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SPECIAL ISSUE: SUPREME COURT OF CANADA IN 1997

THE SUPREME COURT AND THE CHARTER: QUANTITATIVE TRENDS— CONTINUITIES AND DISCONTINUITIES

BY PETER H. RUSSELL

Statistics about courts and judges can at best give only an indication of broad trends in the work of the courts and the inclinations of judges. They certainly cannot tell us much about the major developments in the Supreme Court's constitutional jurisprudence or about the impact its decisions are having on the country. Statistics cannot even give us a very useful snapshot of one year's constitution decisions of the Supreme Court.

The statistical data provided by the organizers of this conference on 1997 Supreme Court of Canada cases involving constitutional challenges are a case in point. For my

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FEATURES

THE VAGARIES OF REVIEW AT THE SUPREME COURT OF CANADA

BY JAMIE CAMERON

VAGARIES

It is disheartening to watch the Supreme Court of Canada at work. For some time now, there have been complaints, some muted and some not, that the jurisprudence is confused and unpredictable, that the judges are divided, and that there are gender gaps between its seven male and two female members. Decision-making is often a riddle, because the Court can be fragmented, and can also spring unanimous decisions on unwitting academics when they least expect them.

This year "activism", which gratuitously decides an issue or notably expands judicial power, co-exists alongside "deference", where the judiciary backs away from the enforcement of rights or withdraws from an issue. In discussing that pattern, an initial caveat should be entered: labels that are based on certain assumptions about principles of constitutional interpretation are themselves somewhat unhelpful.

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money, what is really important about the Supreme Court's constitutional work in 1997 is not to be found in any of its quantitative features. The Court's most important acts of constitution-making—for that is, inescapably, what the Court does in adjudicating constitutional disputes—came in just two decisions—one on the judiciary itself, and the other on Aboriginal rights.

The Supreme Court presided over by Chief Justice Lamer appears to be much less restrained than was the Dickson Court in deciding cases that affect the metes and bounds of the judiciary's power and the material interests of its members.

In the four cases included in these statistical tables (see the article by Patrick Monahan at p. 102) as *Charter* challenges based on section 11(d), the Supreme Court imposed on all jurisdictions in Canada the requirement that an independent commission play the key role in deciding on any changes in judicial remuneration. Quite unlike the other *Charter* cases included in these tables, these four were not brought before the Court by ordinary citizens trying to vindicate their rights. In fact, these cases were brought to the Supreme Court by provincial court judges objecting to the treatment of their salaries during a period of fiscal restraint. The Court's decision in these cases should be seen as an assertion of judicial power against the political branches of government. The Supreme Court presided over by Chief Justice Lamer appears to be much less restrained than was the Dickson Court in deciding cases that affect the metes and bounds of the judiciary's power and the material interests of its members.

The relative acquiescence of the media and mainstream opinion with the activism of the judicial salary cases is in marked contrast to the shocked public reaction to the Court's decision in *Delgamuukw*. This is the single most important decision ever rendered by a common law court on the doctrine of aboriginal title. The decision significantly strengthens the legal resources of indigenous peoples—not only in Canada but around the world. While it gives real substance to native title, it also upholds the Crown's sovereign power to infringe that title. But by requiring that such infringements, unless minor, require more than consultation with native title holders, the Supreme Court in effect renews the *Proclamation of 1763* and commits contemporary Canada to following a treaty-like process in making arrangements for sharing land and jurisdiction with Aboriginal peoples whose land rights have not been extinguished.

While judicial statistics cannot tell us very much, they can tell us something—especially about continuities and discontinuities in the work of the courts and alignments among the judges. It is with an eye to long-term patterns and possible breaks in them that I look at the batch of tables presented to us. To do this, it is necessary to relate them to earlier work on quantitative trends, namely work published by Professor Ted Morton and myself assisted by Michael Withey and Troy Riddell, and now updated by James Kelly.

Over the last fourteen years, Charter cases have constituted just under one-quarter of the Court's business. This has meant that, in the Charter era, constitutional law has become the largest legal category on the Supreme Court's docket. The Canadian Supreme Court, however, is still far from being a "constitutional court", because constitutional cases account for less than one-half of its caseload.

Though there are differences

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between the ways these earlier studies counted and classified *Charter* decisions, I do not think these differences are so serious as to undermine the value of comparing the results of these quantifying exercises.

Relying on the judiciary to settle disputes between the branches of government is as bad for the health of the body politic as relying on it to settle disputes between the levels of government.

First, on the quantitative importance of the *Charter of Rights* in the work of the Supreme Court, the story is one of continuity. The conference data show that, in the seven year period from 1992 to 1997 (inclusive), the Court decided 230 *Charter* cases—just over 30 per year. That is pretty close to average: since 1984, when the Court heard its first *Charter* case, it has averaged 25 *Charter* cases per year, and if one omits the first two years when *Charter* cases were just trickling in, the average *Charter* output per year is 27.5 cases. Although 1997 may seem like a lean year with just 20 *Charter* cases, this is only a reflection of a sharp drop in the total number of cases the Court decided last year.

Over the last fourteen years, *Charter* cases have constituted just under one-quarter of the Court's business. This has meant that, in the *Charter* era, constitutional law has become the largest legal category on the Supreme Court's docket. The Canadian Supreme Court, however, is still far from being a "constitutional court", because constitutional cases account for less than one-half of its caseload.

The biggest change indicated by the data for these recent years is the remarkable increase in aboriginal rights cases. Aboriginal peoples are increasingly turning to litigation—not as an alternative to negotiation, but as a means of strengthening their position in political negotiations. The other development in the Court's constitutional docket, not captured by these tables, is the increase in the Court's decision making on the judicial branch of government itself. In 1997, the Court devoted more of its energy to adjudicating disputes between the branches of government than between the levels of government: besides the four cases dealing with judicial salaries, it decided important cases dealing with evidence of judicial bias and judicial-executive branch relations. Relying on the judiciary to settle disputes between the branches of government is as bad for the health of the body politic as relying on it to settle disputes between the levels of government.

Other quantitative dimensions of the Supreme Court's *Charter* work show remarkable continuity. Actions of executive branch officers, mainly the police, rather than legislation continue to be the target of just under one-half of the *Charter* challenges coming before the Court. No doubt, this reflects another enduring continuity—the fact that two-thirds of *Charter* cases involve the legal rights sections of the *Charter*. While the democratic sting in judicial review of executive acts is less pronounced than in judicial review of legislation, it should nonetheless be noted that the frequency of the Supreme Court's review of legislation is considerably higher than in *Charter* cases dealt with in the lower courts. However, it is interesting to observe that, while overall since 1984 the success rate of *Charter* challenges to executive acts has been somewhat higher than in challenges to legislation, in the conference data on the most recent seven years the reverse has been true—a 35 percent success rate in cases challenging legislation versus just 31 percent in cases challenging administrators and the police.

Since 1984, the success rate for legal rights has been 31 percent as compared with only 22 percent in equality rights cases, and 20 percent in fundamental freedoms cases.... Charter claimants continue to have their best chance before the Supreme Court when they are claiming the protection of one of the Charter's specific legal rights.

Federal legislation continues to be challenged a little more frequently than provincial legislation. This is in marked contrast to the situation in the United States, where state legislation is challenged much more often than federal statutes. The reason for this is not just the greater number of states but the fact that criminal law, the main target of constitutional challenges, is essentially under state jurisdiction in the U.S. Not only is federal legislation reviewed more often in Canada, it is overturned proportionately a little more often than provincial legislation.

Aggregate success rates in *Charter* cases coming before the Supreme Court really cannot tell us very much. The conference data show that, over the last seven years, 31 percent of the Supreme Court's *Charter* cases have resulted in wins for the *Charter* claimant. This, despite the very high rate of success reported for 1997, is very close to the overall success rate of 33 percent recorded for all *Charter* cases since 1984. But significant trends emerge only when we look at variations in success rates across the three categories of *Charter* cases that account for nine out of every ten *Charter* cases the Court hears—legal rights (sections 7 to 14), fundamental freedoms (section 2), and equality rights (section 15).

When we do this, we find in the data for recent years as in the data for all of the Court's *Charter* decisions since 1984, that success rates are significantly higher in cases involving legal rights than in the other two categories. Since 1984, the success rate for legal rights has been 31 percent as compared with only 22 percent in equality rights cases, and 20 percent in fundamental freedoms cases. The differences are narrower in the conference data for 1992-97—29 percent for legal rights versus 27 percent and 24 percent for fundamental freedoms and equality rights. But if we remove cases involving the amorphous section 7 (where many claimants try but few succeed), and section 12 (cruel and unusual punishment), the success rate in legal rights rises to over 30 percent. *Charter* claimants continue to have their best chance before the Supreme Court when they are claiming the protection of one of the *Charter*'s specific legal rights.

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Since the Court's "honeymoon" period with the Charter *came to an end in 1985, the* Charter *has tended to divide it much more than any other part of its docket. Our study of its first decade of* Charter *decisions showed that, while the Court was unanimous in 82 percent of its non-*Charter *decisions, in* Charter *cases its unanimity rate fell to 59 percent. The conference data show an even lower unanimity rate, just 39 percent, for the last four years of* Charter *decisions.*

The relative continuity in the Supreme Court's *Charter* statistics is interesting to observe in light of the fact that it has changed from being a Court largely made up of Trudeau Government appointees to one composed almost entirely of Mulroney Government appointees. Indeed, since Justice Wilson's retirement in 1991, right up to Justice La Forest's retirement and Justice Sopinka's death in 1997, all of the Court's ordinary members have been Mulroney appointees. Only Chief Justice Lamer, whom Mulroney elevated to that position in 1990, was originally a Trudeau appointment. At least quantitatively, in terms of overall bottom-line results, the shift from a Mulroney Court to a Trudeau Court does not indicate that the Supreme Court has become significantly more conservative or less activist. The overall success rate of *Charter* claimants in Chief Justice Lamer's court has been just 1 percent, lower than in the pre-1990 Dickson Court.

But what about divisions within the Court? Since the Court's "honeymoon" period with the *Charter* came to an end in 1985, the *Charter* has tended to divide it much more than any other part of its docket. Our study of its first decade of *Charter* decisions showed that, while the Court was unanimous in 82 percent of its non-*Charter* decisions, in *Charter* cases its unanimity rate fell to 59 percent. The conference data show an even lower unanimity rate, just 45 percent, for the last seven years of *Charter* decisions.

Though there are no doubt shifting coalitions on different issues, there is evidence of a dominant core group of five justices on the Lamer Court—the Chief Justice himself plus Justices Cory, Iacobucci, Sopinka, and Major. More often than not, these five have been on the majority side when the Court has split in *Charter* cases and they have been relatively pro-*Charter*, compared with the other four members of the Lamer Court, Justices Gonthier, La Forest, L'Heureux-Dubé, and McLachlin.

But it would be misleading to view these two groupings as ideological blocks. In earlier analyses of voting trends, we looked separately at criminal justice cases and equality cases involving the rights of women and vulnerable minorities (including cases involving language and aboriginal rights, and religious freedom claims). This analysis showed

[I]t is evident that the two newest members of the Court, Justices Bastarache and Binnie—Prime Minister Chrétien's first Supreme Court appointments—could tip the balance of power in the Court. If one or both of them took an approach to the Charter *that is significantly closer to L'Heureux-Dubé and McLachlin than to the judges they replaced, the Court could shift to the left and become more supportive of equality claims.*

that the two women justices, L'Heureux-Dubé and McLachlin, while relatively non-activist in criminal justice cases, especially L'Heureux-Dubé, were by a considerable measure the most likely of all the justices on the Lamer Court to support *Charter* claimants in cases raising issues of social and cultural equality. The two judges most likely to align with them in these cases were Chief Justice Lamer and Justice Cory. On the other hand, the two Justices who left the Court in 1997, Justices La Forest and Sopinka, though relatively pro-claimant in criminal justice cases, especially Sopinka, were at the opposite ends of the Court in equality cases.

Bearing these trends in mind, it is evident that the two newest members of the Court, Justices Bastarache and Binnie—Prime Minister Chrétien's first Supreme Court appointments—could tip the balance of power in the Court. If one or both of them took an approach to the *Charter* that is significantly closer to L'Heureux-Dubé and McLachlin than to the judges they replaced, the Court could shift to the left and become more supportive of equality claims. So, ultimately, we do have something interesting to look for in the Supreme Court's 1998 *Charter* statistics.

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The papers in this special issue of *Canada Watch* were originally presented at a *Canada Watch* Conference held in Toronto on April 17, 1998. Following the Conference, the authors revised their papers for publication. Plans are now underway for next year's Conference, which will examine the Supreme Court of Canada's 1998 constitutional cases, and will be held in Toronto on April 16, 1999. A highlight of the 1999 Conference will be an analysis of the Supreme Court of Canada's August 20th decision in the *Quebec Secession Reference*.

TO OBTAIN FURTHER INFORMATION ABOUT NEXT YEAR'S CONFERENCE, PLEASE CONTACT MICHELLE MARTIN AT MMARTIN@YORKU.CA, OR BY TELEPHONE AT **416-736-2100, EXT. 5816**.

"PRINCIPLES"

The criminal justice jurisprudence might be considered a case in point. There the Court appears activist, and its decisions in *R.* v. *Feeney*, *R.* v. *Carosella*, and *R.* v. *Stillman* reinforce a pattern of favouring the rights of the accused over the social interest in law enforcement. Whether such "activism" is principled or not, however, is a question of perception. Cases that ask whether the authorities acted reasonably or unreasonably are highly fact-sensitive, and it is not surprising in those circumstances that the answers given by members of the Court have differed.

[T]he wisdom of expanding section 7's indeterminate concept of "fundamental justice", when section 8 explicitly protects individuals from unreasonable search and seizure, is surely open to question.

Beyond difficult facts, the criminal justice decisions raise issues of interpretation. There, *Carosella* and *Stillman* should both be noted. Although prior to *Carosella* it was accepted that the *Charter* only binds the government, a majority in that case held that a third-party custodian's failure to produce clinical and counselling records could violate an accused's section 7 right of full answer and defence.

In *Stillman*, the majority decision read a privilege against self-incrimination into section 7 to protect an accused whose bodily samples had been taken for DNA testing without his consent. As McLachlin J. pointed out in dissent, however, self-incrimination is a testimonial privilege which has never applied to real evidence. As well, the wisdom of expanding section 7's indeterminate concept of "fundamental justice", when section 8 explicitly protects individuals from unreasonable search and seizure, is surely open to question. Finally, not only was the majority's hard line on the exclusion of evidence absolutist, but the discussion in *Stillman* compounded the confusion surrounding section 24(2) and the *Collins* test.

The criminal justice jurisprudence lends itself to an argument, as dissenting voices claim in these cases, that the Court's activism is unprincipled. Yet any conclusion will depend on the relative merits of due process and crime control values. Leaving aside the relative merits of those two models, "principled decision-making" also raises questions about how cases are adjudicated, and whether the Court applies its canons of constitutional interpretation consistently from case to case.

JUDGES AND THE HOW AND WHY OF DECISIONS

In that regard, the Court's decisions on judicial independence and impartiality are telling. Such delicate issues demand careful responses from a Court that is unavoidably placed in a position of some conflict of interest.

The *Judges' Remuneration Case* consolidated a team of cases from provinces which, stripped down, posed the question of whether provincial court judicial salaries could be altered without violating section 11(d) of the *Charter*. As Justice La Forest noted in his dissent, section 11(d)'s promise of an independent and impartial tribunal applies only to proceedings in which individuals are charged with offences. The difficulty in articulating a principle of independence for provincial courts generally was that sections 96-100 of the *Constitution Act, 1867* deal only with the status of superior courts and judges, and that section 92(14) assigns jurisdiction over provincial courts and judges to the provinces.

[In the Judges' Remuneration Case*], Chief Justice Lamer discounted what sections 96-100 of the* Constitution Act, 1867 *"actually say", and read section 11(d) "up" to constitutionalize a principle of independence for all courts, "no matter what kind of cases they hear". Not only did he incorporate that principle into the Constitution from outside its text, he held that to comply, the provinces must establish independent, effective, and objective commissions to regulate remuneration.*

Undeterred by those obstacles, Chief Justice Lamer discounted what sections 96-100 of the *Constitution Act, 1867* "actually say", and read section 11(d) "up" to constitutionalize a principle of independence for all courts, "no matter what kind of cases they hear". Not only did he incorporate that principle into the Constitution from outside its text, he held that to comply, the provinces must establish independent, effective, and objective commissions to regulate remuneration. Any changes or freezes to their salaries that are made without prior recourse to such bodies would, in his view, be unconstitutional.

