 Etats		
Autriche				X
Belgique				X
Brésil				X
Canada	⅔ des Etats incluant 50% de la population[3]			
Émirats Arabes Unis				X
Etats-Unis	¾ des Etats[4]		¾ des Etats[4]	
Éthiopie	⅔ des Etats			
Inde	½ des Etats			
Malaysia				X[5]
Mexique	Majorité des Etats			
Micronésie		¾ des votes dans ¾ des Etats		

Nigeria	⅔ des Etats	
Pakistan		X
Russie	⅔ des Etats	
St. Kitts-Nevis		⅔ des votes dans les 2 Etats
Suisse	Majorité des votes	Majorité des votes dans une majorité d'Etats[6]
Venezuela	⅔ des Etats	
Yougoslavie	Unanimité	

1) En Afrique du Sud, les États membres sont impliqués indirectement, car les membres de la 2e chambre émanent du gouvernement et de la législature de chaque province.

2) En Allemagne, les États membres sont impliqués indirectement car les membres du Bundesrat émanent du gouvernement de chaque Land.

3) Au Canada, une province peut exercer un droit de retrait vis-à-vis une modification réduisant les pouvoirs des provinces.

4) Aux États-Unis, le choix de la méthode de ratification par les États membres revient au Congrès américain.

5) En Malaisie, le pouvoir exécutif de deux États (Sabah et Sarawak) a un droit de veto personnel sur certaines modifications.

6) En Suisse, les 20 cantons comptent pour 1 voix chacun, et les 6 demi-cantons pour 1/2 voix chacun.

Tableau 4 : Constats

	TOTAL (N.:22)	Fédérations libres et démocratiques (N.: 10)	Autres fédérations (N.: 12)
A. Équilibre intergouvernemental			
Droit d'initiative aux deux ordres de gouvernement	10	4 sur 10	6 sur 12
Rejet de l'unilatéralisme central	15	8 sur 10	7 sur 12
Consentement central non requis.	3	3 sur 10	0 sur 12
B. Démocratie			
Référendum	4(6)*	4(6)* sur 10	0 sur 12
C. Protection des minorités (en tant que procédure courante)			
Unanimité	2	1 sur 10	1 sur 12
Veto personnel	3	1 sur 10	2 sur 12
Droit de retrait	1	1 sur 10	0 sur 12

* Obligatoire dans quatre fédérations, et optionnel ou probable dans deux autres, pour un total de 6.

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THE PARTIAL COMMENCEMENT OF ACTS: A CONSTITUTIONAL CRITICISM OF THE LIEUTENANT GOVERNOR IN COUNCIL'S "LINE-ITEM VETO" POWER

Craig E. Jones*

The extent to which a separation of powers doctrine applies in the context of a parliamentary democracy such as Canada has long been a matter of debate. The author argues that this doctrine does have application in Canada and that it is violated by the blanket ability of some provincial executives to proclaim only portions of passed acts in force. This ability is rooted in the Interpretation Acts of a number of provinces and its effect, which the author equates with a line item veto, is to usurp the authority of the legislature and potentially upset the legislative compromise that ordinarily accompanies the passage of legislation. In the United States, the Supreme Court has found that bestowing a largely unfettered ability on the Office of the President to delete portions of legislation passed by Congress is not permitted by the US Constitution. Given the application of some form of a separation of powers doctrine in Canada, the author argues that the partial commencement of acts is also unconstitutional.

La mesure dans laquelle la doctrine de la séparation des pouvoirs s'applique dans le contexte d'une démocratie parlementaire telle que le modèle canadien fait depuis fort longtemps l'objet d'un débat. L'auteur estime que cette doctrine vaut pour le Canada mais qu'elle n'est pas respectée par les pouvoirs provinciaux d'adopter seulement des portions de certaines lois. Cette capacité est enracinée dans la Loi d'interprétation de plusieurs provinces. Le résultat, que l'auteur compare à un veto pour certains articles, consiste à usurper l'assemblée législative et à éventuellement rompre le compromis législatif qui accompagne habituellement l'adoption d'une loi. La Cour suprême des États-Unis a trouvé que conférer des pouvoirs presque absolus au Bureau du Président permettant d'éliminer des portions de lois adoptées par le Congrès constituait une violation de la séparation des pouvoirs telle qu'elle était envisagée dans la Constitution américaine. Vu l'application d'une certaine forme de séparation de pouvoirs au Canada, l'auteur estime que l'entrée en vigueur partielle d'une loi est également inconstitutionnelle.

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I. INTRODUCTION

In a parliamentary democracy, the final wording of any particular law is generally imagined to be decided upon in the tempestuous environs of the legislature, by the will of the elected with the consent (and, in a perfect world, even the participation) of the governed. Once the legislature has debated a bill, and voted for its passage, it is ready to become law upon Royal Assent. Presumably, if the bill was in the least controversial, the finished product would reflect the delicate compromises and indelicate bargains made among politicians — compromises and bargains that prompted at least one observer to compare the law-making process to the production of sausages.[1]

It is expected, one would further suppose, by those who had lent their support to a law relying on the legislative compromise, that the "final" bargain would be just that. It follows that if the executive was empowered to, at its sole pleasure, lop off any pieces of this bargain with which it was, with the benefit of hindsight, unhappy, some of those same parties who had championed the law would feel betrayed. If support for the bill was tenuous even within the government ranks, it could even be argued that the executive's precipitous action was offensive to the authority of parliament and by extension, the electorate.

This is why constitutional democracies, even those which grant the executive a veto over legislation, have a natural aversion to the power of "line-item veto," the process described above. And yet British Columbia, as well as several other Canadian provinces, have legislation in place that amounts to a line-item veto in the hands of the executive. That this enormous and potentially abusive power is so seldom the source of controversy likely says more about historical executive restraint than any secure constitutional foundation for its existence. In fact, what I will call a general, or *carte blanche* power of line-item veto raises very important questions about our democratic intentions.

My purpose here is to describe the mechanism through which a provincial executive may exercise a general line-item veto power through what I will refer to as "partial commencement" of legislative Acts. I will review the history of the provisions in question, and the constitutional fate of comparable regimes in Canada in the United States. I will then outline the argument against continuing

[1] "Laws are like sausages: it is better not to see them being made" Otto von Bismarck-Schoenhausen (1815-1898) Chancellor of Germany (Attributed).

this practice, and discuss — perhaps even attempt to refute — some of the arguments that may be offered in support of it. Throughout, I will be focussing on British Columbia legislation; though certainly the regime of partial commencement questioned here is in place elsewhere, with all of its concomitant problems.

II. PARTIAL COMMENCEMENT

A. The Basis of Partial Commencement

It is certainly not uncommon in British Columbia, as elsewhere, to see an Act commenced pursuant to the following section, or one very much like it:[2]

> This Act comes into force by regulation of the Lieutenant Governor in Council.

Ordinarily, these words confer on the executive[3] only a power to bring into force the legislation on an "all or nothing basis."[4] In order to effect a "piecemeal" commencement, the British Columbia government would rely on the *Interpretation Act*, which states that:[5]

> 5 (2) If an enactment is to come into force or be repealed on proclamation or by regulation of the Lieutenant Governor in Council,
>
> the proclamation or regulation may apply to the coming into force or repeal of *any provision* of the enactment, and

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2 In British Columbia, see for instance: *Adult Guardianship Act*, R.S.B.C. 1996, c. 6; *BC Benefits (Child Care) Act*, R.S.B.C. 1996, c. 26; *BC Benefits (Youth Works) Act*, R.S.B.C. 1996, c. 28; *British Columbia Neurotrauma Fund Contribution Act*, R.S.B.C. 1996, c. 3; *Children's Commission Act*, S.B.C. 1997, c. 11; *Diking Authority Act*, R.S.B.C. 1996, c. 96; *Disability Benefits Program Act*, R.S.B.C. 1996, c. 97; *Enforcement of Canadian Judgments Act*, R.S.B.C. 1996, c. 115; *Fish Protection Act*, S.B.C. 1997, c. 21; *Fisheries Renewal Act*, S.B.C. 1997, c. 22; *Health Care (Consent) and Care Facility (Admission) Act*, R.S.B.C. 1996, c. 181; *Public Guardians and Trustee Act*, R.S.B.C. 1996, c. 383; *Representation Agreement Act*, R.S.B.C. 1996, c. 405. Most BC Acts contain commencement clauses that are identical in effect to this example, if not in wording.

3 In BC, there is no practical difference between whether an Act calls for proclamation or regulation, and thus it is the executive (cabinet) who 'proclaims' as well as passes regulations. The *Regulations Act*, R.S.B.C. 1996, c. 402 provides that:

> 12. If an Act provides that it comes into force on proclamation, the Act or part of it may be brought into force by regulation of the Lieutenant Governor in Council.

4 *Reference Re Proclamation of Section 16 of the Criminal Law Amendment Act*, 1968–69 (1970), 10 D.L.R. (3d) 699 (S.C.C.) [hereinafter *Re Criminal Law Amendment*].

5 R.S.B.C. 1996, c. 228.

> proclamations or regulations may be issued at different times for different provisions of the enactment [emphasis added].

As mentioned earlier, the legislation of other provinces feature very similar provisions.[6] So, effectively, the combination of the sections quoted above create a regime, which has become quite standard, whereby the executive may review the legislature's Act and pass those parts of it with which they happen to agree. Now, I am not suggesting that this power was usurped with a shred of malfeasance; conversely, I think it likely that section 5 of the BC *Interpretation Act*[7] is principally the result of a quest for expedience, rather than executive power. But consider for a moment the ramifications. What would happen if the legislative assembly passed an Act which established a tax on a particular activity, and also contained a provision whereby money raised by the tax would assist the needy? It may well be that the latter provision was essential in maintaining support for the new tax. But under the *Interpretation Act*,[8] the executive is free to proclaim only the former provision, and in doing so thwart the democratic process through which the bill was drafted.[9]

B. The *Criminal Law Amendment Reference*[10]

The Supreme Court of Canada visited this very issue in 1970, where Parliament had passed a *Criminal Law Amendment Act, inter alia* providing assistance to the prosecution in drinking-driver cases.[11] The *Act* as passed by Parliament also featured some safeguards for the accused.[12] Unfortunately for the accused, however, the commencement provisions of the *Criminal Law Amendment Act* provided as follows:[13]

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6 See for instance the Alberta *Interpretation Act*, R.S.A. 1980, c. I–7 s. 6; the Nova Scotia *Interpretation Act*, R.S.N.S. 1989, c. 235, s. 3(7); and the Northwest Territories *Interpretation Act,* R.S.N.W.T. 1988, c.I–8, s. 7(3). The history of the provision in Manitoba is discussed later in this article.

7 *Supra* note 5.

8 *Ibid.*

9 Far from being some sort of "gap-filling authority," the use of the technique of partial, or piecemeal, proclamation is routine, at least in BC. For instance, the recent Order in Council 1999/753, B.C. Gaz. 1999.II.436, brought into force partially some 30 Acts (principally Acts of statutory amendment), under the apparent authority of the regime described here.

10 *Supra* note 4.

11 1968-69 (Can.), c.38.

12 *Ibid.*

13 *Ibid.*, s. 120.

> This Act *or any of the provisions of this Act* shall come into force on a day or days to be fixed by proclamation [emphasis added].

The Governor in Council, as it turned out, decided to proclaim a provision which provided for the taking of samples from a person accused of impaired driving, but did not proclaim corresponding provisions compelling the police to provide part of the same sample to the accused. The question before the Supreme Court of Canada[14] was therefore whether the commencement provision above could validly allow partial or piecemeal commencement of the different sections; in other words, whether Parliament can assign a line-item veto power to the executive, and whether the executive can exercise it in an apparently lopsided way.[15]

In *Re Criminal Law Amendment*, a 5–4 majority of the Supreme Court of Canada found that the provision was valid, and the executive was free to proclaim whichever "provisions" of the *Act* it chose.[16] However, the most powerful safeguard feature of the majority's decision, and one to which I will repeatedly return, is that the Act in *Re Criminal Law Amendment contained within it* the assignment of line-item veto power, and it was limited in application to that Act.[17] In other words, Parliament was presumed to have turned its mind to the potential of executive abuse, and accepted the risk in passing the *Act* as written. I would call this a "specific line-item veto." As mentioned, the Supreme Court narrowly approved it, carefully distinguishing it from what I term a "general line-item veto" and intimating that the latter might be constitutionally problematic.[18] The point, according to the majority judgment, was that Parliament must be presumed to have anticipated and assented to the possibility that the executive might act arbitrarily and against its wishes.[19] The judges had turned their minds to that possibility within the context of the *Act*, and approved of it.

