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CanadaWatch

PRACTICAL AND AUTHORITATIVE ANALYSIS OF KEY NATIONAL ISSUES

SPECIAL DOUBLE ISSUE ON THE SUPREME COURT'S 1998 CONSTITUTIONAL CASES

The Supreme Court's 1998 constitutional cases: The debate over judicial activism heats up

BY PATRICK J. MONAHAN

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It was another busy and controversial year on the constitutional front for the Supreme Court of Canada in 1998, as is demonstrated by the wide range of opinion reflected in this, the third annual *Canada Watch* special issue on the Supreme Court's constitutional decisions. The court issued a total of 25 constitutional decisions in 1998, representing just over one-quarter of the 92 judgments released during the year. Once again we have brought together leading commentators from across the country to debate and analyze the key developments. (The papers were originally presented at a conference held in Toronto on April 16, 1999, and have been revised for publication in *Canada Watch*.)

The Charter

Twenty-one of the 25 constitutional decisions in 1998 were Charter cases. In those cases, the court ruled in favour of the Charter claimant 8 times, in favour of the government 12 times, and the result in one case was inconclusive. This Charter "success rate" of 40 percent is slightly above the court's average of 33 percent over the past decade, but is not out of line with results obtained in individual years in the 1990s. (The highest "success rate" over the past decade was achieved in 1997, when one-half of the 20 Charter cases resulted in a ruling in favour of the claimant, while the lowest success rate was in 1993, when the Charter claimant succeeded in just 9 of the 42 decisions handed down that year, or about 21 percent.)

Sixteen of the 21 Charter cases in 1998 arose in the criminal law context, which, again, is consistent with past trends. The Charter claimant succeeded in six of those cases (37.5 percent). However, in only one criminal case, *R. v. Lucas*, did the court rule a provision in the *Criminal Code* to be unconstitutional. (Even in *Lucas*, the court largely upheld the defamatory libel provisions in the Code, while ruling that an incidental

1998 constitutional cases, page 70

FEATURES

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1998 constitutional cases continued from page 69

feature of the existing provision was unconstitutional. Thus, while *Lucas* is technically a "loss" for the government, in substance the government succeeded in defending the validity of the Code provisions at issue.) The other five cases in which the Charter claimant succeeded in 1998 involved decisions or actions of the police or the judiciary.[1]

The criminal law case that received the most media and public attention was *R. v. M.R.*—1 of the 10 criminal cases in which the court sided with the government rather than the accused. Here the court ruled that school authorities and the police can order searches of high school students without first obtaining a warrant from a judge or justice of the peace. (In order to obtain a warrant, the police must convince the justice that there are reasonable grounds to believe that they will find evidence of a criminal offence.) The court held that the normal requirement to obtain a search warrant before conducting a search could be relaxed in the case of high school students given the public interest in maintaining order and discipline within the school system. However, our court did not go as far as the U.S. Supreme Court in the 1995 *Veronica* decision, where the U.S. court allowed police to conduct random drug searches of students involved in extracurricular activities. In *M.R.*, our court noted that there was no need for a warrant because the school vice-principal had reliable information indicating that the student in question was involved in selling drugs. By emphasizing the fact that the vice-principal had reasonable grounds for searching the student in question, the court seemed to implicitly rule out random drug searches such as those that are permitted in the United States.

The other high-profile criminal law case in 1998 was *R. v. Schreiber*, another government "win," where the court held that a letter of request sent to the Swiss authorities seeking confidential banking information relating to the so-called airbus scandal did not violate the Charter. What was surprising about the majority decision, written by Madame Justice L'Heureux-Dubé, was her ruling that the guarantee in the Charter section 8 against "unreasonable search and seizure" did not even apply to the letter of request because it involved a request to a foreign government. Thus, the Canadian government is apparently free to send such letters and obtain sensitive information about Canadians from foreign authorities even if the government has no basis of any kind to believe that a criminal offence has been committed.

In previous years, the Supreme Court has been criticized for adopting an unduly activist stance in criminal law cases, such that the ability of the police and Crown to investigate and prosecute crime has allegedly been put in jeopardy. (For example, there was an outcry following the *Feeney* decision in 1997, where the court threw out a murder conviction, even though the accused was clearly guilty, because evidence had been obtained as a result of an illegal search. More on the aftermath of the *Feeney* case below.) The court did not make any similar bold or controversial moves in 1998, with the highest profile cases (*M.R.* and *Schreiber*) both favouring the government.

Of the five non-criminal Charter cases in 1998, the most significant by far was *Vriend v. Alberta*, where the court ruled that Alberta's human rights legislation violated section 15 because it failed to prohibit discrimination on grounds of sexual orientation. This decision attracted a good deal of public controversy, with Alberta Premier Ralph Klein giving some consideration to whether to invoke the Charter's "notwithstanding clause" and override the court ruling. (Mr. Klein ultimately accepted the court's ruling.) Much of the controversy over the case stemmed from the court's decision to amend the statute by "reading in" a prohibition against discrimination on grounds of sexual orientation. But the remedy of

1998 constitutional cases, page 101

CanadaWatch
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The incredible expanding Code: Vriend v. Alberta

BY ROBERT E. CHARNEY

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The public controversy following the release of the Supreme Court of Canada's decision in the *Vriend* case seemed to centre on the court's choice of remedy. The court granted an immediate declaration reading "sexual orientation" into Alberta's *Individual Rights Protection Act* (IRPA), thereby extending the scope of the Act to prohibit private sector discrimination against gays and lesbians. The Alberta government had sought a temporary suspension of the declaration to permit the Alberta legislature to consider the court's decision and come up with its own legislative response. In his otherwise concurring opinion, Justice Major would have granted such a suspension for a period of one year to give the Alberta legislature the "opportunity to bring the impugned provisions into line with its constitutional obligations."

I am not troubled by the court's choice of remedy. It strikes me that if the court's decision that the absence of "sexual orientation" from the IRPA infringed s. 15(1) of the Charter is correct, then the inclusion of "sexual orientation" is the only appropriate remedy and the court was right to so order. I could never understand why the Alberta government was so keen to have the court put the issue back on the legislative agenda. If the Alberta government knew of some other means to amend the IRPA to meet its constitutional obligations, it has been free to follow such an alternative course for over a year now. The fact that it has not pursued any alternatives suggests that there aren't any.

Two aspects of the *Vriend* decision are troubling: first, its apparent expansion of Charter equality jurisprudence and, second, its potential implication for the administration of human rights legislation across Canada.

In deciding that the absence of sexual orientation from the IRPA does create a distinction (the first step in s. 15(1) analysis), the court concluded that "the distinction is simultaneously drawn along two different lines":

> The first is the distinction between homosexuals, on the one hand, and other disadvantaged groups which are protected under the Act, on the other. ...
>
> The second distinction ... is between homosexuals and heterosexuals.

Two aspects of the *Vriend* decision are troubling: first, its apparent expansion of Charter equality jurisprudence and, second, its potential implication for the administration of human rights legislation across Canada.

The first distinction is something new to equality jurisprudence. Formerly, equality jurisprudence had always been based on what I would describe as symmetrical distinctions. Distinctions could be based on sex (men/women), race (whites/non-whites), age (over 65/under 65), etc. The included and excluded groups were mutually exclusive. The notion that distinctions between disadvantaged groups can meet the first step of the s. 15(1) analysis is difficult to reconcile with the wording and purpose of s. 15.

For example, pay equity for women draws a distinction between women who are protected under the Act and "other disadvantaged groups" who are not protected. Pay equity does not attempt to remedy systemic inequities arising out of other grounds of discrimination like race or disability. Pay equity legislation does not, however, discriminate on the basis of race or disability since all women (the included group) are protected regardless of race or disability. Protecting women from systemic sex discrimination does not discriminate against racial minorities because women and racial minorities are not mutually exclusive groups. The law simply does not draw distinctions on the basis of any ground of discrimination enumerated in s. 15(1).

There is a real danger to extending s. 15(1) to prohibit asymmetrical distinctions *between* the enumerated grounds. If legislatures think they cannot provide benefits like pay equity to some disadvantaged groups without including every disadvantaged group covered by every enumerated and conceivably analogous ground, social policy reform is more likely to be impeded than advanced.

If the IRPA is to be found to infringe s. 15 of the Charter, it must be on the basis of the second, symmetrical distinction between homosexuals and heterosexuals identified by the court. Indeed, the court did recognize that this distinction was "the more fundamental" one, and it is unfortunate that it did not restrict its analysis to this basis.

Incredible expanding Code, page 79

The Charter and equality rights: The Vriend case

BY MARY EBERTS

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In the Vriend case, the Supreme Court dealt with what was perhaps the inevitable outcome of its policy of judicial deference to the legislature in Charter matters. The deference had, before Vriend. become so pronounced that it almost seemed to make the Charter disappear. Parliamentary sovereignty, thought to have been confined by means of the entrenched Charter, had been clearly on the rebound. In Vriend, the government of Alberta and the majority in the Alberta Court of Appeal took an unabashed parliamentary sovereignty position and, in response, the Supreme Court had to pull back from the brink and articulate a Constitution-based theory of the relationship between courts and legislatures. This theory is neither radical nor innovative; it draws heavily on wisdom developed long before the Charter, from the courts' traditional supervision of administrative action by means of the prerogative writs. However, while not radical, the theory is timely, and its timeliness bestows upon it great importance. In fact, the court's illumination of the appropriate relationship between courts and legislature, and its foundation of that view upon the constitution itself and not some notion of political reality, is "just-in-time." Had there been any further delay in making these matters clear, there was some real danger that the Charter would have been, *de facto*, unentrenched.

The foundations for the court's policy of deference are, particularly, the *Edwards Books*, *Irwin Toy*, and *McKinney* cases. The mainspring of that policy is the idea that legislatures are, with regard to certain kinds of legislation, balancing the claims of competing groups. This function is distinguished from situations where the legislature is acting on behalf of the whole community. The dichotomy is set out quite plainly in the oft-quoted passage from the judgment of Chief Justice Lamer and Justice Wilson:

> When striking a balance between the claims of competing groups, the choice of means, like the choice of ends, frequently will require an assessment of conflicting scientific evidence and differing justified demands on scarce resources. Democratic institutions are meant to let us all share in the responsibility for those difficult choices. Thus, as courts review the results of the legislature's deliberations, particularly with respect to the protection of vulnerable groups, they must be mindful of the legislature's representative function. For example, when "regulating industry or business it is open to the legislature to restrict its legislative reforms to sectors in which there appear to be particularly urgent concerns or to constituencies that seem especially needy." ...
>
> In other cases, however, rather than mediating between different groups, the government is best characterized as the singular antagonist of the individual whose right has been infringed. For example, in justifying an infringement of legal rights enshrined in ss. 7 to 14 of the Charter, the state, on behalf of the whole community, typically will assert its responsibility for prosecuting crime whereas the individual will assert the paramountcy of principles of fundamental justice. There might not be any further competing claims among different groups. In such circumstances, and indeed whenever the government's purpose relates to maintaining the authority and impartiality of the justice system, the courts can assess with some certainty whether the "least drastic means" for achieving the purpose have been chosen. ... The same degree of certainty may not be achievable in cases involving the reconciliation of claims of competing individuals or groups or the distribution of scarce government resources. [993-994]

Read closely, this passage can be seen to relate to difficulties in second-guessing legislative line drawing in the "balancing" type of case. It is as much an argument involving the courts' institutional capacity, as the courts' appropriate role. Yet this line of thinking also clearly addresses role. We can see that, for example, in the remarks of the Chief Justice in *Edwards Books*: "The courts are not called upon to substitute judicial opinions for legislative ones as to the place at which to draw a precise line." [782] In *Irwin Toy*, the majority judgment states: "[I]f the legislature has made a reasonable assessment as to where the line is most properly drawn, especially if that assessment involves weighing conflicting scientific evidence and allocating scarce resources on this basis, it is not for the court to second guess. That would only be to substitute one estimate for another." [990]

The basis for the deference here is a pragmatic one. Courts are seen as no better than legislatures in weighing complex or contradictory scientific evidence for the purposes of making resource allocation decisions. Interestingly, in these foundational cases about judicial deference in the "balancing" type of case, the resources that were

being allocated by the legislature were not financial or fiscal. Rather, the legislature was deciding who should be protected against certain kinds of conduct (for example, advertising directed at children or the requirement of Sunday work). The resource being allocated was protection of the vulnerable. The court is saying in these cases that the legislature may decide how much protection of the vulnerable it will allocate, given the claims of non-vulnerable groups that the vulnerable not be protected, and that the court will defer to any "reasonable" decision about that resource allocation.

This, in my view, is a highly problematic formulation. Assessing and weighing complex, contradictory evidence is, in fact, what courts are known to do well. It is central to their function. While allocation of fiscal resources raised from taxation of the public may be squarely within the legislative domain (recall the staunch reservation of money bills for the Commons and the centrality of money bills to, for example, whether the government maintains the confidence of the House), it is not so clearly the legislature's sole domain to decide who merits the "resource" of protection for the vulnerable, and how much of that resource should be allocated to whom. Rather, one would have thought, protection of the vulnerable is, in the first instance, the function of a constitution or of quasi-constitutional instruments, interpreted and applied by the courts.

The judicial deference to legislative decision making in the interests of the vulnerable, which we find in cases like *Edwards Books* and *Irwin Toy*, does not appear to be explicity based on any rationale found in the constitution itself. Rather, it is founded on unusual notions of institutional capacity (the legislature is a better judge of evidence as the court, or at least as good at it), and a very broad definition of the kinds of resource allocation decisions that are within the proper sphere of the legislature.

In this reasoning, the legislature is seen as a kind of broker, considering the competing claims for its benevolence and effecting trade-offs and deals that will satisfy a number of interests to a sufficient degree. The court, in effect, gives the legislature a zone of tolerance within which to carry on this brokerage activity. The test of the limits of that zone is a reasonableness test.

Had they not dealt, at last, firmly with the issue, and rather allowed to prevail the arguments of the Attorney General of Alberta and the Alberta Court of Appeal majority, then it is no exaggeration to say that for all intents and purposes the human rights vigour and capacity of the Charter would have been exhausted.

In *McKinney*, dealing with allegations that it was contrary to the Charter's equality guarantees for *Human Rights Code* protections against discrimination in employment to end at age 65, Mr. Justice LaForest articulates quite clearly the reasonable broker theory. He is not prepared to say that the course adopted by the legislature, in the social and historical context through which we are now passing, is not one that reasonably balances the competing social demands that our society must address. The fact that other jurisdictions have taken a different view proves only that legislatures there adopted a different balance to a complex set of competing values. [314] LaForest J. identifies certain "conflicting pressures" faced by the legislature: if the legislative goal is to be achieved, it will inevitably be achieved to the detriment of some, and attempts to protect the rights of one group will also inevitably impose burdens on the rights of other groups. "There is no perfect scenario in which the rights of all can be equally protected." [315]

In the circumstances, a legislature must be given reasonable room to manoeuvre to meet these conflicting pressures. What a court needs to consider is "whether, on the available evidence, the Legislature may reasonably conclude that the protection it accords one group does not unreasonably interfere with a guaranteed right." [315]

LaForest J. refers to the "macro-economic and social concerns of extending this protection beyond 65," which prompted the legislature not to extend protections in employment beyond that age, and states, "The effect, of course, was to deny equal protection of the law for those over 65." [316] In language that seems to bear little resemblance to any test in the Charter itself, he continues, characterizing the legislature's action: it "sought to provide protection for a group which it perceived to be most in need and did not include others for rational and serious considerations that, it had reasonable grounds to believe, would seriously affect the rights of others." [317]

This partial approach is acceptable. A legislature, states Justice LaForest, should not be obliged to deal with all aspects of a problem at once: "It must surely be permitted to take incremental measures. It must be given reasonable leeway to deal with problems one step at a time, to balance possible inequities under the law against other inequities resulting from the adoption of a course of action, and to take account of the

The Charter, page 89

Outing Prejudice

BY BRUCE RYDER

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In 1998, the Supreme Court issued two forceful rulings countering the view that "majority rules" is an exhaustive statement of the principles that ought to guide the resolution of controversial constitutional issues. The first salvo came in the *Vriend*[1] ruling, which responded directly to an Alberta variant of populist majoritarianism. The second came in the *Secession Reference*,[2] where the court took on the Québécois version. What these two opinions on very different issues have in common is the eloquent defence of the view that Canadian constitutional democracy rests on a web of principles much richer than simple majoritarianism. Forced to defend their positions on the terrain of reasoned argument, rather than by reliance on thinly disguised bigotry or impassioned slogans, the legal frailties of the populist majoritarian positions were effectively exposed by the Supreme Court. The court crafted opinions that read like civics lessons directed at its critics, especially the populist majoritarians who decry as illegitimate activism the judicial imposition of constitutional limits on the exercise of legislative or executive power.

The Quebec government refused to participate in the *Secession Reference* hearings on the grounds that constitutional law had nothing to do with Quebec's potential accession to sovereignty. Rather, Quebec's future political status was a question to be decided by a majority of voters and the National Assembly unconstrained by constitutional obligations. In response, the court's opinion affirmed that "the essence of constitutional democracy" is more than "a system of simple majority rule."[3] The power of any majority is constrained by the principles of constitutionalism, federalism, and the rights of minorities. The court went on to indicate that without advance agreement on a clear referendum question, what constitutes a clear majority, and the process to be followed after a referendum vote in favour of secession, other Canadian governments have no duty to negotiate secession. Any future Quebec government that seeks a mandate to secede has thus been rendered accountable not just to a majority of Quebeckers, but also to other actors with a stake in existing constitutional arrangements.

The courts should be applauded when they do not bow to the pressures created by this cynical ploy.

The Alberta government's strategy in the *Vriend* case was similar to Quebec's position on the *Secession Reference*. The government argued that the legislative assembly's decision to leave discrimination on the basis of sexual orientation in the closet, unacknowledged and legally invisible, was a decision that did not have to be accounted for in constitutional litigation. It was a question to be decided by the legislative assembly who were accountable only to a majority of voters in the province. In response, the court noted that the Charter had introduced a "new social contract" and "a redefinition of our democracy."[4] Canadian constitutional democracy means more than majority rule; it requires "that legislators take into account the interests of majorities and minorities alike, all of whom will be affected by the decisions they make." Where that has not occurred, judicial intervention "is warranted to correct a democratic process that has acted improperly."[5]

The court's decision in *Vriend* was notable for its clear refusal to countenance the Alberta government's attempts to leave anti-gay prejudice securely tucked away in a legal closet. It did so by developing a strong analysis of "adverse effects" discrimination at the s. 15 stage of analysis, and by insisting that the government present a compelling rationale for its failure to provide any protection against discrimination to gays and lesbians at the s. 1 stage of analysis.

SILENCE AS DISCRIMINATION

Only by studiously ignoring social reality as experienced by a minority of Albertan citizens could the government submit that its failure to add the words "sexual orientation" to its anti-discrimination legislation was a "neutral silence" to which the Charter did not apply. By examining this submission "in the context of the social reality of discrimination against gays and lesbians,"[6] Cory J. was able to demonstrate that the legislature was claiming a right to remain neutral in the face of evidence of discrimination against gays and lesbians, even thought it had not remained neutral about the other most common and socially destructive forms of discrimination. Section 15 of the Charter, however, is decidedly not "neutral" about discrimination. Moreover, case law prior to *Vriend* had made clear that s. 15, like most other Charter rights and freedoms, imposes a mix of positive and negative obligations on the state, and thus can be violated by either state action or inaction that imposes differential treatment on a disadvantaged group. Justice Cory pointed out that the omission of sexual orientation imposed differential treatment between gays and lesbians and other protected groups, and, more fundamentally, between gays and lesbians and heterosexuals, since the latter group has "no complaints to make concerning sexual orientation."[7] Moreover, he wrote, Alberta's failure to act had sent out "a strong and sinister

message"; "it is tantamount to condoning or even encouraging discriminations against lesbians and gay men."[8]

SILENCE AND SECTION 1

The Alberta government had no more success in attempting to rely on silence as a cover for anti-gay prejudice at the section 1 stage of the Charter analysis than it had under s. 15. The most important aspect of Iacobucci J.'s s. 1 analysis was his insistence that a law that violates Charter rights cannot be upheld unless the government can demonstrate that the objective of the law as a whole *and* the objective of the particular infringing provision are *both* "pressing and substantial."[9] The courts have not always been consistent in insisting that the infringing measure itself be a focus of examination in the s. 1 analysis. As a result, a government's reliance on prejudicial reasoning can be left unexamined and governments permitted to defend the indefensible. The *Egan* ruling is a case in point. The majority of the court did not demand that the government demonstrate how a complete denial of old age spousal allowances to same-sex couples was related to a non-discriminatory state objective.

The *Vriend* ruling, in contrast, pursues the implications of equality principles into the s. 1 analysis in a manner that bodes ill for state-sanctioned prejudice of all kinds. The court noted that the Alberta human rights legislation itself has a pressing and substantial objective—the protection of all persons from discrimination. However, the Alberta government offered the court no submissions on the objective of the infringing measure—namely, the omission of sexual orientation. Choosing silence before the court was no doubt less incriminating than presenting rationales that inevitably would have promoted the view that gays and lesbians are less worthy of concern and respect. Governments, however, have no s. 1 right of silence. They have the burden of presenting reasoned justifications for Charter violations. The conclusion was unavoidable that there was no "discernible objective for the omission that might be described as pressing and substantial so as to justify overriding constitutionally protected rights."[10]

When the misrepresentations and faulty logic are stripped away, the defenders of the Alberta government in the *Vriend* saga are revealed as proponents of the bigoted view that society is better off if private employers, landlords, and service providers are permitted by law to discriminate against persons who are, or are perceived to be, gay or lesbian.

If the focus of the s. 1 analysis is kept on the infringing measure in future decisions involving legislation that completely fails to recognize the rights of gays and lesbians, those exclusions will similarly be doomed by governments' inability to present anything other than discriminatory rationales for them. For example, courts will have no difficulty finding that the overall objectives of statutes dealing with the rights and responsibilities of family members are pressing and substantial. However, typically the exclusion of same-sex couples from these statutes has no discernible objective and is indeed counter to the achievement of the legislative goals.

ILLEGITIMATE JUDICIAL ACTIVISM?