Justice La Forest wrote separately and found fault with the Chief Justice's opinion, in the first instance because the case on appeal had been limited to section 11(d) and proceedings in which individuals are charged with an offence. In his view, it was inappropriate for the Court to ignore that constraint and create a general principle of independence. La Forest J. was rightly alarmed that the Court had decided a question which had not been fully argued and, in doing so, had imposed substantial obligations on the provinces, without canvassing section 92(14) and other aspects of the issue.

He also questioned the Chief Justice's creative use of the 1867 preamble to divine a principle of independence for provincial court judges. To do so against the text and the historical record, to support a requirement of independent commissions, was in La Forest J.'s view "tantamount to enacting a new constitutional provision to extend the protection provided by s. 11(d)." La Forest J. was all the more troubled by the Court's activism because the judges "can hardly

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seem to be indifferent" in a case that "concerns their own remuneration."

Prior to Eldridge, *it had been accepted that hospitals were not bound by the* Charter. *In concluding that decisions about the provision of health care services are subject to section 15,* Eldridge, *like* Carosella, *greatly expanded the* Charter's *reach. In doing so, the decision created the anomaly that some parts of a hospital's operations, such as the delivery of services, are now bound by the* Charter, *while others, including employment policies on mandatory retirement, are not.*

As he observed, there is "virtually no possibility" that the independence of individual judges would be compromised by negotiations on remuneration for the institution as a whole. To elevate independence to a dogma, however, the Chief Justice raised the spectre of "political interference". Yet the spectre of interference there was far more abstract than in *Tobiass* v. *Minister of Citizenship and Immigration*, where a lawyer from the Department of Justice held a meeting with the Chief Justice of the Federal Court of Canada, specifically to discuss the course of proceedings in a sensitive war crimes case. The meeting was held in the absence of defence counsel. Despite having found that judicial independence could be undercut by salary negotiations, the Court held in *Tobiass* that the meeting was improper, but that the Federal Court's impartiality to continue the case was not compromised. In a second case, *R.D.S.* v. *The Queen*, the Court divided, but a majority held that a judge's comments about the biases of white police officers did not compromise her impartiality to decide a charge against a black defendant.

The point is not to argue against judicial independence or to take sides on the facts in the cases on bias and impartiality; it is, instead, to raise questions about the way decisions are made and the consistency of the Court's jurisprudence from one case to another.

CHARTER HIERARCHIES

The themes above can be tracked in two key cases on sections 15 and 2(b), which both appear "*Charter*-activist". In *Eldridge* v. *British Columbia*, the Court unanimously held that section 15's guarantee of equality was violated by the hospitals' and health care service's failure to provide sign language interpretation for deaf patients. Meanwhile, *Libman* v. *A.-G. Quebec* unanimously invalidated Quebec's referendum legislation because it placed unjustifiable constraints on expressive freedom.

There the comparison ends. Though *Eldridge* is unquestionably activist, *Libman* is an example of deference posing as activism. Once again, it bears mentioning that whether either or both results are "principled" on their merits depends on one's point of view. Rather than engage that question, the analysis here focuses on the way issues are raised and decided, as well as on the Court's differential treatment of equality and expressive freedom.

[A]s the process for leave to appeal does not include reasons, Court watchers are left guessing what preferences might explain why the Court hears some section 15 claims and not others.

Prior to *Eldridge*, it had been accepted that hospitals were not bound by the *Charter*. In concluding that decisions about the provision of health care services are subject to section 15, *Eldridge*, like *Carosella*, greatly expanded the *Charter*'s reach. In doing so, the decision created the anomaly that some parts of a hospital's operations, such as the delivery of services, are now bound by the *Charter*, while others, including employment policies on mandatory retirement, are not.

In addition, the Court's unanimous conclusion that it is unconstitutional for hospitals not to provide sign language interpretation generated further confusion about the applicable principles of review under section 1. Previously, the Court had maintained, albeit inconsistently, that decisions about the allocation of scarce resources ought to reside with the legislators and their delegates. Against that orthodoxy, the Court in *Eldridge* discounted the government's pleas that these are policy choices, and that it would be highly problematic to constitutionalize a claim for sign language services, and not others. Whether the judiciary should be setting constitutional standards for the provision of services in circumstances of fiscal stress in the health care system is, of course, a question of competing values.

Thus the result in *Eldridge* is important in its own right, but also as compared to others. Why the Court valued that claim and then denied leave to appeal in *Schaefer* v. *A.-G. Canada* is at least curious. There the issue was whether the unequal allocation of maternity benefits under federal employment insurance legislation violates section 15. Following *Schacter*, which created equality in employment benefits for biological fathers, Parliament altered the scheme, which had entitled adoptive mothers to the same benefits as biological mothers. Its new, *Charter*-adjusted legislation granted biological mothers up to 25 weeks of benefits, and dropped adoptive mothers to 10 weeks. One might have thought that a case involving equality rights under federal legislation applicable across the country would warrant the Court's attention, especially given the discrepancy, and the fact that the inequality between statutory degrees of motherhood arose from a *Charter* challenge brought by biological fathers. However, as the process for leave to appeal does not include reasons, Court watchers are left guessing what preferences might explain why the Court hears

some section 15 claims and not others.

[T]hough none of the parties had been heard on the issue [in Libman*], the Supreme Court of Canada stated, unequivocally, that the Alberta Court of Appeal was wrong and that the federal legislation was constitutional. It is difficult to imagine a more flagrant breach of "due process" than the Court's unqualified statement, in such circumstances, that "we cannot accept the Alberta Court of Appeal's point of view because we disagree with its conclusion."*

Further puzzles arise when *Eldridge* is considered alongside *Libman*. On its face, *Libman* also appears activist, because the decision there unanimously and anonymously invalidated Quebec's mandatory scheme for referendum campaigning. In fact, though, *Libman* is more like an ode to deference.

It is peculiar, initially, that invalidating provincial referendum legislation became a pretext in *Libman* for the validation of a federal election law which was not even before the Court. By the time of *Libman*, La Forest J.'s quibble about the way the issue was framed and decided in the *Salaries Case* had been published in his dissenting opinion. Shortly thereafter, however, the Court treated the *Referendum Case* as an opportunity, effectively, to reverse the Alberta Court of Appeal in *Somerville* v. *A.-G. Canada*.

There, the provincial appellate court struck down third-party spending limits in the *Canada Elections Act*. The decision was not appealed, and neither the record nor the evidence was therefore before the Supreme Court in *Libman*. Moreover, though none of the parties had been heard on the issue, the Supreme Court of Canada stated, unequivocally, that the Alberta Court of Appeal was wrong and that the federal legislation was constitutional. It is difficult to imagine a more flagrant breach of "due process" than the Court's unqualified statement, in such circumstances, that "we cannot accept the Alberta Court of Appeal's point of view because we disagree with its conclusion."

A second point concerns the hierarchy among *Charter* rights that has become increasingly entrenched in the jurisprudence. Section 2(b) cases have consistently drawn a distinction between low- and high-value expression, to justify an attenuated standard of review under section 1 for low-value expression. The logic of that approach suggests that expressive activity at the core of section 2(b), like participation in democratic elections, would to the contrary receive strong protection under section 1.

Libman regrettably demonstrates that no expression is valuable enough to warrant a stringent standard of justification. There the Court said that "while the impugned provisions in a way restrict one of the most basic forms of expression . . . the legislature must be accorded a certain deference" [my emphasis]. In the result, *Libman* invalidated limits on political expression but signalled quite clearly that fresh legislation ameliorating the minimal impairment problem, perhaps by following the federal example, would be sufficient to pass *Charter* muster.

Giving full faith and credit for the problematics of Charter *adjudication and interpretation, the Court must nonetheless be encouraged to develop a code of principles to explain its decisions and improve confidence in its mandate of review.*

It is significant that the Court explicitly endorsed deference to the legislature in a case implicating political expression. Significant, not only because that says something about section 2(b) and how it is regarded, but also because of what it says about the relative value of *Charter* rights, which are equal as a matter of constitutional text. Thus *Libman*'s deference should be measured against the Court's willingness to compel the provinces to establish commissions to review judges' salaries, and to direct choices between competing health care services. The problem is not necessarily that *Eldridge* is "wrong"; the true difficulty is that the cases do not stand together for any visible set of standards for judicial review. Without any foundation in principle, decisions look like little more than bald preferences.

A PLEA

The Supreme Court of Canada's task is not easy, and this comment certainly does not claim the magic of elixir of principle for itself. Giving full faith and credit for the problematics of *Charter* adjudication and interpretation, the Court must nonetheless be encouraged to develop a code of principles to explain its decisions and improve confidence in its mandate of review. One of the current romanticisms is that the *Charter* engages a process of dialogue between institutions. It is unfortunate that some academics feel compelled to browbeat the Court to catch its attention, because dialogue is unquestionably more pleasant, and probably more fruitful, than confrontation. So by all means reject the critique, but please listen to it first.

Jamie Cameron is a Professor of Law at Osgoode Hall Law School, York University.

LITIGATION TRENDS IN 1997 SUPREME COURT JURISPRUDENCE

BY DEBRA M. MCALLISTER

INTRODUCTION

There are two significant litigation trends in the Supreme Court's 1997 constitutional jurisprudence. First, the Court has made a serious effort to move beyond and resolve the confusion left by the 1995 equality rights trilogy of *Miron* v. *Trudel*, *Egan* v. *Canada*, and *Thibaudeau* v. *Canada*. In *Eaton* v. *Brant County Board of Education*, *Benner* v. *Canada (Secretary of State)*, and *Eldridge* v. *British Columbia (Attorney General)*, the Court delivered unanimous decisions that leave open questions, but that also make a genuine contribution to the development of equality rights.

The second significant litigation issue is the further expansion of evidence that the Court will accept in constitutional cases. While this trend has been developing for some time, the decision in *Delgamuukw* v. *British Columbia* takes an important step forward. Indeed, this case should prompt a re-examination of procedural rules to clarify the process for presenting non-traditional forms of evidence in constitutional cases.

EQUALITY RIGHTS DECISIONS

In March of 1996, Professor Hogg spoke at the Toronto Department of Justice Charter Conference on the volume and complexity of the Supreme Court's *Charter* decisions, referring in particular to the 1995 equality rights trilogy and the *RJR-MacDonald* case. He noted the daunting length of the decisions, and the problems that arise from having many sets of reasons. Not only does this make it difficult to determine who stands where on a specific issue, it can even be unclear whether the legislation withstood the constitutional challenge.

[W]e still have different approaches on fundamental section 15 issues, although the Court has not engaged in the debate as it did in 1995. Instead it has built consensus and has given guidance where it can.

Concise summaries of the positions which emerged from the 1995 trilogy are now available, but it is worth recalling the initial decisions themselves. First, the cases are quite lengthy, taking up 300 pages in the Supreme Court Reports. Second, there is extensive cross-referencing between sets of reasons and between cases, so all three decisions must be read together. Third, there is no clear majority position in these cases: four judges led by Gonthier J. took one approach; another four judges advanced a second approach as stated by Cory J. and McLachlin J.; and L'Heureux-Dubé J. took yet another path. These were not simply differences in form, but they also illustrated a divergence in the judges' understanding of the essence of discrimination.

We no doubt want the judges of our highest court to analyze and reflect upon the law; if their conclusion is that the law must be interpreted in a particular direction, they should say so. Giving content to *Charter* rights is not easy; it is a complex, value-laden, and subtle process. Finally, debate drives the law forward, and we need dissents to foster that debate.

However, we also need clear majorities on significant issues, or the law will founder. The 1995 trilogy may have been an unavoidable step in the development of section 15, but it was not particularly helpful and did leave considerable uncertainty in its wake.

The 1997 equality rights cases are a welcome change, first because all three are unanimous decisions. They acknowledge that there has not been unanimity among members of the Court, but at least there is an attempt to establish agreement on general principles. *Eaton* and *Benner* hold that the reasons of McLachlin J. in *Miron* and Cory J. in *Egan* set out essentially the same test and methodology. Both *Benner* and *Eldridge* hold that the same result as was reached would have been reached, regardless of which approach of the 1995 trilogy was applied. The result is that we still have different approaches on fundamental section 15 issues, although the Court has not engaged in the debate as it did in 1995. Instead it has built consensus and has given guidance where it can.

Second, there is a real sense of purpose in these judgments, particularly in *Eaton* and *Eldridge*, which deal with difficult issues of recognizing differences in order to achieve equality. These decisions may not tell us the precise shape or contours of section 15, but they do tell us the texture of the right, and that the Court is committed to breathing life into the promise of equality.

EVIDENCE IN CONSTITUTIONAL CASES

The second significant litigation trend is the expansion of evidence in constitutional cases. In a March 1997 address to the Toronto Department of Justice Charter Conference, Dean Pilkington advocated changing procedural rules to better accommodate non-traditional forms of evidence in constitutional litigation. Her suggestions should be revisited in light of the decision in *Delgamuukw*.

The Supreme Court stated in one of its earliest *Charter* decisions, *Hunter* v. *Southam Inc.*, that the purpose of a constitutional *Charter of Rights* is "the unremitting protection of individual rights and liberties . . . It must, therefore, be capable of growth and development over time to meet new social, political and historical realities". This kind of protection and growth simply cannot be achieved by relying on the traditional rules of procedure and evidence.

There is an impressive body of literature on evidentiary requirements in constitutional cases. Much of it is premised on the statement in *R.* v. *Danson* that "[a]djudicative facts are those that concern the immediate parties . . .who did what, where, when, how and with what motive or intent . . . Such facts are specific, and must be proved by admissible evidence."

However, "[l]egislative facts are those that establish the purpose and background of legislation, including its social, economic and cultural context. Such facts are of a more general nature, and are subject to less stringent admissibility requirements . . ." They do not fit neatly into rules developed in non-constitutional litigation, and they raise

unique issues of admissibility, weight, and form of presentation.

The Supreme Court has taken a broad approach to admissibility of extrinsic evidence since *Re B.C. Motor Vehicle Act*, where the Minutes of a Parliamentary Committee were admitted as an aid to the interpretation of section 7 of the *Charter*, but were not given much weight. The presentation of extrinsic evidence is a more controversial issue that has generated considerable debate among practitioners.

The controversy flows from the use of "Brandeis briefs" in the United States, which consist of social-scientific material submitted without formal proof. The theory is that formal methods of proof that ensure that evidence is reliable are not necessarily helpful for material such as historical documents. The problem is that courts may need the assistance of experts, presented and tested through formal means, to interpret social scientific materials.

The practice of briefing extrinsic evidence has been used repeatedly in *Charter* cases, although with very little comment by the Supreme Court. For example, in *R.* v. *Hufsky* and *R.* v. *Thomsen*, seven volumes of material on impaired driving established justification under section 1, but the Court did not comment on the form of presentation. Similarly, in *Ford* v. *Quebec (Attorney General)*, material on language policy had been appended to a factum, but did not take the opposing parties by surprise. The Court stated that the material was similar to that considered in other section 1 cases without the evidentiary testing of the adversary process.

Essentially, the Supreme Court has accepted Brandeis briefs of legislative facts, so long as the parties have adequate notice. However, this has not always been the approach of lower courts. For example, in *Canada (Canadian Human Rights Commission)* v. *Taylor*, the Federal Court of Appeal refused to consider briefed extrinsic material, because "[t]he Rules provide means for this Court to receive evidence. The means do not include bootlegging evidence in the guise of authorities." Although this material was important in the Supreme Court's section 1 analysis, this passage continues to resurface in arguments on admissibility of extrinsic evidence.

[E]quating oral histories which establish adjudicative facts with legislative facts, which establish context, blurs the distinction between these categories and indicates that they are not as helpful as we originally thought.