Re Criminal Law Amendment also featured vigorous dissents by Ritchie and Martland JJ.[20] These dissents focused on limiting the power of the executive to change the substance and effect of individual passages[21] thereby keeping the

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14 [Hereinafter SCC].

15 *Supra* note 4 at 709.

16 *Ibid.* at 712.

17 *Ibid.*

18 *Ibid.* at 711.

19 *Ibid.*

20 *Ibid.* at 712 and 701 respectively.

21 It was unclear what constituted a "provision" for the purposes of exclusion; was it a phrase, a sentence, a subsection, or a section?

executive from usurping the role of Parliament. Because of these dissents, some conclude that there may be limits to the modifications the executive can make in such circumstances. P. Côté, for instance, believes that:[22]

> It is doubtful ... *except in the case of a flagrant abuse of power* by the executive, that the courts would intervene to invalidate a proclamation on the grounds that its effect was to change the meaning of the statute [emphasis added].

But even if there is abuse, how could the Canadian *Constitution*[23] rectify it, except by limiting its exercise beforehand? Lysyk J. of the BC Supreme Court expressed discomfort with the solution proposed by the SCC in *Re Criminal Law Amendment* in *Waddell* v. *Schreyer*:[24]

> Neither the majority opinion written by Judson J. nor the separate concurring opinions of Hall and Laskin JJ. address this hypothetical example — the proclaiming into force of an offence punishable with life imprisonment without proclaiming the defences available to the charge — and, of course, it can hardly be assumed that the Majority would have adopted [this] proposition... What the example does perhaps illustrate is that, despite the actual result in this *Reference*, it remains necessary to read the delegating provision of a statute as qualified by what must be taken to have been the intention of Parliament, however elusive and difficult to ascertain that may be in a particular case.

However, Lysyk J. subsequently avoided confronting the authority of the SCC by distinguishing *Re Criminal Law Amendment* on another basis.[25]

Nevertheless, Lysyk J.'s interpretation that the intention of the legislature may be frustrated by partial commencement is not easily dismissed. In fact, it is possible that the entire regime of general partial commencement by regulation is unconstitutional, for precisely the reasons that Lysyk J. identifies, and even Sopinka J. seemed to hint at; there is a real difference between an 'Act-specific' line-item veto power and a general, or *carte blanche* authority.

III. THE CONSTITUTIONAL QUESTION

A. Introduction to the Constitutional Principles

In *Re Criminal Law Amendment*, it was found by a narrow majority of the

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22 *The Interpretation of Legislation in Canada*, 2d ed. (Cowansville, Quebec: Les Editions Yvon Blais Inc., 1992) at 88.

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

24 (1983), 5 D.L.R. (4th) 254 at 274–5.

25 *Ibid.* at 275.

Supreme Court of Canada that the legislative branch may specifically turn over power of 'partial proclamation' to the executive, at least if it does so explicitly in the commencement provision of the Act in question.[26] I trust it is self-evident that a power of partial commencement is indistinguishable from the power of line-item veto; the two terms are used interchangeably in this article.

I have also noted that, in the case of most BC Statutes, the legislature has not explicitly allowed for partial commencement, and instead apparently relies on the blanket provisions of the BC *Interpretation Act*, and in particular section 5 of that *Act*.[27] Again, that provision allows the Lieutenant Governor in Council to issue proclamations at "different times for different provisions of the enactment."[28]

Clearly, section 5(2) amounts to a *carte blanche* granting to the executive of a "line-item" commencement power; the Lieutenant Governor in Council might proclaim only those parts of a given Act with which he agrees. This, it could be argued, represents a significant shift in the balance between the executive and legislative powers, and could easily prove abusive in the hands of a government so inclined. I understand that the "separation of powers" concept is generally regarded as a foreign, and particularly American one; in the course of this article I hope to demonstrate that it is not so, and some "separation of powers" principles must continue to be applied in the Canadian constitutional context, expressly or implicitly.

There has been no Canadian case since the *Re Criminal Law Amendment* decision[29] that fully analyses the problem of partial commencement; but it must be recalled that even that case did not deal with *blanket* transfer of authority from legislative to executive, but rather a *specific* one, within the statute itself. This distinction is important as we turn our attention to recent US decisions.

B. The US *Line Item Veto Act*[30]

In 1996, with much fanfare, the United States Congress enacted a statute which purported to give to the President a power of "line-item veto" over certain types of legislation.[31] This was promoted as an important tool for "shaving the

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26 *Supra* note 4 at 711.
27 *Supra* note 5.
28 *Ibid.*
29 *Supra* note 4.
30 Pub. L. 104–130, s.2, 10 Stat. 1200 (1996).
31 *Ibid.*

pork" from legislation and streamlining the process of government. Nevertheless, when it came up for review through two cases to the US Supreme Court, it was struck down as being in violation of the presentment clause in the *US Constitution*.[32]

The *Line Item Veto Act*, was enacted by the US Congress in April 1996 and became effective on 1 January 1997.[33] It gave the President the power to "cancel in whole" certain types of provisions that have been signed into law.[34]

The *Act* required the President to adhere to precise procedures whenever he exercised his cancellation authority. It provided that in identifying items for cancellation he must consider the legislative history, the purposes, and other relevant information about the items, and further that he must determine, with respect to each cancellation, that it would reduce the federal budget deficit, and not harm either essential government functions or the national interest.[35] Moreover, the *Act* required that the President must transmit a special message to Congress notifying it of each cancellation within five calendar days (excluding Sundays) after the enactment of the cancelled provision.[36] In short, it was a *carefully limited assignment* to the President of powers normally reserved for Congress.

An immediate suit was brought by six members of Congress who had voted against the *Act* and challenged its constitutionality.[37] The DC District Court held that the Act was unconstitutional, but after a direct, expedited appeal to the US Supreme Court, the suit was dismissed on a question of standing.[38]

Less than two months after the US Supreme Court's decision in that case, the President exercised his authority under the *Line Item Veto Act*[39] to cancel one provision in the *Balanced Budget Act of 1997*,[40] and two provisions in the

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32 Art. 1, s. 7.

33 *Supra* note 30.

34 Specifically, any dollar amount of discretionary budget authority, any item of new direct spending, or any limited tax benefit, *ibid.*

35 *Ibid.* s. 691(b)(i-iii), (a)(A).

36 *Ibid.*, s. 691 (a)(B).

37 *Byrd* v. *Raines,* 956 F. Supp. 25. (D.D.C. 1997), 524 US 417.

38 *Raines* v. *Byrd,* 521 U.S. 811 (1997).

39 *Supra* note 30.

40 Pub. L. 105–33, 111 Stat. 251 (1997).

Taxpayer Relief Act of 1997.[41] This time, parties claiming that they had been injured by two of those cancellations filed actions in the District Court. That Court again held the statute to be invalid,[42] and the Supreme Court again expedited its review.

In *Clinton* v. *City of New York*, the Supreme Court, after resolving the issues of standing and jurisdiction in favour of the Appellees, turned to the merits of the case.[43] The majority[44] held that:[45]

> In both legal and practical effect, the President has amended two Acts of Congress by repealing a portion of each ... There is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statues ... *There are powerful reasons for construing constitutional silence on this profoundly important issue as equivalent to an express prohibition* ... Familiar historical materials provide abundant support for the conclusion that the power to enact statutes may only "be exercised in accord with a single finely wrought and exhaustively considered, procedure." ... Our first President understood the text of the Presentment Clause as requiring that he either "approve all the parts of a Bill, or reject it in toto." ... What has emerged in these cases from the President's exercise of his statutory cancellation powers, however, are truncated versions of two bills that passed both Houses of Congress. They are not the product of the "finely wrought" procedure that the Framers designed.

In *Clinton*,[46] it was argued by the government that the *Line Item Veto Act* did not really do anything that had not done before; in that the President had under other Acts the right to cancel portions of those duly enacted statutes, the same authority confirmed in the Canadian executive in *Re Criminal Law Amendment*.[47]

In response the US Court makes the distinction between the principles adopted by the Supreme Court of Canada in the *Re Criminal Law Amendment*[48]

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41 Pub. L. 105–34, 111 Stat. 788 (1997).

42 *City of New York et al.* v. *Clinton, President of the United States et al.*, 985 F. Supp. 168, 177–182 (D.D.C. 1998).

43 524 US 417, 118 S. Ct. 2091 [hereinafter *Clinton* cited to US].

44 Stevens, J. with Rehnquist, C.J., and Kennedy, J., Souter, J., Thomas J., and Ginsburgl, JJ. Kennedy, J., filed a concurring opinion. Scalia, J. filed an opinion concurring in part and dissenting in part in which O'Connor, J. joined, and in which Breyer, J. joined in part. Breyer, J. filed a dissenting opinion in which O'Connor, J., and Scalia JJ. joined in part, *ibid.*

45 *Ibid.* at 438–40.

46 *Supra* note 43.

47 *Supra* note 4.

48 *Ibid.*

and those reflected in section 5(2) of BC's *Interpretation Act*:[49]

> [W]henever the President suspended an exemption under the Tariff Act, he was executing the policy that Congress *had embodied in the statute*. In contrast, whenever the President cancels an item [under the *Line Item Veto Act*] he is rejecting the policy judgment made by Congress and relying on his own policy judgment. Thus the conclusion in *Field* v. *Clark* ... does not undermine our opinion that cancellations pursuant to the *Line Item Veto Act* are the functional equivalent of partial repeals of Acts of Congress that fail to satisfy Article I, s. 7 [emphasis added].[50]

In other words, you can give the President line-item veto power on an Act-by-Act basis, but to give it to him *carte blanche*, and in advance, even in a very limited way, is unconstitutional. And it is unconstitutional, moreover, *by virtue of the fact that the Constitution itself is silent* on the issue.

In Canada, the SCC had already (albeit narrowly) considered and endorsed the first part of this rule (i.e., that Parliament *could* specifically allow legislation to be modified by the executive), but had remained silent on the second (i.e., whether Parliament could give such an authority on a blanket or advance basis). It must also be recalled that much of the Supreme Court of Canada's decision in *Re Criminal Law Amendment*[51] was based on the assumption that Parliament had anticipated, weighed and approved of the risks associated with giving Cabinet the power to bring in the *Criminal Law Amendment Act* in whole or in part. These considerations were similarly incorporated in the American decision in *Clinton*.[52]

It becomes obvious that the considerations informing the Canadian Supreme Court's decision in *Re Criminal Law Amendment*[53] cannot be employed to save the blanket authority granted by section 5 of BC's *Interpretation Act*,[54] at least not if the reasoning of the American Court in *Clinton*[55] is accepted.

The Court in *Clinton* made it clear that it was not opposed to the line-item veto *per se*, but simply that such a program, if desired, would require constitutional amendment:[56]

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49 *Supra* note 5.
50 *Supra* note 43 at 444.
51 *Supra* note 4.
52 *Supra* note 43.
53 *Supra* note 4.
54 *Supra* note 5.
55 Supra note 43.
56 *Ibid.* at 449.

> If there is to be a new procedure in which the President will play a different role in determining the final text of what may "become a law," such change must come not by legislation but through the amendment procedures set forth in Article V of the Constitution.

The same argument could be applied to the provincial "line-item veto" through partial commencement. The *Constitution Act, 1982*[57] provides formulae by which one province might change constitutional provisions which affect only it, although which amending formula applies to our problem is open to debate.[58]

IV. ORIGIN OF PARTIAL COMMENCEMENT PROVISIONS IN CANADA

A. Commencement of Laws in the Province

It might be useful to ask, at this point in the exploration, if anyone has raised the constitutional question inherent in partial commencement statutes such as BC's *Interpretation Act*.[59] The short answer is no; the provisions, it would appear, have never borne the brunt of a focused constitutional scrutiny, as an examination of their history reveals.