Justice Cory built a persuasive case in *Vriend* that Alberta was seeking to defend inaction that "demeans the individual and strengthens and perpetrates the view that gays and lesbians are less worthy of protection as individuals in Canadian society."[11] There are, of course, some who believe that governments should be free to perpetrate this view without Charter impediments, and thus they take issue with the recognition of sexual orientation as an analogous ground of discrimination by the court in *Egan* and *Vriend*. The defenders of discrimination against gays and lesbians have argued that the Supreme Court has engaged in illegitimate judicial activism by ignoring the deliberate decision by the drafters of the Charter to omit the words "sexual orientation" from the text of s. 15.[12]

It is true, as La Forest J. argued in the *Provincial Judges Reference*, that courts lack democratic legitimacy when they "attempt to limit the power of legislatures without recourse to express textual authority. ... To assert otherwise is to subvert the democratic foundation of judicial review."[13] The Supreme Court opinions in the *Provincial Judges Reference* and the *Secession Reference* relied on this kind of illegitimate interpretive methodology, inventing legal obligations that had no grounding in any provision of the constitutional text. But at issue here is a text, s. 15, that does not expressly exclude any ground of discrimination and leaves open the possibility of recognition of unlisted grounds. Let us assume, for the purposes of argument, the controversial assertion that the intention of the drafters should determine the interpretation of ambiguous constitutional texts, and let us further assume that we can overcome the practical difficulties of identifying the relevant drafters and their clear intention on controversial issues. Then can we not conclude that the rejection of amendments that would have added

Outing prejudice, page 76

Outing prejudice continued from page 75

marital status and sexual orientation to the text of s. 15 by the parliamentary committee studying the draft Charter in 1981[14] ought to have determined its judicial interpretation? The answer is no, because committee members were aware that the list of grounds of discrimination prohibited by s. 15 was open-ended. It was not an exhaustive list; the task of identifying other prohibited grounds of discrimination was deliberately left to the courts.[15]

The *Vriend* ruling, then, is not one in which Supreme Court judges have imperilled their legitimacy by infidelity to legislative intent or constitutional text. The legislative intent was to leave to the courts to decide whether sexual orientation is, like the listed grounds and other analogous grounds, one of "the most common" and "most socially destructive and historically practised bases of discrimination."[16] Thus, the court can hardly be faulted for undertaking in *Egan* and *Vriend* precisely the task that the framers intended them to undertake with s. 15.

PREJUDICE VERSUS EQUALITY

When the misrepresentations and faulty logic are stripped away, the defenders of the Alberta government in the *Vriend* saga are revealed as proponents of the bigoted view that society is better off if private employers, landlords, and service providers are permitted by law to discriminate against persons who are, or are perceived to be, gay or lesbian. Bigotry was evident, for example, in Justice McClung's statement that he could not accept that it is an illegitimate "legislative response for the Province of Alberta to step back from the validation of homosexual relations, including sodomy, as a protected and fundamental right, thereby 'rebutting a millennia of moral teaching.'"[17] Similarly, Ted Morton has argued that good government policy allows individuals to be fired from their jobs and denied accommodation or access to services solely because of their actual or suspected sexual orientation in order to respect "the freedom of choice and association of those of us who think homosexuality is unnatural and unhealthy."[18] That is, the right to act on bigotry should trump the right to equality. When prejudice emerged loudly from the closet in response to *Vriend*, Premier Klein was fortified in his decision to let the ruling stand. He remarked that "we have people out there writing letters that quite frankly make your stomach turn."[19] Under intense pressure to invoke the notwithstanding clause in s. 33 of the Charter, Klein opted instead to take a public stand in favour of the court's ruling. He stated that "it's morally wrong to discriminate on the basis of sexual orientation" and his government took steps to educate Albertans about the meaning and impact of *Vriend*.[20]

A poll commissioned by the Alberta government found that 57 percent of Albertans believe same-sex couples should have the same rights as common law heterosexual couples. The legislative process in Alberta has in fact not even responded to the wishes of the majority, never mind the gay and lesbian minority.

However, the Klein government, like all other Canadian governments apart from Quebec and British Columbia, has yet to demonstrate any intention of exercising moral leadership in removing legal discrimination against same-sex couples. A bill passed by the Alberta legislature on May 19, 1999 confers spousal support rights and obligations on unmarried heterosexual couples, but not same-sex couples.[21] The *M. v. H.* ruling released the following day quickly confirmed the unconstitutionality of that omission.[22]

Earlier in 1999, a poll commissioned by the Alberta government found that 57 percent of Albertans believe same-sex couples should have the same rights as common law heterosexual couples.[23] The legislative process in Alberta has in fact not even responded to the wishes of the majority, never mind the gay and lesbian minority. The growing public support of the equality rights of same-sex couples makes it unlikely that the Klein government will use the notwithstanding clause in the wake of the *M. v. H.* ruling to "erect fences" around Alberta legislation conferring rights and responsibilities on family members. This is particularly so since the same poll indicated that 69 percent of Albertans believe that the notwithstanding clause should be invoked only after a clear vote of support in a referendum—a position the Klein government is considering enacting into law.[24]

It may be that the government of Alberta, like its counterparts in Ottawa and other provinces, will be content to leave the burden of achieving legal equality for same-sex spouses to lesbian and gay litigants and the courts. We may continue to endure the spectacle of legislators who ignore what they fear are unpopular constitutional responsibilities and then condemn the courts for failing to do the same. The courts should be applauded when they do not bow to the pressures created by this cynical ploy. If legislators do not take on their share of responsibility for eliminating legal discrimination, they will

Outing prejudice, page 80

Vriend v. Alberta: Judicial Power at the Crossroads?

BY F.L. MORTON

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The Supreme Court's 1998 ruling in *Vriend v. Alberta* is a remarkable decision. Its distinction is not just that it addresses the controversial issue of gay rights, but that it embodies almost all the elements that constitute the court's new Charter-based power. As such, it serves as a marker for where we as a nation have been and where we might be heading with respect to the balance of power between legislatures and courts.

The friends of Charter-based judicial power—whom I designate as the "Court Party"—regard *Vriend* as the court's "moral supernova" of the nineties, a term once used in American circles to describe their Supreme Court's landmark 1954 desegregation ruling, *Brown v. Board of Education.* To its critics—of which I am one—*Vriend* is nothing more than a partisan judicial power grab, the culmination of a well-orchestrated interest group litigation campaign to persuade judges to take sides in an essentially political dispute. *Vriend* culminates a decade and a half of ever-bolder assertions of judicial policy making—to the applause of its admirers and to the dismay of its critics.

The Court Party hopes that *Vriend*, like *Brown*, marks the dawn of a new era of judicial-led social reform. Critics hope that it will become more like the *Roe v. Wade* of Canadian constitutionalism, the high-water mark of judicial activism. The American court's 1973 abortion ruling was every bit as bold as *Brown*, but—unlike *Brown*—it did not serve as the legal–moral foundation for a new generation of judge-led social reform. Instead, it mobilized a public reaction to what critics described as raw judicial law making. Court-curbing became a partisan political issue, and a succession of Republican presidents used their judicial appointments to reshape the court into a more centrist body.

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In 10 years, will we look back at *Vriend* as the *Brown v. Board* or the *Roe v. Wade* of Canadian constitutional politics? Let us begin by looking at what makes Vriend the remarkable ruling that it is. If there is a toolbox of judicial activism, the judges left few tools unused in constructing *Vriend.*

Vriend is a classic example of "judge-driven" rather than "text-driven" judicial review. Not only does "sexual orientation" not appear in Charter s. 15, it was expressly excluded. When the Charter was being drafted, a parliamentary committee defeated a motion to add sexual orientation by a vote of 22-2.

Nor should it qualify as "non-enumerated analogous grounds." In the absence of any societal consensus on this issue, the evidence of a contrary framers' intent should still have precluded this so soon after the adoption of the Charter. Appeals to genetic determinism are inconclusive, and are rejected by leading gay rights advocates who argue that "sexual orientation is a matter of choice, not nature."[1]

Vriend is radical in a second sense: state inaction is treated as equivalent to state action. The court condemned Alberta not for what it did but for what it did not do—extend the scope of a regulatory program. Once state inaction is deemed to trigger a constitutional violation, the Charter is transformed from a state-limiting instrument to a state-expanding instrument. This transformation is a major goal of the "equality-seekers" wing of the Court Party, whose policy objectives of "substantive equality"—such as pay and employment equity programs—require more, not less, government. It also allows these same interests to use the Charter to fight neoliberal "downsizing" of the welfare state in the courts.

The court also pushed the envelope in its choice of remedies—"reading in." Rather than using the traditional remedy of a declaration of invalidity, the court chose to "preserve" Alberta's human rights legislation by "reading in" the words "sexual orientation." If ever there was "judicial legislation," this is surely it.

Contrary to its supporters' claims, "reading in" extends judicial activism by pre-empting a legislative response and accompanying public debate. By "fixing" the constitutional violation themselves, the judges gave the Klein government the option of doing nothing—an option they, like any elected government, accepted.

Judicial power, page 78

Judicial power continued from page 77

The *Vriend* decision also rides roughshod over the principle and practice of Canadian federalism. There are 11 different human rights acts in Canada—10 provincial and 1 federal. No two are the same. This tradition of provincial diversity and autonomy ended with *Vriend*. By tying human rights acts into s. 15 of the Charter, the Supreme Court established itself as the new national overseer of provincial human rights legislation.

Vriend exhibits another one of the hallmarks of contemporary Charter politics: interest groups' use of the Charter to turn their causes into cases. Delwin Vriend was no more than a figurehead for a coalition of four gay rights groups who had unsuccessfully lobbied the Alberta government to add sexual orientation to its HRA. Their objective was never to get Delwin Vriend's job back, but to force the Alberta government to adopt a policy it had twice considered and rejected. All parties knew that Vriend's employer—a religiously affiliated college—was exempted from the provincial human rights legislation under the BFOQ clause.

The court ignored that *Vriend* could have no practical effect on the parties. Its concern was with policy not disputes. This was consistent with its recent rulings on standing and mootness, which have removed any meaningful requirement of a "live dispute" as a condition for accessing judicial power. In so doing, the court has effectively set itself up as a *de facto* third chamber in the legislative process.

Interest groups not only carried Delwin Vriend into the courts, they also came to his assistance in the form of interveners. There were nine interest-group interveners supporting Vriend's claim, plus two government agencies. This form of "judicial lobbying" has become a standard strategy for interest groups to try to influence Charter decisions. The presence of numerous "friends of the court" cue the judges as to who is supporting whom, and provides additional legal arguments to support the favoured party.

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Vriend's support from federal and provincial human rights commissions points to another defining characteristic of Charter litigation—the state-connection. There is a strong overlap in membership and ideology between the new rights advocacy organizations, government lawyers, human rights agencies, the law schools, and the Court Challenges Program (CCP). Many of the interveners are regular recipients of government funding from the CCP. Since costs are the single largest barrier to Charter litigation, this federal funding has been a crucial factor in their success.

"Systematic litigation"—interest-group use of strategically chosen Charter cases to advance their policy agenda—was identified by feminists in 1984. LEAF's success in implementing a "systematic litigation" strategy has inspired other groups—notably EGALE—to adopt similar strategies. *Vriend* is the most recent in a long string of EGALE legal victories.

Complementing interest group use of "systematic litigation" strategies is a less tangible but equally influential initiative—what LEAF calls the "influencing the influencers" campaign. This campaign consists of cultivating a supportive legal and judicial climate—through law reviews, books, judicial education seminars, and conferences—by promoting legal arguments that support a group's litigation efforts. For example, a veritable flood of printers' ink was spilled advocating a "substantive" and "contextual" approach to interpreting the Charter's equality rights—a campaign that realized its objective in the court's 1989 *Andrews* decision.

LEAF's success has inspired others. A 1997 review of 22 randomly selected Canadian law review articles on the family found that not one supported the traditional family, while all supported gay rights alternatives. Such unanimity in the legal commentary provided an influential foundation for gay rights advocates' litigation efforts in *Vriend* and the precedents leading to it.

Finally, *Vriend* illustrates the Supreme Court's new role as the political vanguard of the social left. There is a growing list of policy areas where any legislative action—and now, inaction—that does not accommodate these groups' demands will be automatically challenged in court. (Costs and standing are no longer barriers.) The Supreme Court has proven itself a reliable ally of the social left. Feminists have enjoyed a success rate of over 70 percent in appeal courts, and advocacy groups for gay rights, aboriginals, and official language minorities are not far behind. (In contrast, the odd appellate court victory for conservative groups—*Lavigne* or *Tremblay*—have all been reversed on appeal.)

In sum, *Vriend* displays all the tools of Court Party praxis—both on and off

Judicial power, page 105

Incredible expanding Code continued from page 71

The second troubling aspect of the *Vriend* decision is its potential implication for the administration of human rights legislation. In *Andrews v. Law Society*, the Supreme Court of Canada recognized that a fundamental distinction between human rights legislation and the Charter is that "Human Rights Acts passed in Canada specifically designate a certain limited number of grounds upon which discrimination is forbidden." Section 15(1) of the Charter is not so limited.

Open-textured provisions like Charter s. 15 are often found in constitutional documents because constitutions are difficult to amend and must adapt by means of judicial interpretation. In contrast, such open-textured provisions are generally not appropriate in the context of an administrative scheme that can be amended by the legislature and must be written so as to give the administrative agency and the affected parties reasonable notice of their statutory rights and obligations.

There is serious concern that the *Vriend* decision may be interpreted as requiring human rights legislation to "mirror" Charter s. 1(1) by being open ended in order to prohibit any ground of discrimination that a court might hold is analogous to those listed in Charter s. 15(1).

While the unlimited expansion of human rights legislation may have some surface appeal, it is problematic. The history of human rights legislation shows an evolving expansion of the prohibited grounds of discrimination. Successive amendments expanded the prohibited grounds on the basis of the legislature's assessment as to those in the greatest need of its protection and benefit.

At each amendment the legislature had to consider the effect of including additional prohibited grounds in the legislation, including whether the Human Rights Commission has sufficient staff and resources to administer and enforce an expanded Code, and whether such an expansion could weaken human rights by spreading the commission's efforts too thinly. Expansion of the grounds of discrimination could undermine the ability of the commission to deal effectively with the prohibited grounds of discrimination in its current mandate.

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This factor was recognized by the Ontario Human Rights Commission in its 1977 report *Life Together: A Report of Human Rights in Ontario*. The commission stated (at 55-56):

> But simply to include more prohibited grounds in the legislation is not enough. The Commission has neither enough staff nor enough funds to administer and enforce the present Act, much less an expanded Code. Even if more adequate resources were provided, there would remain the problem of diffusion. That is, the Commission's efforts to protect human rights could be weakened by spreading these efforts too thinly. If the Code is broadened too much, there is danger that the Commission would be required by law to handle complaints under so many categories of discrimination that it might not be able to deal effectively with even the most serious problem areas, for example racial discrimination. In some southern jurisdictions in the United States, people with racist views have been known to favour the addition of new grounds to human rights legislation for this very reason. Each new area of responsibility added to the workload of their Commission reduced its ability to protect human rights, particularly when staff and financial resources were not provided to help cope with these added responsibilities. ...
>
> The Ontario Human Rights Commission is concerned that its ability to deal with major problems of discrimination should not be reduced by an undue expansion of the Code, or by an extension of responsibilities that is not accompanied by the provision of adequate resources.

Like the proverbial straw that broke the camel's back, it will be difficult for any government to demonstrate under Charter s. 1 that adding "just one more" analogous ground will over burden the administrative scheme.

The problem of an "open-ended" Code is particularly acute given the fact that the identity of the "analogous grounds" under Charter s. 15 are unknown and may change from time to time. The category of analogous grounds is an open-ended concept dependent not only on the context of the law, which is subject to challenge, but also on the context of the place of the affected group in the entire social, political, and legal fabric of our society. In considering whether a certain distinction is based on an analogous ground of discrimination, the Supreme Court has been careful not to close the category of analogous grounds. Even in cases where the court has held that a particular distinction is not based on an analogous ground of discrimination, it has often noted that the same classification might still be an analogous ground in a different context.

Incredible expanding Code, page 80

Incredible expanding Code continued from page 79

Requiring Human Rights Codes to mirror Charter s. 15 would create a situation of perpetual uncertainty; neither the Human Rights Commission nor persons to whom the Code may apply would know whether conduct was proscribed by the Code until after a judicial determination. Since the Supreme Court of Canada decided in *Bell v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854 that human rights commissions have no jurisdictions to consider Charter issues, this would turn the administrative scheme on its head by requiring a judicial determination before the administrative process could proceed.

The Supreme Court appeared to appreciate that open-ended human rights legislation was not necessarily desirable, and dismissed concerns that the consequence of its decision may be that human rights legislation will be forced to mirror the Charter as "too simplistic." The court stated (at para. 106):

> It is true that if the appellants' position is accepted, the result might be that the omission of one of the enumerated or analogous grounds from key provisions in comprehensive human rights legislation would always be vulnerable to constitutional challenge. It is not necessary to deal with the question since it is simply not true that human rights legislation will be forced to "mirror" the Charter in all cases ... However, the notion of "mirroring" is too simplistic. Whether an omission is unconstitutional must be assessed in each case, taking into account the nature of the exclusion, the type of legislation, and the context in which it was enacted. The determination of whether a particular exclusion complies with s. 15 of the Charter would not be made through the mechanical application of any "mirroring" principle, but rather, as in all other cases, by determining whether the exclusion was proven to be discriminatory in its specific context and whether the discrimination could be justified under s. 1. If a provincial legislature chooses to take legislative measures which do not include all of the enumerated and analogous grounds of the Charter, deference may be shown to this choice, so long as the tests for justification under s.1, including rational connection, are satisfied.

While I take some comfort in these words, the court has not articulated a principled basis for distinguishing between those analogous grounds that must be added from those that need not. This places human rights commissions across the country in the position of not knowing either what the analogous grounds may be or whether any particular omission will be constitutional.

Outing prejudice continued from page 76

continue to invite the "judicial activism" many of them purport to abhor.

1 *Vriend v. Alberta*, [1998] 1 S.C.R. 493.

2 *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217.

3 *Ibid.*, at paras. 75-76.

4 *Supra* note 1, at paras. 134-135.

5 *Ibid.*, at para. 176.

6 *Ibid.*, at para. 100.

7 *Ibid.*, at para. 82.

8 *Ibid.*, at para. 100.

9 *Ibid.*, at paras. 109-111.

10 *Ibid.*, at para 116.

11 *Ibid.*, at para. 102.

12 See Ted Morton, "*Vriend*: A Misinterpretation of the *Charter*," http://www.pagusmundi.com/acsa/badlaw.htm. Justice McClung, in his opinion in *Vriend* at the Alberta Court of Appeal, insinuated that the addition of sexual orientation to s. 15 by the judges was illegitimate since it had been "emphatically rejected by Parliament's agency, the Commons Justice Committee." *Vriend v. Alberta* (1996), 132 D.L.R. (4th) 595, at 617.

13 *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at paras. 316 and 319.

14 *Minutes and Proceedings of the Special Joint Committee on the Constitution*, 1980-81, 29 January 1981, at 48:34.

15 As Justice Minister Chrétien explained, "there are other grounds of discrimination that will be defined by the courts ... we do not think it should be a list that can go on forever." *Ibid.*, at 48:33.

16 *Per* McIntyre J. in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.

17 *Vriend v. Alberta* (1996), 132 D.L.R. (4th) 595, at 609.

18 Ted Morton, "*Vriend*: The Negative Policy Consequences," http://www.pagusmundi.com/acsa/badpolicy.htm.

19 *Alberta Report*, April 20, 1998, at 14.

20 *Ibid.*, at 17.

21 See Bill 12, the *Domestic Relations Amendment Act, 1999*, which received Royal Assent on May 19, 1999. The Bill was introduced in response to a ruling of the Alberta Court of Appeal that the Act discriminates on the basis of marital status: *Taylor v. Rossu* (1998), 161 D.L.R. (4th) 266.

22 *M. v. H.*, [1999] S.C.J. no. 23.

23 "Polls Put Lie to Myth that Albertans Intolerant," *National Post*, 30 March 1999.

24 "Klein hopes to give voters a veto on the constitution," *National Post*, 18 March 1999.

Le *Renvoi relatif à la Sécession du Québec*, la primauté du droit et la position du procureur général du Canada

PAR WARREN J. NEWMAN

Warren J. Newman est avocat général au ministère de la Justice du Canada. Me Newman faisait partie de l'équipe des avocats qui ont représenté le procureur général du Canada devant la Cour suprême dans le *Renvoi relatif à la secession du Québec*.

L'avant-projet de loi intitulé *Loi sur la souveraineté du Québec*, et le projet de loi no 1, qui lui a succédé, visaient à autoriser l'Assemblée nationale du Québec à procéder à la sécession *unilatérale* du Québec du reste du Canada; ils menaçaient de porter un coup sans précédent à l'ordre juridique Canadien. La « Déclaration de souveraineté » et les dispositions de l'avant-projet de loi annonçaient rien de moins qu'une révolution, mais une révolution qu'on n'osait pas appeler par son nom. Elle devait se présenter sous l'aspect de mesures législatives et, en apparence, assurer la continuité plutôt qu'engendrer le chaos. Par un habile tour de prestidigitation, la législature de la province de Québec, dont les pouvoirs procèdent uniquement de la Constitution du Canada, serait remplacée par l'Assemblée nationale de l'État indépendant du Québec, qui exercerait ses pouvoirs en vertu du nouveau régime censé établi par la législation sur la souveraineté.

Ceux qui ont l'insouciance de ne pas prendre au sérieux la menace alors naissante d'une déclaration unilatérale d'indépendance, parce qu'ils la considèrent comme une éventualité lointaine, seraient mieux avisés de se rappeler les paroles prononcées par le parrain du projet législatif sur la souveraineté, le premier ministre Parizeau, qui a plus tard écrit candidement :

« On constatera que mes discours, en ce qui touche les négociations avec le Canada, sont rédigés de façon à permettre une telle déclaration de souveraineté. Et je ne me suis jamais engagé en public ou en privé à ne pas faire de déclaration unilatérale de la souveraineté. Tout ce qui a été écrit dans les journaux à ce sujet démontre une fois de plus que, dans ces matières, ceux qui parlent ne savent pas et que ceux qui savent ne parlent pas. » Cette déclaration a causé une certaine consternation; il a alors ajouté :

« Je ne comprends pas ceux que les mots effraient. Une déclaration unilatérale de souveraineté du Québec faisait partie intégrante de la loi et de l'Entente du 12 juin [entre chefs de partis souverainistes], advenant un échec des négociations de partenariat. »

En adoptant l'avant-projet de loi, la législature du Québec aurait manifestement outrepassé sa compétence. Le gouvernement fédéral s'est gardé de s'engager trop tôt dans la contestation de la validité des mesures législatives proposées. Il ne s'agissait encore après tout que d'un simple projet de mesures législatives, et il est généralement prématuré de demander aux tribunaux de se prononcer sur de tels projets. Par ailleurs, la première bataille juridique portait, dans une large mesure, sur la tenue même d'un référendum, et le gouvernement fédéral n'était pas rébarbatif à l'idée qu'on consulte les Québécois sur la façon dont ils perçoivent leur avenir.