Delgamuukw adds a new dimension to the debate. The plaintiffs tendered oral histories, personal recollections, and affidavits of territorial holdings to establish occupation and use of land to which they claimed aboriginal title. Despite 374 days of trial and many years in litigation, Lamer C.J.C. ordered a new trial because the trial judge improperly rejected, or did not give sufficient weight to, the plaintiffs' evidence.

He reiterated that "first . . . trial courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating Aboriginal claims, and second . . . trial courts must interpret that evidence in the same spirit." The second principle "requires the courts to come to terms with the oral histories of Aboriginal societies, which, for many Aboriginal nations, are the only record of their past."

Lamer C.J.C. concluded that "the laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents . . . This process must be undertaken on a case-by-case basis."

Aboriginal rights cases raise unique evidentiary issues, since oral histories may be the primary evidence of the claim. *Delgamuukw* is also significant for non-aboriginal litigation: first, it points out the weakness in the distinction between adjudicative facts and legislative facts. Lamer C.J.C. treated oral histories as equivalent to historical documents. However, they were not just legislative facts of a general nature which established a social, economic, and cultural context. They also established the adjudicative facts concerning the immediate parties, or the "who did what, where, when, how and with what motive or intent" facts. As well, these oral histories were placed on the same footing as legislative records with less stringent admissibility standards. This is a sensible approach where oral histories are the primary evidence of aboriginal claims, and an important step in giving real substance to aboriginal rights. However, equating oral histories which establish adjudicative facts with legislative facts, which establish context, blurs the distinction between these categories and indicates that they are not as helpful as we originally thought.

Second, Lamer C.J.C. held that the adaptation of the laws of evidence to accommodate oral histories must be undertaken on a case-by-case basis. That is what we are currently doing with legislative facts, dealing with evidentiary and procedural issues on a case-by-case basis because the ground rules are not firmly established. This is not the most effective method of litigating constitutional rights, since a considerable amount of time and expense is often consumed in these disputes before the merits of the claim themselves are considered.

No doubt, fine-tuning of specific principles must be accomplished through the jurisprudence. However, the rules of practice are in need of revision to establish the foundation for dealing with the legislative facts of constitutional cases. To achieve the unremitting protection of individual rights and liberties, we must have better mechanisms for putting this kind of evidence before the courts.

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RECOGNITION OF ABORIGINAL TITLE

BY PETER W. HOGG

Before the decision of the Supreme Court of Canada in *Delgamuukw* v. *British Columbia* (1997), we knew that aboriginal title existed, but we did not know what it looked like. The *Calder* case (1973) and the *Guerin* case (1984) had recognized that aboriginal title survived European settlement and the assumption of sovereignty by the British Crown. The theory of the common law was that the Crown mysteriously acquired the underlying title to all land in Canada, including land that was occupied by Aboriginal people. But the common law recognized that aboriginal title, if not surrendered or lawfully extinguished, survived as a burden on the Crown's title.

Aboriginal title was recognized by the *Royal Proclamation of 1763*, which governed British imperial policy for the settlement of British North America. As settlement advanced across the country, in most of the settled areas treaties were entered into with the Aboriginal people, who surrendered portions of their land to the Crown, thereby freeing up the surrendered land for settlement and development by non-Aboriginal people. British Columbia, where most of the land was occupied by Indians when the Europeans arrived, was a notable exception to the practice of treaty-making. In that province, European settlement took place without treaties with the Aboriginal people and, while a treaty process has now been established, at the time of writing (1998) no treaties have actually been concluded. This has led to litigation, as Aboriginal people have turned to the courts to define their rights.

The admission of oral histories to prove occupation would violate the hearsay rule, but the rules of evidence have to be adapted to the realities of pre-sovereignty aboriginal societies. Otherwise, proof of occupation would become impossible and theoretical entitlements to aboriginal title would be rendered nugatory.

The leading case on aboriginal title is now *Delgamuukw* v. *British Columbia* (1997), which was an action by Aboriginal people for a declaration that they had aboriginal title to a tract of land in the northern part of British Columbia. After a prolonged trial, followed by appeals, the result of the case was inconclusive. The Supreme Court of Canada found that the trial judge had wrongly rejected (or given insufficient weight to) much of the aboriginal evidence that was proffered in support of the claim, and the Court ordered a new trial to make new factual findings. However, the Court did lay down the rules of evidence and substance that were to govern the new trial, and the majority opinion of Lamer C.J.C. is the most complete account of the law that has ever been attempted by the courts.

Aboriginal title has its source in the occupation of land by Aboriginal people before the Crown assumed sovereignty over the land. It does not derive from a Crown grant, something that could only take place after the assumption of sovereignty by the Crown. Aboriginal title is proved, not by showing a chain of title originating in a Crown grant, but by showing that an Aboriginal people occupied the land prior to sovereignty.

Proof of pre-sovereignty occupation does not involve adherence to strict rules of evidence. Because aboriginal societies did not keep written records at the time of sovereignty, their account of the past would typically be contained in "oral histories"—stories that had been handed down from generation to generation in oral form. The admission of oral histories to prove occupation would violate the hearsay rule, but the rules of evidence have to be adapted to the realities of pre-sovereignty aboriginal societies. Otherwise, proof of occupation would become impossible and theoretical entitlements to aboriginal title would be rendered nugatory. This danger was illustrated by the trial of this case, in which the judge had found that the claimants had not established their title to the claimed lands, but he had reached this finding after rejecting (or giving little weight to) much of the oral-history evidence that had been proffered to him. This caused the Supreme Court to hold that the factual findings at trial could not stand, and that a new trial was required in which oral histories would be admitted and given appropriate weight.

In *Delgamuukw*, Lamer C.J.C. frequently repeated the proposition, which is found in all the earlier cases, that aboriginal title is *sui generis* (one of a kind). By this he meant that there are five important differences between aboriginal title and non-aboriginal title. The first is the point that I have just made, which relates to the source of aboriginal title. Aboriginal title derives from pre-sovereignty occupation rather than a post-sovereignty grant from the Crown.

The second difference relates to the range of uses to which aboriginal-title land may be put. Aboriginal title confers the right to exclusive use and occupation of the land, which includes the right to engage in a variety of activities on the land, and those activities are not limited to those that have been traditionally carried on. For example, the exploitation of oil or gas existing in aboriginal lands would be a possible use. However, the range of uses to which the land could be put is subject to the limitation that the uses "must not be irreconcilable with the nature of the attachment to the land which forms the basis of the particular group's aboriginal title". This means that land occupied for hunting purposes could not be converted to strip mining, for example. This inherent limit on the uses to which the land could be put may be contrasted with the lack of any comparable restriction on a fee simple title (although there will usually be statutory restrictions on a fee simple title, such as zoning by-laws).

The third difference between aboriginal title and non-aboriginal title is that aboriginal title is inalienable, except

to the Crown. This was well-established in the prior case law. The doctrine of inalienability means that the Crown has to act as an intermediary between the Aboriginal owners and third parties. In order to pass title to a third party, the Aboriginal owners must first surrender the land to the Crown, which then comes under a fiduciary duty to deal with the land in accordance with the best interests of the surrendering Aboriginal people, for example, by ensuring that adequate compensation is received by the Aboriginal owners.

During the period of European settlement, the doctrine of inalienability was a safeguard against unfair dealings by settlers trying to acquire aboriginal land, and an encouragement to the process of treaty-making. The doctrine also supplied certainty to land titles in Canada, because it made clear that a Crown grant was the only valid root of title for non-Aboriginal people and for non-aboriginal land.

The fourth difference between aboriginal title and non-aboriginal title is that aboriginal title can only be held communally. Lamer C.J.C. said: "Aboriginal title cannot be held by individual aboriginal persons; it is a collective right to land held by all members of an aboriginal nation."

The fifth (and last) difference between aboriginal title and non-aboriginal title is that aboriginal title is constitutionally protected. Even before 1982, aboriginal title could not be extinguished by provincial legislation, by virtue of the exclusive federal power over "Indians, and lands reserved for the Indians" in section 91(24) of the *Constitution Act, 1867*. Before 1982, aboriginal title could be extinguished by federal legislation, but the legislation would have that effect only if it showed a "clear and plain" intention to extinguish aboriginal title. In 1982, section 35 of the *Constitution Act, 1982* was adopted. The effect of section 35 is to confer constitutional protection on any aboriginal title that was "existing" (unextinguished) in 1982. The constitutional protection accorded by section 35 is not absolute, but it does require that any infringement of aboriginal title must not only be enacted by the competent legislative body (which is the federal Parliament), but also that the infringement must satisfy the *Sparrow* test of justification. At a minimum, the test of justification would normally require prior consultation with the Aboriginal owners before any of the incidents of their title was impaired, and fair compensation for any impairment.

The result of *Delgamuukw* is that we now know a good deal about what aboriginal title looks like. The case is the latest (and most important) of a long series of aboriginal-rights cases out of British Columbia, nearly all of which have been won by the Aboriginal people. It is now necessary for governments to stop fighting the Aboriginal people of British Columbia in the courts, and get on with making treaties with them.

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VARIETIES OF ABORIGINAL RIGHTS

BY BRIAN SLATTERY

What sorts of rights are covered by the words "aboriginal rights" in section 35(1) of the *Constitution Act, 1982*? The decision of the Supreme Court in *Delgamuukw* represents an important elaboration of the views presented earlier in *Van der Peet* and its companion cases. Considered as a whole, these cases suggest that aboriginal rights fall into two broad categories, which for convenience we may call generic rights and specific rights.

A generic aboriginal right is a right of a standardized character that attaches to all Aboriginal groups that meet certain criteria. The basic contours of a generic right are determined by general principles of Canadian common and constitutional law rather than historical aboriginal practices, customs, and traditions. So the governing principles of a generic right are the same in all groups where the right arises, even if the precise application of these principles may vary somewhat in light of factors specific to the group.

By contrast, a specific aboriginal right is a right distinctive to a particular Aboriginal group. The basic contours of the right are determined by the historical practices, customs, and traditions integral to the culture of the group in question. As such, specific rights differ substantially in form and content from group to group.

Aboriginal title, as defined in *Delgamuukw*, provides a clear example of a generic right. Chief Justice Lamer laid down two governing principles. First, aboriginal title gives a right to the exclusive use and occupation of the land for a broad variety of purposes. These purposes do not need to be grounded in the practices, customs, and traditions of the land-holding group, whether at the time of contact or at any other historical period. In other words, an Aboriginal group is free to use its lands in ways that differ from the ways in which the land was traditionally used. A group that lived mainly by hunting, fishing, and gathering at the time of contact is free to farm the land, to ranch on it, to use it for eco-tourism or to exploit its natural resources (para. 117). Second, lands held under aboriginal title cannot be used in a manner that is irreconcilable with the fundamental nature of the group's attachment to the land, so that the land may be preserved for use by future generations. In other words, the group may not ruin the land or render it unusable for its original purposes.

These two basic principles govern all Aboriginal groups that hold aboriginal title. Nevertheless, it can be seen that the precise application of the second principle will be governed by factors particular to the group, depending on the nature of the group's original attachment to the land. Aboriginal title is thus a prime example of generic rights. However, it is not the only one. The aboriginal right to speak a mother tongue is probably also a generic right. The basic structure of the right would be the same in all groups where it arises, even if its precise con-

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tent varies from linguistic group to group. The aboriginal right of self-government arguably fall into this category as well, as we will see later.

Although the distinction between generic and specific rights is clear in principle, it is less sharp in practice. What the courts initially regard as a specific right distinctive to a particular group might over time prove to be a generic right, if experience shows that rights of a similar legal structure are found in a substantial number of Aboriginal societies.

Turning now to specific aboriginal rights, we can see that they fall into three groups, depending on their degree of connection with the land. The first group comprises specific aboriginal rights that relate to a definite tract of land but fall short of aboriginal title. The Court describes these as site-specific rights. For example, if an Aboriginal people proves that hunting on a certain tract of land was an integral part of their distinctive culture then, assuming that the right exists apart from aboriginal title to that tract of land, the aboriginal hunting right will constitute a site-specific right tied to that particular tract.

The second group comprises specific aboriginal rights that involve the use of land but are not tied to any particular tract of land. We may call these floating rights, because they have the capacity to move from area to area. For example, an Aboriginal group might be able to establish that it has a specific right to perform certain land-related activities that are not connected to any particular tract of land but may be exercised on any land to which the group members have access, whether as Aboriginal people or simply as ordinary members of the public. For example, suppose an Aboriginal group has always gathered wild plants for medicinal purposes as an integral part of its distinctive culture. These plants are not found in any particular place but grow in a large variety of locations, which change from year to year. It happens that the active ingredients in some of these plants are listed as "restricted drugs" in the *Food and Drugs Act*. If members of the Aboriginal group were charged with possession under the *Act*, they might be able to defeat the charge by establishing an aboriginal right to gather the plants for medicinal purposes. Here the aboriginal right would be a floating right because, although it involves a use of land, it is not tied to any specific tract of land.

In the third group we find specific aboriginal rights that are not necessarily linked with the land at all—cultural rights for short. Like other specific rights, cultural rights are grounded in the practices, customs, and traditions integral to the culture of a particular Aboriginal group. Their distinguishing characteristic is the fact they can be exercised without using the land. For example, an Aboriginal group might have an exclusive right to sing certain distinctive songs as an integral part of its culture. This right is not limited to any particular tract of land and obviously does not involve any use of the land at all.

In light of the Court's analysis in Delgamuukw, *it now seems arguable that the right of self-government should be classified as a generic aboriginal right akin to aboriginal title rather than a bundle of specific aboriginal rights. According to this view, the right of self-government is governed by uniform principles laid down by Canadian common and constitutional law.*

When we stand back from this classification, an important point emerges. Although the distinction between generic and specific rights is clear in principle, it is less sharp in practice. What the courts initially regard as a specific right distinctive to a particular group might over time prove to be a generic right, if experience shows that rights of a similar legal structure are found in a substantial number of Aboriginal societies. For example, a specific right to sing certain songs might constitute the germ of a broader category of generic cultural rights with standard legal features. In other words, a specific right has the potential to contribute to the emergence of a new class of generic rights.

How does this classification apply to the aboriginal right of self-government? In the *Pamajewon* case, the Court viewed the question of self-government through the lens provided by *Van der Peet* and held that the right of self-government would have to be proved as an element of specific practices, customs, and traditions integral to the particular Aboriginal society in question. According to this approach, the right of self-government would consist of a bundle of specific rights to govern particular activities rather than a generic right to deal with a range of more abstract subject-matters. However, this holding must now be viewed in light of *Delgamuukw*, which significantly broadens our understanding of the classification of aboriginal rights.

In light of the Court's analysis in *Delgamuukw*, it now seems arguable that the right of self-government should be classified as a generic aboriginal right akin to aboriginal title rather than a bundle of specific aboriginal rights. According to this view, the right of self-government is governed by uniform principles laid down by Canadian common and constitutional law. The basic structure of the right does not vary from group to group; however, its application to a particular group may differ depending on the local circumstances. This is the approach to the right of self-government taken in the *Report of the Royal Commission on Aboriginal Peoples* (which the Supreme Court cites in its brief

comments on self-government in *Delgamuukw*). It seems that this approach is most consistent with the global understanding of aboriginal rights that emerges from the Court's analysis.

[T]he manner in which the members of the group use their aboriginal lands is presumptively governed by the internal law of the group. So, in effect, the concept of aboriginal title supplies a protective legal umbrella, in the shelter of which Aboriginal land law may develop and flourish.

Nevertheless, this conclusion could be debated. In declining to be drawn into any analysis of self-government in *Delgamuukw*, the Court reiterates its holding in *Pamajewon* that rights to self-government cannot be framed in what it describes as "excessively general terms", and observes that in the current case the Aboriginal parties advanced the right to self-government "in very broad terms, and therefore in a manner not cognizable under s. 35(1)". These statements could be read as indicating that the right of self-government is nothing more than a bundle of specific rights, governed by the criteria laid down in *Van der Peet*.