Prior to 1974, there were no "blanket" partial commencement provisions within BC's *Interpretation Act*. Up until the new *Interpretation Act*[60] came into force in June of 1974, a typical BC commencement provision might read:

> This Act, excepting this section and the title, comes into force on a date to be fixed by the Lieutenant Governor by his Proclamation, and he may fix different dates for the coming into force of the several provisions.

Note how this provision is similar to the provision upheld as valid by the Supreme Court of Canada in *Re Criminal Law Amendment Act*.[61] However, after section 5(2)'s appearance in BC's 1974 *Interpretation Act*,[62] a typical commencement provision became that quoted at the beginning of this article, or the even more perfunctory version:

> This Act comes into force on a day to be fixed by Proclamation.

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57 *Supra* note 23.

58 For instance, there is a question of whether the proposed amendment would alter the position of the Lieutenant Governor.

59 Supra note 5.

60 S.B.C. 1974, c.42.

61 Supra note 4.

62 Supra note 60.

There have been two modifications to section 5 since 1974. In 1976 the *Interpretation Amendment Act*[63] substituted "enactment" for "Act," and six years later the *Regulations Act*,[64] amended section 5(2) to include commencement by regulation as well as proclamation.

That is the evolution of partial commencement since it was adopted in BC in 1974. But where did the idea come from?

B. The Origins of BC's "New" *Interpretation Act*[65]

The current BC *Interpretation Act*[66] originated in two bills from 1974. They are virtually identical, but the first, Bill 110, was withdrawn after first reading.[67] Bill 153, *Interpretation Act*, was first read on June 10, with rapid-fire second and final readings on June 11 and June 13, at which point it was passed.[68] It received Royal Assent on June 20.[69]

There is no discussion surrounding section 5(2) in any of the *Hansard* debates regarding the introduction of both Bills 110 and 153.[70] The only inkling of the motivation behind section 5(2) the brief commentaries at the end of each of Bills 110 and 153,[71] which indicate that the purpose behind the revised Act is to adopt the provisions of the *Uniform Interpretation Act* presented at the 1973 Conference of Commissioners on Uniformity of Legislation in Canada (CCULC).[72]

The Uniform Interpretation Act went through several drafts and much discussion prior to August 1973.[73] The final adopted version reads:[74]

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63 S.B.C. 1976, c.23, s.3.
64 S.B.C. 1983, c.10, s.16.
65 Supra note 5.
66 *Ibid.*
67 Bill 110, *Interpretation Act,* 4th Sess., 30th Leg., British Columbia, 1974.
68 Bill 153, *Interpretation Act,* 4th Sess., 30th Leg., British Columbia, 1974.
69 *Ibid.*
70 British Columbia, Legislative Assembly, *Debates* (23 April 1974) at 2410; (10 June 1974) at 3893; (11 June 1974) at 3907–10; (13 June 1974) at 4014–15.
71 Supra note 67 and 68.
72 *Proceedings of the 55th Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada* (1973) [hereinafter 1973 *Proceedings*], Appendix M at 275.
73 *Ibid.*
74 *Ibid.*, s. 6(2).

> Where an Act is to come into force on a day to be fixed by proclamation,
>
> (a) the proclamation may apply to, and fix a day for the commencement of, any provisions of the Act, and
> (b) proclamations may be issued at different times in respect of different provisions of the Act.

This passage is virtually identical to section 5(2) of the BC *Interpretation Act* as introduced in 1974.[75] It would be tempting to see this provision as a response to the SCC's decision in *Re Criminal Law Amendment*, which was decided in 1970;[76] however, further research reveals that earlier drafts of the *Uniform Interpretation Act*[77] contained essentially similar provisions. Section 7(2) of the draft contained in the CCULC's 1967 *Proceedings* reads:[78]

> Where an enactment is to come into force on a day fixed by proclamation, the proclamation may apply to, and fix a day for the coming into force of, any part, section, or portion of the enactment; and proclamations may be issued at different times as to any part, section, or portion of the enactment.

It is clear that the evolution of this passage owed nothing to the Supreme Court's decision in the *Criminal Law Amendment* reference of 1970;[79] in fact, the note beneath this passage in the 1967 *Proceedings*[80] indicates that this section was borrowed from the Manitoba *Interpretation Act*, to which we now turn.[81]

Like that of other provinces, Manitoba's current *Interpretation Act*[82] has gone through many permutations. The exact origin of the "partial commencement" provision, however, is known, even if the reasons for it are not.

On 31 March 1952, the Lieutenant Governor of Manitoba granted Royal Assent to *An Act to amend The Manitoba Interpretation Act*.[83] Section 1 provides that:[84]

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75 Supra note 60.
76 Supra note 4.
77 Infra note 78.
78 *Proceedings of the 49th Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada* (1967) at 135 [hereinafter 1967 *Proceedings*].
79 Supra note 4.
80 *Supra* note 78 at 135.
81 S.M. 1952, c. 36.
82 R.S.M. 1970, c.I.80.
83 S.M. 1952, c.36.
84 *Ibid.*

> Section 6 of the Manitoba *Interpretation Act*, being chapter 105 of the Revised Statutes of Manitoba, 1940, is amended by adding thereto the following subsection:
>
> > (3) Where an Act or a regulation is to come into force on a day fixed by proclamation, the proclamation may apply to, and fix a day for the coming into force of, any part, section, or portion, of the Act or regulation; and proclamations may be issued at different times as to any part, section, or portion, of the Act or regulation.

As can be seen, this is, with the exception of Manitoba's inclusion of "regulation," identical to the draft considered for inclusion in the *Uniform Interpretation Act* in 1967.[85] Its mutation into the version finally adopted by the CCULC in 1973, appears to be internal to the CCULC. I could find no reference in the CCULC's *Proceedings* to the *Re: Criminal Law Amendment Act*[86] case or its discussion of partial proclamation.[87]

To briefly review, then: Manitoba adopted partial commencement in 1952, and it was endorsed by the Alberta Commissioners tasked with drafting the *Uniform Interpretation Act*.[88] During the drafting process between 1967 and the *Uniform Interpretation Act*'s adoption in 1973, it was changed into the form recognizable as the current section 5(2) of BC's *Interpretation Act*.[89] BC adopted the provision into their new *Interpretation Act* in 1974,[90] and amended it to allow partial commencement by regulation with the *Regulations Act*.[91]

Apparently no one, at any point, discussed its constitutionality.

V. DELEGATION AND THE ROLE OF THE LIEUTENANT GOVERNOR

A. Constitutional Presentment Clauses

Section 7 of Article I of the *US Constitution* says in part:

> Every bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States; if he approve he

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85 Supra note 78.
86 See *supra* notes 72 and 78.
87 *Supra* note 4.
88 Supra note 78.
89 Supra note 5.
90 Supra note 60.
91 Supra note 64.

shall sign it, but if not he shall return it.

The equivalent presentment provisions in BC can be found in section 48 of the *Constitution Act*:[92]

> 48. If a Bill is presented to the Lieutenant Governor for the Lieutenant Governor's assent, the Lieutenant Governor may return it, by message, for the reconsideration of the Legislative Assembly, with amendments the Lieutenant Governor thinks fit.

This commencement clause must be read with an understanding of the role played by the Cabinet, or Lieutenant Governor in Council. Together with the Lieutenant Governor, this body constitutes an "executive" roughly parallel with the US model, in which both offices are embodied in the President or a State Governor.

There are also, of course, similar presentment rules in the Canadian *Constitution*, and a similar role for the Governor in Council and Governor General.[93] The rules determining their powers are, along with unwritten and common-law principles, designed to avoid the possibility that legislative authority might be usurped by the executive, or (at least in the US) vice-versa. Both US and BC constitutions allow for the executive to suggest or propose amendments or even original statutes, but they must always be approved by the legislature before being presented or re-presented.

It is true that there are countless differences between the Canadian and US constitutions, and certainly with respect to the separation of powers between the legislative and executive branches of government. It may be argued that the differences between the systems with respect to the delegation of powers are determinative in this situation, and the similarities irrelevant. I do not think this is so, but I will attempt to weigh the opposing arguments.

B. The Separation of Powers

The US Constitution, and that of most constituent states, provides for an explicit separation of the executive and legislative branches of government. The President is elected separately from the House, and is not a member of it. In a sense, he embodies elements of both the Governor General and Governor in Council's positions in the constitutional framework. Unlike the Governor General, he has veto power. Unlike the Governor in Council, he must approve every piece of legislation for it to become law, but like both the Governor

92 R.S.B.C. 1996, c.66.

93 Supra note 23.

General and the Governor in Council he, in theory at least, cannot make or amend laws. As we have seen in *Clinton*,[94] of course, this "absolute separation" is quite porous indeed, but at least its existence is openly recognized.

Conversely, Professor Peter W. Hogg speaks for the proposition that in Canada (and by paternity, in England) there need be *no* separation of powers between the executive and the legislative:[95]

> The close link between the executive and legislative branches which is entailed by the British system is utterly inconsistent with any separation of the executive and legislative functions.

This English view of constitutionalism echoes that propounded in the nineteenth century by Walter Bagehot in *The English Constitution*,[96] but has largely fallen out of favour with contemporary English scholars such as Hilaire Barnett, who contend that the issue of separation of powers is alive in England today:[97]

> While Bagehot's view may have been tenable at the time in which he wrote, it is nowadays too simplistic and inaccurate a description of the working of the constitution. *Prima facie* this close union of executive and legislature would suggest that the potential for abuse against which Montesquieu warned exists at the heart of the constitution ... There exist ... tenable grounds for such an argument ... set against the extent to which procedural mechanisms in Parliament avoid an *actual or potential* abuse of power by the executive [emphasis added].

In fact, Professor Barnett goes on to point out that delegated legislation "raises important questions related to the separation of powers."[98] The only way the problem is currently addressed is through Parliamentary control:[99]

> Provided that parliamentary scrutiny is adequate, *and that the courts are vigilant and effective* in ensuring that delegated powers are exercised consistently with the law, it may be concluded that this ostensible breach of the separation of powers is unavoidable although *whether it is subject to adequate scrutiny and control remains questionable* [emphasis added].

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94 Supra note 43.

95 *Constitutional Law of Canada*, 4th ed. (Scarborough: Carswell, 1997) at 351.

96 (1867) (Fontana, 1993) at 67–8, as cited by Hilaire Barnett, *Constitutional and Administrative Law* (London: Cavendish, 1995) at 133. Bagehot said the "efficient secret of the English constitution" was "the close union, the nearly complete fusion, of the executive and legislative powers."

97 Barnett, *ibid.*

98 *Ibid.* at 136.

99 *Ibid.* at 137.

This suggests a lively role for the courts in monitoring the separation of powers under the British system of constitutional oversight. I would argue that the role of the courts in Canada is more active still, as we have a constitution superior to a simple parliamentary majority, whereas England does not.

C. Delegation to the Executive

Professor Hogg recognizes that delegation to the executive was restricted on a separation of powers basis in the "startling" decision of *Credit Foncier Franco-Canadien* v. *Ross*,[100] but finds that the *Re Criminal Law Amendment Act*[101] case effectively "overruled" it.[102] But if the latter decision is indeed the last word on the issue of separation of powers in Canada, I would argue that it does not go as far as Professor Hogg suggests it does, and that it does not give a blank cheque to executive usurpation of legislative power by delegation. To put it starkly, if Parliament is supreme, can a simple act of Parliament do away with its supremacy in favour of the executive? Professor Hogg would apparently argue that it could; I do not believe that to be so. *Re Criminal Law Amendment*[103] really only establishes that delegation by parliament to the executive *can* occur under certain circumstances, and is thus not determinative of our broader question.