Le gouvernement fédéral s'est aussi abstenu de saisir la Cour suprême du Canada de la validité de l'avant-projet de loi, bien qu'on l'ait exhorté très tôt à le faire. Le gouvernement a préféré centrer son attention sur la question concrète du *pourquoi* de la séparation, plutôt que de se laisser entraîner dans un débat fastidieux sur les mécanismes juridiques déterminant *comment* elle serait réalisée. Une attitude dite « légaliste » aurait été dépeinte comme une tentative d'intimider la population du Québec pour l'empêcher d'exprimer son opinion de façon démocratique. Une audience devant la Cour suprême à la veille du référendum aurait vraisemblablement divisé les forces fédéralistes, ravivé les passions et enflammé le débat plutôt que de le clarifier.

Au-delà de ces considérations de politique, la compétence en matière de renvoi est une «juridiction spéciale» et, bien que les avis exprimés par la Cour suprême dans le cadre du renvoi aient fait évoluer en profondeur le droit constitutionnel canadien, il ne faut recourir à cette procédure qu'avec circonspection et parcimonie.

L'un des éléments moteurs de la décision du procureur général du Canada de contester les prémisses sur lesquelles s'appuie la prétention au droit à la sécession unilatérale a été la position que le procureur général du Québec a adoptée, en avril 1996, pour obtenir la radiation de l'action principale dans l'affaire *Bertrand*. Le Québec n'a pas soutenu simplement que cette affaire particulière était caduque, en ce qui a

Le renvoi relatif . . . suite page 82

Le renvoi relatif suite de la page 81

trait au projet de loi no 1, jamais adopté, et au référendum antérieur, ou prématurée et hypothétique, en ce a trait à un référendum à venir; il a plutôt affirmé carrément que le «processus d'accession à la souveraineté» du gouvernement du Québec échappait entièrement et à tout jamais à l'application de la Constitution ainsi qu'à la compétence des tribunaux du Canada, et qu'il était sanctionné par le droit international.

La participation du procureur général du Canada à l'affaire *Bertrand,* en mai 1996, et au renvoi devant la Cour suprême, plus tard la même année, avait pour but de démontrer la pertinence de la Constitution du Canada et de la primauté du droit quant à tout processus visant à modifier le statut constitutionnel du Québec, ainsi que de faire ressortir le rôle des tribunaux dans l'appréciation de la validité de toute mesure ayant pour objectif de donner force de loi à une déclaration portant que le Québec n'est désormais plus une province du Canada, mais un État indépendant.

Le procureur général du Canada n'a jamais contesté le droit des Québécois d'exprimer démocratiquement leur souhait de demeurer au sein du Canada ou de ne plus en faire partie. Néanmoins, pour être légale, la sécession devrait s'effectuer conformément à la Constitution et à la primauté du droit. Ces dernières ne constituent pas des obstacles au changement politique; elles fournissent un cadre à l'intérieur duquel pourrait être réalisé un changement dans la stabilité, l'ordre et le respect des valeurs de chacun.

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LA SAGESSE DE L'AVIS EXPRIMÉ DANS LE RENVOI

En rédigeant leur jugement unanime, les neuf juges de la Cour supreme du Canada ont clarifié les règles juridiques fondamentales, qui en avaient grand besoin, ainsi que le rôle qu'elles devaient jouer dans le processur de sécession. Les juges ont réussi à le faire avec une élégance, une sensibilité et une logique dignes de l'autorité et de l'influence que la Cour exerce à juste titre et témoignant de sa maturité, de son assurance et de sa force inébranlable face aux attaques parfois grossières et injustifiées auxquelles se sont livrés certains acteurs politiques pendant le Renvoi.

Le génie de l'arrêt de la Cour suprême dans le *Renvoi sur la sécession du Québec* tient au fait qu'elle a eu la lucidité d'allier la légalité constitutionnelle à la légitimité politique.

La Cour suprême a confirmé que la sécession unilatérale constituerait un acte illégal selon la Constitution et une atteinte à l'ordre juridique canadien; une révolution. La situation du Québec ne crée pas non plus, en vertu du droit international, un droit de réaliser la sécession unilatéralement, que ce soit par application du droit à l'autodétermination ou autrement. En vertu de la Constitution du Canada, la sécession légale requiert une modification constitutionnelle. La Cour n'a pas hésiter à souligner le fait que nulle tentative de cacher le caractère véritable d'une déclaration unilatérale d'indépendance en invoquant le principe « d'effectivité » ne pouvait transformer cette révolution en acte légale.

Du même souffle, la Cour a reconnu que l'option sécessionniste du mouvement souverainiste au Québec acquerrait la légitimité démocratique si une majorité claire des Québécois, répondant à une question claire, exprimaient leur volonté de ne plus faire partie du Canada. De plus, l'expression claire de cette volonté imposerait à tous les participants à la fédération l'obligation de négocier les modalités et les conditions de la sécession.

Il s'agissait évidemment d'une surprise intéressante et inattendue pour les souverainistes, dont de nombreux porte-parole ont immédiatement approuvé cet aspect de la décision de la Cour.

Toutefois, il est primordial de se rappeler que la Cour a précisé que le principe démocratique qui légitimerait l'option souverainiste est un principe inhérent à la *Constitution du Canada.* L'obligation de négocier est un devoir

Le renvoi relatif . . . suite page 108

The issue of international recognition in the Supreme Court of Canada's Reference on Quebec Sovereignty

BY DANIEL TURP

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The Supreme Court's *Reference on Quebec Sovereignty* of August 20, 1998,[1] the "Solomonic judgment" as one recent observer has characterized it,[2] has been commented on in many of its aspects, and some of the juristic opinion has been concerned with its international underpinnings.[3] In my own piece on "globalizing sovereignty,"[4] I attempted to look into the international ramifications of the Supreme Court's opinion and to understand the linkage made by the court between the duty to negotiate and the international community.

I thought I would expand on this subject and explore in greater detail the issue of international recognition that the court relies upon in its judgment. International recognition is a very well-known concept of international law and has been the subject of a great deal of attention throughout the development of the law of nations.[5] It has been an evolving institution that has not lost its relevance with the proliferation of sovereign states and has been at the crossroads of international law and politics.

Although referred to at least seven times in the *Reference*, the question of international recognition of a sovereign Quebec is not pursued to any great extent by the Supreme Court of Canada. The court's statements on the topic reveal themselves, upon closer reading, to consist mainly of political prognostication and not of legal reasoning. This is so true in fact that one is led to ask: to what purpose was the matter raised by the court at all? I suggest this answer. The threat of non-recognition by the international community appears to be the only sanction the court adverts to in its circumspect discussion of the consequences of an illegal—that is, unconstitutional—departure from Canada by Quebec. The purpose of the court's discussion of recognition seems to emphasize the court's contention that a unilateral declaration of independence by Quebec is against Canadian and international law.

It is clear, then, that the court considers there to be an obligation on the so-called participants in Confederation to negotiate. But the foundation of this obligation is not at all clear.

The court first addresses the issue of international recognition in declaring that:

> To the extent that a breach of the constitutional duty to negotiate in accordance with the principles described above undermines the legitimacy of a party's actions, it may have important ramifications at the international level. Thus, a failure of the duty to undertake negotiations and pursue them according to constitutional principles may undermine the government's claim to legitimacy which is generally a precondition for recognition by the international community. ... Both the legality of the acts of the parties to the negotiation process under Canadian law, and the perceived legitimacy of such action, would be important considerations in the recognition process.[6]

This court's first allusion to recognition clearly links the recognition process with the duty to negotiate, the most "stunning element" of the Supreme Court *Reference*.[7] But the court refers not only to this newly created constitutional duty to negotiate, it also stresses the importance of legitimacy in the process of recognition. These notions colour the court's discussion of recognition, and need to be addressed before we deal with the issue of international recognition itself.

THE DUTY TO NEGOTIATE AND THE CLAIM TO LEGITIMACY

After dismissing a challenge to its jurisdiction, the court begins its analysis of the questions put to it by a discussion of the nature of the Canadian constitution. Our constitution is both written and unwritten. Included in the unwritten part are principles that infuse and inform our constitutional arrangements.[8] Four of these principles are considered by the court in this opinion: federalism; democracy; constitutionalism; and the rule of law and the protection of minorities.

The obligation to negotiate is first mentioned in the court's discussion of

International recognition, page 84

International recognition continued from page 83

the principle of democracy. The court declares that the *Constitution Act, 1982* gives expression to the democratic principle in conferring a right to initiate constitutional change on "each participant in Confederation."[9] This right involves "a corresponding duty on the participants in Confederation to engage in constitutional discussion in order to acknowledge and address democratic expressions of a desire for change in other provinces."[10] This corresponding duty also arises from the democratic principle.

Later in the *Reference*, the court declares that "[t]he secession of a province from Canada must be considered, in legal terms, to require an amendment to the Constitution, which perforce requires negotiation."[11] The duty to negotiate, which was described as arising from the right of provinces to initiate constitutional change under the *Constitution Act, 1982*, and the concomitant democratic principle that that Act embodies, is here said to arise differently. Here, the obligation to negotiate is said to arise from the simple legal fact that the breaking off of a province from Canada cannot be effected legally without amending the constitution.

The court finds a third source for the obligation to negotiate. "The clear repudiation by the people of Quebec of the existing constitutional order ... places an obligation on the other provinces and the federal government to acknowledge and respect that expression of democratic will by entering into negotiations ... ."[12]

Yet another source for the duty to negotiate is identified by the court in the *Reference*, where the "constitutional principles which gave rise to the duty to negotiate" are given as "federalism, democracy, constitutionalism and the rule of law, and the protection of minorities."[13] Here, the court declares that all four of the principles with which they are concerned in the *Reference* found an obligation to negotiate.

It is clear, then, that the court considers there to be an obligation on the so-called participants in Confederation to negotiate. But the foundation of this obligation is not at all clear. The court cites at least four different foundations for the obligation, seeming not to notice that it is doing so. The reasoning leaves something to be desired.

The court's discussion of legitimacy is fraught with difficulties. It does not define the term. But the thrust of the arguments suggests that by "legitimacy," the court means some sort of political or popular authority, rather than any sort of legal authority. This must be so, for Quebec's legal authority is perfect as is.

Nor is it clear whether the obligation to negotiate applies in the case of any proposal for constitutional change by any province, or whether it is limited to a proposal to leave by one of the provinces. The reasoning in paragraphs 69 and 90 suggests that the obligation arises upon any constitutional proposal by any province. But the reasoning in paragraphs 84 and 88 suggests that negotiation is only necessary in the case of a claim for sovereignty by a province, and the court's discussion of the legitimacy to initiate a constitutional amendment that the government of Quebec would enjoy following a Yes vote[14] supports the view that the duty to negotiate is a narrow one and specific to the Quebec case.

The obligation to negotiate, whatever its legal foundation in the court's view, is deemed to affect Quebec's recognition internationally, which would also be the case for Quebec's claim of legitimacy.

The issue of legitimacy is brought by the court when it commences its discussion on referendums. Referendums have no legal effect per se in British parliamentary systems. The court states that "the Constitution does not itself address the use of a referendum procedure, and the results of a referendum have no direct role or legal effect in our constitutional scheme."[15] Hence the sovereigntist's longstanding argument that, strictly speaking, the government of Quebec need not wait until it has won a referendum in order to initiate negotiations for Quebec's sovereignty. Nevertheless, the court acknowledges that "a referendum undoubtedly may provide a democratic method of ascertaining the views of the electorate" and considers that "[t]he democratic principle ... would demand that considerable weight be given to a clear expression by the people of Quebec of their will to secede from Canada."[16]

The effect of a successful referendum—subject to the court's mention of a "clear majority" and a "clear question," would be to "confer legitimacy on the efforts of the government of Quebec to initiate the Constitution's amendment process in order to secede by constitutional means."[17]

The court's discussion of legitimacy is fraught with difficulties. It does not define the term. But the thrust of the arguments suggests that by "legitimacy," the court means some sort of political or popular authority, rather than any sort of legal authority. This must be so, for Quebec's legal authority is perfect as is. As their

court argues, the *Constitution Act, 1982* confers on Quebec, as a participant in Confederation, the "right" to initiate constitutional change with or without the "legitimacy" of a positive referendum result, which in any event is an instrument of "no direct role or legal effect in our constitutional scheme."[18] So it would seem that the legitimacy to which the court refers is not needed either. Nor does the court say that the Quebec government requires such legitimacy. It simply observes that the Quebec government would gain this legitimacy as a result of a successful referendum.

The court affirms, on the other hand, that "refusal of a party to conduct negotiations in a manner consistent with constitutional principles and values would seriously put at risk the legitimacy of that party's assertion of its rights, and perhaps the negotiation process as a whole."[19] The statement applies to all parties, not just to Quebec. But in Quebec's case, it is difficult to understand how the manner in which it might negotiate the constitutional amendments necessary to effect its departure from Canada could possibly jeopardize the legitimacy of its assertion of its rights. At least in the case of its right to initiate constitutional change, that right is complete and unassailable simply by virtue of Quebec's status as a province of Canada (or "participant in Confederation"); a successful referendum may increase its political legitimacy in some abstract way, but it adds nothing to Quebec's already perfect legal powers.

Likewise in the case of the other parties to the negotiations, the federal government and the other provinces, their rights to be a party to the negotiations and approve or disapprove proposed constitutional amendments must also be founded on the unassailable ground of the Constitution Act, 1982. In their case, as in the case of Quebec, "legitimacy" seems to be a political consideration foreign and extrinsic to their legal rights and powers. Yet, legitimacy, as well as the duty to negotiate, are not foreign to matters related to international recognition, to which I will now turn in dealing with the court's various statements on the subject of recognition itself.

But in Quebec's case, it is difficult to understand how the manner in which it might negotiate the constitutional amendments necessary to effect its departure from Canada could possibly jeopardize the legitimacy of its assertion of its rights.

INTERNATIONAL RECOGNITION AND QUEBEC SOVEREIGNTY

The court claims that a failure by any party to observe its constitutional obligation to negotiate "in accordance with the principles" may "undermine a government's claim to legitimacy which is generally a precondition for recognition by the international community." We have seen that the legitimacy of which the court speaks must be a political legitimacy rather than a legal one. If that is so, there may be some truth in the claim that negotiating in bad faith, for example, might damage Quebec's political bid for international recognition. For "[i]n more cases than not the decision whether or not to recognise will depend more upon political considerations than exclusively legal factors."[20] Notice, however, that this statement is a political opinion of the court rather than a statement of either Canadian or international law.

The court does consider, however, the possibility of Quebec's *de facto* secession.[21] It declares that "under the Constitution there is no right to pursue secession unilaterally," yet "this does not rule out the possibility of an unconstitutional declaration of secession leading to a *de facto* secession." It continues: "[t]he ultimate success of such a secession would be dependent on effective control of a territory and recognition by the international community."[22]

It is, however, unclear what the court means by a "successful secession." If it is speaking of the law (as perhaps it ought to be), it is mistaken to say that an effective Quebec accession to sovereignty depends upon recognition by the international community: "Recognition is not strictly a condition for statehood in international law" and "[s]tates do not in practice regard unrecognised States as exempt from international law."[23] The court does finally acknowledge that recognition is not a condition for statehood, when it declares that "recognition by other states is not, at least as a matter of theory, necessary to achieve statehood."[24] So the court's statement that the success of Quebec secession depends in part on international recognition is a political statement, not a legal one. Such dictas of the court in the nature of a political prediction are an informed guess about a hypothetical situation. They do not declare the law.

There is one instance, however, of the court addressing the question of recognition from a more legal perspective. The court notes that "[t]he process of recognition, once considered to be an exercise of pure sovereign discretion, has come to be associated with legal norms."[25] It cites, but does not quote from, the *European Community Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union*.[26] It notes that foreign states, in determining whether or not to recognize a seceding state, may take into account "the legality of the secession according to the law of the state from which the territorial unit purports to have seceded."[27]

The court adds that, "an emergent state that has disregarded legitimate

International recognition, page 97

Solomonic or Mulronic?*

BY MICHAEL MANDEL

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The Supreme Court gave the federal government the answer it was looking for when it held that even a successful referendum would not give Quebec the right to secede "unilaterally," either under the Constitution of Canada or under international law.

However the Court disappointed hardline federalists with its recognition that "a clear majority on a clear question" would "confer democratic legitimacy" on Quebec's secession initiative and oblige the rest of Canada to participate in negotiations that might lead to sovereignty.

Both sides immediately claimed victory and the word "Solomonic" was heard frequently in the days following the release of the judgment, meaning to suggest that it wisely gave something to both sides. But that would be very bad Bible reading, because the essence of Solomon's judgment in the *Mothers' Case* was not that it gave something to both sides but that it pretended to, flushing out the wrongful claimant by trickery and ultimately handing total victory to her adversary.

If the Supreme Court's judgment is to be considered Solomonic, it is because it, too, is full of pretence and trickery. The main pretence is that the Court even answered the question it was asked. In fact, the Court pulled a typical legal trick and posed itself a completely different question, transforming the key notion of "unilateral secession" from *secession without agreement*, even after negotiations, (which is what Quebec was proposing in the sovereignty referendum) into *secession without negotiations*:

> [W]hat is claimed by a right to secede "unilaterally" is the right to effectuate secession without prior negotiations with the other provinces and the federal government.

A second pretence is that the Supreme Court decided anything at all, even about the question it asked itself. In what may well be a judicial first, the Court was adamant that it would not enforce compliance with *any* aspect of its judgment. It would leave the question of whether "a clear majority on a clear question" had been achieved and whether the parties were complying with the duty to negotiate, to the parties themselves:

> [I]t will be for the political actors to determine what constitutes "a clear majority on a clear question" ...
> [T]he courts ... would have no supervisory role.

To appreciate how really extraordinary this is, imagine if, at the end of a trial, the judge said, instead of "guilty" or "not guilty," that "*the guilty one is the one who clearly did it, but I leave it to the prosecutor and the accused to decide who that is. As for me, I'm outta here.*"

Despite the earnest attempts of PQ lawyers to put a good spin on the decision, there was a clear winner and it was not Quebec—which was clearly assigned the role of the false mother. The federal government got the one thing it really wanted: a way to delegitimate a democratically won referendum.

On the other hand, despite the earnest attempts of PQ lawyers to put a good spin on the decision, there was a clear winner and it was not Quebec—which was clearly assigned the role of the false mother. The federal government got the one thing it really wanted: a way to delegitimate a democratically won referendum. And here the Court delivered the goods in many ways: the effective subordination of international law to Canadian law, the idea of a "clear question," and, above all, the idea of "a clear majority." As even most sovereignist Quebeckers have had to admit, this can only mean that an old-fashioned, plain and simple majority of "fifty percent plus one"—the majority that Quebec came within a whisker of achieving in October 1995—would not be enough.

This response was highly predictable, because, in the modern world, going to constitutional court is the preferred way of denying people what they want and still calling it "democracy." That is why Trudeau imported the whole system into Canada: to "trump" democracy when it became inconvenient to the established order. The Court's constitutional *raison d'etre* depends on this preposterous redefinition of democracy as not being about majority rule, otherwise known as "one person, one vote."

What the Supreme Court gave to Quebec as a consolation prize was essentially worthless: in place of the democratic right to independence after an affirmative vote by a majority of the population, Quebec got an unenforceable right to negotiations, with all the obstacles the rest of Canada could raise at negotiations underlined three times in red ink, and no promises about the outcome:

> While the negotiators would have to contemplate the possibility of seces-

Solomonic or Mulronic? page 97

Political and media bias about the Supreme Court of Canada: Dispelling the big lie that the court is "soft on crime"

BY MICHAEL CODE

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In the United States, there is a long tradition of politicizing the judiciary. The tradition begins with the fact that most American judges, at the state and local levels, are directly elected by vote of the majority and must run for re-election at the end of their terms. It extends to the requirement that Supreme Court judges must have their appointments confirmed by a favourable vote from the political party that has control of the Senate. And it includes the routine phenomenon of politicians, and members of the media, attacking judicial decisions on blatantly political grounds.

In the United States, these attacks on the judiciary have generally come from right-wing politicians and right-wing newspapers—that is, from the Republican Party and its supporters—arguing that particular judges or particular courts are too "liberal." However, in one recent well-known case, President Clinton openly criticized a federally appointed judge for excluding evidence in a drug case. The judge eventually reversed his decision.

This highly politicized culture in which the American judiciary operates has generally been absent in Canada. None of our judges are elected, or must run for re-election. None of our judges have their appointments subjected to confirmation votes by a majority of elected politicians. And political attacks on judges and their courts, by politicians or by the media, are generally regarded as improper attempts to influence the process of impartial adjudication. Indeed, in this country, it is arguable that any attempt to bring political pressure to bear on the judiciary would be regarded as a violation of the constitutionally entrenched requirement of judicial independence.

This Americanization and politicization of our legal culture is profoundly disturbing and must be resisted. If these trends continue they will inevitably lead to judicial decision making in this country that is driven by a desire to please the majority or the powerful or those who control access to the media.

In the face of this apparently stark contrast between American legal culture and Canadian legal culture, there are some disturbing recent events in this country, in which the *Canada Watch* Supreme Court conference has played a role.

First, the Reform Party and its leader have adopted the American Republican Party tradition of launching blatantly political attacks on the judiciary for being too "liberal." Second, the right-wing media have given prominence to these political attacks and have aided and abetted with their own misleading coverage of the courts. Third, the Conservative Party in Alberta has now begun to openly muse about ways to bring greater political control over its Provincial Court judges (for example, by limited term appointments). And finally, events like *Canada Watch*'s annual Supreme Court conference have encouraged lawyers and academics to seek out "the latest trends" in the Supreme Court's Charter jurisprudence and to obtain "front page coverage" of any "controversial" theories they might have about the court's direction.

In my opinion, this Americanization and politicization of our legal culture is profoundly disturbing and must be resisted. If these trends continue they will inevitably lead to judicial decision making in this country that is driven by a desire to please the majority or the powerful or those who control access to the media. The ideal of judicial decision making that is based on rational principles, objective reasoning, and stubborn neutrality will be lost.