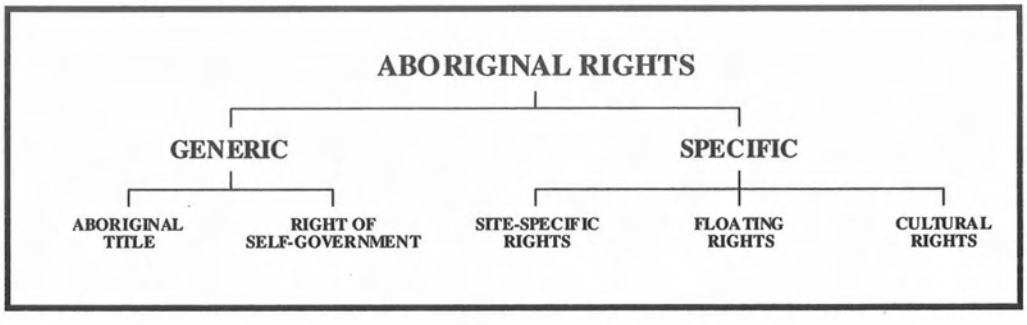
However, I think it preferable to read these comments as a warning against over-ambitious litigation, which attempts to induce the courts to settle very abstract and difficult questions without an appropriate factual or argumentative context. As the Court states: "The broad nature of the claim [of self-government] at trial also led to a failure by the parties to address many of the difficult conceptual issues which surround the recognition of aboriginal self-government. The degree of complexity involved can be gleaned from the Report of the Royal Commission on Aboriginal Peoples, which devotes 277 pages to the issue. That report describes different models of self-government, each differing with respect to their conception of territory, citizenship, jurisdiction, internal government organization, etc. We received little in the way of submissions that would help us to grapple with these difficult and central issues. Without assistance from the parties, it would be imprudent for the Court to step into the breach. In these circumstances, the issue of self-government will fall to be determined at trial."

Elsewhere in its reasons, the Court indicates an approach to the question of self-government that builds on the concept of aboriginal title. In discussing the communal nature of the title, Lamer C.J.C. states: "Aboriginal title cannot be held by individual aboriginal persons; it is a collective right to land held by all members of an aboriginal nation. Decisions with respect to that land are also made by that community."

This point has several important ramifications. First, the manner in which the members of the group use their aboriginal lands is presumptively governed by the internal law of the group. So, in effect, the concept of aboriginal title supplies a protective legal umbrella, in the shelter of which Aboriginal land law may develop and flourish. Second, since decisions about the manner in which lands are used must be made communally, there has to be some internal structure for communal decision-making. This need for a decision-making structure provides an important cornerstone for the right of aboriginal self-government. At a minimum, an Aboriginal group has the inherent right to make communal decisions about how its lands are to be used and by whom. In particular, the group may determine how to apportion the lands among group members, to make grants and other dispositions of the communal property, to lay down laws and regulations governing use of the lands, to impose taxes relating to the land, to determine how any land-based taxes and revenues are to be used, and so on.

Since aboriginal title is itself a generic right, it follows that the inherent right to make communal decisions about aboriginal lands is also a generic right whose basic legal structure does not vary from group to group. Nevertheless, the precise way in which this right applies and the particular modalities of self-government that it supports will clearly be governed by factors specific to the group.

Our discussion is summed up in the diagram below, which illustrates the various categories of aboriginal rights reviewed.



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PRELIMINARY THOUGHTS ON DELGAMUUKW AND TREATY RIGHTS

BY SHIN IMAI

The decision of the Supreme Court of Canada in *Delgamuukw* limits the ability of British Columbia to authorize the use of provincial lands which are held subject to aboriginal title. If the approach used in *Delgamuukw* is applied to the interpretation of treaties, provincial power may be circumscribed in other parts of Canada which are subject to treaties between the Crown and First Nations.

Treaties signed in the nineteenth and early twentieth century cover large parts of Ontario, the Northwest Territories and the Prairie provinces. Treaty 9, which covers northern Ontario, is typical. The written version of the 1905 treaty states that the First Nation "cedes, releases and surrenders" its interest in 130,000 square miles of land. In return, the government agrees to provide annual payments of $4 a year per individual; to provide reserves totalling only 514 square miles; and to provide for the continuation of hunting, trapping and fishing rights.

The "hunting, trapping and fishing" clause found in Treaty 9 reads as follows: "And His Majesty the King hereby agrees with the said Indians that they shall have the right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the government of the country, acting under the authority of His Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes" (emphasis added).

Note that, according to the Treaty, hunting, trapping and fishing rights are subject to two exceptions. First, the rights are subject to what are referred to as the "regulations of the country". Second, the exercise of these rights is subject to what can be called the "lands taken up" limitation.

This short paper will focus on the application of the Court's decision in *Delgamuukw* to the interpretation of the "lands taken up" limitation. There are four aspects of the decision which are significant for the purposes of this discussion:

1. The weight given to oral histories;
2. The significance attached to the internal laws of the First Nation;
3. The articulation of fiduciary duties;
4. The clarification of the role of the federal and provincial governments.

ORAL HISTORY

The Supreme Court ordered a new trial in *Delgamuukw* because of the failure of the trial judge to give sufficient weight to oral history. If the same approach is applied to the interpretation of Treaty 9, for example, the analysis should go beyond the written words to an examination of oral history and the intention of the First Nation signatories.

What does the oral history tell us of the intentions of the First Nations who signed Treaty 9? In a recent article, Patrick Macklem shows that the First Nations entered into the treaty to preserve their way of life and their hunting, trapping and fishing rights. According to the report of the Treaty Commissioners, one of the Chiefs, Missabay, expressed on behalf of his people the fear that, "if they signed the treaty, they would be compelled to reside upon the reserve to be set apart for them, and would be deprived of the fishing and hunting privileges which they now enjoy".

In reply, the Treaty Commissioners are reported to have told the First Nations that "their fears in regard to both these matters were groundless, as their present manner of making their livelihood would in no way be interfered with".

If this account of the discussions between the signatories is given weight, the agreement would indicate that the lands used for hunting, trapping and fishing could not be unilaterally taken away from the First Nations.

INTERNAL LAWS OF FIRST NATIONS

One of the most significant aspects of *Delgamuukw* is the determination that the internal laws of Aboriginal nations are as important as common law for determining aboriginal title. It follows that the internal laws of the First Nations at the time of the signing of the treaty would also be given enhanced consideration.

In the Treaty 9 example, it may be that Cree or Ojibway law did not conceive of hunting, trapping and fishing rights as fungible commodities that could be bargained away. Therefore, no chief could have had the authority under First Nation law to agree to the eventual extinguishment of hunting, trapping and fishing opportunities.

However, since some "taking up" of land was contemplated at the time the treaty was signed, there would be a need to reconcile the aboriginal intention with the written words of the treaty. This reconciliation could take a number of forms, but could include the requirement for a level of consent and participation by the First Nations in the implementation of the "taking up" of the land clause. What this consent and participation might involve is discussed below.

FIDUCIARY DUTY

Let us assume that the "lands taken up" clause in the treaty is interpreted as not permitting unfettered power to infringe or extinguish hunting, trapping and fishing opportunities. The inquiry should then turn to the interplay between the interests of the Crown and the interests of the First Nations.

In *R.* v. *Sparrow*, the Court puts limits on the ability of federal legislation to infringe or extinguish aboriginal rights, by requiring that the legislation be justified through a two-stage test. In the first stage, the legislation must have a valid objective that is "compelling and substantial". Once that objective is established, the Crown is under an obligation to fulfill its fiduciary duties by acting in a manner consistent with the honour of the Crown.

With respect to the first stage of the test, the Supreme Court in *Delgamuukw* refers to a wide range of valid legislative objectives that would permit infringement of aboriginal title. These objectives include agriculture, forestry, mining, hydroelectric power, protection of the environment, and the settlement of foreign populations. This list looks remarkably like the list set out in the treaty for "taking up" the land: "settlement, mining, lum-

bering, trading or other purposes." In the treaty context, then, the valid legislative objective may be found in the list of purposes included in the "lands taken up" clause.

The second stage of the test is the discharge of the Crown's fiduciary responsibilities. For Treaty 9, the inquiry could begin with the "degree of scrutiny" to be accorded the infringement of the "right to pursue their usual vocations of hunting, trapping and fishing." If the issue in dispute relates to sustenance, food, or ceremonial purposes, the government would likely be required to meet a high standard of justification. If the issue in dispute is purely commercial activity, the standard of justification may be met by taking into account a wider range of factors. In *R.* v. *Gladstone*, the Supreme Court indicated that infringements of aboriginal commercial fishing rights could take into consideration the economic interests of non-Aboriginal people in the region.

How stringent could the degree of scrutiny be? In my view, there are circumstances in which the proposed "taking up" could be completely prohibited. Even before *Delgamuukw*, the British Columbia Court of Appeal in *Claxton* v. *Saanichton Marina* prohibited the construction of a marina because it would have interfered with a treaty right of a First Nation to gather shellfish. In *Delgamuukw* itself, the Chief Justice suggests that full consent of the First Nation may be required for infringements of hunting and fishing rights: "Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands."

There are several "forms" the fiduciary duty could take. One of the most commonly utilized "forms" under the *Sparrow* test is consultation. In *Delgamuukw*, the Court states that the degree of consultation may vary with the seriousness of the infringement. However, whatever the extent of the consultations, they "must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal people". In the context of hunting, trapping and fishing, I would expect that the consultations would address such matters as the area under consideration, the birds, animals, and habitat affected, the seasons for the hunt, and other pressures on the resource.

Compensation is a second issue which could be addressed. The James Bay and Northern Quebec Agreement provides a precedent for compensating loss of hunting, trapping and fishing rights. In that Agreement, there is a scheme for supplementing income for hunters and trappers, and a formula for replacing land which is taken up for development.

Formalizing First Nation participation in decisions affecting the treaty lands is a third way of discharging the fiduciary duty. If hunting, trapping and fishing rights are to be affected by development, the First Nation could have a role in ensuring that the detrimental effects are kept at a minimum. Modern land claims agreements contain many models for the establishment of joint Crown-First Nation bodies which oversee developments on land.

A number of other ideas could be implemented to address specific circumstances. For example, the Crown could modify non-aboriginal uses (such as sport hunting) to ensure the continuation of a treaty right to hunt for food. Or the members of the First Nation could be given priority for related activities such as the establishment of remote fishing camps.

ROLE OF FEDERAL AND PROVINCIAL GOVERNMENTS

Finally, we come to the question of the constitutional authority to infringe treaty rights by "taking up" lands. In Treaty 9, the listed activities—settlement, mining, lumbering, trading—are largely within provincial legislative authority. Consequently, one view is that the treaty contemplates the exercise of provincial authority. As we have seen, the provinces have generally proceeded on this view in their development activities on treaty lands.

Another view is that treaty rights are integral to "Indianness", so that only the federal government has authority to infringe or exercise those rights under section 91(24) of the *Constitution Act, 1867*.

Delgamuukw itself is ambiguous on this point. While the judgement states clearly that only federal legislation can extinguish aboriginal rights, the judgement suggests that both the provinces and the federal government can infringe aboriginal rights. Whether the constitutional authority is federal or provincial, the application of the principles articulated in *Delgamuukw* will have substantial impact on the role of provinces in "taking up" lands. If *Delgamuukw* is interpreted to mean that only the federal Crown has legislative authority to infringe aboriginal and treaty rights, then the province has no authority to "take up" lands. Provincial licenses for mining, forestry, and so on would be ineffective if they authorized activities which infringed treaty rights. On the other hand, if the treaty does authorize provincial "taking up," then it is clear that the provincial Crown will have to become accustomed to a new role as a fiduciary. In this role, the province will have to satisfy the requirements set out in *Delgamuukw* to consult in good faith, provide compensation, and establish a role for aboriginal participation in the use of the land.

CONCLUSION

I have tried to show how four aspects of the decision in *Delgamuukw*, a case dealing with aboriginal land rights, could be applied to the interpretation of the "lands taken up" limitation in Treaty 9. I find further support for this argument in court decisions relating to the other limitation to treaty hunting, trapping and fishing rights: the "regulations of the country" clause. The Ontario Court of Appeal in *R.* v. *Bombay* and the Supreme Court of Canada in *R.* v. *Badger* both applied the justification test in *R.* v. *Sparrow* to conclude that, after 1982, the federal government did not have unfettered authority to override treaty rights. Both Courts came to this result, notwithstanding the presence of a "regulations of the country" clause in the treaties. In my view, there is good reason to believe that *Delgamuukw* could similarly be applied to interpret the provisions of a treaty.

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A NEW ERA OF EQUALITY ACTIVISM?

BY BRUCE RYDER

The dismal success rate of *Charter* claimants before the Supreme Court in 1996 (11%), led many to pronounce the end of an era of *Charter* judicial activism. After the striking turnaround evident in the 1997 statistics, it is now clear that predictions of the demise of *Charter* activism were premature.

[T]his year's judgments corrected some deficiencies in the earlier jurisprudence, easing concerns in particular about ominous developments in the 1995 trilogy of Egan *v.* Canada, Miron *v.* Trudel, *and* Thibaudeau *v.* Canada.

In any case, neither activism nor restraint is in itself a good thing. What matters most is the quality of the top Court's reasoning. In 1997, the quantitative leap in the *Charter* success rate happened to be matched by an equally impressive improvement in the quality of *Charter* doctrine. Nowhere was this improvement more evident than in last year's trilogy of equality rulings, *Eaton* v. *Brant Co. Board of Education*, *Benner* v. *Canada*, and *Eldridge* v. *British Columbia*. Together, these decisions have created new hope that equality jurisprudence may in fact make a difference after all.

THE EVOLUTION OF S. 15

Prior to 1997, most equality cases that reached the Supreme Court failed, many of them on questionable grounds. From 1992 and 1996, equality claimants were successful in only 3 of 14 cases (21.5%). In 1997, 2 out of 3 claims succeeded. More importantly, this year's judgments corrected some deficiencies in the earlier jurisprudence, easing concerns in particular about ominous developments in the 1995 trilogy of *Egan* v. *Canada*, *Miron* v. *Trudel*, and *Thibaudeau* v. *Canada*.

In contrast to the approach taken to most other *Charter* rights and freedoms, the Supreme Court did not say before 1997 that the section 15(1) equality rights should be given a large and liberal interpretation. This omission, conspicuous by its absence, was an indication of the ideologically charged uncertainty the Court felt about the scope of the guarantee.

The Court's confidence in relation to equality rights has grown in recent decisions, such that, in *Eldridge*, La Forest J. could finally state the obvious on behalf of a unanimous Court: "S. 15(1), like other *Charter* rights, is to be generously and purposively interpreted." Another indication of the uncertainty that had pervaded *Charter* equality jurisprudence was the difficulty the Court had in agreeing on ssection 15's purposes. Given that the Court has said that the interpretation of *Charter* provisions should be guided by their purposes, this was no small matter.

From 1989 to 1993, the Court insisted that the "overall purpose of s. 15 is to remedy or prevent discrimination against groups subject to stereotyping, historical disadvantage and political and social prejudice in Canadian society". In the 1995 trilogy, this group-based conception of section 15's purpose disappeared from sight without any explanation. Justice McLachlin offered a competing view of section 15's purpose that places the individual rather than the group at the centre of equality analysis. Her version of section 15's purpose emphasizes the need to treat individuals fairly, that is, according to their true merits rather than false group stereotypes. It draws strength from section 15(1)'s guarantee of legal equality to "[e]very individual". It has difficulty, however, accounting for the emphasis on overcoming group disadvantage in section 15(2). Moreover, it is a purpose that is of limited assistance in helping us determine when laws based on real differences—such as physical disabilities, or biological differences such as pregnancy—are discriminatory.

Justice McLachlin's understanding of section 15's purpose does work well when evaluating laws that draw distinctions on their face that are premised on false or inaccurate ideas about groups. In *Benner*, the first equality decision released by the Court in 1997, the provision at issue was one in the *Citizenship Act* that made it more difficult for children to acquire citizenship if they were born outside Canada and only their mothers had Canadian citizenship. Children born abroad who had a Canadian father acquired citizenship automatically. In a unanimous judgment written by Iacobucci J., the Court struck down the provision, finding it was premised not on real differences but on the stereotype that "men and women are not equally capable of passing on whatever it takes to be a good Canadian citizen."

Most discrimination cases, however, are not so easy. It is relatively rare for our laws openly to draw distinctions on the basis of a prohibited ground of discrimination. It follows that the ability of the *Charter* to confront issues of inequality will depend to a large extent on the judges' ability to grapple with issues of adverse-effects discrimination.