Any absolutist view of legislative delegation and parliamentary supremacy is also undermined by other decisions. It is, for instance, far from certain that the legislature might delegate its decision-making powers to the general populace through a referendum binding on it. In *Re Initiative and Referendum Act*, the question was skirted as the Privy Council decided that the Act's referendum provisions impermissibly bypassed the Lieutenant Governor.[104] Nonetheless, the doctrine of parliamentary supremacy would seem to speak against the validity of a binding referendum process. This question was again skirted by the SCC in *Haig* v. *Canada*, as the referendum at stake in that case was "consultative" and not binding.[105]

Indeed, if Professor Hogg is correct and there is truly no constitutional limitation to the powers of delegation, then by statute a legislature could make itself obsolete and turn over all decisions to the executive, something which

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100 [1937] 3 D.L.R. 365 (Alta. A.D.).
101 Supra note 4.
102 Supra note 95 at 357.
103 Supra note 4.
104 [1919] A.C.935.
105 [1993] 2 S.C.R. 995.

would not be constitutionally tolerated. Hogg himself points out that the Manitoba Court of Appeal, when considering the *Initiative and Referendum Act*,[106] decided that "direct democracy" was constitutionally invalid, not simply because it impermissibly bypassed the Lieutenant Governor, but because it delegated law-making to a body which was not a "legislature" — the electorate.[107] Similar reasoning was adopted (citing the *Initiative and Referendum Reference*)[108] in *Upper House Reference*, where the Supreme Court of Canada held that the Federal Parliament had no power to abolish the Senate.[109] Such an abolition, noted the Court, would be "a transfer by Parliament of all its legislative powers to a new legislative body of which the Senate would not be a member."[110] This despite the fact that, as Professor Hogg notes, five provinces had in fact abolished their upper houses by ordinary statute.[111] Yet this difficulty simply highlights the dichotomy; there exists a fundamental difficulty when separation of powers questions are not confronted in a principled and open way.

The "standard" analysis endorsed by Professor Hogg, is largely based on the line of "delegation cases," principally *Hodge* v. *The Queen*.[112] But that case, and others like it, dealt simply with the delegation of regulation-making power in the conventional sense; that is delegation to further the intent of Parliament with respect to any particular Act. To suggest that this principle of convenience goes as far as to constitute a right of delegation *without bounds* runs counter to the Privy Council's words in the *Initiative and Referendum Reference*.[113] Indeed as Hogg himself describes it:[114]

> The Privy Council in the *Initiative and Referendum Reference* asserted that, while *Hodge* permitted a provincial legislature to "seek the assistance of subordinate agencies," it did not follow "that [the Legislature] can create and endow with its own capacity a new legislative power not created by the [Constitution] Act to which it owes its own existence." One is prompted to ask, why not?

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106 *Initiative and Referendum Reference*, (1916) 27 Man. R. 1.

107 Supra note 95 at 357.

108 *Supra* note 106.

109 (1979), [1980] 1 S.C.R. 54.

110 *Ibid.* at 72.

111 *Supra* note 95 at 360. The question of Senate reform is now dealt with in the *Constitution Act, 1982*, supra note 23, s. 42(1)(b).

112 (1883) 9 App. Cas. 117 [hereinafter *Hodge*].

113 Supra note 106.

114 Supra note 95 at 356.

The obvious answer to Professor Hogg's question is that *Hodge*[115] notwithstanding, there remains a constitutional principle which abhors the overriding of the "good judgment" of the legislature by the "good judgment" of the executive. Professor Hogg may prefer to avoid calling this a separation of powers, but it looks like one and it acts like one. This is entirely consistent with the discussion of both the majority and dissent in *Re Criminal Law Amendment* decision,[116] and many of the other delegation cases discussed above. Perhaps the argument against usurpation of legislative authority by the executive was best expressed by Duff C.J.C. in *Re Alberta Legislation*:[117]

> The [*Constitution Act 1867*] contemplates a Parliament working under the influence of public opinion and public discussion. There can be no controversy that such institutions derive their efficacy from the free public discussion of affairs, from criticism and answer and counter-criticism, from attack upon policy and administration and defence and counter-attack; from the freest and fullest analysis and examination from every point of view of political proposals. This is signally true in respect of the discharge by Ministers of the Crown of their responsibility to Parliament, by members of Parliament of their duty to the electors, and by the electors themselves of their responsibilities in the election of their representatives.

D. The Role of the Lieutenant Governor

But reference to Federal delegation cases is of limited utility when considering the provincial Interpretation Acts. It was noted in section 92 of the *British North America Act* that the provinces were not competent to amend their own constitutions "with respect to the Office of the Lieutenant Governor."[118] While this section has been repealed,[119] the amending formula that was introduced in 1982 effectively means that the provinces continue to be restricted in the same way. This suggests an anticipation that separation of powers protections should operate between the provincial legislature and executive. Certainly this prohibition has been interpreted as protecting the Lieutenant Governor from becoming irrelevant or marginalized, as was the threatened effect of the *Initiatives and Referendum Act* in the reference of 1919.[120] Could it operate to prevent the legislature from making *itself* irrelevant?

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115 Supra note 4.

116 *Supra* note 112.

117 [1938] 2 D.L.R. 81 at 107.

118 1871 (U.K.) (now renamed *The Constitution Act*, 1871), P.S.C. 1985, Appendix II, No. 11.

119 Replaced by s. 45 of the *Constitution Act*, 1867, *ibid.*, in turn subservient to s. 41, which provides that changes to the office of the Lieutenant Governor are to be made only through the unanimity procedure.

120 Supra note 106.

In an article in the 1948 *Canadian Bar Review*, G. S. Rutherford reviewed the delegation cases and summarized that:[121]

> [f]rom the cases discussed we can draw these conclusions ... *in so far as provincial legislatures are concerned*:
>
> a) delegation by a legislature of its powers must be within the limits fixed by section 92 of the *British North America Act* and therefore must not affect the office of Lieutenant-Governor;
>
> b) delegated powers should be ancillary to legislation.
>
> In other words a provincial legislature can delegate power to regulate but not to legislate [emphasis in original].

Rutherford goes on to argue, again based on the delegation cases, that:[122]

> delegated power *to alter the scope or other terms of a statute* is power to legislate; and that such a power, although it may be possessed by Parliament ... is ... not "within the cases of subjects in relation to which the constitution has granted legislative powers" to provincial legislatures [emphasis in original].

I submit that the power of line-item veto in the executive is offensive to these principles, and profoundly affects the role of the Lieutenant Governor. In editing legislation, through line-item veto powers, the Lieutenant Governor is himself legislating; this is not constitutionally permissible.

The Canadian and US systems are, I suggest, not as far apart as most would seem to think. The American "absolute separation of powers" is anything but, and Professor Hogg's assertion of "absolutely no Canadian equivalent" is similarly misleading. To suggest that because our legislative branches are modelled on that of England we must inherit the absolute parliamentary sovereignty of our parent state, ignores the principal features of the Canadian reality; a federal state (with the necessary division of powers set out and respected), and a constitution which is superior to parliament. These factors require adoption of the appropriate principles of separate powers.

But the US Court emphasized in *Clinton* that the case did *not* require a consideration of the appellees' alternative argument that the *Line Item Veto Act* "impermissibly disrupts the balance of powers among the three branches of

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[121] "Delegation of Legislative Power to the Lieutenant-Governors in Council"(1948) 26 Can. Bar. Rev. 533 at 543.

[122] *Ibid.* at 544.

government."[123] In restricting its decision strictly to an analysis of the presentation clause in Article I,[124] the US Supreme Court avoided the larger question and, in my view, made its decision more readily applicable to BC. The US Court in essence said that the line-item veto is not a power anticipated by the US Constitution.[125] Absent explicit prescription, the change was invalid. In other words, the Court used the presentment clause as a written manifestation of an implied separation of executive and legislative powers; in such circumstances, resort to a specific separation doctrine was unnecessary.

The US Court's argument applies equally to Canadian legislation. The *carte blanche* empowerment of the executive to edit legislation via provincial Interpretation Acts is unforeseen by the Canadian constitutional system, and would not be saved by the (arguably limited) powers of parliamentary delegation. It is established that provincial legislatures may not exercise their discretion to delegate in such a way as to introduce "political institutions foreign to and incompatible with the Canadian system."[126] A cabinet with a broad power to effectively and unilaterally amend laws carefully drawn by the entire legislature is such an introduction.

It could of course be argued that, in the US, with an explicit separation of powers lingering "in the wings," it is not surprising that the natural "default position" of the courts favours prohibition of line-item discretion in the executive. Conversely, the argument goes, because there is no specific check/balance arrangement in our Canadian Constitution, absent specific mention of line-item power, it should be assumed to *not* be precluded.

While this argument has merit and would certainly be endorsed by Professor Hogg, it is largely unsupported in the cases. I submit that there may well be constitutional boundaries between the legislative and executive; they are rarely recognized, and even more seldom exposed by the courts, but nonetheless they exist. These amount, I submit, to a constitutional requirement for the separation of these powers to a greater extent than that permitted by section 5(2) of BC's *Interpretation Act*[127] and similar statutes.

It must also be pointed out, if one can accept my hypothesis that the

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123 Supra note 43.
124 Supra note 32.
125 *Supra* note 43.
126 *OPSEU* v. *Ontario* (1986), [1987] 2 S.C.R. 2 at 47.
127 Supra note 5.

reasoning of the US Supreme Court in *Clinton*[128] is applicable to Canada, that the American *Line Item Veto Act*[129] very carefully prescribed and monitored the scope of the powers delegated to the President. The effect of the provincial partial commencement statutes is to grant much broader powers to the executive, without any limitations or mechanism for oversight whatsoever.

VI. CONCLUSION

I have advocated here a recognition of a separation of powers doctrine to protect the executive and legislative branches from intrusion by the other. I have further postulated that by granting, through partial commencement provisions in some provincial Interpretation Acts, line-item veto powers to the executive, provincial legislatures have impermissibly breached this doctrine. It cannot be predicted, of course, whether Canadian courts would accept this argument. If they did, however, the constitutional infirmities of the many Acts which may be affected would not be difficult to rectify. It is likely that, following *Re Criminal Law Amendment*,[130] all that would be required would be a modification of the commencement provisions in question to explicitly allow, within each Act itself, for piecemeal commencement.

However, so long as legislatures continue to rely on the "general line-item veto" contained within their Interpretation Acts, they are leaving themselves susceptible to a challenge that any Act commenced in accordance therewith should be found to be null and void. No doubt such a challenge will come at a time without respect to the convenience of the government; it may therefore behoove provincial Attorneys General to visit and resolve this issue before a question of legislative import comes to hang in the balance.

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[128] Supra note 43.
[129] Supra note 30.
[130] Supra note 4.

SEPARATING MINIMAL IMPAIRMENT FROM BALANCING: A COMMENT ON *R.* V. *SHARPE* (B.C.C.A.)

Guy Davidov*

*The constitutional challenge to the child pornography legislation (*R. *v.* Sharpe, *B.C.C.A.) is used here as a vehicle to reflect on the practical application of the standards of constitutional review set by the Supreme Court in* R. *v.* Oakes. *It is shown that the B.C.C.A. in Sharpe — and the Supreme Court in previous cases — have confused the distinction between minimal impairment and balancing (the second and third stages of the Oakes proportionality test). Trying to avoid balancing and appear more objective, judges tend to over-use and misapply the minimal impairment test by examining alternatives that cannot achieve the legislative goal in full.*

It is suggested that constitutional analysis in cases like R. *v.* Sharpe *should, first, separate the two stages, i.e., balancing should be performed openly and only as part of the last proportionality stage; and second, be based on much sounder empirical foundations, including findings regarding the magnitude of the risk to children (the chance of the risk materializing and the intensity of the harm), and the magnitude of the infringement of rights.*

Le défi constitutionnel de la loi sur la pornographie juvénile (R. contre Sharpe, Cour d'appel de la Colombie-Britannique) est invoqué comme véhicule de réflexion sur l'application pratique des normes de la revue de la constitution établies par la Cour suprême dans R. contre Oakes. On démontre que la Cour d'appel de la Colombie-Britannique dans l'affaire Sharpe et la Cour suprême dans les causes précédentes n'ont pas fait de distinction claire et nette entre l'atteinte minimale et l'équilibre des intérêts en jeu (les phases deux et trois du test de proportionnalité dans l'affaire Oakes). En évitant de soupeser les intérêts en jeu et de paraître plus objectifs, les juges ont tendance à avoir un trop grand recours au test de l'atteinte minimale et à détourner ce test en examinant d'autres solutions qui ne peuvent atteindre le plein but du législateur.