Political and media bias, page 88

Political and media bias continued from page 87

In this regard, Chief Justice Lamer recently made a very disturbing confession to Kirk Makin in his February 2, 1999 interview in *The Globe and Mail*, while discussing the political storm whipped up by the Reform Party and the media after a B.C. Supreme Court Judge struck down the child pornography possessory offence in the *Criminal Code*:

> I am concerned that as a result of virulent or harsh comments by the press or the public, *the most popular thing to do might become the outcome*. Judges are human beings. I would be remiss if I were to say that we are super human *or that we are not influenced sometimes*. [Emphasis added.]

When the *Feeney* case was re-tried, without the benefit of the inadmissible evidence excluded by the Supreme Court pursuant to the Charter, his *conviction* at the re-trial was barely mentioned in the media. Feeney's conviction at his re-trial should have sent a clear message—namely, that it is possible to respect basic civil liberties and, at the same time, maintain law and order. This was obviously not a message that interested the politicians or the media.

I would like to use *Canada Watch*'s review of the Supreme Court's 1998 criminal and constitutional jurisprudence as an opportunity to illustrate my concerns about political and media bias toward the court, and its possible effect on the court. From the perspective of those who would like to politicize our legal culture, the majority of the Supreme Court has used the Charter much too liberally in furtherance of an individual rights or civil liberties bias that sacrifices collective public security and law enforcement values. The politicians and members of the media who espouse this view became particularly vociferous during 1997 when the Supreme Court decided the *Feeney* case on May 22 (reported at 115 C.C.C. (3d) 129). By a slim 5-4 majority, the court decided that it was a serious Charter violation for a police officer to enter a dwelling house without a warrant and without reasonable and probable grounds and where there were no exigent circumstances to justify such a warrantless entry.

This seemingly plausible result unleashed a rabid response from the Reform Party, from the chain of newspapers owned by Southam Inc. and from *The Globe and Mail*. The latter paper published a lengthy and prominent article in August 1997, centred on the *Feeney* case and purporting to be an objective analysis of an overall trend in the court's jurisprudence. The thesis of the article was that the majority of the court, led by Chief Justice Lamer, had developed a "pro-accused/anti-police" bias. *The Globe*'s reporter, Sean Fine, marshalled *10 cases* decided by the court in the last *10 years* in support of his thesis. In other words, his highly politicized argument was based on an examination of about 1 percent of the court's relevant jurisprudence.

When some colleagues and I wrote a rebuttal, pointing to 10 contrary cases, *The Globe and Mail* refused to publish it. In particular, our letter had pointed out that the Supreme Court of Canada has systematically reformed the law of criminal evidence in the last 10 years so as to make *the prosecution* of crime easier. We pointed to a line of recent cases where the court has held for the first time that forms of hearsay evidence and "similar fact" evidence, long excluded from common law, are now admissible at the instance of the Crown (see, *R. v. Khan* (1990), 59 C.C.C. (3d) 92; *R. v. K.G.B.* (1993), 79 C.C.C. (3d) 257; and *R. v. C.R.B.* (1990), 55 C.C.C. (3d) 1). At the same time, the court has also abrogated the common law rule that relevant *defence* evidence is always admissible, no matter how minimally probative, because it may raise a reasonable doubt. Instead, the court has held, again for the first time, that some forms of relevant defence evidence can be excluded by the Crown because of prejudice to the Crown's interests (see, *R. v. Seaboyer* (1991), 66 C.C.C. (3d) 321 and *R. v. O'Connor* (1995), 103 C.C.C. (3d) 1). It is arguable that this trend in the court's modern case law, toward admitting some dubious forms of prosecution evidence while excluding relevant but minimally probative defence evidence, has contributed to wrongful convictions in this country (see, for example, *R. v. Parsons* (1996), 146 Nfdl. and P.E.I. R. 210 (Nfdl. C.A.) and F. Kaufman Q.C., *The Commission on Proceedings Involving Guy Paul Morin*, 1998, vol. 2, at 1138-59).

Political and media bias, page 109

 continued from page 73

difficulties, whether social, economic or budgetary, that would arise if it attempted to deal with social and economic problems in their entirety, assuming such problems can ever be perceived in their entirety." [317]

Justice LaForest does find a Charter-based rationale for this policy of broad deference to legislative choices. He states that the Charter was not meant to apply to private conduct, leaving the task of regulating and advancing human rights in the private sector to the legislative branch. "This invites a measure of deference for legislative choice." While emphasizing that the courts should not stand idly by in the face of a breach of human rights in the Code itself, as happened in *Blainey*, he states:

> But generally, the courts should not lightly use the Charter to second-guess legislative judgment as to just how quickly it should proceed in moving forward towards the ideal of equality. The courts should adopt a stance that encourages legislative advances in the protection of human rights. Some of the steps adopted may well fall short of perfection, but ... the recognition of human rights emerges slowly out of the human condition, and short or incremental steps may at times be a harbinger of a developing right, a further step in the long journey towards full and ungrudging recognition of the dignity of the human person. [318-319]

McKinney, then, is really a ringing endorsement of a policy of gradualism in developing human rights protection. It proceeds from the assumption that unless one is gentle with the legislatures, and encourages even their tiniest steps in the right direction, they might balk and do nothing. There is little in this attitude that reflects the court's understanding in *Andrews* of how developments in human rights legislation led the way toward the Charter's equality guarantees, little that reflects the quasi-constitutional status given human rights legislation in a series of Supreme Court decisions. There is astonishing judicial deference to the realpolitik that it is often difficult to secure human rights protections because of competing social and economic concerns, which concerns may or may not have constitutional protection or status. In short, the decision in *McKinney* signals the court's abdication of the field of human rights protection, in favour of any gradual or incremental action at the legislative level that politicians may find possible.

Parliament's role is to choose the appropriate response to social problems within the limiting framework of the constitution. But the courts also have their role: to determine, objectively and impartially, whether Parliament's choice falls within the limiting framework of the constitution.

The results of this policy of thoroughgoing judicial deference to legislative priority setting appear with clarity in the reasons of Justice Sopinka in *Egan*. The swing vote in that case, Sopinka J. agreed that failure to provide to same-sex couples the spousal allowance under the Old Age Security Act was a violation of the Charter's guarantees of equality under s. 15. However, he found that the denial was justified under s. 1. In doing so, he relied upon the *Irwin Toy* typology to characterize this legislation as "the kind of socio-economic question in respect of which the government is required to mediate between competing groups rather than being the protagonist of an individual." [575] In such circumstances, the court will be more reluctant to second-guess the choice that Parliament has made. [576] Again, the legislature is seen as a broker between roughly equal claimants for its resources, and the role of the court is that, not of principled reviewer of legislative brokerage, but rather of uninformed "second-guesser" of the policy choices made. This perspective totally strips the court of its role as reviewer of legislative action in light of the standards established in the constitution. It accedes to a conception of the court's role as, at most, a rival policy maker, looking at the same brokerage decisions from the same perspective, and not to be preferred to the original.

Faced with the legislative history—namely, that the legislation had first been passed in 1975, and no steps had been taken since then to include same-sex couples in its ambit, Sopinka J. remarks:

> It may be suggested that the time has expired for the government to proceed to extend the benefits to same-sex couples and that it cannot justify a delay since 1975 to include same-sex couples. While there is some force in this suggestion, it is necessary to keep in mind that only in recent years have lower courts recognized sexual orientation as an analogous ground, and this court will have done so for the first time in this case. While it is true, as Cory J. observes, that many provincial legislatures have amended human rights legislation to prohibit discrimination on the basis of sexual orientation, these amendments are of recent

The Charter, page 90

 continued from page 89

> origin. Moreover, human rights legislation operates in the field of employment, housing, use of public facilities and the like. This can hardly be equated with the problems faced by the federal government which must assess the impact of extending the benefits in some 50 federal statutes. Given the fact that equating same-sex couples with hetero-sexual spouses, either married or common law, is still generally regarded as a novel concept, I am not prepared to say that by its inaction to date the government has disentitled itself to rely on s. 1 of the Charter. [576]

Iacobucci J. describes this approach as "extremely deferential." [617] He distinguishes *McKinney* from the facts in *Egan* on several bases, and also takes direct issue with the philosophical underpinning of Justice Sopinka's position—namely, that protection for gays and lesbians is of relatively recent origin, and regarded as a novel concept, and that the government can justify discriminatory legislation because of the possibility that it can take an incremental approach in providing state benefits.

He characterizes both ideas for introducing two unprecedented and potentially undefinable criteria into s. 1 analysis, and permitting s. 1 to be used in "an unduly deferential manner well beyond anything found in the prior jurisprudence of this Court." He cautions: "The very real possibility emerges that the government will always be able to uphold legislation that selectively and discriminatorily allocates resources." This would, he says, "undercut the values of the Charter and belittle its purpose." [619]

Although Cory and Iacobucci JJ. were dissenting in the *Egan* decision, the warning they sound in their judgment about excessive judicial deference was badly needed. I do not agree with them that the reasons of Sopinka J. go well beyond anything found in previous cases. In my view, his reasons build on what had gone before, and carry the prior observations to their natural conclusion. In *Egan*, in fact, Sopinka J. applied the previous reasoning to a situation more obviously meant for it, because in *Egan* there actually was a resource allocation decision underlying the legislation. *Egan* did not just deal with a situation where the legislature had brokered minority rights protections against other interests, but concerned real resource allocation by government.

It was the resource allocation aspect of *Egan* that allowed the trial court and Court of Appeal of Ontario to distinguish Justice Sopinka's remarks in the subsequent case of *M. v. H.*, a case dealing with the province's *Family Law Act*. This statute, created to regulate matters between spouses upon the dissolution of the relationship, was seen by the Ontario courts as one essentially dealing with private relations between the parties, not state spending decisions. The trial judge also refused to follow Sopinka J. as a matter of principle.

Epstein J. in *M. v. H.* described the concept of "legislative leeway" as one that applies simply to accommodate the time the government requires to respond to demands arising from changing social needs. It takes time for the legislature to identify the need, gather information about it, craft the appropriate response, and, on occasion, test the will of the people. It may be, observes the judge, that in appropriate circumstances a s. 15 violation should be tolerated in anticipation of, and to allow for, future amendments necessary to further the legislative intent. [616] She refused to apply even that form of judicial deference, however, to the case at bar, given the decades of endemic discrimination endured by gays and lesbians, the fact that Ontario had amended certain legislation to extend them protection, and especially the fact that "it is clear that the Ontario legislature cannot (or will not) move forward with such an initiative". [617] The justice cited the position of the attorney general of Ontario in the *M. v. H.* case itself as "a demonstration of the inability of the parties to look to their elected representatives to remedy legislation which violates a constitutionally guaranteed right." In the first instance, the attorney general had intervened and filed a detailed brief in support of the plaintiff's position, but after the 1995 election, the new attorney general intervened in support of the defendant. Epstein J. concludes, "It is simply not realistic to regard the current state of Ontario law pertaining to spousal support as merely part of the process of legislative reform." [617]

Epstein J. addresses directly the issue of judicial role. She states that it is difficult for the legislature to change the law in a particularly unpopular way, even if to do so would enhance a constitutionally protected right. It is for precisely this reason that an independent judiciary must take appropriate action, a task that was assigned to judges by the elected representatives who promulgated the Charter. She cites the observations of Chief Justice Lamer that "many of the toughest issues we have had to deal with have been left to us by the democratic process." [617-618]

In the Court of Appeal, Charon J.A. similarly rejects the judicial deference argument in light of the legislature's own inactivity. In responding to the attorney general's argument that implementing something like a partnership registration scheme is a policy choice for the government and not a constitutional issue for the court, she remarks:

> Perhaps the Attorney General might have been in a better position to make this argument if the legislature had indeed made some policy choices with a view of redressing the discrimination. But it did not. It chose inaction. It is not open to the court to simply avoid the issue on the ground that legislative reform could provide a superior remedy. Nor is it open to the court to defer the issue until further information becomes available. [458]

In *Vriend*, the court deals in an authoritative way with what was becoming a crisis of judicial authority, because of the extremely deferential approach to legislative power that had culminated in the reasons of Justice Sopinka in *Egan*, after building through the reasons of the court in *Edwards Books*, *Irwin Toy*, and *McKinney*. Had they not dealt, at last, firmly with the issue, and rather allowed to prevail the arguments of the Attorney General of Alberta and the Alberta Court of Appeal majority, then it is no exaggeration to say that for all intents and purposes the human rights vigour and capacity of the Charter would have been exhausted. The Alberta arguments were a fully mounted attack on the legitimacy of the Charter and judicial review under the Charter. Such arguments could have been encouraged only by the extreme deference to legislative power shown in the line of cases I have discussed.

The legitimacy of the Charter and of judicial review under it were put at issue in several different ways in *Vriend*. Such issues arise in the context of arguments about the applicability of the Charter to legislative omissions, in light of s. 32 of the Charter; in the discussion of whether a violation of s. 15 has occurred; in the court's discussion of the object of the *Individual's Rights Protection Act*; in the rational connection and minimal impairment analyses under s. 1; and in the discussion of remedy. In most Charter cases, the deference issues may arise in one or two of these contexts, usually rational connection or minimal impairment and remedy. The fact that they are so pervasive in this judgment shows, in my view, how close to a crisis in these areas the jurisprudence had come, and how massive was the assault on the judicial role mounted in the *Vriend* case.

SECTION 32

The Alberta government argued that because the case concerned a legislative omission, s. 15 of the Charter should not apply pursuant to s. 32. The argument put forward the position that courts must defer to a decision of the legislature not to enact a particular provision, and that the scope of the Charter review should be restricted so that such decisions will be unchallenged. This effort to elevate s. 32 into a powerful threshold test of what would, in effect, be justiciable under the Charter, was rejected. Cory J. opts instead for a simple test under section 32, whether there is some "matter within the authority of the legislature" that is the proper subject of a Charter analysis. [529]

Respect for the legislative function can well mean that courts will not second-guess policy choices, but respect for the judicial function means that all actors in the system must proceed on the basis that courts will apply constitutional standards to legislation, whether that legislation embodies policy choices or not.

In his reasons, Cory J. deals with the argument of McClung J.A. that application of the Charter to a legislative omission is an encroachment on legislative autonomy. The Charter is not to be used to extract legislation from the provinces, but rather to police it once, and if, it is proclaimed. In the view of McClung J.A., the legislative decision not to legislate on a particular matter within its jurisdiction, particularly a controversial one, should not be open to review by the judiciary. [530]

Cory J. denies that this appeal represents a contest between the power of the democratically elected legislatures to pass the laws they see fit, and the power of the courts to disallow those laws or "dictate" that certain matters should be included in those laws. He states that it is not the courts that limit the legislatures, but rather the constitution, which must be interpreted by the courts. When a citizen brings a proper challenge to the constitutionality of a law, the courts must deal with it. To decline to do so would be to undermine the constitution and the rule of law. And in doing so, they do not impose their view of "ideal" legislation, but rather determine whether the challenged act or omission is constitutional or not. Cory J. states that the language of s. 32 does not cover only positive acts of the legislature, and that it is only in the analysis under s. 15 that it can be determined whether an omission is neutral–that is, has no effect on equality. Such neutrality cannot be assumed. [531-532]

SECTION 15

One of Alberta's s. 15 arguments was that a successful appeal would mean that human rights legislation would always have to "mirror" the Charter by including all of the enumerated and analogous grounds. Cory J. observes that human rights legislation, like all other legislation, must conform to the requirements of the Charter, but that the determination of whether a particular exclusion complies with s. 15 would not be made through a mechanical application of a mirror principle, but rather by means of a s. 15 analysis, which considers the nature of the exclusion, the type of legislation, and the context in which it was enacted. If a legislature chooses to take legislative measures that do not include all of the enumerated and analogous grounds of the Charter, deference may be shown to this choice, so long as the tests for

The Charter, page 92

justification under s. 1, including rational connection, are satisfied. [553]

SECTION 1: RATIONAL CONNECTION

The respondents relied on Justice Sopinka's incrementalism argument under this head of the case, to submit that a rational connection to the purpose of a statute can be achieved through the use of incremental means that, over time, expand the scope of the legislation to all those whom the legislature determines to be in need of statutory protection. Cory J. addresses that argument with the same sense of realism brought to a similar argument by the two courts in *M. v. H.* [558] He states that the inclusion of sexual orientation in the *Individual's Rights Protection Act* has been repeatedly rejected by the Alberta legislature, so that it is difficult to see that any principle of incrementalism is at play. He also distinguishes *Egan* on the basis that it concerned a government expenditure program; in doing so, he restores some balance to the Irwin Toy, McKinney line of reasoning about balancing claims to scarce "resources." *Egan* was a "resources" case. *Vriend*, like *Edwards Books*, *Irwin Toy*, and *McKinney*, is not. Happily, the court in *Vriend* does not commit the fallacy of regarding human rights protection as a "resource" that may be brokered by the legislature.

Cory J. also returns to his and Iacobucci J.'s earlier denunciation on principle of the incrementalism defence:

> [G]roups that have historically been the target of discrimination cannot be expected to wait patiently for the protection of their human dignity and equal rights while governments move toward reform one step at a time. If the infringement of the rights and freedoms of these groups is permitted to persist while governments fail to pursue equality diligently, then the guarantees of the *Charter* will be reduced to little more than empty words. [559-560]

Cory J. here returns the focus to the Charter and its minority rights guarantees. This is an appropriate shift away from the highly deferential "art of the possible" approach of LaForest J. in McKinney—an approach that showed little awareness of the essentially coercive power of the law in a proper case, and none at all of the provisions and effect of s. 52 of the *Constitution Act, 1982*.

SECTION 1: MINIMAL IMPAIRMENT

The respondents had argued that the IRPA is the type of social policy legislation that requires the Alberta legislature to mediate between competing groups or interests, these being in Vriend religious freedom and homosexuality. Such a characterization is, of course, an attempt to trigger the high degree of judicial deference to the legislative broker that we see in *McKinney* and *Irwin Toy*, among others.

Cory J. flatly rejects the legislature as broker characterization. [560] He usefully points out that, to the extent that there may arise a conflict between these two interests, the IRPA itself contains internal mechanisms for mediating it. Because these mechanisms allow conflicts to be balanced and mediated on a case-by-case basis, it is not necessary for the legislature to refuse to confer rights on one group because of potential conflicts. A complete solution to any such conflict already exists within the legislation. [560-561]

At the level of principle, Cory J. usefully collects authorities for the proposition that although legislatures ought to be accorded some leeway when making choices between competing social concerns, judicial deference is not without limits. Madam Justice McLachlin in *RJR-MacDonald* has observed that care must be taken not to extend the notion of deference too far. Deference must not be carried to the point of relieving the government of the burden that the Charter places upon it of demonstrating that the limits it has imposed on guaranteed rights are reasonable and justifiable. Parliament's role is to choose the appropriate response to social problems within the limiting framework of the constitution. But the courts also have their role: to determine, objectively and impartially, whether Parliament's choice falls within the limiting framework of the constitution. She observes:

> To carry judicial deference to the point of accepting Parliament's view simply on the basis that the problem is serious and the solution is difficult, would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which our constitution and nation is founded. [561]

Cory J. finds that the government of Alberta had failed to demonstrate that it had a reasonable basis for excluding sexual orientation from the IRPA. In the circumstances, the call for judicial deference was found to be inappropriate. [561-562]

REMEDY

It is in this part of the combined Cory and Iacobucci reasons for judgment that we find the strongest statements rehabilitating or reclaiming a judicial role under the Charter. In this section of the reasons, there are strong statements reaffirming that judges adjudicating Charter cases are not simply, as had been alleged, putting their power up against that of the legislatures, but rather acting pursuant to a role assigned by the constitution, and bringing to bear constitutional standards, not personal views, on the issues at hand. In doing so, the reasons reassert that this is a constitutional democracy, characterized by constitutional rather than parliamentary supremacy.

The reasons emphasize the democratic origins of the judicial role under the Charter:

> We should recall that it was the deliberate choice of our provincial and

federal legislatures in adopting the *Charter* to assign an interpretative role to the courts and to command them under s. 52 to declare unconstitutional legislation invalid. [563]

> [I]t should be emphasized ... that our *Charter*'s introduction and the consequential remedial role of the courts were choices of the Canadian people through their elected representatives as part of the redefinition of our democracy. Our constitutional design was refashioned to state that henceforth the legislatures and executive must perform their roles in conformity with the newly conferred constitutional rights and freedoms. That the courts were the trustees of these rights insofar as disputes arose concerning their interpretation was a necessary part of this new design.
>
> So courts in their trustee ... role must ... scrutinize the work of the legislature and executive not in the name of the courts, but in the interests of the new social contract that was democratically chosen. [564]

The limitations on the role of the courts in this new regime are expressed in terms similar to those used to define their role in more traditional judicial review contexts: courts are not to second-guess legislatures and executives and make value judgments on what they regard as the proper policy choice. This indeed restores to its proper perspective the commentary in *Irwin Toy*, *Edwards Books*, and *McKinney* about line-drawing. Respect for the legislative function can well mean that courts will not second-guess policy choices, but respect for the judicial function means that all actors in the system must proceed on the basis that courts will apply constitutional standards to legislation, whether that legislation embodies policy choices or not.

The reasons go on to articulate an approach of mutual respect and dialogue, or dynamic interaction, between the branches of government. In reviewing legislative enactments and executive decisions to ensure constitutional validity, the courts speak to those branches of government. In enacting new legislation to accomplish similar objectives, without the constitutional flaws, the legislature responds to the courts. [565] This dialogue was noticeable between courts and legislatures in administrative law and federalism cases, long before the entrenchment of the constitution. That its vigour was suspended for a time following the enactment of the Charter has to reflect a period of considerable discomfort on the part of the court with its new role. To see the court finding its feet again, as it were, and embracing the task assigned to it by the constitution, is a positive development.

In my view, the catch in this reasoning, is that it cannot be only the courts that define and delineate what these democratic principles are. For the court's dialogue theory to work, and have integrity as a foundation of its constitution-based role in judicial review, it cannot be applying ideas about democracy generated only by itself.