Prior to 1997, there was little reason to be hopeful. A majority of the Court had given short shrift to strong adverse-effects arguments presented in *Symes*, *Rodriguez*, *Thibaudeau*, and *Adler*.

A NEW APPROACH

In 1997, the Court developed a strong and clear conception of adverse effects discrimination. In *Eaton*, the Court held that the placement of Emily Eaton, a 12-year-old girl with cerebral palsy, in a special education class for children with disabilities, did not constitute discrimination. Justice Sopinka, writing for the Court, found the "stereotypical application of group characteristics" formulation of discrimination incomplete. Instead, he noted, "it is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination." The government was under an obligation to take into account the distinct needs

of the disabled to avoid adverse-effects discrimination, in this context the potential denial of equal ability to benefit from educational services. Given the nature of Emily's disabilities, the Court held that her placement in a special education class was not discriminatory.

The Court took the sensible step of recognizing that section 15 is best understood as an attempt both to treat individuals fairly and to overcome group-based disadvantage.

The concept of adverse-effects discrimination, when joined with section 15's promise of equal benefit of the law, produced a powerful judgment in the *Eldridge* case. The Court held, in another unanimous judgment, that the B.C. government's failure to provide funding for interpretive services in the health care system, while neutral on its face, had a disproportionate negative impact on the basis of physical disability. The deaf were denied the "equal benefit of the law", since equal access to health care depended on effective communication. Justice La Forest noted that adverse-effects analysis in the context of benefit schemes requires government to "take special measures to ensure that disadvantaged groups are able to benefit equally from government services."

In both *Eaton* and *Eldridge*, the Court restored its emphasis on section 15's purpose of overcoming group-based disadvantage, a point that had gone missing in 1995. The Court took the sensible step of recognizing that section 15 is best understood as an attempt both to treat individuals fairly and to overcome group-based disadvantage. The Court seemed to assume prior to 1997 that it had to choose one or the other of these goals.

In *Eldridge*, La Forest J. wrote that section 15(1) serves these "two distinct but related purposes." Both purposes find strong support in Canadian legal and political traditions, and both are supported by the text of the *Charter*. Section 15(1) reflects a commitment to treating individuals in accordance with individual merit and capacities rather than on the basis of ascribed group stereotypes. Section 15(2) reflects a commitment to promoting equality of outcomes for members of groups suffering from historical and continuing patterns of disadvantage. In most cases, the twin purposes of section 15 will supplement or complement each other in the analysis of the issue of discrimination. When they do not, as in the case of some equity (or affirmative action) programs, section 15(2) makes clear that the goal of overcoming group disadvantage should prevail over a claim of "reverse discrimination" by an individual.

FINDING COMMON GROUND

Another positive aspect of the 1997 equality decisions is that all three were unanimous rulings. In contrast, the 1995 trilogy revealed a Court having large difficulties speaking in one voice on the meaning of equality. Three distinct approaches were articulated. Apart from the uncertainties produced by this state of affairs, a disturbing new twist to equality doctrine was added by a group of four judges led by Gonthier J. and La Forest J. In their view, a finding of discrimination requires that the personal characteristic in question be irrelevant to the functional values underlying the law. Thus, in his dissent in *Miron*, Gonthier J. wrote that since marital status is relevant to defining the attributes of marriage, legislation denying automobile accident benefits to unmarried couples is not discriminatory. Justice La Forest adopted this approach in his plurality judgment in *Egan*, where he stated that a distinction drawn by legislation is not discriminatory if it expresses a fundamental reality or value. In his view, since sexual orientation is relevant to the fundamental social and biological realities underlying marriage, it followed that the denial of an old age spousal allowance to same-sex couples was not discriminatory.

The problem with Gonthier and La Forest JJ.'s approach is that, despite their protests to the contrary, they were willing to accept as legitimate discriminatory versions of the government's purposes in *Miron* and *Egan* (favouring married over unmarried heterosexual couples, and favouring heterosexual couples over same-sex couples, respectively). Their approach is no more coherent than saying that laws that burden women are not discriminatory since they are relevant to defining the prerogatives of men. Unless the object is to improve the conditions of a disadvantaged group, government must be prevented by section 15 from using a prohibited ground of discrimination to favour one group over another, even if such discrimination has been socially accepted as a "fundamental reality or value".

The circular logic adopted by Gonthier and La Forest JJ. did not reappear in the 1997 trilogy. As a result, the Court was able to issue three unanimous decisions. The judges are still adhering to the different tests they articulated in 1995. There are signs, however, that they are expressing similar ideas in different verbal formulations and that they will find a way of merging their respective insights. For example, once the taint of circular logic flowing from the acceptance of a discriminatory objective is removed from the Gonthier/La Forest approach, there is no need to banish the question of a classification's relevance from the section 15 analysis. Since sameness or identity of treatment is not synonymous with equality, and since treating people differently is frequently what equality requires, we need some way of determining when differential treatment on the basis of a prohibited ground is discriminatory. If a law or other government action is based on a personal characteristic that is irrelevant to non-discriminatory legislative goals (Gonthier and La Forest JJ. in *Miron* and *Egan*), or if it is based on the attribution of false or stereotypical group attributes (McLachlin J. in *Miron*), or if it exacerbates the position of disadvantaged groups (Sopinka J. in *Eaton*, La Forest J. in *Eldridge*), then there is good reason to believe that such a law is discriminatory.

In the 1997 equality decisions, these approaches complemented and supplemented each other, producing a more coherent and more powerful vision of equality than had existed in the prior jurisprudence.

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ELDRIDGE V. BRITISH COLUMBIA: DEFINING THE EQUALITY RIGHTS OF THE DISABLED UNDER THE CHARTER

BY MARY CORNISH & FAY FARADAY

The Supreme Court of Canada's latest decision on section 15(1) equality rights, *Eldridge* v. *British Columbia (Attorney General)*, addresses two key issues in the evolution of *Charter* jurisprudence: first, to what extent are decisions made by private entities subject to *Charter* review, and second, to what extent are governments obliged to provide the disabled with equal access to public services. In *Eldridge*, the claimants challenged the failure by hospitals and the B.C. Medical Services Commission to provide sign-language interpreters for deaf persons seeking medical services.

[E]ven though they are private entities, the Charter *applies to hospitals to the extent that they are implementing a specific government policy.*

Writing for a unanimous nine-judge court, Justice La Forest found that even though they are private entities, the *Charter* applies to hospitals to the extent that they are implementing a specific government policy, here providing B.C. residents with medically required services free of charge. The Court ruled that the hospitals' and Commission's failure to fund sign-language interpretation for deaf persons violated section 15(1), where such translation was necessary for effective communication in delivering medical services. Finding that the violation was not saved under section 1, the Court suspended the declaration of unconstitutionality for six months to allow the government to formulate an appropriate response.

BACKGROUND FACTS

Medical services in British Columbia are funded in two ways: first, under the *Medical and Health Care Services Act* provincial residents are entitled, free of charge, to "benefits" that are "medically required services". The *Act* grants the Commission discretion to determine what constitutes a funded "benefit".

Second, the *Hospital Insurance Act* describes the general services to be provided by acute-care hospitals. However, each hospital, as a private corporation, has discretion to decide which of these services it will provide and how the services will be delivered. The province funds hospital services by giving each hospital a lump-sum payment that the hospital can allocate, in its discretion, towards the services it actually does provide.

Neither the Commission nor the hospitals exercised their discretion to fund sign-language interpreters for deaf persons seeking medical care.

SECTION 32: APPLICATION OF THE CHARTER

The Court ruled that neither provincial statute prohibited the funding of sign language interpreters and each statute could be interpreted consistently with the *Charter*. Accordingly, any violation of section 15(1) lay in the discretion wielded by the two subordinate bodies authorized to act under the legislation: the Medical Services Commission and the hospitals.

The first issue was whether decisions by hospitals or the Medical Services Commission constitute the type of "government action" that attracts scrutiny under section 32 of the *Charter*.

The Court articulated two governing principles: first, just as government cannot pass unconstitutional laws, it cannot authorize or empower other entities to act in ways that violate the Charter. *Second, governments should not be permitted to evade their* Charter *responsibilities or escape* Charter *scrutiny by delegating the implementation of their policies and programs to private entities.*

The Court reviewed its previous jurisprudence regarding the *Charter*'s application. On one hand, it had ruled that because government had the power of routine or regular control over community colleges as instruments of its education policy, these colleges were "government" for the purposes of section 32 and were subject to *Charter* review. Where an entity was part of "government", the *Charter* applied to all its activities including those that might otherwise be considered private.

On the other hand, the Court ruled that neither universities nor hospitals were part of the apparatus of "government", and in adopting mandatory retirement policies they were not implementing government programs or policies. Accordingly, on the facts these institutions were found not to be subject to the *Charter*.

However, the Court left open the possibility that in some circumstances and with respect to some activities, hospitals, universities, or other private entities could be subject to review for compliance with the *Charter*. *Eldridge* required that the Court address this issue squarely for the first time and accordingly, through its decision, the Court has now clarified when private entities can be subject to the *Charter*.

The Court articulated two governing principles: first, just as government cannot pass unconstitutional laws, it cannot authorize or empower other entities to act in ways that violate the *Charter*. Second, governments should not be permitted to evade their *Charter* responsibilities or escape *Charter* scrutiny by delegating the implementation of their policies and programs to private entities.

The Court ruled that a private entity may be subject to the *Charter* in respect of certain "inherently governmental actions". One cannot compile in the abstract a comprehensive list of factors which might identify activities as "governmental". However, the *Charter* will apply to private entities

insofar as they act in furtherance of or act to implement a specific government program or policy. It is not enough that the entity perform a public purpose; rather, it must be implementing a specific governmental policy or program. Where a private actor is implementing a specific government program, he/she will be subject to the *Charter* only in respect of that act and not its other private activities.

Eldridge broadens the range of entities and activities that can be subject to Charter scrutiny. In the current context where the "privatization" of government services holds considerable political cache, the decision could help employees and recipients of "governmental" services to prevent an erosion of their Charter rights. To the extent that government retains effective power to set the agenda of the "privatized" entities, Eldridge will enable individuals to hold government accountable under the Charter.

On the facts in *Eldridge*, the Court found that the provincial legislation established a comprehensive social program. Hospitals were merely the vehicles through which the Legislature chose to deliver the program. The government remained responsible for defining both the content of the services to be delivered and the persons entitled to receive them. The Court ruled that "the Legislature, upon defining its objective as guaranteeing access to a range of medical services, cannot evade its obligations under s. 15(1) of the *Charter* to provide those services without discrimination by appointing hospitals to carry out that objective. In so far as they do so, hospitals must conform to the *Charter*". Similarly, the Court found that the Commission implements the government policy of ensuring that all residents receive medically required services without charge and was likewise subject to the *Charter*.

For the first time, the Court has articulated a rationale and a means for finding that in some circumstances private entities will be subject to the *Charter*. In so doing, the Court has acknowledged the reality that there is no hard and fast division between government and the private sector. It affirmed that we expect government to do more than act as a traditional law maker; we also expect government to stimulate and preserve the community's economic and social welfare. Where the government acts to do so, its *Charter* obligations follow.

Eldridge broadens the range of entities and activities that can be subject to *Charter* scrutiny. In the current context where the "privatization" of government services holds considerable political cache, the decision could help employees and recipients of "governmental" services to prevent an erosion of their *Charter* rights. To the extent that government retains effective power to set the agenda of the "privatized" entities, *Eldridge* will enable individuals to hold government accountable under the *Charter*.

Finally, to the extent that the *Eldridge* analysis contributes to a functional understanding of what constitutes government, governmental services and government control, it could assist in other non-*Charter* contexts. One example is related employer applications, where the actions of a private entity are highly regulated and/or controlled by government and a party seeks to share or transfer liability to the body (government) which is effectively responsible and accountable for an impugned course of action.

SECTION 15: EQUALITY RIGHTS

The Court's section 15(1) analysis in *Eldridge* was less groundbreaking, but nevertheless significant for the evolution of equality jurisprudence. While the legal test under section 15(1) remains unsettled, the Court has drawn together a number of previously articulated general principles to illustrate what governments must do in practice to comply with their section 15(1) obligations.

First, the Court followed a contextual analysis to overturn the formal analysis employed by the majority at the B.C. Court of Appeal, which essentially had held deaf persons responsible for the unequal burden they experienced. The Court of Appeal majority suggested that in the absence of the legislation, deaf persons would have to pay their doctors as well as their interpreters. For the deaf and hearing populations alike the legislation removed the obligation to pay their doctors. The inequality which arose because deaf persons continued to pay their translators exists independently of the legislation and so is beyond the reach of the *Charter*.

By contrast, the Supreme Court of Canada's contextual analysis is firmly situated within a detailed examination of the social, political, and legal environment experienced by deaf persons. The Court recognized the "unfortunate truth that the history of disabled persons in Canada is largely one of exclusion and marginalization", and that "their entrance into the social mainstream has been conditional on their emulation of able-bodied norms". The disadvantage experienced by deaf persons derives largely from barriers to communication with the hearing population and because society generally has been organized as though everyone can hear.

The Court stated that while the Court of Appeal's approach has a "certain formal, logical coherence ... it seriously mischaracterizes the practical reality of health care delivery". The Supreme Court identified the "benefit of the law" at issue in *Eldridge* more broadly, and with an eye on the substantive equality outcome, as being the provision, without charge, of medical care. This concept clearly encompassed the ability to communicate effectively with one's health care provider. The Court ruled that, rather than being ancillary to the benefit, communication is "indispensable" to the delivery of medical services. For the hearing population, effective communication is routinely available, free of charge, as part of every health care service. However, under the

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present system, to receive the same quality medical care as the hearing population, deaf persons must pay for the means of communication even though the system intended to make ability to pay irrelevant.

Eldridge's contextual analysis affirms section 15(1)'s commitment to secure in substance the Charter's fundamental objective of guaranteeing for all equal treatment without discrimination.

The Court's application of the contextual analysis in this case and its deconstruction of the positions advanced by the courts below will assist *Charter* claimants in rebutting the arguments of those who resist their claims. The case's history illustrates in practical terms how a dispute can be characterized at the front end either to preclude or to secure *Charter* protection. *Eldridge*'s contextual analysis affirms section 15(1)'s commitment to secure in substance the *Charter*'s fundamental objective of guaranteeing for all equal treatment without discrimination.

Second, after reiterating that the *Charter* protects against adverse-impact discrimination and that substantive equality sometimes requires that some people be treated differently than others, the Court ruled that, in introducing the benefit program at issue, the government had a responsibility to ensure that the benefit was equally accessible to all. While not addressing the obligation of positive state action under the *Charter* generally, the Court ruled that once the state provides a benefit, it must do so equally and achieving a constitutionally sound result may require it to take positive measures.

The government had argued that it should be entitled to provide benefits to the general population without ensuring that disadvantaged members of society have the resources to take full advantage of those benefits. However, the Court chastened the government, stating that "this position bespeaks a thin and impoverished vision of s. 15(1)", which is belied by the thrust of the Court's equality jurisprudence. To comply with section 15(1), the government had to take positive action and special measures to ensure that disadvantaged groups were actually able to benefit equally from government services and benefits. Any limitations on the obligation to accommodate disadvantaged groups must only be assessed under section 1 when determining if a *Charter* violation can be justified.

Based on the record, the Court concluded that the failure to provide free sign-language interpretation for deaf B.C. residents where necessary for effective communication in the delivery of medical services violated section 15(1). This, however, may not require interpreters in all medical situations; the standard of "effective communication" is flexible, taking into consideration the complexity and importance of the information to be communicated, the context in which the communications take place, and the number of persons involved.

[I]n confirming the Charter's objective of securing substantive equality, the Court places on government a positive obligation to design its benefits in a manner that incorporates the long-standing human rights principles of accommodation to ensure that the benefit is in practice accessible to disadvantaged groups.

This analysis places on government a clear and positive obligation to ensure that in drafting legislation it must have an expansive understanding of what constitutes the "benefit of the law". Moreover, in confirming the *Charter*'s objective of securing substantive equality, the Court places on government a positive obligation to design its benefits in a manner that incorporates the long-standing human rights principles of accommodation to ensure that the benefit is in practice accessible to disadvantaged groups.