Il est suggéré que l'analyse constitutionnelle dans des causes telles que R. contre Sharpe soit tout d'abord séparée en deux étapes, notamment que l'examen des intérêts en jeu soit fait ouvertement et uniquement à la dernière étape de proportionnalité et ensuite, que cet examen soit fondé sur de meilleurs fondements empiriques, y compris des conclusions sur l'ampleur du risque pour les enfants (les chances que le risque se matérialise et l'intensité du préjudice), ainsi que l'ampleur de la violation des droits.

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I. INTRODUCTION

The recent constitutional challenge in *R.* v. *Sharpe* to the child pornography legislation[1] provides a good opportunity to reflect on the standards of constitutional review set by the Supreme Court of Canada and the way they are actually being applied by the courts. In this short comment I would like to use the *Sharpe* case to highlight the points of distinction between the minimal impairment and the balancing tests, two important parts of the constitutional "proportionality" standard, and criticize the misunderstanding of this distinction and the under-utilization of the balancing test in the case law. I will not try to justify, nor criticize, the basic standard of review (as set out in *R.* v. *Oakes*), but rather take it as a starting point and comment on its application in practice. I will start with the general — explaining the proportionality standards and their misapplication in the past, and then move to the specific — how these problems are played out in *Sharpe* and how the Supreme Court should structure its decision in such cases.

II. THE STRUCTURE OF THE *OAKES* PROPORTIONALITY STANDARD: THE LOGICAL, THE CAREFUL, AND THE JUST

As is widely known, the standard for reviewing justifications for rights limitations under section 1 of the *Charter* was set out by the Supreme Court of Canada in *R.* v. *Oakes*.[2] According to this standard, in order to be "demonstrably justified in a free and democratic society," a law infringing constitutional rights must pass several tests. The objective must be of sufficient importance, namely a "pressing and substantial" one. As to the means, they must stand up to a proportionality test, which includes three stages: first, the measures adopted must be "rationally related" to the objective; second, the means should impair the right or freedom in question "as little as possible" (the "minimal impairment" test); third, there must be proportionality between the deleterious and the salutary effects of the law (the balancing stage).

It is perhaps misleading that the last three tests are all together called "proportionality." Strictly speaking, only the last stage of the analysis — the

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1 *R.* v. *Sharpe* (1999), 169 D.L.R. (4th) 536 (B.C.S.C.) [hereinafter *B.C.S.C. decision*], affirmed (1999) 175 D.L.R. (4th) 1 (B.C.C.A.) [hereinafter *B.C.C.A. decision*]. Notice of appeal to the Supreme Court of Canada has been filed.

2 *R.* v. *Oakes*, [1986] 1 S.C.R. 103 [hereinafter *Oakes*].

balancing stage — should be called proportionality, as only at this stage are the positive impacts of the law weighed against the negative ones to see if they stand *in proportion* to each other. But it is nonetheless appropriate to tie the three tests together under the umbrella of proportionality, since they are all designed to make sure that the state is giving sufficient weight to constitutional rights and values. Thus, in a broader sense, all three tests look for the proportional weight, or significance, granted to constitutional rights and values.

It would be useful to understand the three requirements of the proportionality test as the logical, the careful, and the just. The "rational relation" test is merely supposed to make sure that the means chosen are somehow related to the goal, that there is a rational — *logical* — connection between means and ends. It is extremely rare for a modern legislature or government to fail this basic requirement, i.e., to choose means that cannot logically advance its own cause. Indeed, as a matter of practice this test rarely makes a difference. The "minimal impairment" stage is where the vast majority of the cases are decided, one way or another. Here the state must show that it was *careful* in drafting the law — that there is no gratuitous infringement of rights, unnecessary to achieve the objective of the law. Such violations were very common in the past, not so much due to ill-intentions, but usually because legislatures or governments were not as attuned to constitutional values as they are today and did not make the effort to draft legislation more carefully (especially when rights of minorities or criminal offenders were concerned). Today, thanks to the clear message sent out in *Oakes* and efforts of the courts in applying this standard, state authorities tend to be much more careful, putting some time and effort into minimizing the infringement of rights.[3] Why the minimal impairment stage is still the centre of constitutional analysis is a perplexing question that I will try to answer shortly.

The last stage of the proportionality test is the first and only stage in which courts examine whether the law is constitutionally *just*. At this stage, it has already been settled that the legislation is directed towards a legitimate objective, that rational means were chosen to that end, and that it is narrowly tailored so as to minimize the limitation of rights. It is still possible, however, that the law ignores the magnitude of the harms caused by it — that there are

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[3] See P. W. Hogg and A. A. Bushell, "The *Charter* Dialogue Between Courts and Legislatures" (1997) 35 Osgoode Hall L.J. 75; P. J. Monahan and M. Finkelstein, eds., *The Impact of the Charter on the Public Policy Process* (North York: York University Centre for Public Law and Public Policy, 1993).

harms (by the infringement of rights) out of proportion to any benefit that this law might bring. Constitutional justice thus makes the balancing stage a necessary requirement. It is only here that the *costs* of the law (or government action) are taken into account.[4] And it is only here that the actual impact of the measures chosen (to what extent do they really further the objective?) is weighed against these costs.[5] In practice, however, for reasons that will be explored below, the third proportionality test has so far been all but meaningless in Canadian constitutional jurisprudence. Since its initiation in *Oakes*, this test has hardly ever determined the outcome of a case in the Supreme Court of Canada.[6]

III. BETWEEN MINIMAL IMPAIRMENT AND BALANCING

It is important to emphasize the distinction between the minimal impairment and the balancing tests — a distinction often misunderstood by the courts. A common mistake with the application of the minimal impairment test is the examination of means that compromise the achievement of the objective. For purposes of the minimal impairment test, it is not enough that there are some theoretical, less-restrictive means. These means must be good enough to achieve the goal *in full*, i.e., to the same extent as the means chosen by the state. The test examines whether there are less restrictive means *to achieve the desired objective*.[7] Thus, if the same objective can be achieved with a lesser

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4 See J. Cameron, "The Past, Present, and Future of Expressive Freedom Under the *Charter*" (1997) 35 Osgoode Hall L.J. 1 at 66, cited with approval in *Thomson Newspapers Co.* v. *Canada (A.G.)*, [1998] 1 S.C.R. 877 at para. 125.

5 *Dagenais* v. *Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835.

6 See P. W. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1999 student ed.) at 750–51. The sole exception, to the best of my knowledge, is the recent *New Brunswick (Minister of Health and Community Services)* v. *G.(J.)*, 177 D.L.R. (4th) 124 (1999) (S.C.C.), where the Court assumed without deciding that the other requirements were met, turning directly to the third proportionality test, and concluding that the deleterious effects of the policy far outweigh the salutary effects of any potential budgetary savings (which was the government's goal when denying state-funded legal counsel to a mother facing child protection hearings). There were some other rare occasions in which the Court maintained that the third proportionality requirement was not met (*Rocket* v. *Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232; *R.* v. *Laba*, [1994] 3 S.C.R. 965; *Thomson Newspapers*, *supra* note 4), but only as a supporting argument for an already determined decision, usually on minimal impairment grounds.

7 See, e.g., *RJR-MacDonald Inc.* v. *Canada (A.G.)*, [1995] 3 S.C.R. 199 at 342; *Thomson Newspapers*, *supra* note 4 at para. 118.

infringement of rights, this is what a reasonable legislature or government must choose. On the other hand, if the state can prove that alternative means cannot achieve the goal as well as the means chosen by it, the examination moves to its last stage — balancing. Here, and only here, the alternative of compromising the objective is considered.

The misunderstanding of this distinction can explain the misguided criticism of the minimal impairment requirement which is based on the claim that "a judge would be unimaginative indeed if he could not come up with something a little less 'drastic' or a little less 'restrictive' in almost any situation, and thereby enable himself to vote to strike legislation down."[8] True, it is usually easy to suggest legislation that avoids the infringement, but also — at least to some extent — prevents the achievement of the goal. This is not what the minimal impairment test is about. The idea is to examine whether the goal can be achieved *to the same extent* without gratuitous infringements. Judges cannot come up so easily with such alternatives and, if they can, there is no reason why the state should not use these alternatives.

Unfortunately, it is quite common for the courts to over-rely on minimal impairment, while virtually ignoring the balancing test. Consider the recent case of *Eldridge*,[9] for example. At issue was the refusal of the British Columbia government to finance sign-language translators in hospitals. Although the Supreme Court tried to frame its decision in minimal impairment terms, I believe it was a matter of balancing. The goal of the government in this case was simply to save money.[10] Naturally, this goal cannot be achieved to the same extent if the state allocates the money for sign-language translators. The minimal impairment test is thus irrelevant. As a matter of balancing, however, the situation in which deaf persons cannot communicate with their doctors is not justified for the sole purpose of saving $150,000.[11] Behind the minimal impairment rhetoric, this is effectively what the Court said.

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8 *Illinois Elections Bd.* v. *Socialist Workers Party,* 440 U.S. 173 at 188–9 (1979) (per Blackmun J.), cited with approval by P. Hogg, *supra* note 6 at 746. For a similar view see R. J. Sharpe, "A Comment on David Beatty's 'A Conservative Court: The Politicization of Law'" (1991) 41 U.T.L.J. 469 at 481–2.

9 *Eldridge* v. *British Columbia (A.G.)*, [1997] 3 S.C.R. 624.

10 The objective — defined by the Court as "controlling health care expenditures" — was assumed without decision to be "pressing and substantial" (*ibid.* at para. 84).

11 See D. Beatty, "Canadian Constitutional Law in a Nutshell" (1998) 36 Alta. L. Rev. 605.

Another recent example is the case of *Thomson Newspapers*[12] which dealt with a ban on the publication of opinion survey results during the final three days of a federal election campaign. The Supreme Court concluded that the means chosen impaired freedom of expression more than necessary. The less restrictive alternative that the Court pointed to was "a mandatory disclosure of methodological information *without* a publication ban."[13] But surely this alternative cannot be as effective as a complete ban. If there is not enough time for interested parties to reveal inaccuracies, we cannot count on the readers' self-understanding of statistical methodology to completely resolve the risk of misleading polls. The objective of the legislation cannot be achieved *in full* (to the same extent) with the alternative means suggested. Assuming that there are no *other* alternatives sufficient to achieve the objective (a ban for a shorter period, perhaps?), a correct application of the minimal impairment test must lead to the conclusion that the requirement is met. The real question is one of balancing: is the achievement of the goal in full important enough to justify the infringement of rights in the circumstances?

IV. THE ELUSIVE BALANCING TEST

Why are the courts avoiding the balancing stage, forcing their reasons into the minimal impairment framework? Perhaps the reason lies in the reluctance of judges to be seen as balancing the good and bad of a law. "Balancing" looks and sounds very political, as if judges are deciding what's more important in our society. There is no objective way to appraise the values, rights and interests involved. The personal opinions and political preferences of the judge will unavoidably influence the decision. It may be the fear of being regarded as subjective, then, which drives the courts away from the third proportionality test. The minimal impairment test, on the other hand, has a more "objective" appearance. Although courts must make some empirical evaluations regarding the availability and suitability of different means, judges probably perceive themselves to be on relatively safe ground when evaluating evidence about different possible legislative schemes, as opposed to weighing the importance of a law against the severity of a right's infringement.

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12 *Thomson Newspapers*, *supra* note 4.

13 *Ibid.* at para. 119.

As a "solution," judges tend to use, alternately, one of two different moves. When they want to uphold a law, they ignore the balancing part of the *Oakes* test, at best going through it without any meaningful examination. When they want to invalidate a law, they prefer to use the minimal impairment test (which has a much more objective appearance), even when it means misusing it by founding the decision on insufficient alternatives.