Along with the reaffirmation of the constitutional role of the courts, these reasons for judgment make observations on the nature of democracy that parallel those made in the *Secession Reference*. It seems that in this substantive area, too, the court is finding new confidence about its role in the context of our representative democracy. The reasons observe, "Although a court's invalidation of legislation usually involves negating the will of the majority, we must remember that the concept of democracy is broader than the notion of majority rule, fundamental as that may be. In interpreting legislation in light of section 1 of the Charter, the court must inevitably delineate some of the attributes of a democratic society; when legislatures and the executive fail to take these wider democratic values into account, the court should stand ready to intervene to protect them." [567]

Here, the reasons adopt the forceful statement, "judges are not acting undemocratically by intervening when there are indications that a legislative or executive decision was not reached in accordance with the democratic principles mandated by the Charter." [567]

In my view, the catch in this reasoning, is that it cannot be only the courts that define and delineate what these democratic principles are. For the court's dialogue theory to work, and have integrity as a foundation of its constitution-based role in judicial review, it cannot be applying ideas about democracy generated only by itself. In the original *Oakes* case, where Chief Justice Dickson articulates a sketch of some fundamental democratic principles, through *Vriend* and the *Secession Reference*, one is left wondering how the court informs itself about what are the democratic principles to which its interpretative functions must resonate. While I do not agree with the general trend of the court's reasoning here, in that I believe that both the constitution and principles of democracy can and should support the court's oversight of legislation, and can and should demark

The Charter, page 94

a limited sphere for judicial deference to legislative will, it remains the case that the court–legislature dialogue remarked upon by Iacobucci J. in his reasons does not seem at this time to have produced a hardy concensus about our fundamental democratic principles. At least, however, as the court now articulates these principles, a broader dialogue among the court, legislatures, the academy, and the public can ensue about their durability and reliability as insights into our democratic character.

In actually performing his remedies analysis, Iacobucci J. exhibits the same realistic approach to what the Alberta legislature actually did that we found in the Ontario Court, General Division and Court of Appeal in *M. v. H.* Lack of excessive deference is clearly sharpening the court's acuity of observation and willingness to call it as it is. Iacobucci J. mentions that in 1993 the Alberta legislature appointed the Alberta Human Rights Review Panel to conduct a public review of the IRPA and the Alberta Human Rights Commission. The panel issued a report making several recommendations, including the inclusion of sexual orientation as a prohibited ground of discrimination in all areas covered by the Act. The government responded to the recommendation by deferring the decision to the judiciary, citing the current court case *Vriend v. The Queen*. Iacobucci J. observes that this statement is a clear indication that in light of the controversy surrounding the protection of gay men and lesbians under the IRPA, it was the intention of the Alberta legislature to defer to the courts on this issue. He interprets the statement as "an express invitation for the courts to read sexual orientation into the IRPA in the event that its exclusion from the legislation is found to violate the provisions of the Charter." On this basis, he finds that the remedy of reading in is entirely consistent with legislative intention. [575-576]

Similarly, Iacobucci J. identifies the democratic principles that underpin his decision. In his view, a democracy requires that legislators take into account the interests of majorities and minorities alike, all of whom will be affected by the decisions they make. Where the interests of a minority have been denied consideration, especially where that group has historically been the target of prejudice and discrimination, judicial intervention is warranted to correct a democratic process that has acted improperly. [577] And, referring again to his dialogue concept, he concludes on the note that when a court reads in, it is not the end of the legislative process because the legislature can either pass new legislation in response to the court's decision or use s. 33 of the Charter to override that decision.

In a country where legislatures seem all too often to have forgotten the essence of democracy and to have abandoned the self-restraint and self-starting deference to constitutional principle that characterizes a country with a largely unwritten constitution, it is timely and welcome that the court wishes to embark upon a dialogue about the nature of our democracy.

CONCLUSION

I am heartened that the court has come back from the brink of a potentially disastrous policy of undue judicial deference to legislative action—a policy that essentially ignored the constitutional base of judicial review, and confused legitimate legislative balancing of resources with a permissive approach to legislatures approaching difficult social and economic tasks. This rethinking of judicial deference is promising in that it is constitution based and calls for an analysis of democratic principles. In a country where legislatures seem all too often to have forgotten the essence of democracy and to have abandoned the self-restraint and self-starting deference to constitutional principle that characterizes a country with a largely unwritten constitution, it is timely and welcome that the court wishes to embark upon a dialogue about the nature of our democracy. Such a dialogue should continue to be carried on within the strong framework of the written constitution, and continue to call for legislatures, courts, and citizens to reflect on the nature of our democracy. We should remember in this dialogue that it is not just about power, or the power of legislatures and the power of courts, simpliciter, but rather about the proper demarcation of roles within a constitutional and representative democracy. The Supreme Court was right in *Vriend* to call the dialogue back onto constitutional terrain. The dialogue having been opened, it is up to us to continue it, with rigour, and expectations that both courts and legislatures will make observations on principle, and not on realpolitik, or the politics of the possible.

Interrogating the prosecution process: The Charter and the Supreme Court of Canada in 1998

BY DIANNE L. MARTIN

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It is now trite to observe that the Charter has had considerable impact on the law of evidence. As we all know, the structures of the adversary system have been transformed, both procedurally and substantively over the past 15 years. Styles of advocacy have changed and the processes of fact finding have been refined–some would say complicated unnecessarily. The impacts have been cumulative, as counsel have become more adept at litigating constitutional questions and the court has developed confidence and a corpus of jurisprudence. Although most changes have made prosecutions easier[1] (contrary to popular opinion) the practice that also permits accused persons to "interrogate the prosecution process," which I identified in 1995, has continued. In this regard, the 1998 term generated significant judgments in a number of key areas: *R. v. Williams*, [1998] 2 S.C.R. 1128, on ensuring the impartiality of juries; *R. v. Rose* (1999), 129 C.C.C. (3d) 449, on the order of jury addresses; and the suite of decisions that follow *R. v. Dixon*, [1998] S.C.R. 244, yet another attempt to resolve the content of a constitutionally protected right to disclosure of the prosecution case.

However, in keeping with the by now fairly well-established trend of deference to prosecutorial prerogatives, and reliance on a presumption of prosecutorial propriety, only *Williams* was decided in a manner that might be said to "favour" the accused. The "benefit" was to facilitate measures to ensure a jury free from systemic racism (which must surely also "favour" a prosecution seeking a just result?)

In *Rose*, the trend to an uncritical support for prosecutorial prerogatives continues. The court confirmed that the *Criminal Code* provisions that require the accused to address the jury first if any defence evidence is called[2] are constitutional. This provision has troubled defence counsel for some time. The decision whether to call a defence is fraught with peril on many counts, most the product of concern about how one's client will perform. Until the decision in *Corbett v. The Queen* (1988), 41 C.C.C. (3d) 385 (S.C.C.), it meant the accused was exposed to prejudicial cross-examination on prior convictions as well as losing the right to address the jury last. The court acknowledged the dilemma, and the cost, in *Corbett*, but in a close 5-4 judgment, in *Rose*, they fell back on a distinction between "preferable" procedures and unconstitutional ones. It is a troubling decision on many counts, not the least of which is its tendency to reinforce the trial as a exercise for the demonstration of guilt, which must conform to certain rules of "fair play."

Rose was charged with killing his mother by strangulation. His defence was that she committed suicide and that his subsequent conduct in disposing of the body was the result of panic and not guilt. It appears from the judgment to have been a close case. Ms. Rose had a history of severe mental illness marked by suicide attempts and recurring suicidal thoughts, although she was in apparently good spirits in the weeks preceding her death. Both the Crown and defence pathologist concurred that the "soft strangulation" that caused her death could as readily be explained as suicide as homicide. The accused testified and admitted that shortly before her death he had struck his mother and then left her. He admitted disposing of her body when he returned home and found her strangled with a coaxial cable. Rose clearly had opportunity, and it was possible to construct motive from the known tension between them. A close case.

The controversy over the order of jury addresses and the related issue of whether the defence should have a right to reply to the Crown address was triggered by the forensic evidence. The last defence witness (Rose testified first, following the usual practice) was a leading pathologist, Dr. Frederick Jaffe. Although the issue was not raised with the prosecution pathologist, nor put to the accused, the Crown elicited from Dr. Jaffe the evidence that in the case of soft strangulation, a blue colouration would mark the victim's face until the ligature was removed. In Dr. Jaffe's words, "a reasonably skilled observer" would notice it. The defence did not re-examine on the point. The defence lost a motion to address the jury last (not surprisingly given the case law) and did not address the "blue face" evidence in his remarks.

It was, however, an important aspect of the Crown's address. He invited the jury to conclude that Rose did not notice the blue face on the basis that he did not testify about it, and thus that it did not exist. In a close case, this argument, unanswered, could well be pivotal. It certainly concerned the defence who asked for a right to reply to it, or for a comment/clarification in the judge's charge. Both were denied.

Interrogating, page 96

Interrogating continued from page 95

Justice Binnie, for Lamer C.J.C., Mclachlin, and Major JJ., in an elegantly written dissent, put his finger on the heart of the problem:

> While it would be comforting to think that in a criminal trial facts speak for themselves, the reality is that "facts"emerge from evidence that is given shape by sometimes skillful advocacy into a coherent and compelling prosecution. The successful prosecutor downplays or disclaims the craftsmanship involved in shaping the story. Such modesty should be treated with skepticism. ... [T]he fact remains that in an age burdened with "spin doctors" it should be unnecessary to belabour the point that the same underlying facts can be used to create very different impressions depending on the advocacy skills of counsel. In the realities of a courtroom it is often as vital for a party to address the "spin" as it is to address the underlying "fact." (Paras. 18 and 19)

The minority are arguing from first principles. Their judgment also notes that the majority of common law jurisdictions around the world either permit a right of reply (the "three address system"), or allow the defence the option of going last. Given this evidence, if the provision offended a Charter guarantee, it clearly could not survive s. 1.

That much of the rest of the world has viewed this Crown prerogative as unfair, along with a significant number of judges over the years, was not sufficient for the majority however. In a disappointing judgment written by Mr. Justice Cory for Iacobucci and Bastarache JJ. with Justice Gonthier concurring, and Justice L'Heureux-Dubé writing separate reasons concurring in the result, the court opted for reliance on stale and untested social "science" and anecdote to buttress their view that establishing innocence cannot be allowed to unduly interfere in an orderly demonstration of guilt. Defend, in other words, but not too much:

> As suggested by Sopinka J. for the majority of this Court in *Dersch v. Canada (Attorney General)*, [1990] 2 S.C.R. 1505, 60 C.C.C. (3d) 132, 77 D.L.R. (4th) 473, however, the right to make full answer and defence does not imply an entitlement to those rules and procedures most likely to result in a finding of innocence. Rather, the right entitles the accused to rules and procedures which are fair in the manner in which they enable the accused to defend against and answer the Crown's case. As stated by Sopinka J., at p. 1515:
>
> > The right to full answer and defence does not imply that an accused can have, under the rubric of the Charter, an overhaul of the whole law of evidence such that a statement inadmissible under, for instance, the hearsay exclusion, would be admissible if it tended to prove his or her innocence. (Para. 99)

This is a chilling proposition when examined. In essence, it is a claim that a Crown prerogative of dubious provenance and little support throughout the common law world should survive because it is not enough to justify its change that it might tend to prove innocence. Surely, the test should be that it can only survive if it serves a greater purpose. The very real risk of wrongful conviction that reliance on the way things have always been done was amply demonstrated in the dissent by reference to Justice Kaufman's report on the wrongful conviction of Guy Paul Morin. The dissent might also have noted that the use of prior inconsistent statements to hold Crown witnesses to their police versions, reliance on so-called consciousness-of-guilt evidence, and inappropriate reliance on science and social science, all factors in this case, have contributed to all of the well-known wrongful convictions in Canada, and to many lesser-known ones as well. In a justice system with real commitment to constitutional values, that a change might permit an accused person the chance to demonstrate innocence should indeed justify "an overhaul of the whole law of evidence." A relatively minor procedural change that has been adopted in England and in most states in the United States surely qualifies.

The judgment is troubling as well in its unexamined reliance on anecdote and dated social science evidence to support its reluctance to change. The majority accepts with little examination the unsupported assertions of some appellate judges that:

Interrogating, page 116

The court opted for reliance on stale and untested social "science" and anecdote to buttress their view that establishing innocence cannot be allowed to unduly interfere in an orderly demonstration of guilt. Defend, in other words, but not too much. ... This is a chilling proposition when examined.

Solomonic or Mulronic? continued from page 86

sion, there would be no absolute legal entitlement to it and no assumption that an agreement reconciling all relevant rights and obligations would actually be reached.

All this plus a blunt reminder that secession would require an amendment of the constitution, and no suggestion that Quebec could do that unilaterally: "Under the Constitution, secession requires that an amendment be negotiated."

So, if the government of Quebec is serious about independence, it is seriously mistaken in straying from its original strategy of boycotting the whole thing, relying on international law, and emphasizing the fact that the Canadian constitution was imposed on it and that the Supreme Court—every last judge on it—was appointed by the level of government that did the imposing. In fact, though Trudeau passed the first constitutional amendment against Quebec's will, it was the Supreme Court of Canada that said it was constitutionally okay to do so.

But if the Court is biased, why not hand the federal government total victory? Why give Quebec any concessions, even these puny rhetorical ones? The answer is that the Court is biased in favour of federalism and not any particular government wearing the federalist mantle, much less that particular government's strategy.

The Court reads the polls. It knows that the sovereigntists have been weakened, and it knows that nothing strengthens weak sovereigntists like fresh insults from Canadian institutions. Better to show a little rhetorical generosity. This, after all, was the strategy of the Meech Lake Accord, and here it might just be worth mentioning that, unlike the court that torpedoed Meech with its ruling on the signs law in 1988 (a "Trudeau" court in which all the judges were appointed by Meech's most implacable foe), this court is still dominated by judges appointed by Meech architect Brian Mulroney (6-9—a "clear majority" if ever there was one). But Meech was no gift to the cause of Quebec sovereignty; it was meant to be the kiss of death. This judgment is of no more value to Quebec sovereigntists than the "distinct society" clause, and for the same reason: its interpretation lies entirely in the hands of an institution that will always put federalist interests first. These judges will turn on a dime if the political need arises. They've done it before, and in Quebec, too, with much less jurisprudential leeway than they have given themselves in this case. They're only (slightly) elevated lawyers, after all, and you've heard the one about the lawyer haven't you?

* Although this paper was published in an earlier issue of *Canada Watch*, certain portions were inadvertently edited. The editors have, therefore, agreed to republish the article in its original, unedited form.

International recognition continued from page 85

obligations arising out of its previous situation can potentially expect to be hindered by that disregard in achieving international recognition, at least with respect to the timing of that recognition."[28] That last sentence is simply an inelegant way of admitting that an ungentlemanly break from Canada by Quebec would probably do no more than delay Quebec's inevitable recognition by third states. Interestingly enough, the question of recognition by Canada itself is never addressed in the *Reference*. This is a curious omission given that "if the former sovereign recognizes as a State a local unit exercising *de facto* control over certain territory, then that entity is, at least *prima facie*, a State."[29]

Given that the court's discussion of recognition consists mainly of political, rather than legal, considerations, we may wonder why the court chose to consider the question of international recognition at all. The three questions put to the court could have been answered, it would seem, without broaching the topic. The reason lies most probably in the court's admission that, absent negotiations, Quebec may opt to break from Canada anyway.

The *amicus curiae* submitted that, with or without a right under international law to secede unilaterally, international law will ultimately recognize effective political realities.[30] This argument is referred to as the principle of effectivity. It amounts, to some extent, to a denial of the court's jurisdiction over that matter. It may even imply a denial of the rule of law. The response of the court is forceful:

> If the principle of "effectivity" is no more than that "successful revolution begets its own legality"... it necessarily means that legality follows and does not proceed the successful revolution. *Ex hypothesi* the successful revolution took place outside the constitutional framework of the predecessor state, otherwise it would not be characterized as "a revolution." It may be that a unilateral secession by Quebec would eventually be accorded legal status by Canada and other states, and thus give rise to legal consequences; but this does not support the more radical contention that subsequent recognition of a state of affairs brought about by a unilateral declaration of independence could be taken to mean that secession was achieved under the colour of a legal right.[31]

The court also notes that while our law does in some cases allow a person to

International recognition, page 98

International recognition continued from page 97

profit from her own wrong (for instance, in the case of adverse possession of land under common law), to allow the profit is not to make the profitable act any less wrong. As the court puts it, "It is ... quite another matter to suggest that a subsequent condonation of an initially illegal act retroactively creates a legal right to engage in the act in the first place."[32]

Thus, the court's response to the effectivity argument is to assert that effective or otherwise, the act of unilateral secession remains illegal because it is unconstitutional. And yet, nowhere in the *Reference* does the court suggest that in the event of such an illegal secession, it would be Canada's responsibility or prerogative to prevent the illegal act and to reassert the rule of law. Nowhere is the possibility of military measures—or any measure, for that matter—mentioned. The only sanction to which the court alludes in the event of an unconstitutional break from Canada could be the possible withholding of recognition of Quebec by the international community. Yet, the international community could also sanction Canada if it has not negotiated with Quebec in good faith, and such a sanction could be the granting of international recognition to Quebec.

The question of the international recognition of a sovereign Quebec was obviously taken up by the Supreme Court of Canada because it realized that the issue of Quebec sovereignty could not be looked at within only domestic parameters. A close examination of the court's reliance on recognition reveals that it is referred to from a political standpoint rather than from a legal viewpoint. Such a course of action is surprising, but shows how intertwined the issues of international law and politics have become.

The views of the Supreme Court of Canada comfort the idea that recognition could play a key role in the process whereby Quebec could achieve international sovereignty. Sovereigntists have long been aware of this fact and have carefully studied the issue.[33] But, they also have been active in explaining to state members of the international community, through various means,[34] that they would solicit international recognition when Quebeckers decide to become a country after negotiating, as they have always advocated, not only the terms of secession, but also a novel form of partnership with Canada.[35] And that process, with the additional guidance of the Supreme Court of Canada, is bound to continue.

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1 [1998] 2 S.C.R. 217, paras. 103, 106, 110, 142, 143, 144, and 155 (the *Reference*). In para. 152, the court also seems to refer to recognition when it uses the expression "acceptance of the result by the international community."

2 M. Mandel, "Solomonic or Mulronic?" elsewhere in this issue. See also K. McRoberts, "In the best Canadian Tradition" (January-February, 1999), 7 *Canada Watch* 11.

3 O. Corten, "Vers un droit international canadien," *id.*, at 39.

4 *Id.*, at 4.

5 On recognition, see generally J. Verhoeven, *La reconnaissance internationale dans la pratique contemporaine* (Paris: Pedone, 1975) and the recent update published by the same author in "La reconnaissance internationale: déclin et renouveau" (1993), 33 *Annuaire français de droit international* 7.

6 *Reference*, para. 103.

7 See on this duty P. Hogg, "The Duty to Negotiate" (January-February 1999), 7 *Canada Watch* 1. See also A.C. Cairns, "The Quebec Secession Reference : the Constitutional Obligation to Negotiate," vol. 10, no. 1, *Constitutional Forum* 6.

8 *Reference*, para. 32.

9 *Reference*, para. 69.

10 *Ibid.*

11 *Id.*, para. 84.

12 *Id.*, para. 88.

13 *Id.*, para. 90.

14 *Id.*, para. 87.

15 *Ibid.*

16 *Ibid.*

17 *Ibid.*

18 *Id.*, para. 69.

19 *Id.*, para. 95.

20 See M.N. Shaw, *International Law*, 3rd ed., at 242.

21 *Reference*, para. 106.

22 *Ibid.* See also *Reference*, para. 155.

23 See J. Crawford, *The Creation of States in International Law* (Oxford: Oxford University Press, 1981), 74.

24 *Reference*, para. 142.

25 *Reference*, para. 143.

26 (1992), 31 *International Legal Materials* 1485, at 1487.

27 *Reference*, para. 143.

28 *Ibid.*

29 See Crawford, supra note 23, at 249. See also the remarks to the same effect in a Canadian context by P.J. Monahan, "When Cooler Heads Shall Prevail: Assessing the Costs and Consequences of Quebec Separation" (January, 1995), *C.D. Howe Institute Commentary*, no. 65, at 12.

30 *Reference*, para. 110.

31 *Reference*, para. 144.

32 *Reference*, para. 146.

33 For a summary of the positions of the sovereigntist movement, see D. Turp, *Avant-projet de loi sur la souveraineté* (Cowansville: Éditions Yvon Blais, 1995), at 6-9 and the bibliography, at 11-12.

34 See Bloc Québécois, *The Road to Nationhood*, Parliamentary wing of the Bloc Québécois, Information Branch, 1998 (available on the Bloc Québécois's Web site at www.blocquebecois.parl.gc.ca).

35 See the recently released document on partnership: Bloc Québécois, *Dans l'intérêt de tout le monde*, Chantier de réflexion sur le partenariat, 17-18 avril 1999, at 25.

How to wake a sleeping giant: The Supreme Court of Canada and the law of search and seizure in 1998

BY ALAN N. YOUNG

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In reviewing the 1997 term, I relied upon Shakespeare in concluding that "the law hath not been dead, though it hath slept." It appears that the judicial hibernation is not yet complete, and the 1998 term did not produce any earth-shattering or groundbreaking decisions in the area of search and seizure. In the 17 years of our Charter era, the Supreme Court of Canada has done a commendable job in articulating the broad principles that animate our protection against unreasonable search and seizure, but the instantiation of these broad principles is proving to be a painful period of growth and decline.

Last year, the court resolved three search and seizure controversies. Two of the three cases are not directly concerned with the day-to-day administration of criminal justice and the rulings therein will not have a dramatic impact on policing in Canada. In both the *Schreiber* case (1998), 158 D.L.R. (4th) 577, and the *M.R.M.* case, the court diminished Charter protection with respect to extraterritorial searches conducted at the request of Canadian law enforcement officials (*Schreiber*) and searches conducted by school officials who are not directly acting as agents of the state (*M.R.M.*). The unique institutional settings within which these cases arose led to a relatively non-contentious conclusion that the reasonable expectation of privacy in these settings is lessened and accordingly s. 8 of the Charter is to be applied with less vigour, if at all.

Although reasonable people will disagree, it is at least arguable that the court's parsimonious application of the Charter in these contexts is justifiable. The greatest potential for abuse of power and disregard of Charter values is raised within the context of the domestic criminal process. Accordingly, the full force of Charter protection could justifiably be reserved solely for confrontational interactions between police and citizen, and leaving a watered-down version of our rights to operate in unique institutional contexts is not necessarily an abandonment of the Charter dream.