This obligation to prevent adverse-effects discrimination is especially relevant to the disabled, as the Court noted that discrimination often arises not from singling out the disabled for special treatment, but from the exact reverse—from the government's failure to understand and address the adverse effects on the disabled caused by laws of general application.

Eldridge, then, is significant for equality seekers because it more concretely articulates the government's positive obligations under the *Charter*. The decision may also be helpful in spurring the government to take its constitutional obligations seriously in the course of designing its legislative schemes to comply with the *Charter*. If the decision can help equality seekers ensure that legislation is designed consistently with the government's proactive obligations to consider accommodative measures, it may help provide a practical solution while preempting the need to bring expensive and time-consuming litigation.

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THE DIFFERENCE DILEMMA: THE SUPREME COURT AND EQUALITY RIGHTS IN 1997

BY ROBERT E. CHARNEY

An examination of the Supreme Court of Canada's 1997 statistics relating to *Charter* section 15 decisions may lead to a completely false conclusion. Three section 15 decisions, each unanimous in result, each penned by a single author. The appearance is that of a united Court with a consistent methodology.

The facade of unanimity achieved in 1997 was based on the result only. The Court had managed to distill four tests into three, but was still divided 4-4-1 on the appropriate section 15(1) analysis. There was still no majority, let alone unanimity.

One year earlier, the Court had been splintered four ways in its section 15 analysis, and the lack of any clear majority resulted in uncertainty and confusion in lower courts. The legal community looked forward to the day when a single analysis might be adopted by a clear majority. Given the divisions only one year earlier, a unanimous judgment seemed an impossible dream.

The statistics do not, however, reveal the true story. The facade of unanimity achieved in 1997 was based on the result only. The Court had managed to distill four tests into three, but was still divided 4-4-1 on the appropriate section 15(1) analysis. There was still no majority, let alone unanimity. Yet the fact that a unanimous result was achieved in all three cases must raise the question of whether the philosophical divisions which characterized the Court's decisions the previous year are really all that significant or even relevant.

THE EATON CASE

The first section 15 case, *Eaton* v. *Brant County Board of Education*, concerned the provision of special education for mentally disabled children in the public school system. It was one of those rare cases in which a unanimous Supreme Court of Canada reversed the decision of a unanimous Court of Appeal, which had itself reversed the decision of a unanimous Divisional Court.

The case concerned a 12-year-old girl with cerebral palsy, who was unable to speak, or to use sign language meaningfully. She had no established alternative communication system. When she began kindergarten in the public school system, she was placed on a trial basis in her neighborhood school. A full-time educational assistant, whose principal function was to attend to her special needs, was assigned to her classroom. A number of concerns arose as to the appropriateness of her continued placement in a regular classroom, and the teachers and assistants concluded, after three years of experience, that the placement was not in her best interest and might well harm her. Her parents did not agree with this assessment.

Through a series of administrative hearings and appeals, the determination was made that she should be placed in a special education class. The parents applied for judicial review to the Divisional Court, which dismissed the application. The Court of Appeal allowed a subsequent appeal and set aside the tribunal order. The issue was whether the placement of a child in a special education program contrary to her parents' wishes infringed section 15(1) of the *Charter*. The Court of Appeal had concluded that the *Charter* mandated a presumption in favour of integration, and that the tribunal had erred in failing to take this presumption into account when assessing the proper place for this student.

[T]he purpose of section 15(1) of the Charter *is not only to prevent discrimination by the attribution of stereotypical characteristics to individuals, but also to a ameliorate the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society as has been the case with disabled persons.*

In the Supreme Court of Canada, Mr. Justice Sopinka began by acknowledging that "there has not been unanimity in the judgments of the Court with respect to all the principles relating to the application of section 15 of the *Charter*". In this case, however, the issue could be resolved "on the basis of principles in respect of which there was no disagreement". The Court stated: "The principles that not every distinction on a prohibited ground will constitute discrimination and that, in general, distinctions based on presumed rather than actual characteristics are the hallmarks of discrimination have a particular significance when applied to physical and mental disability. Avoidance of discrimination on this ground will frequently require distinctions to be made taking into account the actual personal characteristics of disabled persons".

This emphasizes that the purpose of section 15(1) of the *Charter* is not only to prevent discrimination by the attribution of stereotypical characteristics to individuals, but also to a ameliorate the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society, as has been the case with disabled persons.

While concern for the elimination of discrimination based on stereotypical attitudes and assumptions relating to the effect of disability on ability is one of the objectives of section 15(1), the Court noted that the "other equally important objective seeks to take into account the true characteristics of this group" to enable them to participate in and enjoy all of society's benefits.

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The Court stated: "It is the failure to make reasonable accommodation, to fine tune society so that its structures and assumptions do not result in a relegation and banishment of disabled persons from participation, which results in discrimination against them ... The discrimination inquiry which uses 'the attribution of stereotypical characteristics' reasoning as commonly understood is simply inappropriate here ... It is recognition of the actual characteristics, and reasonable accommodation of these characteristics, which is the central purpose of section 15(1) in relation to disability".

Accordingly, the Court held that disability, as a prohibited ground, differs from other enumerated grounds such as race or sex because there is no individual variation with respect to these grounds. To say that the government should not make stereotypical assumptions on the basis of race or sex means that the government should not take into account an individual's race or sex when determining their entitlement to government benefits. But the obligation to accommodate disability means that the government must take into account an individual's actual disability in order to enable that individual to access government benefits. The Court explained this by reference to the "difference dilemma": "whereby segregation can be both protective of equality and violative of equality depending upon the person and the state of disability. In some cases, special education is a necessary adaptation of the mainstream world which enables some disabled pupils access to the learning environment they need in order to have an equal opportunity in education. Also while integration should be recognized as the norm of general application because of the benefits it generally provides, a presumption in favour of integrated schooling would work to the disadvantage of pupils who require special education in order to achieve equality. Integration can be either a benefit or a burden depending on whether the individual can profit from the advantages that integration provides".

[In Eaton*], the Court rejected the Court of Appeal's conclusion that section 15 mandates a presumption in favour of integration, a presumption that can be displaced by the parent's consent to a segregated placement.*

Unlike the Court of Appeal, the Supreme Court was satisfied that the tribunal had given thorough and careful consideration to the placement that would be in the child's best interests from the standpoint of receiving the benefits that education provides. It found that the tribunal had considered her special needs and her three years experience in a regular class and that it "strove to fashion a placement that would accommodate those special needs and enable her to benefit from the services that an educational program offers" without "segregating her in the theoretically integrated setting".

Having satisfied itself that the tribunal had considered which placement was superior and concluded that the best possible placement was in a special class, the Court held that such a determination could not amount to discrimination within the meaning of section 15 of the *Charter* because "it seems incongruous that a decision reached after such an approach could be considered a burden or a disadvantage imposed on a child". The Court rejected the Court of Appeal's conclusion that section 15 mandates a presumption in favour of integration, a presumption that can be displaced by the parent's consent to a segregated placement. The issue to be considered in this context is the best interest of the child, "unencumbered by a presumption".

In hearing this case, the Supreme Court heard argument from intervenors representing advocacy groups for the disabled on both sides of the integration question. Some argued that integration was virtually always the correct approach, while others supported the position that disabled individuals (or their parents acting in their best interests) should have the choice of either integrated or special facilities. The Court's conclusion recognized that the answer lay in the individual assessment of each person's particular disability to determine what facilities would best accommodate their special needs. This will often be a difficult task, as the tribunal must consider the evidence of the professional educators and the parents, who may not see eye to eye on the issue of the best interest of the child.

THE BENNER CASE

The second case, *Benner* v. *Secretary of State of Canada*, concerned the rights of children born outside of Canada before February 15, 1977. The *Citizenship Act* provided that persons born abroad before that date would be granted citizenship on application if born of a Canadian father but would be required to undergo a security check and to swear an oath if born of a Canadian mother. The issue was whether the treatment accorded to children born abroad to Canadian mothers before February 15, 1977 by the *Citizenship Act* infringed section 15(1) of the *Charter* because it discriminated on the basis of sex.

In analyzing the section 15 issue Mr. Justice Iacobucci, writing on behalf of the Court, began with a consideration of the various approaches to section 15 which had developed in the cases decided previously. The first approach set out in Mr. Justice Iacobucci's decision was that adopted by McLachlin and Sopinka JJ. in *Miron* v. *Trudel*, which set out the following test for discrimination under section 15(1): "The analysis under section 15(1) involves two steps. First, the complainant must show a denial of 'equal protection' or 'equal benefit' of the law, as compared with some other person. Second, the claimant must show that the denial constitutes discrimination. At this second stage, in order for discrimination to be made out, the claimant must show that the denial rests on one of the grounds enumerated in section 15(1) or an analogous ground and that the unequal treatment is based on the stereotypical application of presumed group or personal characteristics. If the claimant meets the onus under this analysis, violation of section

15(1) is established".

Once we depart from the text of the Charter, *we are left to wonder how an unelected court can discern as vague a concept as "societal significance" without imposing their personal beliefs.*

This test is substantially similar to the test outlined by Cory and Iacobucci JJ. in *Egan* v. *Canada*, which was decided at the same time as *Miron* v. *Trudel*. The primary difference between the two approaches is Justice McLachlin's requirement that the unequal treatment be based on the "stereotypical application of presumed group or personal characteristics". Cory and Iacobucci JJ. do not make explicit reference to this requirement, although it is probably not a significant difference since both tests have always lead to the same result.

The second approach to section 15 focuses on the "relevance" of a distinction to the purpose of the legislation. This approach, favoured by Lamer C.J.C. and La Forest, Gonthier, and Major JJ., requires an analysis of the "nature of the personal characteristic and its relevancy to the functional values underlying the law" in order to make a finding of "discrimination". It is not enough that the denial of equality be based on an enumerated or analogous ground, since the same ground may be discriminatory in some cases but not in others depending on the context. The ground of distinction must also be irrelevant to the values underlying the legislation or section 15(1) will not be violated.

A third approach to section 15 analysis is found in the reasons of L'Heureux-Dubé J. in *Miron*. According to this third methodology, once a distinction has been shown to result in the denial of one of the four equality rights on the basis of membership in an identifiable group, the distinction must then be shown to be discriminatory. This will require determining that it is "capable of either promoting or perpetuating the view that the individual adversely affected by this distinction is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration". Making this determination will require consideration of both the group adversely affected by the distinction and the nature of the interest adversely affected by it. The interaction of the group's social vulnerability, in light of the social and historical context, and the constitutional and societal significance of the interest will determine whether the impact of the distinction constitutes discrimination.

This third approach taken by L'Heureux-Dubé seems to be very similar to the approach taken by McLachlin and Cory JJ. in their analysis. L'Heureux-Dubé appears to accept their analysis but retains the flexibility to expand section 15 of the *Charter* beyond the enumerated and analogous grounds in circumstances where, in her view, the interest adversely affected by the legislation has "societal significance". The source for determining whether a particular interest has "societal significance" is left unstated in her analysis. Perhaps that source may be the text of the *Charter* itself, although it seems unnecessary to supplement other *Charter* rights by incorporating them into the section 15 analysis. Once we depart from the text of the *Charter*, we are left to wonder how an unelected court can discern as vague a concept as "societal significance" without imposing their personal beliefs.

[In Benner, *the Court observed that] the* Citizenship Act *continued to establish "two classes of persons born abroad wishing to become citizens: those whose Canadian parent was male and those whose Canadian parent was female ... This legislation continues to suggest that, at least in some cases, men and women are not equally capable of passing on whatever it takes to be a good Canadian citizen".*

While the Court could not agree to a single approach to section 15 of the *Charter*, the Court was unanimous that, "no matter which test is applied", the law in issue infringed section 15 of the *Charter*. If "relevance" was a factor to be considered, the Court concluded that the gender of a citizenship applicant's Canadian parent has nothing to do with the values underlying the *Citizenship Act* and is irrelevant to the quality of one's candidacy for Canadian citizenship.

If L'Heureux-Dubé J.'s approach were taken, the Court concluded that "the effects of these distinctions can be extremely severe", and "I cannot imagine an interest more fundamental to full membership in Canadian society than Canadian citizenship".

If the Court required a showing that the unequal treatment was "based on the stereotypical application of presumed group or personal characteristics", the Court concluded that the *Act* maintained the stereotype that citizenship was inherited from the father and that women were incapable of passing their citizenship to their children unless there was no legitimate father from whom the child could acquire citizenship.

The Court concluded that the law infringed section 15 of the *Charter* because it denied access to benefits of citizenship on the basis of the gender of the applicant's Canadian parent. While the applicant's own gender was not a factor, the legislature could not circumvent the requirements of section 15 by superimposing the discrimination against the parent on the child. The *Citizenship Act* continued to establish "two classes of persons born abroad wishing to become citizens: those whose Canadian parent was male and those whose Canadian parent was female ... This legislation continues to suggest that, at least in some cases, men and women are not equally capable of passing on whatever it takes to be a good Canadian citizen".

ELDRIDGE V. B.C.

The third equality case, *Eldridge* v. *British Columbia*, like the *Eaton* case, was a disability case. And if the *Eaton*

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case was met with less than full enthusiasm from the advocates for the disabled, *Eldridge* was universally hailed as a major triumph.

While the result in the Eldridge case is certainly significant in terms of section 15 analysis, the most significant aspect of this case may well prove to be its extension of the definition of "government action" to include private entities like hospitals which are implementing a specific government policy or program.

The *Eldridge* case concerned the provision of medical services in British Columbia. Each of the appellants was born deaf and their preferred means of communication was sign language. Their complaint was that the provincial health insurance plan did not cover language interpretation for the deaf. As such, they were unable to communicate with their doctors and other health care providers. The issue was whether the health insurance plan discriminated on the basis of disability contrary to section 15 of the *Charter* because it did not cover language interpretation for the deaf.

The Court concluded that, while the legislation establishing the health insurance scheme did not itself infringe section 15 of the *Charter*, the failure of hospitals to provide such services did. The failure of the legislation to provide expressly for sign-language interpretation as a medically required service was not an infringement of section 15 because hospitals were provided with broad discretion to provide medical service delivery. The obligation fell on the hospitals, as the vehicle chosen by the legislature to provide access to medical services, and to ensure that such services were distributed in a manner consistent with the requirements of section 15. This obligation included the provision of sign-language interpretation services for deaf patients.

Once again the Court went through the motions of repeating the three approaches to section 15, and concluded that "the same result is reached regardless of which of these approaches is applied". As in the *Eaton* case, the Court stressed that "the discrimination does not lie in the attribution of untrue characteristics to the disabled individual. Rather, it is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them".

While the result in the *Eldridge* case is certainly significant in terms of section 15 analysis, the most significant aspect of this case may well prove to be its extension of the definition of "government action" to include private entities like hospitals which are implementing a specific government policy or program. In previous decisions, a majority of the Court had concluded that hospitals were not government actors within the meaning of section 32 of the *Charter*, and accordingly their mandatory retirement policies were not subject to section 15 (*Stoffman* v. *Vancouver General Hospital*, [1990] 3 S.C.R. 483).

In *Eldridge*, the Court concluded that "a private entity may be subject to the *Charter* in respect of certain inherently governmental actions". The rationale for this conclusion was that governments "should not be allowed to evade their constitutional responsibilities by delegating the implementation of their policies and programs to private entities".

The Court distinguished between "government" entities, which are subject to the *Charter* regardless of the nature of the activity in which they are engaged, and "private" entities which may attract *Charter* scrutiny with respect to a particular activity that can be described as governmental. In the latter case, one must "scrutinize the quality of the act at issue, rather than the quality of the actor". Hospitals would not be subject to the *Charter* when implementing a mandatory retirement scheme for hospital staff, since this is a matter of "internal hospital management". In contrast, the purpose of the *Hospital Insurance Act* is to provide particular services to the public. Although the benefits of that service are delivered and administered from private institutions it is government, not hospitals, that is responsible for defining both the content of the service to be delivered and the persons entitled to receive the service. Accordingly, the Court concluded "the structure of the *Hospital Insurance Act* reveals, therefore, that in providing medically necessary services, hospitals carry out a specific governmental objective ... Hospitals are merely vehicles the legislature has chosen to deliver this program". The Court concluded that although "the system has retained some of the trappings of the private insurance model from which it derived, it has come to resemble more closely a government service than an insurance scheme".