In such circumstances, it is not surprising that Professor Hogg declared the third proportionality test "redundant."[14] But the balancing stage is far from being redundant. As already explained, it is a necessary requirement to ensure constitutional justice — to ensure that on our way to achieve a social goal, we are not causing an unbearable infringement of rights. Hence, both of the moves made by courts are unacceptable. Ignoring the balancing requirement means that infringements can be justified without taking their severity into account. It means rigidity without attention to context; disregard to the harshness of the limits in the circumstances. Demanding the use of less effective means as part of the minimal impairment stage is misleading; it means that courts simply perform a balancing analysis at this stage without acknowledging it. It is also less clear, both to the judges themselves and their readers, what actually is being done in the constitutional analysis. When they try to force the balancing test into the minimal impairment stage, chances are they end up applying both of them inadequately.

Admittedly, a number of different arguments may be raised against the use of balancing tests in constitutional law. Discussing such arguments is out of the scope of this comment, though. As already stated, the *Oakes* test (and the balancing stage included) is taken as a starting point, and I will not attempt to defend or criticize it here. My aim is simply to comment on the way the three-staged proportionality test has been applied in practice in the past, and suggest the correct way to apply it in the future.

[14] See Hogg, *supra* note 6 at 751. Professor Hogg sees this stage as a mere restatement of the first test (the examination of the objective). However, the first test examines the objective in the abstract; it is only in the last stage that the courts balance the infringement in the specific circumstances against this objective.

V. *R.* v. *SHARPE*: THE FACTS AND THE CONSTITUTIONAL QUESTION

The problems described so far are found in strikingly clear expression in the *Sharpe* decision. Under consideration in this case was section 163.1(4) of the Criminal Code, which proscribes the possession of child pornography. The term "child pornography" is defined broadly, including any visual representation that shows explicit sexual activity with a person younger than eighteen; written materials that advocate such activity; and any depiction, for a sexual purpose, of the sexual organs of such a young person.[15] The Code outlaws not only the publication and distribution of these materials, but also (in the impugned section 163.1(4)) the *possession* of child pornography itself.

It was not disputed that the law infringes section 2(b) of the *Charter*, which protects freedom of thought, belief, opinion and expression. The case focused on the state's attempt to justify the law according to the standards of section 1. Before the BC Court of Appeal, Mr. Sharpe himself admitted that it is sometimes justified to proscribe the possession of child pornography. He argued, however, that the section was too broad in including situations that bear no risk of harm to children. Various examples were raised, but the one that captured the most attention — perhaps being the most extreme — was the possession of one's own drawings or writings, made from one's own imagination.[16] The discussion centred, then, on the question of whether child pornography which "may have been created without abusing children and which may never be published, distributed or sold creates a sufficient risk of harm to children that it should be an offence for anyone to possess such material."[17]

The state offered evidence to show the risk of harm (albeit indirect) to children in such cases. Based on expert witnesses and some studies and reports, three arguments were advanced in favour of the legislation's broad scope. First, child pornography can be used by some pedophiles in the grooming process to

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15 With the exception of works that have an artistic merit, or an educational, scientific or medical purpose. Acts that serve the public good are also exempted.

16 Another important example — the analysis of which for purposes of this paper is similar — concerns visual representations of *legal* sexual activities of children 14 to 17 years old (i.e., non-exploitative, non-commercial and consensual).

17 *B.C.C.A. decision*, *supra* note 1 at para. 232 (McEachern C.J., dissenting, but not on this point).

facilitate sexual activity with children. Second, it can be used to confirm or augment the cognitive distortions of some pedophiles, reinforcing their belief that their behaviour is normal and does not harm children. And third, child pornography can excite some pedophiles to commit offences against children.[18]

VI. THE DECISIONS TO DATE

The trial judge, Shaw J., made findings of facts on each of these empirical claims, agreeing with them partially.[19] His analysis did not, however, deal specifically with possession of one's own drawings or similar problematic situations, subtleties of the argument against the legislation which were only clarified on appeal.[20] Although he found that possession could be (at least to some extent) harmful to children, Shaw J. nonetheless concluded that section 163.1(4) was unconstitutional, based on the balancing test, as he believed the deleterious effects outweigh the salutary consequences of this section.

At the BC Court of Appeal, the judges took the liberty of reevaluating the evidence, as well as admitting some additional evidence on the same points. Since the question has now been focused on the more problematic situations (like possession of one's own drawings), one could expect some new findings of fact to be made. But none of the judges made any clear findings about the possible harm to children in these situations. Nor did they contradict Justice Shaw's general factual conclusions, that seemed to support the state's argument that possession of child pornography could cause some harm to children.

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18 *Ibid.* at para. 142. Additional arguments, which will not be discussed here, were that child pornography may harm society in general by desensitizing and legitimizing attitudes concerning the sexualization of children, and that criminalizing possession helps police enforcement efforts in this area.

19 First, he concluded that child pornography indeed poses a danger to children because of its use by pedophiles in the seduction process. Second, he found that child pornography can also be a factor in augmenting or reinforcing a pedophile's cognitive distortions (although he pointed out that there is no hard evidence demonstrating an actual increase in harm to children as a result of these reinforced distortions). Finally, on the issue of whether child pornography can excite pedophiles to commit offences, Shaw J. thought this was true only for "highly erotic" pornography (adding that it could also have a positive effect by helping some pedophiles to relieve sexual tension). See the *B.C.S.C. decision*, *supra* note 1 at para. 23.

20 Mr. Sharpe was not represented by counsel at the first instance and argued, at this stage, against the proscription of possession in general.

Southin J.A., who wrote the leading opinion, was apparently not impressed with the state's empirical arguments,[21] but eventually noted that she did not find it necessary to agree or disagree with the trial judge's finding,[22] nor did she make any explicit findings of her own. This is hardly surprising, as she took a strong libertarian approach, concluding that "legislation which makes simple possession of expressive materials a crime can never be a reasonable limit in a free and democratic society. Such legislation bears the hallmark of tyranny."[23]

Rowles J.A., who wrote a careful and coherent concurring opinion, admittedly stressed that no "reasoned apprehension of harm can be shown" in situations like the possession of one's own drawings.[24] Accordingly, she found section 163.1(4) unconstitutional as failing the minimal impairment test. But she did not specifically consider the validity of the state's three empirical arguments (namely, the risks of grooming, reinforcing cognitive distortions and fuelling sexual fantasies) in this context.

Chief Justice McEachern, in dissent, generally based his legal analysis on the factual findings of the trial judge, avoiding the making of additional findings to confront the main question of the case — the existence of indirect harm to children from possession of one's own drawings and the like. Unlike the trial judge, however, McEachern C.J. concluded that the risk of harm to children outweighed the infringement of freedom of expression, and that the legislation is therefore constitutionally valid.

VII. APPLYING THE *OAKES* PROPORTIONALITY STANDARDS IN *SHARPE*

The objective of the section under consideration in *Sharpe* is the protection of children.[25] The main question at the minimal impairment stage is therefore whether the state can achieve the same objective — the same level of protection for children — with some other, less restrictive means. It is thus essential to

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21 B.C.C.A. decision, *supra* note 1 at paras. 42–52.

22 *Ibid.* at para. 67.

23 *Ibid.* at para. 95.

24 *Ibid.* at para. 205.

25 The objective can be understood in a lower level of generalization — e.g., protection of children from abuse and exploitation caused indirectly by possession of pornography — but the difference is irrelevant for our own purposes here.

make factual findings on this question before continuing with the constitutional analysis. If there are situations covered by section 163.1(4) that serve no purpose of protecting children, then the law should be better tailored by less intrusive means and must be struck down. On the other hand, if there is at least *some* risk that the section helps to mitigate in all the situations covered by it, then the court must move to the next stage of the analysis, and weigh this added protection for children against the infringement of rights.[26]

We have seen that the trial judge did not refer to the subtle and problematic situations, such as possession of one's own drawings, and that the Court of Appeal judges did not fill this lacuna. Since they failed to put the necessary emphasis on the right questions and to come up with clear factual findings, it is impossible to continue with a proper constitutional analysis. Hence, the Supreme Court would have to start by reviewing the evidence and making clear findings on questions of facts. In this area of social sciences it is undoubtedly difficult to come up with solid answers, but avoiding a decision only distorts the analysis. To apply the minimal impairment test, it must be decided, based on social science evidence, whether there is a risk of harm to children caused by possession of one's own drawings (and similar problematic examples). In this context, each of the three empirical arguments made by the state (namely, the risks of grooming, reinforcing cognitive distortions and fuelling sexual fantasies) must be addressed. Attention must also be given to the age of the children involved — whether a risk exists not only for young children, but for adolescents as well.

Without access to the evidence, I cannot claim to know the answers to these difficult empirical questions. One should read and hear all the evidence to decide if the state was able to meet the burden of proof. But it seems reasonable to assume, based on the trial judge's findings, and in the absence of clear findings to the contrary on appeal, that the ban on possession is helpful in achieving better protection for children — at least to some extent — in all the situations covered by it. It appears from the decisions that the expert witnesses on behalf

[26] It was not argued that while possession creates a risk in all the situations covered by section 163.1(4), there is a less intrusive way (other than a complete ban) of mitigating this risk to the same extent. The minimal impairment argument in this case was merely that the section is over-broad in the scope of its application.

of the state testified to that effect, and none of the judges mentioned any evidence to the contrary.[27]

If this is indeed a correct factual statement, (i.e., even situations like possession of one's own drawings put children at some risk), then the objective of protecting the children cannot be achieved to the same extent without section 163.1(4). The analysis must move on to the third proportionality test, to balance the positive and negative impacts of this section. We have to consider if the price that we're paying — the infringement of some people's freedom of thought and expression (as well as privacy and autonomy) — is not too high a price to pay. Shaw J. was correct, then (although he did not explain this) to focus the discussion on this balance — on the third proportionality test. The appeal judges, on the other hand, did not give the balancing test the importance it deserved.

The application of the balancing stage revolves around the two groups of people involved. With the legislation in force, people who want to possess anything within the scope of "child pornography" suffer. Without it, children will be put at risk. The balance between these two groups is the essence of the proportionality test.

Needless to say, the analysis should be "contextual," that is, the right infringed and the legislative goal must be balanced based on their relative strength and importance *in the specific context*, rather than in the abstract.[28] Accordingly, to perform this balancing the Court must make additional

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[27] It is perhaps possible that in some exceptional situations the section is not necessary to protect children. For instance, a *Globe and Mail* editorial raised the example of a teenager carrying a nude picture of his 17-year-old girlfriend in his wallet. Similarly, the British Columbia Civil Liberties Association raised the example of pictures of one's own lawful sexual activity involving persons aged 14 to 17 (see also B. Cossman et al., *Bad Attitude/s on Trial: Pornography, Feminism, and the Butler Decision* (Toronto: University of Toronto, 1997) at 38). Arguably, such situations are not within the scope of the problem that the section was aimed to address. It would be difficult to create an exception for such situations without also excluding situations that the section *does* intend to address, but if such exclusion turns out to be possible, it is necessary for minimal impairment reasons and should indeed be dealt with at this stage.

[28] *Edmonton Journal* v. *Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 (per Wilson J.); *RJR-MacDonald, supra* note 7 at para. 132 et seq.; *Thomson Newspapers, supra* note 5 at para. 91.

empirical assessments. The judges will have to evaluate the data and come to conclusions on the strength of each side of the equation. As to the children who are potential victims of child pornography, the Court must make an assessment on the magnitude of the risk to children to appreciate their side of the story. If the prohibited conduct can result in the abuse or exploitation of children, there is no doubt about the severity of these harms. But there is also a need to assess how high the risk is, and to what extent a ban on possession could mitigate this risk. On the other side, there are those who possess child pornography innocently, without harming any children. Again, in order to appreciate their side of the story, both the intensity of the infringement and the number of people suffering from it have to be assessed. Of course, one cannot easily come up with exact numbers on such questions. But it is important to make clear assessments based on hard evidence.[29]

At the end of the day, empirical data alone cannot solve our problem. The balance involves, unavoidably, a normative analysis based on one's views regarding the importance of freedom of expression, freedom of thought and privacy, in general and in the specific circumstances in particular.[30] But even this normative analysis can, and should, be based on evidence. The Court should hear and read evidence on children who have been abused and exploited by child pornography users to appreciate the intensity of the potential harm; evidence on the magnitude of the risk, to appreciate the chances that these terrible harms may actually happen without the ban (including evidence on the efficacy of a ban on possession, to estimate the salutary effects of such a ban in practice); evidence on child pornography users, to appreciate the intensity of their rights' infringement; and evidence on the number of child pornography users in Canada, to appreciate the magnitude of the infringement caused by section 163.1(4). And once again, the Court must specifically examine the different problematic situations, such as possession of one's own drawings.[31] A decision based on all this empirical data, as opposed to vague and general statements,

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29 For a recent critique on the lack of empirical bases in constitutional decisions, see R. A. Posner, "Against Constitutional Theory" (1998) 73 N.Y.U. L. Rev. 1.