Most significantly, in the one case this term arising out of a conventional police–citizen interaction (*Caslake* (1998), 121 C.C.C. (3d) 97), the court appears to have maintained a vigilant stance against arbitrary police conduct. In *Caslake*, the court addressed the issue of whether search incident to arrest extended to the search of an impounded vehicle seized some six hours earlier when the accused was arrested for a narcotics offence. The police were of the view that they had an automatic right to search any impounded vehicle as part of an inventory process; however, the majority of the court concluded that a thoughtless and automatic power to conduct an inventory search upon arrest exceeded the scope of the power to search incidental to arrest. Years earlier, the court had provided some concrete guidance with respect to this power (*Cloutier* (1990), 53 C.C.C. (3d) 257), and it had been well established that the police did not need to have reasonable and probable grounds to conduct a search incident to arrest. However, the court in *Caslake* was clear in establishing that the removal of the requirement of having reasonable and probable grounds does not lead to the police having *carte blanche* in searching incident to arrest. Lamer C.J.C. stated that in conducting a search incident to arrest "there must be some reasonable prospect of securing evidence of the offence for which the accused is being arrested" and that there must be "sufficient circumstantial evidence to justify a search of the vehicle." In light of the fact that the police believed they had an automatic right to search the vehicle, they did not turn their minds to the criteria of a "reasonable prospect of securing evidence," and the majority found that the search violated s. 8 of the Charter. Of course, in line with a tiresome and disconcerting pattern, the court ultimately admitted the evidence on the basis that the evidence seized was not conscriptive in nature and the seriousness of the violation did not warrant exclusion.

Despite the actual result of the case, I have had occasion to argue in other courts that the *Caslake* decision clearly represents a restrictive approach to the power of search incident to arrest. This argument was met by the state's response that the decision actually represents an expansive and hands-off approach to police powers. In a separate, concurring judgment, in *Caslake*, three judges concluded that inventory searches were part and parcel of the power, and these judges focused upon the abrogation of the warrant requirement and reasonable and probable grounds to support their view that this search power can operate in an assembly-line manner. Although my interpretation was supported by one extra judicial body (4-3), I have never found head-counting to be a satisfactory way to resolve a dispute. As the argument devel-

Sleeping giant, page 100

Sleeping giant continued from page 99

oped in court, I realized that the *Caslake* case had not definitively resolved the issue of the scope of the power to search incident to arrest, and once again ambiguity had reigned supreme.

Ambiguity may be the lifeblood of the legal profession but it should be considered anathema for both the police and those who are governed by the police. However, the conflicting interpretations of *Caslake* pose a fairly predictable and innocuous problem. The common law has never been considered an effective vehicle for law making and rarely does one case serve as a definitive last word on an issue. Nonetheless, the demands and dictates of the Charter have thrust the judiciary into a quasi-legislative role and now the common law must not only serve to resolve interpersonal disputes but it must serve to set investigative policy for the future. As a political institution or mini-legislature, the Supreme Court of Canada must ensure that its decisions are clear, comprehensive, and internally coherent. Without these qualities, a decision will never be able to do anything beyond resolving the very dispute presented in the individual case. Like any legislative act, the objective is to reduce future litigation and not increase legal conflict by issuing decisions that raise more questions than they answer.

The problem of conflicting interpretations of *Caslake* pales in comparison to the invisible problem of the court failing to seize opportunities. While the court struggled with the issue of the scope of the power to search incident to arrest, the court failed to seize the opportunity to resolve a more pressing problem–that is, does there exist a power to search incident to detention? On December 18, 1998, the court denied leave to appeal in the *Ferris* case (1998), 126 C.C.C. (3d) 298 in which the British Columbia Court of Appeal found that there existed at common law a power to search incident to detention. For no apparent reason, the court refused to take the opportunity to provide some guidance with respect to an intrusive investigative activity which presumably occurs on a daily basis. Based upon the recognition that investigative detentions take place daily, the Ontario Court of Appeal in 1993 followed the American example (the "stop and frisk" doctrine) and concluded that, under the common law "ancillary powers" approach to police powers, there existed a power to briefly detain upon reasonable suspicion for investigatory purposes (*Simpson* (1993), 79 C.C.C. (3d) 482). The power is to detain to question for a brief period of time but the Court of Appeal did not impose any obligation to answer, nor did they contemplate a power to search incident to this brief detention.

The power to search incident to detention may be a reasonable power but it stands upon a weak jurisprudential foundation and, more importantly, it is without any legislative support. Somehow a new power of search without legislative authority has been spawned in the Charter era, and the Supreme Court of Canada did not even blink.

Like wildfire, other courts seized upon this new halfway house between freedom and arrest, and inevitably the power expanded by increments. Now, there are four appellate courts which have clearly recognized a power to search incident to detention (*Ferris* (B.C. C.A.), *supra*; *Dupois* (1994), 26 C.R.R. (2d) 363 (Alta. C.A.); *Lake* (1996), 113 C.C.C. (3d) 208 (Sask. C.A.); and *McAuley* (1998), 124 C.C.C. (3d) 117 (Man. C.A.). As these courts worked on the creation of a new power to search, one would have thought that the Supreme Court of Canada would have enthusiastically seized the opportunity to resolve this debate. Especially in light of the court's clear pronouncements in the past that the judicial branch of government should not create new powers of search (for example, *Wong* (1990), 60 C.C.C. (3d) 460), one would have thought that the court would have been moved to intervene to review a development that appears to directly contradict the court's own theory about the proper judicial function in the area of search and seizure.

In the Supreme Court's very first pronouncement on s. 8 of the Charter, it went to great lengths to emphasize that the Charter "is not in itself an authorization for governmental action" and that "it does not confer any powers, even of 'reasonable' search and seizure, on these governments" (*Hunter*, [1984] 2 S.C.R. 145). The power to search incident to detention may be a reasonable power but it stands upon a weak jurisprudential foundation and, more importantly, it is without any legislative support. Somehow a new power of search without legislative authority has been spawned in the Charter era, and the Supreme Court of Canada did not even blink. Every day in Canada, police officers are briefly detaining suspects and probing their pockets, their vehicles, and perhaps even their bodies–all this without truly knowing whether the courts would approve and support this activity in the absence of legislative authorization. Coming out of the rather languid 1998 term, we are thus left with only one important question: How to wake a sleeping giant?

1998 constitutional cases continued from page 70

"reading in" is designed, in fact, to avoid the court's having to strike down offending legislation in its entirety when it finds legislation as currently drafted to be unconstitutional. As such, it reflects a desire on the part of the judiciary to narrow the impact of their rulings, rather than to encroach on the prerogatives of the legislature.

Far more significant than the decision to "read in," in my view, was the court's finding in *Vriend* that the mere failure of government to act could constitute a violation of s. 15. If this ruling is followed in future years, it will give Charter litigants an important tool to force governments to extend the reach of existing laws or to block the repeal of interventionist legislation. For example, a challenge to the Ontario government's repeal of employment equity legislation following the 1995 election has been dismissed by Ontario courts on the basis that government was under no obligation to enact the legislation and thus should be free to repeal it. But *Vriend* would suggest that the government's failure to remedy private acts of discrimination can itself amount to governmental discrimination for purposes of s. 15. On this "logic," the repeal of Ontario's employment equity legislation may be a violation of s. 15 and must be justified under s. 1 of the Charter as a "reasonable limit." This would force the court to evaluate whether, in fact, the employment equity legislation would have remedied discrimination, or whether the legislation was itself discriminatory in that it would have legislated racial quotas in the workplace. Courts are obviously totally ill-equipped to make that kind of evaluation; moreover, if they ever were forced into such an exercise, they would likely fall back on stereotypical reasoning and untested assertions about the nature and extent of private discrimination in the workplace.

The other significant non-criminal Charter case in 1998 was *Thomson Newspapers*, where the Supreme Court of Canada struck down a provision in the *Canada Elections Act* prohibiting the publication of poll results in the 72 hours preceding voting. Mr. Justice Bastarache, one of the newer members of the court, adopted a much more robust approach to s. 2's guarantee of freedom of expression than had been the case in the 1997 *Libman* case. (In *Libman*, while the court ruled that certain limits on third-party spending in a Quebec referendum campaign were unconstitutional, it suggested that the defects in the law could be remedied with very modest tinkering. The Bouchard government took up this invitation and made minimal amendments to the law in 1998 in accordance with the court's suggestions.) In *Thomson Newspapers*, the court rejected the argument that late-campaign polls should be banned in order to prevent a so-called "bandwagon" effect, in which voters supposedly flock to the side of the party predicted to win. Bastarache J. suggests that even if polls do produce a bandwagon effect (which is itself speculative), this is no reason to ban the information: a free society permits voters to decide for themselves which party or candidate to vote for, regardless of whether those choices are for the "right" reasons.

There was no doubt that the federal government would have been under a political obligation to respond to such a referendum result. What seemed difficult to follow was how the court was able to find that there would be a legal duty to negotiate in such circumstances.

FEDERALISM CASES

Six of the 25 constitutional cases in 1998 raised federalism issues involving the relationship between the federal government and the provinces. The most high-profile of these cases was undoubtedly the *Secession Reference*, in which the court answered three questions that had been posed by the federal government on whether Quebec had a right of unilateral secession. While the court agreed with the federal government that Quebec did not have the right, either under domestic Canadian law or under international law, to secede unilaterally, it surprised many observers (including this one) by creating a "duty to negotiate" secession.

Under the court's reasoning, if the Quebec government obtains a clear majority on a clear question in favour of secession, the federal government and the other provinces would have a legal duty to negotiate the breakup of the country. There was no doubt that the federal government would have been under a political obligation to respond to such a referendum result. What seemed difficult to follow was how the court was able to find that there would be a legal duty to negotiate in such circumstances. The court based its analysis on the fact that there was a "gap" in the constitution and that, therefore, it could look to certain underlying principles such as "democracy" in order to fill in that gap.

In the short term, the court's judgment has been well received by both federalists and sovereigntists, since it gave half a loaf to each. The longer-term implications of the judgment for a third

1998 constitutional cases, page 102

1998 constitutional cases continued from page 101

sovereignty referendum are more difficult to gauge. The court did not define what would constitute a "clear majority" or a "clear question." It remains to be seen whether the federal government will attempt to define the meaning of these terms, either by introducing legislation or through a white paper. At the same time, Quebec Premier Lucien Bouchard has been handed an important political tool by the court, since Mr. Bouchard will be able to argue that a "yes" vote is simply a mandate to conduct negotiations, in accordance with the Supreme Court's judgment.

When we talk about "the court" as a single entity, we ignore the fact that the justices are often divided in controversial Charter and constitutional cases. Different members of the court have quite distinctive approaches to the Charter.

THE COURTS AND THE LEGISLATURE

The Supreme Court's role is becoming a source of increasing public debate and controversy, with a growing number of critics alleging that the court is becoming unduly activist. In order to test that criticism, *Canada Watch* undertook an analysis of the 98 constitutional decisions handed down by the Supreme Court over the past 3 years. What we found is that in only 13 cases over the past 3 years did the court rule a statute or part of a statute to be unconstitutional. (The 12 different statutory provisions that were ruled invalid are outlined in table 1.) We also found that in many of those cases, the court left ample room for the legislature to respond in a way that would remedy the constitutional defect in the law while still achieving the legislature's original objective. I already made reference to the fact that following the *Libman* decision in 1997 striking down part of Quebec's referendum legislation, the Quebec National Assembly made very modest amendments to the legislation to bring it into line with the court's ruling. Another illustration is the Ontario legislature's response to the 1998 decision in *Re Eurig Estate*, which ruled that Ontario's system of probate taxes (taxes imposed on the value of an estate when a will is accepted by a court) was unconstitutional. Ontario responded by quickly enacting new legislation that retroactively imposed identical taxes dating back to 1950. The end result was that no one received any money back from the government, even though the regulations under which the taxes had been imposed were found to be unconstitutional. (The only exception was the executor of the Eurig estate, who took the case to court and who received a refund of a grand total of about $5,700 dollars for his trouble. Consider the fact that it will typically cost a litigant well over $100,000 to take a case all the way to the Supreme Court of Canada!)

About half of the Supreme Court's Charter docket does not even deal with the validity of statutes or regulations. These cases focus on whether specific actions taken by government officials or the police involve a violation of Charter rights. Even where the court rules that the specific action or decision in question violates Charter rights, the difficulty can often be remedied for future cases through the enactment of legislation. For example, in the *Feeney* case (referred to earlier), the court ruled that a search warrant was required to enter a private residence in order to make an arrest. There was at the time no *Criminal Code* procedure for obtaining such a warrant. Since police officers had entered Feeney's home without a warrant, the evidence they obtained was excluded and his conviction was overturned. But the story doesn't end there. After the Supreme Court decision, Feeney was put on trial a second time for murder. Even though the police were prevented from introducing the illegally obtained evidence, he was convicted a second time. As lawyer Michael Code comments elsewhere in this issue, media commentary on the *Feeney* case has totally ignored the conviction at the second trial, continuing to refer to the case as an instance of the court "setting a murderer free."

But what about the impact of *Feeney* on the ability of the police to investigate crimes in the future? Within six months of the decision, Parliament amended the *Criminal* Code to establish a procedure for obtaining search warrants to enter private residences to make an arrest. By all accounts, this new procedure is working well. Thus, in the end, not only did Mr. Feeney end up in jail, but police in future cases should be able to effectively pursue and arrest murder suspects.

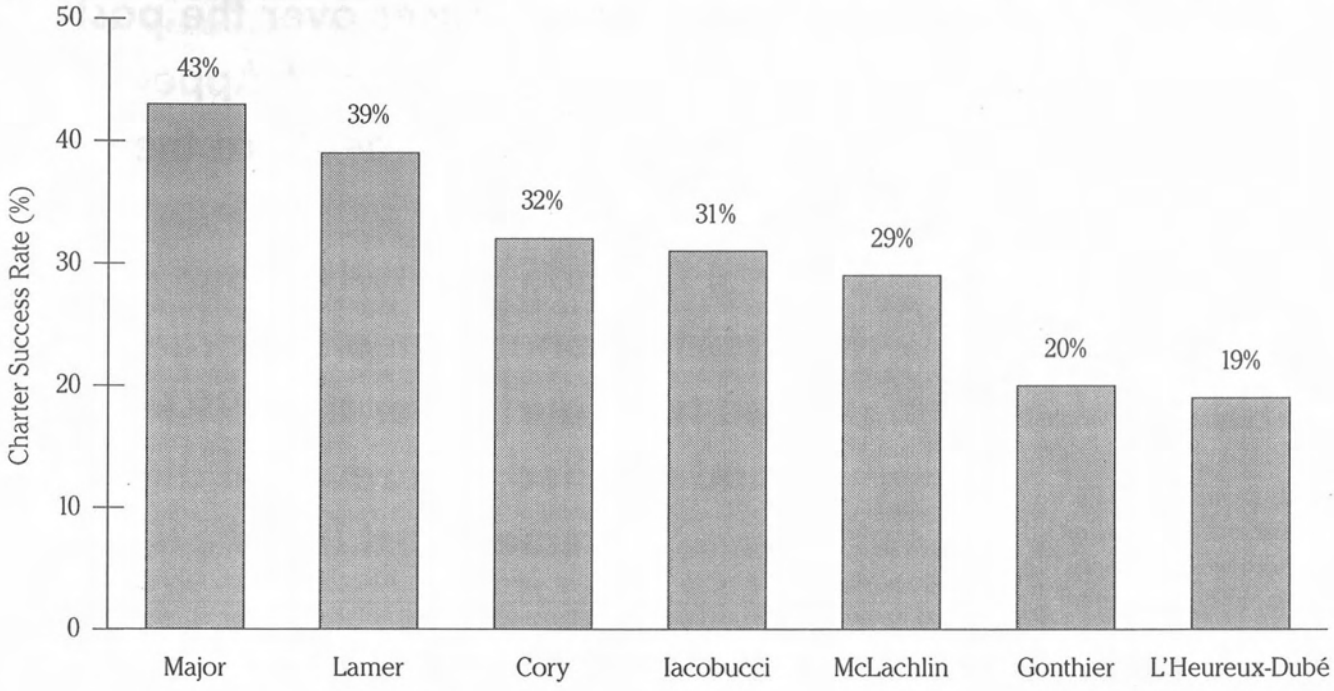
DIVISIONS ON THE COURT

When we talk about "the court" as a single entity, we ignore the fact that the justices are often divided in controversial Charter and constitutional cases. Different members of the court have quite distinctive approaches to the Charter.

As the data in figure 1 demonstrates, the most "activist" member of the court in Charter cases is Alberta's Jack Major. This is perhaps somewhat ironic given the fact that Alberta is the stronghold of the Reform Party, which has been the most outspoken critic of judicial activism. For example, in the 16 Charter cases in which Justice Major participated in 1998, he sided with the Charter

1998 constitutional cases, page 104

Voting Behaviour in Charter Cases, 1991-1998



Note: One additional case was inconclusive.

Table 1: Supreme Court Decisions Declaring Statutes Unconstitutional, 1996-1998

1998	*Re Eurig Estate*	Regulation under the Ontario *Administration of Justice Act* providing for probate fees ruled unconstitutional.
	Vriend v. Alberta	Provincial human rights code unconstitutional for failing to prohibit discrimination on the basis of sexual orientation.
	Thomson Newspapers v. Canada	Provision in *Canada Election Act* prohibiting publication of polls for 72 hours prior to election date ruled invalid.
	R. v. Lucas	Part of defamatory libel provision in *Criminal* Code ruled unconstitutional as an unjustified limit on free expression.
1997	*Godbout v. City of Longueuil*	Residency requirement by municipality of Longueuil ruled an unconstitutional infringement of liberty under s. 7.
	Re Remuneration of Provincial Court Judges (Manitoba, Alberta, and P.E.I. –3 separate cases.)	Legislation reducing salaries of provincial court judges in three provinces ruled unconstitutional as infringing judicial independence; provinces required to set up independent commissions make recommendations as to provincial court salaries.
	Libman v. Quebec	Spending limits in Quebec referendum legislation ruled unconstitutional limit on freedom of expression.
	Benner v. Canada	Provision in federal *Citizenship Act* requiring children born abroad of a Canadian mother prior to 1977 to undergo a security check ruled unconstitutional as a violation of equality rights.
1996	*R. v. Nikal*	Certain conditions attached to a fishing licence under B.C. fishing regulations violate aboriginal right to fish for food under s. 35(1).
	R. v. Cote: R. v. Adams	Regulations under Quebec *Fisheries Act* violate s. 35 aboriginal rights.

1998 constitutional cases continued from page 102

claimant 11 times, or about 69 percent. All other members of the court favoured the government in at least one-half of the Charter cases in which they participated in 1998. Major J.'s tendency to side with the Charter claimant was revealed most clearly in cases where he dissented from the majority, including the following cases in 1998:

- *R. v. M.R.*, an 8-1 decision upholding warrantless searches of high school students, where Major J. was the lone dissenter who would have ruled the search unconstitutional;
- *CEMA v. Richardson*, a 7-2 decision ruling that an egg-marketing scheme in the Northwest Territories did not violate mobility rights under s. 6 or freedom of association under s. 2, where Major J. (along with McLachlin J.) would have struck down the scheme as a violation of mobility rights); and
- *R. v. Rose*, a 5-4 decision ruling that the requirement that an accused address the jury first at the end of a criminal trial where the defence has led evidence does not violate the right of an accused to make full answer and defence, with Major J. one of four members of the court who agreed with Justice Ian Binnie's dissent.

The other member of the court who might be described as a Charter "activist," in the sense that he rules in favour of Charter claims more often than the court's average of 33 percent, is Chief Justice Lamer. The chief justice, who of course has recently announced his intention to retire after close to 20 years on the court and over 9 years as chief justice, ruled in favour of Charter claimants in 39 percent of the cases in which he participated in the 1990s. This compares with Justice Major, who ruled in favour of Charter claimants in 43 percent of the cases on which he sat since 1991.

Justices Cory, Iacobucci, and McLachlin comprised a "middle ground" on the court over the past decade, ruling in favour of Charter claimants in close to one-third of cases, which is not far off the court's average as a whole. The clear Charter "conservatives" are Quebec judges Charles Gonthier and Claire L'Heureux-Dubé, who tended to side with the government in approximately four out of five Charter cases on which they participated.

In constitutional cases over the past decade, the Ontario Court of Appeal and the Federal Court of Appeal are the least likely to be reversed by the Supreme Court of Canada. Thirty-one percent of the constitutional appeals heard from those two courts over the 1991-98 period resulted in a reversal at the Supreme Court level.

At the same time, it should be pointed out that the generalizations set forth in the previous paragraph do not always hold true. For example, Madam Justice L'Heureux-Dubé, although tending to adopt a narrow interpretation of the Charter in criminal law cases, has taken a relatively activist stance in the interpretation of equality rights in s. 15. In contrast, the normally activist Justice Major has tended to favour a somewhat narrower application of s. 15. In *Vriend*, for example, while Major J. agreed with the majority that Alberta's human rights legislation violated s. 15, he would not have "read in" the term "sexual orientation" into the legislation, preferring to send the whole issue back to the Alberta legislature.

REVERSAL RATES

The court allows the appeal in about 45 percent of the cases it hears overall. It is surprising that the reversal rate in constitutional cases over the past decade has been somewhat lower, at about 40 percent. (I describe this result as surprising since constitutional cases tend to raise the most difficult issues, where one might expect the Supreme Court to differ with the provincial court of appeal.)

A reversal rate of 40 to 45 percent might sound high, until you recall that the court agrees to hear the appeal in only about 12 percent of the cases in which leave to appeal is sought. When this number is factored in, the court is overruling the provincial court of appeal in only about 5-6 percent of those cases in which one party is sufficiently dissatisfied with the result as to seek review from the Supreme Court. That number seems relatively modest.

In constitutional cases over the past decade, the Ontario Court of Appeal and the Federal Court of Appeal are the least likely to be reversed by the Supreme Court of Canada. (Thirty-one percent of the constitutional appeals heard from those two courts over the 1991–98 period resulted in a reversal at the Supreme Court level.) The other province with a reversal rate lower than the national average was Nova Scotia, with a 36 percent reversal rate. Three provincial courts of appeal, British Columbia at 46 percent, Alberta at 48 percent, and Quebec at 50 percent, have

reversal rates slightly higher than the overall average in constitutional cases. The number of cases heard from the other provinces are too small to be significant.

THIS ISSUE

Readers will find the developments referred to above considered in more detail in the papers collected in this issue. The papers fall into three groups. Given the significance of the *Vriend* case, not only for equality issues but for the court's overall approach to the Charter, four separate papers (Robert Charney, Mary Eberts, Bruce Ryder, and Ted Morton) examine its implications. Three papers examine the Supreme Court's decision in the *Secession Reference*, followed by three papers examining the court's criminal law decisions. Finally, papers by Jamie Cameron and Roslyn Levine discuss the court's decision in *Thomson Newspapers*.

As this issue goes to press, the court has already handed down a number of major constitutional cases in 1999. All of which means that there will be more grist for the constitutional mill at next year's *Canada Watch* conference, scheduled for April 7, 2000 in Toronto.