CONCLUSION

Based on the results of the 1997 term, it appears that the differences between the three approaches to equality revealed in the Supreme Court cases in 1995 may not be as significant as cases like *Miron* and *Egan* suggested. *Miron* and *Egan* both considered the definition of the word "spouse" and whether it should be extended to include common-law spouses (*Miron*) and same-sex partners (*Egan*). The divisions on the Court in those cases may stem more from specific and fundamental views regarding the definition of "spouse" than from any real difference in general philosophical approach to equality. If this is correct, we would expect to see an evolution toward a single approach. Given the change in the composition of the Court in 1998, it will be interesting to see whether these differences continue, or whether a clear majority develops in favour of a single analysis.

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LOOKING AT THE INDIVIDUAL OR THE GROUP WHEN ASSESSING DISADVANTAGE IN CHARTER LITIGATION

BY RAJ ANAND & MOHAN SHARMA

THE CREATION OF ANALOGOUS SUBGROUP VS. A RELIANCE ON STATISTICAL EVIDENCE OF DISADVANTAGE

The creation of analogous grounds generally requires a finding of a "discrete and insular minority" and/or "the stereotypical application of presumed group or personal characteristics", which suggests a cluster of individuals who uniquely share personal characteristics, and that it is these characteristics which distinguishes them from all others. This task of recognizing and defining analogous grounds into distinct groups has been problematic for the Court when overlapping grounds of discrimination are not acknowledged.

Three cases illustrate how the ability to carve out a subgroup of individuals based on personal characteristics shared among members of protected groups can be determinative. The Court's reluctance to recognize the shared personal characteristics as defining an analogous group has been an obstacle in two such cases, and can be compared with a decision where the Court was able to define a new subgroup entitled to *Charter* protection. Recognition of these subgroups would further the anti-discrimination objectives of the *Charter*, but is not accomplished because of the categorical group approach which predominates *Charter* analysis. I will first review one case where a subgroup was defined by the Court as being analogous, and compare it with two other cases where the Court focussed its analysis on the traditional enumerated and analogous grounds.

Dartmouth/Halifax County Regional Housing Authority v. *Sparks*

The personal characteristic of public housing tenancy was found to be an analogous subgroup by the Nova Scotia Court of Appeal. This case shows how a *Charter* claim can succeed where the subgroup is recognized. In *Dartmouth/Halifax County Regional Housing Authority* v. *Sparks*,[1] a single, black mother and her two children had been public housing tenants for over ten years. The *Residential Tenancies Act* gave tenants with five years' possession a security of tenure such that they may only be evicted if a judge is satisfied that the tenant is in breach of his or her obligations. However, there was an exception for public housing tenants which stated that, in such cases, the terms of the lease prevailed. In this case, the public housing tenant was only afforded one month's notice and no "cause" was alleged. The public housing exception was challenged as infringing the tenant's section 15 equality rights on the basis of race, sex, and income.

The evidence presented showed that public housing tenants were disproportionately comprised of women, blacks, and social assistance recipients. Therefore, the group entitled to protection was argued to be public housing tenants. That is, the personal characteristic of public housing tenancy overlapped with the protected grounds of sex, race, and source of income. The respondent argued, however, that public housing tenancy is not a "personal characteristic." In finding that tenancy is a personal characteristic, the Nova Scotia Court of Appeal stated: "The phrase 'based on grounds relating to personal characteristics' as used in the *Andrews* case cannot be taken to mean that the personal characteristics must be explicit on the face of the legislation, nor that the legislation must be manifestly directed at such characteristics. Such an interpretation would fly in the face of the effects-based approach to the *Charter* espoused by the Supreme Court of Canada."

"It is clear that a determination of the constitutionality of legislation must take account of both the purpose and effects of the legislation."

The Court held that the challenged sections of the legislation "deny benefits to a certain group of the population (public housing tenants) while extending them to others." Such a distinction has the effect of discriminating "against public housing tenants who are a disadvantaged group analogous to the historically recognized groups enumerated in s. 15(1)." In finding an analogous group, the Court stated, "the public housing group as a whole is historically disadvantaged as a result of the combined effect of several personal characteristics listed in s. 15(1)."

The ability of the Court to carve out this subgroup of disadvantaged individuals, based on the fact that this characteristic overlapped with grounds already protected, was therefore crucial to the *Charter* claimant's success. The Court did not require a showing that the legislation made a distinction on an established enumerated or analogous ground. The fact that public housing tenancy overlapped with other protected grounds was sufficient. Therefore, through the recognition of this personal characteristic among already protected groups, an analogous subgroup was defined. However, other cases have been more onerous in their evidentiary requirement of establishing the existence of an analogous ground.

East York (Borough) v. *Ontario (Attorney General)*

In the Ontario Court of Appeal decision of *East York (Borough)* v. *Ontario (Attorney General)*,[2] (the *Megacity* case), it was argued that the personal characteristic of political powerlessness was aggravated by the *City of Toronto Act, 1997*. According to this legislation and the population demographics of the new city of Toronto, the ratio between voters and elected representatives would increase significantly. More voters would be represented by fewer city councillors. Since Toronto, as compared to other surrounding municipalities, is disproportionately made up of members of protected groups who lack political power (i.e., single mothers, visible minorities, the disabled, etc.), it was argued that the new legislation creates a burden among several analogous and enumerated groups who reside in Toronto which

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does not exist in the surrounding municipalities. It was the lack of "effective representation" which constituted the burden.

One of the very reasons for protecting minorities and disadvantaged groups through the Constitution is to recognize their inability to achieve equal rights through the legislative process. If this were not the case, these groups would not have to resort to the Charter's *protection for relief from oppressive legislation, and could simply vote for elected representatives to effectuate the desired change.*

The case is similar to *Sparks* in that a group of individuals who lack political power sought to be defined as an analogous subgroup, based on the fact that groups already protected by the *Charter* lack political power. It can be taken as a fact that political powerlessness is a trait that overlaps among most, if not all, enumerated and analogous groups protected by the *Charter*. One of the very reasons for protecting minorities and disadvantaged groups through the Constitution is to recognize their inability to achieve equal rights through the legislative process. If this were not the case, these groups would not have to resort to the *Charter's* protection for relief from oppressive legislation, and could simply vote for elected representatives to effectuate the desired change.

However, the Court in *Megacity* did not accept that the legislation negatively affected members of a protected group. The Court stated: "The levels of governance and institutional responsibility have been changed within [the city's] boundaries, but those changes cannot be described as a distinction based on stereotypical assumptions about disadvantaged groups. Further there was nothing beyond speculation to show discriminatory impact on any disadvantaged group. The theoretical concern that adjustments in the ratios would negatively impact on the access of disadvantaged groups to the elected representatives in the new City of Toronto did not meet the burden of proof of s. 15."

Had the Court framed its analysis around a subgroup of individuals who lack political power, comprised of members of enumerated or analogous grounds, rather than requiring that statistical evidence be produced establishing that minorities and disadvantaged groups lack political power, the Court's conclusion may very well have been different. The direct result of the legislation is to reduce the political power of those who already lack such power. Indeed, had the Court recognized political powerlessness as an analogous subgroup, it may have been satisfied that the ratios of decreased access to city councillors was a sufficient burden to justify a finding of discrimination. The Court's focus on the enumerated and analogous grounds, however, makes this conclusion impossible.

Clark v. *Peterborough Utilities Commission*

A final case worthy of comment is *Clark* v. *Peterborough Utilities Commission*,[3] a case heard by the Ontario Court (General Division) and on appeal to the Court of Appeal. In this case, a section 15 challenge was brought against a mandatory deposit policy of the Peterborough Utilities Commission from tenants who could not show a "satisfactory payment history." The policy applied only to tenants. Two recipients of social assistance challenged the policy as infringing their right to equality, arguing that "the application of the deposit requirement to tenants and not to homeowners results in a disproportionate number of members of disadvantaged groups being required to provide the deposit."

The applicants relied on *Sparks* and presented statistical evidence showing that women, the disabled, visible minorities, Aboriginal people, and single mothers disproportionately fell below the Low-Income Cut-Offs (LICO) established by Statistics Canada. Evidence was also presented showing tenants in Peterborough to be disproportionately below the LICO. As such, the disadvantage suffered, namely the inability to provide a deposit due to poverty, is disproportionately endured by tenants who are disproportionately made up of groups protected by the *Charter*. In essence, the claimants were seeking to characterize low-income tenancy as an analogous ground based on its overlap with enumerated and analogous grounds.

The Court based its decision on the fact that the policy only applied to tenants who had a poor credit history, and that deposits were only required in such instances. The Court stated that low-income people should not be assumed to have less satisfactory payment histories. As such, the Court could not conclude that the policy adversely affects persons based on personal characteristics. The Court, therefore, found it unnecessary to consider whether low-income tenants constituted an analogous ground.

We would argue, however, that the case was wrongly decided for the following reason. First, the Court failed to define the analogous ground. Since low-income tenants are disproportionately comprised of people who are members of enumerated or analogous grounds, the personal characteristic of being a low-income tenant is an analogous ground. Second, had the Court made this initial finding, it would have then been able to find the correct distinction being made, namely, that between low-income tenants who have unsatisfactory payment histories as compared to homeowners who similarly have unsatisfactory payment histories. The distinction is based on tenancy, not on whether tenants are able to pay their bills. This fact is clear given that the policy does not apply to homeowners. Third, the distinction creates a disadvantage because it deprives low-income tenants who have poor payment histories of access to a necessary service when homeowners with poor payment histories are not similarly deprived.

An examination of the group can result in significant negative consequences for members of a protected group. This is because current Charter *analysis assumes that the remedy for a* Charter *claimant is good for all members of the affected group. In comparison, an examination of the individual, may lead to a* Charter *claim being unsuccessful when most members of a protected group could be alleviated from the challenged burden or disadvantage.*

Based on these arguments, the Court's error stems from its failure to recognize an analogous subgroup based on a personal characteristic which overlaps several enumerated and analogous groups. The Court would have been able to draw the correct comparison groups had it recognized low-income tenants as an analogous group. Rather, the Court focussed its analysis on reviewing the evidence of the protected groups—the disabled, visible minorities, women, single mothers, and Aboriginal peoples. The Court then relied on *Symes* for the proposition that clear evidence of adverse effects must be established. However, the policy distinction directly affected low-income tenants, and only had adverse effects on the underlying disadvantaged groups. In order for the distinction to be considered a direct distinction, the Court had to first find that low-income tenants are an analogous group. As this was not done, success eluded the claimants.

To summarize, depending on whether an analogous subgroup is defined as comprising an individual personal characteristic which overlaps among other protected groups, a *Charter* claim is more likely to succeed. This is evident from a comparison of the decision in *Sparks* with those in *Megacity* and *Clark*. In *Sparks*, the analogous subgroup was defined and comparisons were easily made. However, in *Megacity* and *Clark*, the respective analogous subgroups were not defined. Both Courts were prevented from finding discrimination because of a lack of statistical evidence showing that the already recognized groups were further disadvantaged. However, if the respective Courts had made an initial determination of the disadvantage actually suffered, and thereby defined a subgroup of individuals analogous to those enumerated under section 15, the outcome of each case would have arguably been different.

CONCLUSION

In *Eaton*, the Supreme Court of Canada has established a different test for examining burdens or disadvantage based on the ground of discrimination alleged. For disability, it is clear that the individual is to be examined. For other grounds, a group analysis is appropriate. However, this classification departs from previous *Charter* analysis which suggests that, in some cases, the individual has been examined.

The effect of starting a section 15 claim by defining a subgroup is to clearly define the disadvantage suffered by focussing on the disadvantage, not the traditional enumerated or analogous grounds. This approach is one which best meets the anti-discrimination objectives of the Charter.

An examination of the group can result in significant negative consequences for members of a protected group. This is because current *Charter* analysis assumes that the remedy for a *Charter* claimant is good for all members of the affected group. In comparison, an examination of the individual, may lead to a *Charter* claim being unsuccessful when most members of a protected group could be alleviated from the challenged burden or disadvantage. Judicial economy and access to justice principles ought to ensure that overemphasis is not placed on individual considerations when a successful claim which can benefit the group is made out. Several approaches have been suggested for future section 15 cases. An approach which achieves substantive equality and which is reflective of the principles of access to justice and judicial economy, we argue, is the most desirable approach. Such a goal would be to give true effect to the equality provisions of the *Charter*.

One such approach is for the Court to more readily recognize discrete analogous subgroups. An analogous subgroup would be defined by a personal characteristic that exists among several enumerated or analogous grounds. The effect of starting a section 15 claim by defining a subgroup is to clearly define the disadvantage suffered by focussing on the disadvantage, not the traditional enumerated or analogous grounds. This approach is one which best meets the anti-discrimination objectives of the *Charter*.

NOTES

1. (1993), 101 D.L.R. (4th) 224 (N.S. C.A.).
2. (1997), 153 D.L.R. (4th) 299 (C.A.).
3. (1995), 24 O.R. (3d) 7 [hereinafter *Clark*].

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GROUNDHOG DAY AT THE SUPREME COURT: THE FEDERAL CRIMINAL LAW POWER AUTHORIZES THE REGULATION OF TOXIC SUBSTANCES HARMFUL TO THE ENVIRONMENT

BY JEAN LECLAIR

Environmental protection is not a sufficiently specific subject matter to allow for its exclusive allocation to one level of government. Rather, it is a composite ensemble of widely heterogeneous fields of law. This explains the Supreme Court's refusal to qualify environmental protection as a matter of national interest falling under the exclusive jurisdiction of the Federal Parliament pursuant to the POGG.[1] Both levels of government are thus able to legislate on matters involving the protection of the environment. The distinct nature of the legislative fields enumerated in sections 91 and 92 of the *Constitution Act, 1867* will determine the type of environmental concerns which both levels of government are authorized to take into account in the exercise of their respective powers.

[T]he Supreme Court has just recognized, in Hydro-Québec, *that section 91(27) does authorize the Federal Parliament to adopt what comes very close to being qualified as a regulatory regime of toxic substances.*

For the Federal Government, the approach adopted in *Friends of the Oldman River* constituted an obstacle to the adoption of an exhaustive regulatory regime of *local* and interprovincial activities likely to pollute the environment. Indeed, the "narrowness" of the Federal Parliament's powers (91(9), (10), (12), (13), and 92(10)a) to c), etc.) hampers its ability to establish such a regime.[2] Only the criminal law power—section 91(27) of the Constitution—would have enabled it to achieve this objective as long as it could be interpreted as permitting the regulation—and not simply the prohibition—of substances liable to harm human health or to deteriorate the environment. In a 5-4 majority decision, the Supreme Court has just recognized, in *Hydro-Québec*, that section 91(27) does authorize the Federal Parliament to adopt what comes very close to being qualified as a regulatory regime of toxic substances.

THE MAJORITY DECISION

In *Hydro-Quebec*, the constitutional validity of sections 34 and 35 of the *Canadian Environmental Protection Act* and of an interim order adopted pursuant to it were challenged. These provisions established a mechanism enabling the identification of toxic substances. They also authorized the Minister of the Environment to make regulations concerning any possible use of those substances. Failure to comply with the regulations constituted an offence.

La Forest J., speaking for the majority, concluded that the challenged provisions were validly enacted under section 91(27) of the Constitution because they prohibited, except in accordance with specified terms and conditions, the introduction of toxic substances into the environment. As such, they pursued a legitimate public objective, i.e., the protection of the environment. And, according to La Forest J., the "stewardship of the environment" is one of "the fundamental value[s] of our society", such as the protection of human life or health, which the criminal law power aims to protect (para. 43).

As for the broad wording of the law, such was no obstacle to its constitutionality. . . . Requiring more precision could "frustrate the legislature in its attempt to protect the public against the dangers flowing from pollution".

In coming to this conclusion, La Forest J. insisted on the broad latitude conferred on the Federal Parliament by section 91(27) in the determination of the evils it wishes to suppress and on the extent of blameworthiness that it wishes to attach to a criminal prohibition. Essentially, as he bluntly puts it, "all one is concerned with is colourability" (para. 38). According to him, a careful reading of the law proved that it was confined to matters within the criminal law power of Parliament (paras. 46 and 72).