30 The BC courts placed their emphasis on freedom of expression, and pornography is typically given low value compared to other forms of expression (*R.* v. *Butler,* [1992] 1 S.C.R. 452). The case may seem an easy one if one balances low-value expression against the protection of children. What makes this case much more difficult, and what was in fact at the centre of the BC courts' reasoning, is the infringement of freedom of thought and privacy.

31 This is not to suggest that the BC courts did not deal with some of these questions, but their analysis was far from full on these crucial matters.

would not only be more sensitive to the real interests involved, but would also minimize the extent to which judges' personal values carry the day. Which, as noted above, seems to be the main reason for their consistent (and troubling) avoidance of the balancing test in the first place.

Since all these empirical questions have yet to be resolved, it is impossible to perform the constitutional balancing properly. But given the enormous intensity of the harm to children — the possibility of children being sexually abused and exploited — the scales seem to be tilted in their favour. Even if the risk of this harm (or the added protection resulting from a ban on possession) turns out to be very low, and on the other side the infringement of rights turns out to be severe, it is difficult to imagine that this infringement would be so high as to justify putting children at such risk. If we assume — and this was the starting point for the balancing stage — that some risk to children exists, even in situations like possession of one's own drawings, then the interests of the children should most likely be preferred over those of the child pornography possessors.

VIII. CONCLUSION

In this short comment I have tried to clarify the structure of the *Oakes* proportionality test, and in particular to point out the misunderstanding of the distinction between minimal impairment and balancing. We have seen that judges tend to avoid the balancing test, fearing that their reasoning will be regarded as subjective. They rely instead on a misapplication of the minimal impairment test. But the balancing analysis is crucial to constitutional justice; it is the only stage in which courts can make sure that the legislature is not causing severe infringements of rights out of proportion to the importance of the legislation. And the use of minimal impairment to examine alternatives that cannot achieve the legislative goal in full misses the point of this test. At the end of the day, when the distinction between these two parts of the proportionality analysis is confused, neither the judges nor their readers can tell exactly what happened.

The BC Court of Appeal decision in *Sharpe* is a good example of this over-reliance on minimal impairment and avoidance of balancing. The Supreme Court has an opportunity to clarify how *Oakes* should be applied and provide direction to the lower courts on this matter. A correct constitutional analysis in this case requires, first and foremost, clear decisions on a series of empirical

questions, particularly the existence of indirect harm to children in every situation covered by the legislation, including situations like possession of one's own drawings. Assuming the existence of *some* risk to children in all these situations, however small, as a result of grooming, reinforcing cognitive distortions, and fuelling sexual fantasies, one cannot say that the section fails the minimal impairment test. It is rather a question of balancing. A proper application of the balancing test requires empirical inquiries (and findings) on the intensity and magnitude of the risk of harm to children (as compared to the risk that still exists *with* a ban), on the one side, and the infringement of rights, on the other. The Supreme Court should make clear, to itself and to the readers, what exactly is at stake, and base the balancing on much clearer (and more elaborated) factual findings than those offered by the lower courts.

In the particular facts of this case, assuming the existence of risk to children in all the situations covered by the legislation, it seems that the infringement should be justified. The harms of sexual abuse and exploitation seem to outweigh any harms that child pornography possessors might suffer.

CONSTRUCTING THE QUÉBEC REFERENDUM: FRENCH AND ENGLISH MEDIA VOICES

by Gertrude J. Robinson (Toronto: University of Toronto Press, 1998)

Reviewed by Nelson Wiseman

This book on the Québec Referendum of 1980 has much to offer political scientists and those studying media and communications. What is its relevance to constitutional studies? It is pertinent because the Constitution has gone from being in the exclusive domain of governments and legislatures — the old orbit of responsible government — to the claimed domain of the people. Welcome to the relatively new order where citizens and others use constitutionally entrenched rights to get the courts to rewrite what legislatures and governments have decreed. The first Québec Referendum was pivotal in the process of constitution-making because the political actors at the time — federalists as well as sovereigntists — said they would abide by the results. Indeed, a year later the major protagonists, Pierre Trudeau and René Lévesque (whose photo graces the cover), agreed to a short-lived pact that would have entrenched the referendum as a device to break stalemates in the amendment process.

The Québec experience legitimized in popular consciousness the referendum as part of our living and evolving constitution even though it is thought not to be found in the Constitution itself. (Actually, there is a reference to Newfoundland's Confederation referendum in the preamble to the *BNA Act* of 1949.) Other governments have since resorted to referendums on constitutional issues. Newfoundland did so twice in the case of separate schools; pointedly, Québec did not on the same issue. Even in cases where senior governments refuse to lend their imprimatur to a referendum — as in Manitoba in 1983 on the issue of French language services — municipalities may organize one. In the Manitoba case, Winnipeg succeeded in killing the scheme before the legislature could debate it and after parliament approved it.

Gertrude Robinson's monograph is influenced by some contemporary rubrics like "discourse analysis." The four discrete parts of her book focus on the political actors and journalistic practices of the day; on how the referendum was covered by the media and how journalists and the laws governing the vote framed the contest; and on French/English differences in understanding Québec nationalism, i.e., the two solitudes revisited. The concluding section offers a post-mortem — a rethinking of the relationship of public opinion, news and democratic politics in Québec and Canada. Her references reveal a rich blend of theoretical, conceptual, and empirical sources. Some of the latter are constructed by coding, categorizing and analysing broadcast and published stories, interviews and commentaries. There is depth and breadth in her research and reading, though some turgidity in her detail.

Robinson demonstrates that media are not neutral; they pitch their messages to their viewers' pre-existing biases. This is not a revelation but it raises the question: where did these popular sentiments come from to begin with? Were media not a factor? Obviously, the causal arrow points both ways in an interactive process. Robinson meticulously analyses the media's role in the 1980 referendum. She documents both the campaign's content (ideological framing) and its form (such as visual presentation styles in the media). There were remarkable contrasts in the anglophone and francophone media's coverage. The two communities began with

different coloured lenses and catered to and reinforced the differences. Robinson engages in the challenging work of searching for regularities in speech and knowledge. As the linchpin between leaders and followers, politicians and public opinion, it was the media which defined both the federalist and sovereigntist platforms in 1980 and in 1995. Shortly before he joined the federal cabinet as the minister responsible for the intergovernmental affairs dossier, Stéphane Dion referred to the broadcast acronym RDI as standing for "réseau de l'indépendance." His father Léon was once the dean of Québec's political scientists, the leading authority on the politics of public opinion.

In the concluding chapter, there is a brief but illuminating comparative analysis of the 1980 and 1995 referendums. Both were triggered by a wave of ethnic nationalism; both featured a profound gender gap that decisively favoured the federalist side. Had the Yes side attracted women in the same proportion as men it would have triumphed. In both referendum campaigns the Parti Québécois foolishly depicted women as having a procreational role in society. Media technologies have certainly evolved — they always do — but some similar patterns prevailed.

Robinson touches ground covered elsewhere by some of the established workhorses in the field: sociologists and political scientists such as Maurice Pinard, Richard Hamilton, Vincent Lemieux and Jean Crête. She also draws on the broader Canadian literature which argues that voters are more fickle than in the past, more drawn by leadership images and less bound by longstanding partisan loyalties. We re-encounter a haunting paradox of democratic politics: the least informed, least interested and least engaged in the political process are the most susceptible to media manipulation, to switching or forming barely conscious vote preferences. The outcome in a tight contest, as in 1995, is in the hands and heads of a group of next-to-know-nothings whose emotions are the most easily swayed. Those who are pensive, thoughtful and deliberative on both sides of the issue are the more stable components of the electorate. They can be taken for granted as their preferences are less likely to change.

The Supreme Court's 1998 decision on Québec's potential secession following a future referendum goes unmentioned since it occurred after the book's publication. It may be that the Court's opinion — if there is to be another referendum — will lead to a clearer question. Whatever the wording, however, the answer will be cloudy and contentious. The referendum, an instrument that promises a simple and democratic result is actually a messy bog. A No vote has meant "not now, maybe later;" no one knows what a Yes vote will mean.

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COLOUR CODED: A LEGAL HISTORY OF RACISM IN CANADA, 1900–1950

by Constance Backhouse (Toronto: University of Toronto Press, 1999)

Reviewed by Veronica Strong-Boag

With this volume, Constance Backhouse cements her reputation as Canada's foremost legal historian. Her powerful testament to the systemic consequences of Canadian racism is both thoughtful and moving. In a series of deft case studies she dismantles the "ideology of racelessness" (14) that has been employed by far too many Canadians to camouflage endemic racial prejudice. Once criticized for inattention to race, Backhouse has done the homework that many scholars need to do. Her notes and bibliography assemble a cornucopia of critical Canadian and international readings on race theory, race relations, racism and imperialism. In her analysis, Backhouse joins a small group of Canadian scholars, including Gillian Creese and Jean Barman, who superbly combine feminist and anti-racist insights into the nature of authority and power. Gender is always raced and race is always gendered. *Colour Coded* supplies concrete reminders of those connections.

The research that informs this volume might have made it unwieldy. Fortunately, the writing is engaging and fast-paced and, in an inestimable service to scholars and students, the University of Toronto Press website (www.utpress.utoronto.ca) has provided an expanded version of chapter notes and bibliography. This substantial document is worth every second of the downloading time. Unfortunately, as Backhouse reminds us, much of the relevant material has been lost forever, culled from archives and depositories or never saved at all, its significance for tracing a critical part of our collective history unrecognized.

Colour Coded begins with a careful discussion of the meaning of colour, race and racism. Colour and racial classifications are exercises in mythology. Racism is real in its legitimation of advantage and justification of injury. Canadians are not, however, of one mind. Some have always disavowed or ignored racist ideology. Most obviously, the intended victims — most notably Native, Black and Asian Canadians — have challenged subordination. Some whites (the low cap signals how this colour serves as the reference point for the others, p. 285) reject privilege. Negotiations about race have informed Canadian history from its origins but the "scientific racism" of the nineteenth century is deeply imbedded in Canada law and practice. While "many other trials, appeals, legislative activities and commentaries" could have been selected (16), Backhouse concentrates on six case studies, each profiled in a separate chapter, that vividly illustrate racism's systemic character.

Chapter two deals with the 1939 decision in which the Supreme Court of Canada held that "Eskimos" were Indians for the purposes of the Constitution. That decision, so obviously arbitrary in its disregard of anthropological writings and history, highlights the mutability and essential irrationality of racial definition. "Pure blood," or for that matter "*laine pure*" is the stuff of fantasy. Backhouse shows how this deadly vision evolved through judicial process and changes in the *Indian Act*. Aboriginal peoples were, notably, unconsulted. The Inuit were classified for the convenience of the European diaspora which was determined to name the land and the people over which it claimed dominion.

Chapter three takes up the prohibition of Aboriginal dance, most particularly in the trial of Wanduta (Red Arrow) of the Dakota Nation in Manitoba in 1903. Native dancing, first criminalized in 1884, remained largely prohibited until 1951. A successful farming community, the Oak River Dakota had developed complex relations that included both trade and performance with the white community in Rapid City. The highlight of the local fair was the Dakota Grass Dance. The Department of Indian Affairs, bolstered by Christian bigots, formented division among the Dakota Sioux in a successful effort to have the tribal elder, Wanduta, jailed. Ottawa's simultaneous support for academic investigation of Native traditions confirmed that Native traditions were only legitimate as a backdrop in museum and archival accounts of the story of European progress.