[1] The cases were: *R. v. Maracle* (involving unreasonable delay in prosecution); *R. v. Cook* (suspect arrested in United States has right to counsel); *R. v. Williams* (juror challenge for racial bias allowed); and *R. v. Smith* and *R. v. Skinner* (Crown failure to disclose violates accused's rights to full answer and defence).

Judicial power continued from page 78

the bench. Will it inspire more of the same? Will it be the "moral supernova" that legitimates and further advances the court's new role as egalitarian social reformer? There are certainly reasons to think so. The Court Party continues to enjoy the resources that have contributed to its success to date. It has achieved near hegemonic control of Canadian law schools and legal commentary. Their graduates ensure that a growing percentage of the active bar is imbued with the spirit "Charter values." A new generation of Charter partisans—judges like Rosalie Abella, Jim MacPherson, and Lynn Smith—are being appointed to the bench. Elected governments continue to back-pedal in response to judicial policy making. Section 33 has not been used in a decade. Is it any wonder that, emboldened by their victory in *Vriend*, EGALE has launched a mega-constitutional challenge to 59 federal statutes?

There are, however, some signs of unrest in Charterland. There is growing support for both conservatism and populism in Canadian electoral politics. The success of the Reform Party nationally and the Harris and Klein governments provincially reflect growing middle-class disenchantment with the costs of the welfare state. This movement could collide with the Court Party's attempt to transform rights into entitlements, to more not less government. Recent populist measures such as referendum and recall stress more accountability in government, hardly the strong suit of unelected judges.

It has become politically acceptable to publicly criticize court decisions and judicial activism more generally. A year ago April there was a very public campaign in Alberta, which included radio, television and newspaper advertisements, to urge the Klein government to use s. 33 to overrule the *Vriend* decision. This failed, but last month the Alberta government announced that it would use s. 33 in response to any judicial attempt to impose "same-sex marriage" and that any other use of s. 33 would be decided by referendum.

The Reform Party has also begun to make judicial activism one of its staple issues. It pressed the Chretien government to invoke s. 33 in response to the B.C. child pornography ruling in January. In February, the United Alternative convention endorsed a policy condemning judicial activism and supporting the responsible use of section 33. This latter sentiment was subsequently endorsed by former provincial premiers Peter Lougheed and Allen Blakeney. Responding to the perception of the court's new power, most newspapers in the country have endorsed parliamentary hearings for Supreme Court nominees.

Are these just temporary eruptions or the beginning of something more permanent? The key, I predict, will be the court's ability to persuade the political class that its decisions are required by the Charter. The legitimacy debate is not about "text-driven" judicial activism, but judge-driven activism. To preserve their authority, judges must persuade those on the losing side that their decision is required by the constitution, not by their personal policy preferences.

The court-curbing periods in American history all occurred in response to decisions where the Supreme Court failed to persuade—the *Dredd Scott* ruling on slavery (1856), the "substantive due process" and New Deal cases (1930s), and the *Roe v. Wade* abortion ruling (1973). The current "legitimacy" controversy in Canada is a symptom that growing numbers of Canadians are not being persuaded.

[1] A more complete version of my criticisms of the *Vriend* decision may be found on the website of the Alberta Civil Society Association: www.pagusmundi.com/acsa/badlaw.htm.

Horse race of another kind: Libman, Thomson Newspapers, and "rational choice"

BY JAMIE CAMERON

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"GRAVELY INSULTING"

There is much in *Thomson Newspapers v. Canada* to applaud. There the Supreme Court of Canada invalidated s. 322.1 of the *Canada Elections Act*, which imposed a blackout on opinion polls in the final 72 hours of a federal election, as an unjustified violation of s. 2(b) of the Charter.

Perhaps most notable is the self-important role Bastarache J. assigned voters in his majority reasons. The government's suggestion that the blackout was reasonable because voters should be shielded from information that might influence their exercise of the franchise was, in his opinion, nothing short of "gravely insulting." Far from being "mesmerized" or "enthralled" by polling data, he maintained, voters must "be presumed to have a certain degree of maturity and intelligence." After all, the Canadian voter is "a rational actor who can learn from experience and make independent judgments." He found, as a result, that to uphold a blackout on electoral information because "a very few voters might be so confounded" would "reduce the entire Canadian public to the level of the most unobservant and naive among us."

Those who regarded s. 322.1 as an example of appalling paternalism were quick to congratulate Justice Bastarache for his forceful defence of the voter's right to know. On the other hand, if *Thomson Newspapers* seemed an easy case, s. 322.1's fatal flaw was far from self-evident to the Ontario Court of Appeal, which upheld the measure, or to the Supreme Court of Canada's three Quebec judges, who dissented *en bloc*. Moreover, as roughly contemporaneous decisions in *Libman v. A-G Quebec* and *R. v. Lucas* show, a victory under s. 2(b) of the Charter can rarely be taken for granted. From that perspective it is a good question whether *Thomson Newspapers* should be regarded as a one time nod to expressive freedom, a case determined by its facts and context, or can instead be considered a step forward in the s. 2(b) jurisprudence.

The distinction between what is good and bad, or rational and irrational is unsound for a variety of reasons. First and foremost, it promotes a conception of expressive freedom that is elitist and subjective.

"FAITH IN THE ELECTORAL PROCESS"

The Bastarache majority may be right that Parliament's opinion poll blackout was an insult to voters and an affront to s. 2(b); still, the dissent had the better argument from precedent, especially the court's decision in *Libman*. There, referendum legislation that effectively eliminated political participation outside the statute's mandatory campaign committees ultimately failed under minimal impairment. Even so, the court unanimously agreed that it is reasonable for Parliament and the legislatures to impose strict controls on participation in election campaigns.

Prior to *Libman,* the court had designated categories of "low-value" expression under s. 1, which included hate propaganda, obscenity, and defamatory statements. The purpose of that designation was to rationalize a downward adjustment, or attenuation, in s. 1's standard of justification for expressive activities deemed to be either valueless or marginally valuable. The significance of that approach in *Libman* was this. An assumption that some expression is low value and therefore entitled to minimal protection only under s. 1 implies, conversely, that other s. 2(b) activity must be "high value" and worthy of vigilant protection under the Charter. When that proposition was put to the test, however, the court's response was a grudging concession that Quebec's referendum provisions "do in a way restrict one of the most basic forms of expression, namely political expression."

Libman not only discounted the interference but repeatedly stressed that controls that would prevent "disproportionate influence" in the referendum debate and ensure an "informed choice," thereby preserving the electorate's confidence in the democratic process, should be regarded as positive.

Once expression at the core of s. 2(b) was cast in negative terms, as a distorting force, the court did not find it difficult to grant the legislature the same latitude under s. 1 as it was permitted in cases of low-value expression. Hence *Libman* proclaimed that "a certain deference" was appropriate, and, having declared that referendum campaigns fall within the realm of social science, "which does not lend itself to precise proof," held that the legislature is "in the best position" to choose the means to attain that objective.

In *Thomson Newspapers*, Justice Gonthier found it easy to uphold s. 322.1's blackout on polls: all he had to do was follow the court's decision in *Libman*. First, he maintained that, far from being restrictive of s. 2(b), the purpose of the limit was to "promote political expression." Then, after announcing that "freedom of expression should not be considered as an end *per se*," he held that s. 322.1 furthered the quest for better information, because a "multiplicity of polls" would "foster confusion." Thus he concluded that the 72-hour blackout was "positive rather than negative," and that s. 322.1 would assist "effective representation" by promoting "an informed vote over a misinformed vote," thereby enabling the voter to make "a rational choice."

Once again following *Libman*'s lead, the suggestion in *Thomson Newspapers* that s. 322.1 is "consistent with and indeed enhances the objectives underlying expressive freedom" served to attenuate the standard of justification under s. 1. There, Gonthier J.'s statement that s. 1 does not require scientific proof was solidly rooted in the case law, and he went on to supply a list of decisions which upheld limits, despite inconclusive s. 1 evidence that the infringement of expressive activity was justifiable. At that point it remained only for him to invoke the familiar refrain that "this court should not second-guess the wisdom of Parliament in its endeavour to draw the line between competing credible evidence," and remind other members of the court that Parliament was not bound to find the least intrusive or even the best means of achieving its objective. On that, his concern was that to find otherwise would impose "too high a standard for our elected representatives to meet" and thereby deny Parliament its "choice of reasonable choices, holding it to a standard of perfection of uncertain reach."

The court's majority opinion is at once heartening and disappointing. It is heartening because Bastarache J. resisted the temptation to defer to Parliament's claim that polls might misinform or mislead voters. Significantly, he placed information that was banned at the core of s. 2(b), which in itself marks a rare occasion in the jurisprudence.

It may well be unclear why Parliament, rather than the voter, should judge the question of "effective representation" and likewise, why Parliament, not the voter, should pronounce on how "faith in the electoral process" is either created or maintained. Still, Gonthier J.'s dissent can hardly be faulted for following the court's unanimous decision in *Libman*. Given that he brought his argument squarely within precedent, the more intriguing question is how Justice Bastarache's majority of five came to the opposite conclusion.

RATIONALITY TO THE RESCUE

The majority opinion's riposte in *Thomson Newspapers* relied on two points that effectively collapse into each other. In accordance with the court's dichotomy of valueless and valuable expression, Bastarache J. began with the usual declaration about the importance of a contextual approach under s. 1 and added, in the circumstances of s. 322.1, that "there can be no question that opinion surveys regarding political candidates or electoral issues are at the core of expression guaranteed by the *Charter*." Fair enough, but the same was true in *Libman*, where significant restrictions on "one of the most important forms of expression" were endorsed just the same.

The challenge for Bastarache J., in invalidating the blackout, was to explain away the low-value jurisprudence and the presumption in favour of deference where "social science evidence is in some controversy." As to the former, he denied that limits were upheld in a slew of cases because the court had applied a lower standard under s. 1. Instead, he maintained that, when the expressive activity has low value, it is easier for the government objective to outweigh it. Consistent with the rest of the s. 2(b) jurisprudence, the result in *Thomson Newspapers* turned on the majority's perception that polling information is simply more valuable than other activities that had been reasonably limited.

According to Bastarache J., expression in the "low-value" category, including hate propaganda and obscenity, is intrinsically harmful or demeaning, and systematically and consistently undermines the position of some members of society. In contrast, polls are "sought after and widely valued." As for *Libman*, Bastarache J. claimed that participation in election campaigns was different from opinion polls because the former would "significantly

Horse race, page 113

constitutionnel, qui découle, d'une part, du principe *constitutionnel* de la démocratie et, d'autre part, du droit et de la responsabilité des représentants élus démocratiquement d'entamer des *modifications constitutionnelles* sous le régime de la partie V de la *Loi constitutionnelle de 1982*.

En outre, le devoir de négocier constitue une obligation *réciproque* de toutes les parties, qui résulte de la tentative légitime d'un participant à la Confédération *d'obtenir une modification de la Constitution*. La conduite des parties serait régie par les principes *constitutionnels* : le fédéralisme, la démocratie, le constitutionnalisme proprement dit et la primauté du droit, ainsi que la protection des minorités.

Une majorité politique qui n'agirait pas en accord avec les principes sous-jacents de la *Constitution* mettrait en péril la légitimité de l'exercice de ses droits. La *conduite* des parties acquerrait une grande importance *constitutionnelle*. En vertu de la *Constitution*, la sécession ne pourrait être réalisée unilatéralement; c'est-à-dire sans négociations conformes aux *principes, à l'intérieur du cadre constitutionnel existant*.

Tout cela veut dire qu'il *est dans l'intérêt tant des souverainistes que des fédéralistes de veiller au bon fonctionnement et à l'application de la Constitution du Canada*. La Constitution, y compris ses principes sous-jacents, les droits et les obligations qu'elle crée et sa procédure de modification, est pertinente pour les souverainistes (qu'ils en soient pleinement conscients et qu'ils l'admettent ou non), parce qu'elle protège leurs intérêts légitimes, au même titre que ceux de tous les Canadiens.

Cette conclusion de la Cour est extrêmement salutaire pour les traditions civiques et la culture politique du Canada. Il est malsain qu'une partie importante de la population d'un pays ait, à tort ou à raison, le sentiment que ses intérêts se situent perpétuellement

Tout cela veut dire qu'il *est dans l'intérêt tant des souverainistes que des fédéralistes de veiller au bon fonctionnement et à l'application de la Constitution du Canada.* La Constitution, y compris ses principes sous-jacents, les droits et les obligations qu'elle crée et sa procédure de modification, est pertinente pour les souverainistes (qu'ils en soient pleinement conscients et qu'ils l'admettent ou non), parce qu'elle protège leurs intérêts légitimes, au même titre que ceux de tous les Canadiens.

« en dehors » de la structure du droit fondamental, tout comme il est malsain qu'un gouvernement provincial agisse comme s'il pouvait ignorer les règles de droit. Le jugement de la Cour suprême les invite à rentrer au bercail. Il n'existe pas d'«ennemis de l'État» au Canada lorsqu'il s'agit de défendre une cause politique, fut-elle aussi extraordinaire que la sécession, tant que cette cause et ses adeptes respectent le cadre juridique et les valeurs constitutionnelles fondamentales qui régissent les choix politiques dans une société libre et démocratique comme la nôtre.

Mais en adhérant à la conclusion de la Cour selon laquelle il existe une obligation de négocier, les souverainistes doivent aussi accepter les règles énoncées par la Cour quant aux circonstances qui enclenchent cette obligation—l'expression claire, par une majorité claire, de la volonté de ne plus faire partie du Canada—ainsi que les règles régissant le déroulement des négociations : le respect par *tous* les participants, y compris le gouvernement souverainiste, des principes sous-jacents de la Constitution du Canada que la Cour a reconnus applicables dans le contexte de la sécession. Il s'agit notamment du principe de la primauté du droit, mais aussi du *constitutionnalisme*, au sujet duquel la Cour a pris la peine de préciser qu'il était incarné dans le par. 52(1) de la *Loi constitutionnelle de 1982* et qui exige que tous les actes gouvernementaux soient conformes à la Constitution.

Le respect du *constitutionnalisme*—plus particulièrement dans un contexte comme celui de la sécession, lorsqu'il faut de modifier la Constitution et lorsqu'une obligation de négocier résulte du droit d'entamer un changement constitutionnel en vertu de la *Loi constitutionnelle de 1982*—implique nécessairement, à tout le moins, le respect des dispositions qui régissent la procédure de modification de la Constitution.

L'EFFET JURIDIQUE DE L'AVIS EXPRIMÉ DANS LE RENVOI

La Cour suprême du Canada a prononcé son jugement dans le *Renvoi relatif à la sécession du Québec* dans l'exercice de son rôle consultatif, plutôt que de sa fonction judiciaire.

Dans les commentaires qu'il a formulés à la suite de la décision rendue par la Cour suprême dans le *Renvoi relatif à la sécession du Québec*, le ministre québécois des Affaires intergouvernementales, Monsieur Jacques Brassard, a déclaré que l'opinion de la Cour était un « simple avis », et non un jugement qui lie le gouvernement du Québec. Les journalistes lui ont alors demandé comment il pouvait insister sur la conclusion de la Cour portant que le devoir de négocier la sécession constituait une obligation impérative, selon les termes employés par la Cour même. De plus, pourquoi cette obligation, que la Cour a qualifiée de réciproque, lierait-elle le gouvernement du Canada, si elle ne lie pas le gouvernement du Québec parce que l'énoncé de la Cour constitue un « simple avis »?

Un point de vue plus éclairé a été exprimé plus tard par les procureurs qui ont représenté M. Bouchard et le procureur général du Québec, M. Serge Ménard, devant la Cour d'appel du Québec dans la deuxième affaire *Bertrand, Bertrand c. Bouchard et autres* (*Bertrand (no 2)*).

Cette conclusion de la Cour est extrêmement salutaire pour les traditions civiques et la culture politique du Canada.

Le procureur général du Québec a cité le jugement de la Cour suprême selon lequel il n'est pas nécessaire d'examiner de façon plus approfondie les inquiétudes qui « *découlent du droit invoqué par le Québec de faire sécession unilatéralement* [, à] la lumière de notre conclusion *qu'aucun droit de ce genre ne s'applique à la population du Québec,* ni en vertu du droit international ni en vertu de la Constitution du Canada. »

En d'autres termes, le procureur général du Québec a invoqué—dans une instance devant les tribunaux québécois—l'avis exprimé par la Cour suprême du Canada dans le *Renvoi relatif à la sécession du Québec* et sa conclusion qu'il n'existe pas de droit de faire sécession unilatéralement. Je ne mentionne cet élément que pour illustrer le fait que le procureur général du Québec a manifestement accepté—comme il devait le faire—que l'avis exprimé par la Cour suprême du Canada sur le *Renvoi relatif à la sécession du Québec* constitue maintenant un élément important de la jurisprudence pertinente en matière constitutionnelle qui s'applique au système juridique canadien, et notamment aux tribunaux québécois.

CONCLUSION

La décision équilibrée de la Cour fournit à tous les participants à la fédération canadienne une occasion de marquer un arrêt, et peut-être de débattre de l'avenir du Canada et du Québec en utilisant un vocabulaire moins absolutiste, à la rhétorique et au ton moins stridents, plus respectueux des traditions, des institutions, des valeurs, des espoirs et des aspirations de l'autre partie, et qui tienne davantage compte du fait que bon nombre de ces valeurs et de ces aspirations sont partagées par toutes les parties et découlent de leur histoire commune.

Si le débat sur l'avenir se tient avec plus de clarté, dans un climat assez serein et dans une meilleure compréhension et perception du cadre juridique régissant les choix politiques fondamentaux dans notre pays, c'est dans une large mesure grâce aux efforts déployés, avec une profonde intelligence, par les juges de la Cour suprême dans le cadre du Renvoi.

Political and media bias continued from page 88

These significant recent developments in the law of evidence have facilitated the prosecution of crime and have made the defence of those accused of crime much more difficult. And yet this kind of major development in the law has gone completely unnoticed, except within the legal profession itself, because it runs counter to the dominant "law and order" bias of the media and of politicians.

It is also noteworthy that when the *Feeney* case was re-tried, without the benefit of the inadmissible evidence excluded by the Supreme Court pursuant to the Charter, his *conviction* at the re-trial was barely mentioned in the media. Feeney's conviction at his re-trial should have sent a clear message—namely, that it is possible to respect basic civil liberties and, at the same time, maintain law and order. This was obviously not a message that interested the politicians or the media.

This kind of selective reporting about the court's work makes it appear that the politicians and the media, who criticize the court from a right wing perspective, are not interested in an objective analysis of the court's work and are, instead, simply interested in creating a false appearance about the court that furthers their own agendas. The politicians always believe they can exploit a "law and order" agenda and the media always believe they can exploit controversy. It is in their mutual self-interest to portray the court as being "soft on crime," whether it is true or not.

Political and media bias, page 110

Political and media bias continued from page 109

This impression of the court has now become a media and political artifact in this country. The "big lie" about the court has been repeated often enough that even reporters who did not participate in creating the false picture now refer to it. The lie itself has become newsworthy. Thus Kirk Makin, in his recent *Globe and Mail* interview with Chief Justice Lamer, put it to the Chief Justice that "critics ... say the Supreme Court is soft on crime." The Chief Justice replied, defensively, by pointing to his apparently impressive list of dismissed conviction appeals.

With this background in mind, let us analyze the criminal and constitutional cases decided in 1998 to determine whether the court has, in fact, used the *Charter of Rights and Freedoms* in furtherance of a "pro-accused/anti-police" bias.

There were 10 significant criminal and constitutional cases decided by the court in 1998. Of these, four cases could be said to have produced results and doctrinal developments that favour the liberty of the subject over the powers of the state. In this broad sense they are "pro-defence" as opposed to "pro-Crown," if we must use these terms. The four cases are *Cook, Williams, Maracle*, and *Caslake*.

In *R. v. Cook* (reported at 128 C.C.C. (3d) 1), the court held by a 7-2 majority that the protections of the Charter, in particular s. 10(b), extended to an accused who was interrogated in the United States by Canadian police about a Canadian murder. A narrow and technical reading of the Charter could have led to the view that it can never apply to state action outside of Canadian territory.

In *R. v. Williams* (reported at 124 C.C.C. (3d) 481), a unanimous court relaxed the threshold that an accused has to meet when seeking to challenge prospective jurors for cause on the basis of alleged bias against a racial minority. A narrower application of the pre-existing case law could have led to a more restricted right to challenge prospective jurors for cause.

The "big lie" about the court has been repeated often enough that even reporters who did not participate in creating the false picture now refer to it. The lie itself has become newsworthy.

In *R. v. Maracle* (reported at 122 C.C.C. (3d) 97), the court held by a narrow 3-2 majority that the accused's s. 11(b) right to trial within a reasonable time was violated by almost two years of post-committal delay, some of which was the accused's own responsibility. This was a relatively close case that required a generous balancing of the relevant interests in order to find a Charter violation.

R. v. Caslake (reported at 121 C.C.C. (3d) 97) is an important decision concerning the power of the state to conduct warrantless searches as an incident of arrest. By a narrow 4-3 majority, the court placed limits on this common law power, requiring that the police have proper arrest-related purposes for such searches and that an objective basis exist for the police purpose. It is arguable that these requirements place new restrictions on police powers that were not clearly articulated in the pre-existing case law. However, it must be noted that the court went on to hold unanimously that the .5 gram of cocaine found in the accused's car, as a result of the unconstitutional search, was still admissible in evidence. It could be argued that this is actually a "pro-Crown" decision because it continues the court's virtually unblemished record of never excluding evidence of drugs, pursuant to s. 24(2) of the Charter, in spite of Charter violations. I have included it as a "pro-defence" case because of the majority decision on s. 8 of the Charter.

Weighed against the above four "pro-defence" cases are four other cases decided in 1998 that go in the opposite direction—that is, favouring the powers of the state over the rights of the individual. These four "pro-Crown" decisions are *Arp, M.R.M., Rose*, and *Schreiber*.

R. v. Arp (reported at 129 C.C.C. (3d) 321) involved two very important *Charter of Rights and Freedoms* issues, both of which were resolved in favour of the Crown by a unanimous court. There can be no doubt that if either of these two issues had been resolved in favour of the accused, it would have made the prosecution of crime—particularly violent crime—more difficult in this country. The first issue involved the troubling question of whether "similar fact" evidence can be admitted, linking the accused to different crimes, without proof beyond a reasonable doubt that the accused in fact committed any one of those crimes. In other words, can the Crown call evidence of a number of merely suspicious crimes connected to the accused in order to prove that the accused committed any one of them. Some would say that this approach violates ss. 7 and 11(d) of the Charter and the historic requirement that the Crown must prove guilt beyond reasonable doubt. The appellate courts in this country were legitimately divided on the issue and the Supreme Court of Canada decisively sided with Ontario's "pro-Crown" approach and rejected Alberta's "pro-defence" approach.