Chapter four investigates the 1921 lawsuit of the Tyendinga Mohawk Eliza Sero against the Province of Ontario. One in a long line of Mohawk claimants for sovereignty, Sero demanded compensation for the province's confiscation of her valuable seine net. At issue was the Aboriginal fishery. As we know at the beginning of the new millennium, resource questions lie at the heart of much Native-white relations. At the hands of a racist and sexist judge, one who was little different from the majority of his peers, old imperial guarantees to the "feathered Loyalists," Britain's allies in the American Revolutionary War, were repudiated.

Chapter five turns to Saskatchewan in 1924 and another example of resistance to white hegemony. Yee Clun, a respected and prosperous member of Regina's business community, was determined to challenge the law, dating from 1912, that forbade Asian employers from employing the cheap female help who benefited their white competitors. While post-World War I amendments deleted racial references, the intent remained the same. No consensus existed yet a variety of whites, including activist women and male unionists, continued to caricature Asian Canadians as economic and moral threats to the existing order. Yee Clun's application was nevertheless upheld in a judgment that repudiated discrimination. His success was not a lasting one, however. Saskatchewan's legislators immediately set out to protect municipalities from judicial review. A provincial statute that targeted Chinese businesses remained on the books until 1969.

The next case, taken up in chapter six, involved *R. v. Phillips and the Klu Klux Klan* in Oakville, Ontario, in 1930. In February of that year, the Klan, a healthy American import, forceably prevented Ira Junius Johnson and Isabel Jones from marrying. The would-be groom, a Canadian World War I veteran, was Indian or Black. That very uncertainty testified to the constructedness of racial categories. The intended bride was white. While most authorities, including the town's police chief, were happy to turn a blind eye to the KKK intimidation, Ontario's Black community quickly organized to demand criminal charges. As a result, Dr. William A. Phillips, a Hamilton chiropractor, was the first Canadian Klansman to face prosecution. In a revealing comparison with the treatment meted out to the Communist party in the 1930s, the "KKK's advocacy of white, Protestant supremacy did not seek to 'bring about any governmental, industrial or economic change within Canada,' and consequently did not run afoul of section 98 of the [Criminal] Code as then written" (198). Since the Klan's racism was of no account, only a minor charge was laid. On appeal, the Ontario judge, condemning the Klan's mob character, increased the sentence to three months. A First Nations minister quickly married the couple, within a month of the KKK challenge.

Chapter six turns to the 1946 challenge of the Black Haligonian Viola Desmond to racial segregation. Forced to sit in the "coloured" section of the Roseland Theatre in New Glasgow, the successful businesswoman demanded justice. The factors of gender as well as race, as in the case of Eliza Sero, were significant. Like the Mohawk, Desmond symbolized the respectability and authority of women in her community. Although some Blacks preferred to ignore white abuse, a long tradition of resistance offered her support. Unfortunately, Desmond's white counsel wasn't so audacious. His conservativism helped to lose her case. Despite the unfavourable judgment, Black consciousness was mobilized as never before, providing a powerful inheritance in the last half of the twentieth century.

These six stories, effectively spanning more than the fifty years promised by the book's title, prove a dismal condemnation of law, lawyers, the judiciary and, of course, of Canada more generally. They are, however, far more than that. They are stories of the courage and determination of those who would not allow themselves to be victimized and of the occasional support and sympathy they received from whites. These stories also remind us of how closely thinking about gender and race are connected. Central to the ideology of white supremacy is the notion of the white lady who is vulnerable to the assaults of "lesser" peoples, and its supposed opposite, the inferior, whether debauched or childlike, woman of other races. Masculinity is also racialized but that story is only hinted at here.

In the half century under study, matters did get somewhat better. In 1947, Saskatchewan passed the first comprehensive human rights statute. In the decades since then, however, racism has proved a healthy weed. As the Conclusion reminds us, white Canadians' frequent preference for supposed "racelessness" or "race neutrality" ignores the fact that our society "is built upon centuries of racial division and discrimination" (274). Since white privilege dominates our ideologies and institutions, ignoring race allows racism to go unexamined. Canada is not and has never been an "innocent kingdom." Claims of innocence are, as *Colour Coded* so powerfully demonstrates, an assertion of judicial and collective irresponsibility and complicity.

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The Collapse of Big Brother and the Rise of Consensual Panopticon

THE END OF PRIVACY: HOW TOTAL SURVEILLANCE IS BECOMING A REALITY

by Reg Whitaker (New York: The New Press, 1999) pp. 195

Reviewed by Joane Martel

As a political scientist (York University), Reg Whitaker's research interests have predominantly centred on the way political power is employed. In line with his prior writings, Whitaker's *The End of Privacy* examines the way power is informally exercised outside state structures. Framing his reflection in a Foucauldian perspective, Whitaker outlines the changing parameters of power as sustained changes in informational technologies continue to re-model the political, economic, legal and cultural landscapes. In essence, he argues that the structures of power emerging at the dawn of the twenty-first century are qualitatively different from those based on the "Big Brother" model that came to dominate the twentieth century. As mechanisms of power, new technologies of surveillance have rapidly expanded the boundaries of social spheres open to public gaze. At the same time, the space on which individuals have been able to count, in the past, as private havens has been reduced.

In chapter one, Whitaker lays out the role that information gathering has played in the rise and solidification of the twentieth-century state. Whitaker argues that, as one of the crucial tools of a particular totalitarian and centralized model of state power, intelligence — "the purposeful acquisition of secret information" (p. 2) — is being dethroned as the key activity of sovereign nation-states obsessed with outer as well as internal security. Under the influence of new information technologies, power structures appear to be moving away from their twentieth-century hegemonic form — that of a power concentrated and circumscribed within clearly identifiable origins (within the state) and purposes (for foreign and internal security). In the next century, the structures of power are moving toward a more decentralized, diffused or dispersed form of power that has increasingly obscure origins. This is the result of the use of surveillance technologies outside state-centred activities and inside the private sector. Thus, according to Whitaker, the current historical period is in transition from what he calls the "surveillance state" to the "surveillance society" (p.29). To this effect, the author goes to great length, in chapter two, to conceptualize utilitarian philosopher Jeremy Bentham's notion of the Panopticon and to link it in a convincing manner to social and technological transformations. Specifically, Whitaker argues that panopticism — power exercised without the direct presence of coercion — is observable throughout society. It is the underlying organizing principle in the military, the workplace, the schools and within state-sponsored social security programs, to gather all kinds of information about the population. The state — joined by the private sector — is increasingly engaged in carrying out statistical risk analysis for the purpose of eliminating possible risks of noncompliance to social norms, rules and regulations. To Whitaker, this cultural sensibility toward risk aversion has expanded well beyond the gaze of the state into non-state spheres of society.

In chapter three, Whitaker presents the nature of new information technologies and discusses some of their distressing implications for the social world. He gives an extensive and well-researched historical overview of the development of computers in the twentieth century. While emphasizing the computer's undeniable connection with military research activities during the Cold War (e.g., the development of the Internet),

the author stresses the democratization of their use in the late 1970s through the commercialization of cheap operating systems and software and the invention of the modem. The sophistication of fibre optic cables and electromagnetic signals further improved transmission capabilities and enabled computers to network with one another in real time. Certainly, such innovations in informational technologies are bound to generate some perceivable changes in the societal model of Western nations. In the second portion of the chapter, Whitaker attempts to document the changes within popular culture. He discusses cyberspace — the new "world" or new "space" created by computer networks — and the fact that it has markedly changed the shape of human interactions, be it by allowing online representations of the individual or by interacting with "virtual" human beings who have no corporeal existence. In addition, as an emerging cultural stereotype found in sci-fi movies and television series, the cyborg (part-human, part-machine) has replaced our conventional image of the robot (a machine). As a cultural signifier, the cyborg represents our current sense of self as being in an unprecedented symbiosis with our tools, extending beyond its own organic boundaries to make the machine an intimate component of the self.

The "network society" demands flexibility not only in our conceptions of space and "legitimate" cultural conventions, but in management, in the workforce as well as in every other social site in which informational technologies play an important role (e.g., academic institutions). Because flexibility requires a perpetual adjustment on the part of networking entities (e.g., individuals, corporations, institutions) this implies the unavoidable presence of certain levels of unpredictability. This unpredictability implies, in turn, a constant state of insecurity. It is this insecurity, which is inherent in technological networks, that engenders a particular type of cultural aversion toward risk. Interestingly, Whitaker brings to light here a fundamental paradox intrinsic to the new technologies: on the one hand, infogathering technologies promote and encourage flexibility and change and, therefore, also promote risk. However, they also provide the necessary means to counter that risk. Put simply, "The new information technologies are also technologies of surveillance" (p. 76) used for the explicit purpose of reducing risk. Increasingly, such technologies of surveillance are being used for an astonishing array of social control purposes, as detailed in chapter four.

With numerous concrete and disconcerting examples, chapter four deals with the growing transparency of ordinary people's lives. Not only are surveillance technologies being deployed at a rapidly escalating rate, they are often deployed without the knowledge of those under surveillance. This is the case, for example, of "nannycams," video surveillance cameras installed in the home to record the daily activities of the nanny. It is also the case of anti-crime video surveillance devices equipped with powerful zoom lenses and attached to street corners and building rooftops. While extending the visual coverage of the public areas of a city, this coverage goes far beyond crime prevention purposes and can provide access (possibly unauthorized) to private homes. Along the same lines, I was recently dumbfounded to learn that in order to reduce employees' extended coffee breaks, the Canadian government was considering the use of micro sensors in employee chairs. These sensors record the absence of weight on the chair and, thus, inform the employer of unexcused or prolonged absences from an employee's desk.

More disturbingly, such technologies produce, for both large corporations and states, detailed data profiles of citizens that, as Whitaker explains in chapter five, remain largely outside the control of private

individuals. Similarly to Ewald (1986) and Castel (1991), Whitaker explains that such data profiles are becoming important tools for the social deployment and political entrenchment of the latest technique in governance — risk management. This particular technique requires the categorization of individuals in groups which are considered to pose more or less of an abstract social risk. The underlying danger of data profiles is that they have the very real potential of sorting and labelling people as either good or bad risks which, in turn, can lead to the removal of those individuals representing a negative risk from mainstream society. This is a singular form of alienation — individual as well as collective — that is engendered by the information society. Whitaker argues, in chapter six, that the combination of surveillance technologies and risk management techniques tends to fragment the "common democratic citizenship" (p. 3) into multiple consumer categories. Each of these categories comprises its own particular consumer identity to which individuals come to identify for the advantages they offer them (e.g., the convenience of online banking, the empowerment provided by credit and debit cards, the personal security of "smart" health cards, etc.). For the author, such benefits are one crucial reason why citizens do not publicly protest against, nor perhaps see, the unprecedented invasion of their personal privacy that results from the global growth of "dataveillance" (Bennett, 1996: 237 cited in Whitaker: 125). To Whitaker, this enticement toward the personal benefits that can be derived from infogathering technologies is the equivalent of a "participatory Panopticon" (p. 139), a Panopticon that is a source of goods, hence a Panopticon that garners consensus and support from the masses.

Although he is unequivocally critical of the invasive and universalizing uses of these infogathering technologies, Whitaker does not hold a pessimistic view about emerging networked societies. On the contrary, he concludes his book by emphasizing that the information revolution will not inevitably lead to the exclusive or hegemonic use of technological means by corporations or state agencies. He argues that democratic forces will exploit the same organizational forms that the new technologies are promoting (e.g., online networking) for the specific purpose of resisting either the invasive effects of these technological means or the marginalization and exclusion that ensue from their use. Whitaker provides several examples of recent political resistance which were enabled by new technology. He describes how oppressed populations in Mexico and northern Québec have hacked into government websites and used sophisticated international publicity campaigns or networks with online grassroots organizations to fight neo-liberal or imperialist state policies.

Enhanced by new technologies, surveillance is becoming multidirectional — the *watcher* (formerly, Big Brother) and the *watched* are both keeping an eye on one another. Ultimately, the use of new information technologies is reconfiguring social, political and economic power relations as well as the terrain on which these relations play themselves out. Our cultural understanding of the nation-state and of its traditional role as regulator of social relations has been radically de-stabilized, in good part by this "information revolution." Whitaker argues that the state may actually need to be brought back into the equation and "assert a serious presence in global authority and decision-making" (p. 164) to ensure a global and effective enforcement of environmental regulations.

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