The second issue in *Arp* was equally important—namely, whether the accused's

consent to provide the police with a bodily sample (such as hair, saliva, or blood), in relation to the investigation of one crime, extends to a subsequent investigation of an entirely separate crime. Again, there were good arguments on both sides of this issue, which have profound importance in relation to the ability of the state to maintain ongoing DNA data banks on its subjects. In other words, if you voluntarily give your DNA to the state for one limited purpose, do you forever lose any s. 8 Charter rights in relation to that sample for the rest of your life? Again, the court unanimously sided with state interests on this issue.

Although the decision in *Arp* has greatly facilitated the ability of the Crown and police to prosecute suspected serial murderers and serial rapists, it is noteworthy that it did not lead to an outpouring of media coverage and political commentary to the effect that the Supreme Court of Canada has now been enlisted into the right wing's "war on crime" and should be regarded as "pro-police/anti-accused."

In *R. v. M.R.M.* (reported at 129 C.C.C. (3d) 361), the court held, by a decisive 8-1 majority, that school officials searching students for evidence of criminal offences (marijuana possession and trafficking in this case) need not comply with the usual ss. 8, 10(a), and 10(b) Charter requirements. In particular, a search of the person need not be based on reasonable and probable grounds, there is no need for an arrest or a warrant, and there is no right to counsel even when the student is detained in the school principal's office with a police officer present. In announcing these new relaxed Charter standards, applicable in the school setting, the court was clearly influenced by its view that serious lawlessness in our schools was on the increase. Cory J. stated for the majority, at 368 C.C.C.:

> Schools today are faced with extremely difficult problems which were unimaginable a generation ago. Dangerous weapons are appearing in schools with increasing frequency. There is as well the all too frequent presence at schools of illicit drugs. These weapons and drugs create problems that are grave and urgent.

It is much easier to unleash superficial sound bites that focus on one or two notorious cases that have been wrenched out of their larger context. However, the extra effort is required when the very survival of an important institution is at stake.

There does not appear to have been any empirical evidence before the court on this issue. The facts of the case involved "a small quantity of marijuana," something that has been commonplace in our schools for over 30 years. One wonders whether the court's somewhat politicized rhetoric on these issues was influenced by the negative press clippings it received, completely unjustifiably, after the *Feeney* decision in 1997.

It is noteworthy that, within a few weeks of the release of the judgment in *M.R.M.*, there was a public outcry in Ontario when a number of male high school students were strip searched by a teacher and vice-principal who were investigating a theft at the school. The very conservative premier of Ontario was interviewed and expressed shock at such conduct by school officials. And yet the media did not launch a counter-attack against the Supreme Court of Canada for being way out in front of even the most right-wing "law and order" politicians in the country.

In *R. v. Rose* (reported at 129 C.C.C. (3d) 449), the court dealt with a longstanding thorn in the side of defence counsel in this country—namely, the requirement that they must address the jury first, without any right to reply after the Crown's jury address, in all criminal cases where a defence is called. This ancient rule has been criticized by the Law Reform Commission of Canada and by appellate court judges and it no longer exists in England, New Zealand, parts of Australia, and most of the United States. It arguably constitutes a penalty for calling a defence and it is contrary to the normal rules in all other forms of litigation. Normally, the party who bears the burden (namely, the Crown in a criminal case) must make submissions first, the opposing party then responds, and the party with the main burden then has a final and brief right of reply. The court was badly divided but, by a 5-4 majority, upheld the Crown's right to go last with no right of reply in the defence. Most observers of the justice system would regard this result as one that is advantageous to the Crown and detrimental to the defence.

Finally, in *Schreiber v. A.G. Canada* (reported at 124 C.C.C. (3d) 129), the court held by a clear 5-2 majority that s. 8 of the Charter does not apply at all to searches of Canadians' bank accounts in foreign jurisdictions, even though the search is requested by Canadian police and prosecutors in furtherance of a Canadian criminal investigation. This was the famous, or infamous, "Airbus Case" that led to former Prime Minister Brian Mulroney's libel suit against the RCMP and the federal minister of justice. It involved a letter of Request for Mutual Legal Assistance, sent to the relevant Swiss authorities by the Canadian Department of Justice, seeking a search of certain bank accounts in Zurich.

Political and media bias, page 112

Political and media bias continued from page 111

Schreiber was a Canadian who held one of the bank accounts and he sought a declaration that the Canadian letter, requesting the foreign search, violated his s. 8 Charter rights. The Federal Court, both at trial and on appeal, agreed with his position and held that a Canadian warrant, based on reasonable and probable grounds, was required to authorize the letter of request. The Supreme Court of Canada reversed, essentially holding that the Charter has no application to searches of foreign bank accounts by foreign officials.

This "pro-Crown" result in *Schreiber* involved a strict and narrow reading of the Charter. *The Globe and Mail* had engaged in prolonged and repeated lobbying on its editorial page for the opposite result, arguing that Canadians' foreign bank accounts should be protected by the s. 8 requirement of a Canadian warrant based on reasonable and probable grounds. It is curious that the same newspaper expressed such dismay at the *Feeney* decision when it merely extended similar protections to Canadians' dwelling houses located within this country. Presumably, the right-wing "law and order" agenda need not be extended to the foreign bank accounts of the rich and powerful, which are far more worthy subjects of Charter protection than the dwelling houses of ordinary Canadians.

Aside from the four "pro-defence" and four "pro-Crown" cases decided by the court in 1998, there are two further cases that cannot be easily categorized.

In *R. v. MacDougall and Gallant* (reported at 128 C.C.C. (3d) 483 and 509), the court held unanimously that the s. 11(b) right to trial within a reasonable time extends to the sentencing hearing. However, the court also held unanimously that the particular delay of 10 months in sentencing these two accused, due to judicial illness after the accused had pleaded guilty, was not unreasonable and there was therefore no violation of the Charter. The first of these two findings arguably gives a broad and generous reading to the Charter, although a fairly obvious and non-contentious one. The second finding, based on the view that judicial illness is largely an inherent or neutral form of delay that does not count in the s. 11(b) matrix, reflects a very cautious and conservative approach to this particular Charter right. Accordingly, this case cannot usefully be classified on the media's politicized Charter screen as either "pro-Crown" or "pro-defence."

The majority is constantly shifting back and forth, depending on the particular facts and the particular legal issues in each case. Each individual result can be criticized or supported, based on logic, precedent, and principle. But no clear trend or political bias can be detected.

The last case is *R. v. Dixon, Smith, Skinner, Robart and McQuaid* (reported at 122 C.C.C. (3d) 1, 27, 31, 36, and 40). It is the latest word from the court concerning the s. 7 obligation on the Crown to disclose all relevant information in its possession. The Crown had failed to disclose certain witness statements prior to trial. During the trial, police occurrence reports were obtained by the defence that included summaries of the statements but not the statements themselves. The court held unanimously that the failure to disclose the statements was a violation of the s. 7 right to disclosure. The court's analysis of this issue continues the large and liberal interpretation of this particular Charter right, found in a number of the court's earlier decisions. However, at the remedy stage, the court retrenched by announcing for the first time that defence counsel's "lack of due diligence" in failing to adequately pursue and seek out the withheld statements is a factor to be considered in deciding whether the remedy of ordering a new trial is justified. It is arguable that this latter proposition punishes the accused for his own counsel's negligent failure to uncover the Crown's Charter violation. This is hardly a generous approach to Charter rights. Accordingly, this decision reveals a somewhat mixed approach to the Charter that is not easily placed in either the "pro-Crown" or "pro-defence" categories.

What can one conclude from the above survey of the court's 10 significant criminal law *Charter of Rights and Freedoms* decisions released in 1998? It seems to me that the self-evident conclusion is that the court cannot be fairly classified as either "pro-Crown" or "pro-defence" in its application of the Charter to the criminal law. The majority is constantly shifting back and forth, depending on the particular facts and the particular legal issues in each case. Each individual result can be criticized or supported, based on logic, precedent, and principle. But no clear trend or political bias can be detected.

However, what is equally apparent is that if I were a member of a political party or a member of the media, and my party or my newspaper had a particular agenda concerning the court that it wished to advance, I could easily select the four "pro-defence" cases or the four "pro-Crown" cases and

marshall an argument that the court was biased in one way or the other. The argument appears persuasive and convincing to the public, provided no mention is made of the four cases going the other way.

As long as politicians and members of the media are self-interested and selective, and do not fairly and objectively analyze the *entire body* of the court's work, it is very easy to mislead the public on this point. I concede that it is much more difficult for a reporter or a politician to engage in a thorough analysis of a large body of case law, before announcing a theory about an alleged trend. It is much easier to unleash superficial sound bites that focus on one or two notorious cases that have been wrenched out of their larger context. However, the extra effort is required when the very survival of an important institution is at stake.

I sincerely hope that politicians in this country, and members of the media, will cease their unfair attacks on the court. We all know that when really difficult decisions come along, which require independent and impartial adjudication, we turn to the courts to resolve these disputes instead of turning to highly politicized institutions that will only yield predictably biased results. If recent attempts by the right wing succeed in politicizing our courts, there will be no courts to turn to for fair and impartial adjudication. This is simply because a politicized court is no court at all.

Horse race continued from page 107

manipulate the political discourse" and "make the expression itself inimical to the exercise of a free and informed choice." Deference was not appropriate in the case of s. 322.1, because it regulated expression that was at "the core of the political process" and would inform voters seeking to make rational use of the polling data. Once deference was rejected, there was little doubt Parliament's blackout would fail s. 1's proportionality test.

The court's majority opinion is at once heartening and disappointing. It is heartening because Bastarache J. resisted the temptation to defer to Parliament's claim that polls might misinform or mislead voters. Significantly, he placed information that was banned at the core of s. 2(b), which in itself marks a rare occasion in the jurisprudence. In doing so, he rejected the suggestion that limits on political expression are *positive* because unregulated freedom is *negative*. As well, he grafted elements onto the s. 1 analysis that re-calibrated the balancing of values. Not only did he engage in a serious discussion of the salutary benefits versus deleterious consequences under final proportionality, he focused a certain amount of attention on harm as a *sine qua non* of justifiable limits on expression under s. 1. Each of those innovations is a welcome addition to the s. 2(b) doctrine and especially the latter, as harm and value are not synonymous. Expressive activity that is merely "valueless" should not be prohibited unless, independently of perceptions of its value, it is found to be harmful.

That said, the decision is somewhat disappointing from the perspective of broader principle. Justice Bastarache may be too clever a doctrinal technician by half. In *Thomson Newspapers* he managed to distinguish a slew of precedents that base the s. 2(b) jurisprudence on subjective judgments about what is good or bad and valuable or valueless. In doing so, he further entrenched the dichotomy between expressive activity that is deemed valueless because it is mean or manipulative and therefore irrational, and that which is valuable because the expressive activity, like polls, is "rational" or informational, and cannot be withheld from voters who have a right to know.

The distinction between what is good and bad, or rational and irrational is unsound for a variety of reasons. First and foremost, it promotes a conception of expressive freedom that is elitist and subjective. As well, it surely must be wrong in principle that s. 2(b)'s guarantee is contingent on the freedom being exercised wisely or rationally. As stated above, expressive activity should not be prohibited simply because its content is deemed stupid or valueless but instead, should be based on proof that limits are justifiable because the activity is harmful. Finally, though distinctions between third-party participation and a blackout on polls can no doubt be suggested, it is open to question whether the differences between *Libman* and *Thomson Newspapers* are persuasive. Justice Bastarache was not a member of the court when *Libman* was decided and whether he would have agreed with it is unknown; he was stuck with it in *Thomson Newspapers* just the same.

FORGOTTEN PROMISE

Many years ago, *Irwin Toy* admonished that freedom of expression was guaranteed "to ensure that everyone can manifest their thought, opinions, beliefs, indeed all expressions of the heart and mind, *however unpopular, distasteful or contrary to the mainstream*." In the end *Thomson Newspapers* was an easy case because Parliament's attempt to impose a blackout during an election campaign was offensive. Still, it is not "scientific" information or the "rational" voter that is most in need of s. 2(b)'s protection but instead, the expressive activity that is limited, purely and simply because we dislike and disapprove of it, perhaps even fear it. And, as virtually all the s. 2(b) jurisprudence, including *Thomson Newspapers*, demonstrates, the court has a long way to go to keep that promise once made in *Irwin Toy*.

Freedom of expression in 1998: Adjustments on both sides of the balance

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In 1998, two developments occurred in relation to the s. 2(b) right. These adjustments to the ongoing analysis might be seen as offering (or perhaps removing) something on each side of the balance. First, the concept of content neutrality, embodied in the definition of the right itself, faded further into the horizon of the s. 2(b) landscape. Second, the court increased the difficulty of the legislature's job in representing its constituency and/or the public interest, by adjusting evidentiary requirements in the s. 1 justification process.

Content neutrality was laid as the cornerstone of the s. 2(b) right by the Supreme Court at the outset of construction of the Canadian approach to freedom of expression. To date, the progression of Supreme Court s. 2(b) decisions has resulted in an erosion of this foundational principle. Perhaps this was predictable as a result of the conflict between a broad right and a narrow justification. Arguably, while expanding the justification analysis, in order to produce the necessary balance for some legislation to pass Charter scrutiny, the principle of content neutrality was bound to be sacrificed by the resulting framework.

In the beginning, all expressive activity was held to be protected without regard to content, as long as a meaning was intended to be conveyed.[1] In stating the first exclusion to this principle, the court found that the fundamental freedom would not protect violence or threats of violence. This exclusion was rationalized on the basis that it concerned the "form" of expression and not the "content," as the guarantee was still meant to protect *all* content.[2]

At the same time however, the court designed its s. 1 framework in the manner of a constitutional Swiss army knife—that is, s. 1 was developed as a single tool for all tasks. Although content-restrictive cases engage different issues than cases that restrict access based on time, manner, and place and restrictions on potentially harmful expression, such as hate propaganda, do not share an underlying structure with restrictions on picketing, the s. 1 justification analysis has remained singular.

After the *Edmonton Journal*[3] case, where the court moved to a "contextual approach" to attempt a better balance, the content neutrality principle was weakened further. The inherent "value" of the expression in issue became an important consideration in the court's approach to s. 1. As might have been expected, the determination of the "value" of the protected expression became based on its content. Thus, with application of the contextual approach, the content neutrality principle was depleted further at the level of justification. Previously, the court had been required to conclude that *form* and content "can be inextricably connected."[4] It now appears that *value* and content will also be linked for the time being.

This past year, the court increased its reliance on the restricted expression's "value" in the justification process. The court resolved that the "value" of expression will be determinative of evidentiary issues related to s. 1 justification. *Thomson Newspapers v. Canada (A.G.)*[5] and *R. v. Lucas*[6] provide an excellent contrast of outcomes based on the court's perceived "value" of the restricted expression. In each case the court altered the evidentiary standards relating to the types of proof required to support justification, based on its assessment of the value of the expression in issue. The court continued its earlier claims that such adjustments did not change the *standard* of proof to be met by the state to justify the infringement but dealt only with the type of evidence that could satisfy that standard. The court's theory is that the same standard might be satisfied in different ways depending on the nature of the legislative objective. This may be simply a question of semantics, as the court's measure of the expression's value results in its determination that certain forms of evidence possess the inherent capacity to meet the burden, while others do not and never will.

In *R. v. Lucas*, the constitutionality of the *Criminal Code* offence of defamatory libel was challenged. The court found that, in establishing a rational connection between the legislative objective and the measure adopted by Parliament, the civil burden was satisfied through "common sense." The court also stated that in gauging minimal impairment, it was "particularly important ... to bear in mind the negligible value of defamatory expression." This consideration "significantly reduce[d] the burden on the respondent to demonstrate that the provision is minimally impairing."[7] As a result, low-value expression can be justified with little traditional proof and a dose of evidentiary "common sense."

Similarly, the majority of the court in *Thomson Newspapers* relied on the value of the restricted expression—election poll results in the immediate pre-election period—to ascertain the appropriate type of proof required in the s. 1 process in this case. Based on the high value it attributed to the expression in issue, the court re-

jected any deference to Parliament, which had based the legislation on "a reasonable apprehension of harm" in the face of conflicting social science evidence. In effect, the court required Parliament to have *conclusive* social science evidence to justify its law. In its absence, the court did not accept that the same commonsense presumptions that had served as bases for justification in other cases[8] could satisfy the standard of proof. It is interesting to note, however, that the majority rejected the application of several presumptions that were based on *some* scientific evidence in favour of the court's own unsubstantiated "contrary logical reasoning."[9]

This latest discussion of evidentiary standards and methods of proof may be viewed as part of a natural pendulum phenomenon. The broad s. 2(b) right spawned the requirement for increasingly relaxed standards for s. 1 justification. In *Thomson Newspapers*, sensing the seemingly open-ended nature of this relaxation, the majority of the court appeared to desire some limitation to its application when occasioned by "a reasoned apprehension of harm." The result is that, on one side, the content of the protected expression will be engaged in the analysis and, on the other side, deference to the legislature in areas of inconclusive social science evidence has been limited in justification.

There are problems with this approach. Although the "value" of some expression can be clearly defined with a broad consensus, other expression may not yield an easy determination. Without any certainty as to the level of value the court will ascribe to some kinds of expression, legislators will face a challenge, before they embark on the legislative process, to obtain traditional and conclusive types of evidence in every uncertain s. 2(b) matter. Otherwise, governments will face an increased probability that they will not receive any deference and their legislation will fail Charter scrutiny.

One of the fundamental obstacles that legislators face in meeting their challenge is that social science evidence is, by its very nature, uncertain. Everyone who has ever relied on one hypothesis supported by social science evidence is aware that a contrary hypothesis with an equal amount of supporting studies always exists. Equally, for every expert who lines up on one side of a theory, there is one who is eager to line up on the opposing side. Where the court deems the value of the expression in issue to be high, and social science is the only medium of evidence, can Parliament or the legislatures ever obtain the necessary certainty required by the limitations of the adjusted approach?

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Despite the new limitations, it is clear that the court will still accept "common understandings" to support justification of restrictions in some cases, as it did in *Lucas*. However, reliance on "common sense" as an evidentiary commodity is not a satisfactory universal alternative to legislative paralysis. It is worrisome that the basis upon which the presumptions are accepted or "common understandings" are validated is that they are "widely accepted by Canadians as fact."[10] As appealing as it is to the state to be able to meet its justification through "common sense," its application is a double-edged sword. The courts need to keep in mind that the world was commonly understood to be flat before Magellan circumnavigated the globe. The real danger is that "common understandings" and "widely held beliefs" often embody biases, prejudices, and stereotypes. Potentially they are more unsafe than inconclusive social science, since the latter attempts objectivity.

It is interesting to note the three specific circumstances that the court in *Thomson Newspapers* stated were no longer appropriate for a deferential approach to the existence of harm and the scrutiny of measures chosen to address the harm, based on common sense.[11] These are, first, when contrary logical reasoning exists to refute the presumptions upon which the deference is based; second, when there are no conflicting social interests involving an imbalance of power or a vulnerable group; and, third, when there is no suggestion that the nature of the expression undermines the position of groups or individuals as equal participants in society. These principles might be advantageous in some contexts but might succumb to the frailties of "collective wisdom" in others. Although it is an abhorrent hypothetical thought, legislation that required certain minorities to self-identify might allow "common sense" and legislative deference to operate according to the new rules. This illustration obviously calls this approach into question.

At this time, it is clear the s. 2(b) model is not a finished work. As the court continues to acknowledge, the analysis requires ongoing thought and modelling due to the myriad types of expressive activity it covers, the expansive quality of the right, and the Charter's decree of balance between rights and their just limitations.

1 *Irwin Toy Ltd. v. Quebec*, [1989] 1 S.C.R. 927, at 968-70, *per* Dickson C.J.

2 *Ibid.*

3 [1989] 2 S.C.R. 1326.

4 See note 1, at 968.

5 [1998] 1 S.C.R. 877.

6 [1998] 1 S.C.R. 439.

7 *Ibid.*, at 466.

8 *R. v. Keegstra,* [1990] 3 S.C.R. 697; *R. v. Butler,* [1992] 1 S.C.R. 452; and *RJR-MacDonald Inc. Canada (A.G.)*, [1995] 3 S.C.R. 199.

9 See note 5, at 957.

10 *Ibid.*, at 961.

11 *Ibid.*, at 956-62.

Interrogating continued from page 96

> It is well known that many learned and experienced defence counsel prefer to address a jury first. ... Many defence counsel are of the opinion that there is an advantage in addressing the jury first, shortly after the evidence ... is tendered, when it is fresh in the jury's mind. (Para. 110)

The only support for this "well-known" bit of lore, are three psychological studies from the 1960s and one from 1978 on the issue of which speech is more persuasive—the first or the last. These studies do not, of course, deal with the dilemma experienced in *Rose*. That is, that the prosecution is able to exploit a "late-breaking spin" by speaking last, with no fear of reply.

Justice L'Heureux-Dubé is even more unquestioning. She recognizes that a bias favouring the Crown would be unconstitutional, but baldly asserts that:

> The social science evidence tendered shows that there is no particular advantage to speaking last, and this, combined with the fact that many experienced counsel prefer to speak first, demonstrates that speaking last does not provide the Crown with an inherent advantage. (Para. 60)

This is simply not good enough. Constitutional litigation has compelled counsel and courts alike into somewhat novel territory, as the traditional role of a trial, which is the adjudication of an historical event, has given way to the legislative and predictive decision making that is required to resolve constitutional issues.[3] Presentation and assessment of social science evidence and experts have become common if not routine. This court had its first bad experience with this type of evidence 10 years ago in *R. v. Askov*, [1990] 2 S.C.R. 1199. There is simply no longer any excuse for "cherry picking" bits from the social science literature to bolster an opinion. If one intends to rely upon what counsel do or do not do, find out what it is they do. If one is concerned with questioning the need to reply to an argument—test it. Otherwise, rely on first principles alone.

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1 For example, vulnerable witnesses, particularly children and complainants in sexual assault cases, have received protection and support, and the hearsay rule has been reformed and now permits the use of prior inconsistent statement—such as recanted allegations to police—to be used for the truth of their contents.

2 *Criminal Code*, s. 651.

3 See M. Pilkington, "Equipping Courts To Handle Constitutional Issues: The Adequacy of the Adversary System and Its Techniques of Proof," in Special Lectures of the Law Society of Upper Canada, *Applying the Law of Evidence: Tactics and Techniques for the Nineties* (Toronto: Carswell, 1991), at 51-96.