The challenged provisions did not constitute an infringement of the regulatory powers allocated to the provinces by the Constitution. They dealt only with the control of toxic substances—allowing for their release into the environment under certain restricted circumstances—through "a series of prohibitions to which penal sanctions [were] attached" (para. 51). The *Act* did not bar the use or manufacture of all chemical products. Rather it was aimed at those substances that are dangerous to the environment, substances that are "toxic in a real sense" (para. 60). In short, the *Act* provided for "a limited prohibition applicable to a restricted number of substances" (para. 62).

As for the broad wording of the law, such was no obstacle to its constitutionality. This type of phraseology is characteristic of environmental protection legislation because of the breadth and complexity of such an amorphous subject. Requiring more precision could "frustrate the legislature in its attempt to protect the public against the dangers flowing from pollution" (para. 50).

THE DISSENTING OPINION

In dissent, Lamer C.J.C. and Iacobucci J. declared that two requirements had to be fulfilled for a law to be valid under section 91(27).[3] First, it must be directed at a legitimate public purpose. The dissenting judges, agreeing on this issue with the majority, concluded that the protection of the environment was such an objective (para. 119). Second, the law must contain prohibi-

tions backed by penalties (paras. 112-13). The *Act* failed to satisfy this requirement, since it aimed at protecting the environment by regulating "every conceivable aspect" (para. 96) of "any and all substances which may have a harmful effect on the environment" (para. 110). The *Act* did not provide for prohibitions backed by penalties as in *Morgentaler*[4] and *Furtney*.[5] In those cases, the exemptions were truly exceptions to general prohibitions. Section 34(1) of the *Act* authorized the Minister to regulate every aspect of a toxic substance, and a failure to comply with such a regulation constituted an offence. In other words, "[t]he prohibitions [were] ancillary to the regulatory scheme, not the other way around" (para. 130). Section 34(6) of the *Act* also prescribed that the Governor-in-Council could exempt a province from the application of regulations adopted under sections 34-35 if that province had adopted and implemented equivalent regulations. The dissenting judges argued that such a provision could not be enacted under section 91(27) since provinces do not have any criminal jurisdiction, nor can the federal government delegate such jurisdiction to them (para. 134).

The majority decision is a welcome one in that it will permit the Federal Parliament to establish a comprehensive scheme for the regulation of toxic substances.

Lamer C.J.C. and Iacobucci J. concluded that the regulating power conferred by the *Act* was so broad that it "would not only inescapably preclude the possibility of shared environmental jurisdiction; it would also infringe severely on other heads of power assigned to the provinces" (para. 137). And since the Supreme Court has already unanimously held that the environment was a subject matter of shared jurisdiction, "[o]ne level should not be allowed to take over the field so as to completely dwarf the presence of the other" (para. 136).

COMMENTARY

The majority decision is a welcome one in that it will permit the Federal Parliament to establish a comprehensive scheme for the regulation of toxic substances. La Forest J. seems uncomfortable with the idea of authorizing true regulation under the criminal law power. He constantly speaks of the *Act* in terms of prohibitions and exemptions, and such hesitation is unwarranted.

As long as it is aimed at activities which are in the nature of "public evils", a legislative intervention based on the criminal law power is no longer confined to repression and stigmatization. In other words, regulation is possible under section 91(27), but only the regulation of a substance, an activity, or a person that *endangers* either the safety of the public or the integrity of the environment.[6] Indeed, if it pursues a legitimate public objective, a law based on section 91(27) need not be confined to traditional modes of sanctions.[7] Such interventions need not provide for the infliction of a penalty. For instance, in *Swain*,[8] the Supreme Court held that the section of the *Criminal Code* providing for the detention in a provincial mental institution of those acquitted for reason of insanity was validly enacted under section 91(27), even though no penalty was inflicted. According to the Court, a rational link existed between this preventive provision and the criminal law power, since it applied to persons who had perpetrated acts prohibited by the *Criminal Code*, and whose release could endanger the safety of the public. There is certainly a rational link between the regulation of dangerous substances and the criminal law.[9] As La Forest J. says, if the law is read as only applicable to substances that are "toxic in a real sense", it can come within criminal law.

Under the criminal law power... Parliament can only prevent evils which go against certain fundamental values, such as the protection of health and the protection of the environment (La Forest J., para. 48). As such, if it pursues an objective falling within its constitutional jurisdiction, a province can regulate the very same activities or conduct. In so doing, it is not enacting criminal legislation.

Lamer C.J.C. and Iacobucci J. seem to have fallen prey to the confusion—underlined by La Forest J. (paras. 33 and 44)—that appeared during the argument between the approach to the national concern doctrine and the criminal law power. The dissenting judges are wrong in assuming that the majority's approach precludes the possibility of shared environmental jurisdiction. The national concern doctrine does result in the exclusive conferral of an all-encompassing power over a particular subject to the central Parliament, excluding any provincial interventions over the same issue.[10] Under the criminal law power, however, Parliament can only prevent evils which go against certain fundamental values, such as the protection of health and the protection of the environment (La Forest J., para. 48). As such, if it pursues an objective falling within its constitutional jurisdiction, a province can regulate the very same activities or conduct.[11] In so doing, it is not enacting criminal legislation. Thus, "the use of the federal criminal law power in no way precludes the provinces from exercising their extensive powers under s. 92 to regulate and control the pollution of the environment either independently or to supplement federal action" (La Forest J., para. 47).

The double aspect doctrine thus enables Parliament to establish minimal standards of environmental protection that can be exceeded by the provinces in the exercise of their own powers.[12]

NOTES

1. *Friends of the Oldman River* v. *Canada*, [1992] 1 S.C.R. 3 at 64.
2. J. Leclair, "L'étendue du pouvoir constitutionnel des provinces et de l'État central

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en matière d'évaluation des incidences environnementales au Canada", (1995) 21 Queen's L. J. 37.

3. The dissenting judges also concluded that the *Act* could not be validly enacted by Parliament under the national dimension doctrine nor under its trade and commerce power.

4. *R.* v. *Morgentaler*, [1976] 1 S.C.R. 616.

5. *R.* v. *Furtney*, [1991] 3 S.C.R. 89.

6. Legislation regulating the use of weapons (*Attorney General of Canada* v. *Pattison* (1981), 59 C.C.C. (2d) 138 (Alta. C.A.); *Martinoff* v. *Dawson* (1990), 57 C.C.C. (3th) 482 (B.C.C.A.); of alcohol (*Russell* v. *The Queen* (1881-82), 7 App. Cas. 829); of food and drugs (*R.* v. *Wetmore*, [1983] 2 S.C.R. 284; *C.E. Jamieson & Co. (Dominion)* v. *Canada*, [1988] 1 F.C. 590); and the promotion of tobacco (*RJR—MacDonald Inc.* v. *Canada*, [1995] 3 S.C.R. 199), was held to be valid under the criminal law power.

7. *The Queen* v. *Zelensky*, [1978] 2 S.C.R. 940.

8. *R.* v. *Swain*, [1991] 1 S.C.R. 933.

9. For a particularly enlightening opinion on the question of the possible regulation of toxic substances under the criminal law power, see Muldoon J.'s reasons in *C.E. Jamieson & Co. (Dominion)*, *supra* note 11 at 621-22.

10. Such a doctrine excludes any possibility of invoking the double aspect doctrine: *Johannesson* v. *West Saint-Paul*, [1952] 1 S.C.R. 292 at 311-12; *Re Anti-Inflation Act*, [1976] 2 S.C.R. 373 at 444 and 461.

11. For example, see *Rio Hotel* v. *New-Brunswick*, [1987] 2 S.C.R. 59.

12. There is no conflict between a—valid—provincial law and a less severe—valid—federal law, because it is possible to obey both in respecting the more severe of the two: *Ross* v. *Registrar of Motor Vehicles*, [1975] 1 S.C.R. 5.

Jean Leclair is a Professor of Law, Faculty of Law, Université de Montréal. On the same topic, see J. Leclair, "Aperçu des virtualités de la compétence fédérale en droit criminel dans le contexte de la protection de l'environnement", (1996) 26 R.G.D. 137.

HOW FAR CAN THE COURT GO TOO FAR?

BY ANDRÉE LAJOIE

1997 seems to have been a lean year for the "division of powers" cases, as only two came to the Supreme Court: *Germain* v. *Montréal*, a (small) gain for Québec, and *R.* v. *Hydro-Québec*, an (important) victory for Ottawa. Quantitativists would no doubt conclude that such a record shows how fair the Court is, 50 percent of the cases having been decided in favour of provincial authorities and 50 percent in favour of their federal opponents. But *Germain* seems to have been such a clear and, I submit, not very significant case, that Mr. Justice La Forest decided it in three paragraphs, and the organizers of this panel asked us to concentrate on *Hydro-Québec*: does this reflect a long overdue qualitativist orientation?

Since 1982, the Court's work on the division of powers has lost its pre-eminence to the Charter. *Yet, unnoticed by many, centralization continues and indeed increases, propelled this time by continentalism and the* NAFTA.

I am no determinist, and under no circumstances will I predict the outcome of a case. But I must admit I was not surprised by the Supreme Court decision in *Hydro-Québec*. This was a predictable case if ever there was one and, I will try to show, a potentially disquieting one in terms of the division of powers, if not of the environment. Despite such reservations, I find this decision interesting, because it proves some of my pet theories.

A MOST PREDICTABLE CASE

Whether you analyze it in light of the Court's centralist record on federalism, or from within the narrower context of its criminal law jurisprudence, or even as a reflection of the values it has been writing in the Constitution, the case fits so well that it could hardly surprise anyone. To start with, given the Court's track record on division of powers issues, *Hydro-Québec* is the epitome of normality. Indeed, in a study co-authored for the MacDonald Commission, I recorded the Court's unrelenting centralist tendencies between World War II and the *Charter*. In each of the three periods we distinguished in this era, the Court confirmed a majority of federal interventions, at least in cases emerging from Québec, save for a very short period between 1976 and 1979 when, for balance, it transferred its centralizing urge to cases arising from the rest of Canada. Since 1982, the Court's work on the division of powers has lost its pre-eminence to the *Charter*. Yet, unnoticed by many, centralization continues and indeed increases, propelled this time by continentalism and the NAFTA.

A look at the division of

powers cases in matters specifically related to criminal law shows an even more consistent centralist trend, most visible in the field of health, dating back before the turn of the century. Having already defined crime broadly in the *Margarine Reference* as an act which a law, directed against an injurious or undesirable effect against the public, forbids with appropriate penal sanctions, the Court has now proceeded to describe federal power over criminal law as "plenary" in *Macdonald*. In the meantime, in *Kripps*, Laskin had even included in this power jurisdiction over "provisions in the *Food and Drug Act* . . . that are aimed at marketing and [which] certainly invites the application of the trade and commerce power".

Given these precedents among others, it is not surprising that the Court would characterize the regulation of PCB emissions as "an evil that Parliament can legitimately seek to suppress". Nor is it surprising that such suppression was said to be a "legitimate public purpose" within the criminal law power, since Parliament has discretion to determine what evil it wishes to suppress by penal prohibition, especially given the importance of the environment as a paramount value.

Indeed, the values affirmed in this decision also have been featured in past decisions of the Court. As mentioned, the "environment" is perhaps most sacred among them, as one can notice in cases such as *Canadian Pacific* and *Oldman River*. But the protection of the public against evils, or society against dangers, is another value affirmed in *Hydro-Québec* which has been present in criminal law cases decided not only in the division of powers context, but under the *Charter* as well, at least since the neo-liberal 1990s.

[T]he only concurrent jurisdictions set out in the Constitution are listed in section 95 (immigration and agriculture). Given the doctrine of paramountcy, introducing others can only bring us back to the "occupied field" theory, to which we long ago said good riddance.

How predictable, therefore, that the Court would ground its decision in values such as protection against evil, and would go so far as to describe the safeguarding of the environment as "a public purpose of superordinate importance". Currently, such assertions are even more acceptable, given that *Hydro-Québec* bashing is unlikely to meet with much opposition. What is new here is not that the Court would rely on these values. It is, rather, that it has not only done so explicitly, but affirmed that "[t]he purpose of criminal law is to underline and protect our constitutional values" (at 127), and stated that it is "[t]he all important duty of Parliament and the provincial legislatures to make full use of the legislative powers assigned to them in protecting the environment" (at 86). Could this possibly be an allusion to some nostalgic legal naturalism, mandating a prescriptive effect of values on Parliament?

A POTENTIALLY DISQUIETING DECISION IN TERMS OF DIVISION OF POWERS

However much the environmentalists are right to be pleased with the outcome of this decision, I still think it has the potential to disrupt the division of powers and federalism. Maybe it is not the worst possible one, as the Court itself points out, referring to the fact that it could have validated the impugned legislation and order-in-council on grounds of the "national dimensions" doctrine. This would have had a much more serious effect on provincial jurisdiction on the environment, to the point of its elimination (at 115).

Yet I say a "potentially" disquieting decision because it introduces in our constitutional law a new kind of concurrent jurisdiction: the "Constitution should be interpreted as to afford both levels of government ample means to protect the environment" (at 116), a revival of Lesage's cooperative federalism and the Québec provincial liberals "Livre Beige", allowing for a "wide measure of cooperation between the federal and provincial authorities to effect common or complementary ends" (at 131). Needless to say, the only concurrent jurisdictions set out in the Constitution are listed in section 95 (immigration and agriculture). Given the doctrine of paramountcy, introducing others can only bring us back to the "occupied field" theory, to which we long ago said good riddance.

But this is not the only problem: the decision appears reasonable because the Chlorobiphenyls Interim Order seems an appropriate use of the powers conferred by sections 34 and 35 of the *Environmental Protection Act*. Yet other usages will not necessarily be so reasonable. I tend to agree, on this point at least, with the minority: a completely open-ended concept of "criminal law" and no other will do,

The potential danger of this decision lies in the doors it opens in the future, for other environmental purposes and, more generally, for other fields where this invasive combination of open-ended discretion might apply. The least one can say is that it appears to invest federal authorities with an indefinitely extensible jurisdiction and thus the power to amend unilaterally the structure of federalism—a power that, for some reason, has recently seemed more unreasonable when ascribed to some provincial authorities who will remain nameless.

since unless one is an essentialist, one has to admit that a crime is what the society in which it occurs says it is, coupled with equally open-ended definitions of whatever evils Parliament wants to protects us from in the future, constitute themselves evils against

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which provincial legislative jurisdiction should be protected.

It also makes impossible and oxymoronic any definition of "colourable". Furthermore, I cannot be convinced that the devolution of so much power to the executive under sections 34 and 35 does not bring the doctrine of vagueness into play. Nor can I imagine that a decision that even Chief Justice Lamer finds too centralizing could be any good for the provinces.

The potential danger of this decision lies in the doors it opens in the future, for other environmental purposes and, more generally, for other fields where this invasive combination of open-ended discretion might apply. The least one can say is that it appears to invest federal authorities with an indefinitely extensible jurisdiction and thus the power to amend unilaterally the structure of federalism—a power that, for some reason, has recently seemed more unreasonable when ascribed to some provincial authorities who will remain nameless.

LEGITIMACY—THE ONLY EFFECTIVE LIMITATION ON DISCRETION

However, it might not be by chance that the Interim Order has proven to be a particularly reasonable and acceptable use of the powers conferred: the often quoted definition of criminal prohibition in the *Margarine Reference* reads, in part: "enacted with a view to public purpose which can support it as being in relation to criminal law". If hermeneuticians and rhetoricians alike are right, the Court's discretion can only extend as far as it meets the expectations of its "audiences" and keeps public support.

Such is the basis of its legitimacy which, in a post-modern society, depends on the reception its decisions get from the specialized legal community, but even more on the coincidence of the values that the Court embodies in its decisions and those of the general public.

As long as it gives to "criminal law", "environment", and other assorted open-ended concepts a meaning that a majority of Canadians can support, the Court will keep its credibility and maintain the legitimacy of its decisions. A problem might arise when a broad consensus dissolves, or if, as might happen in other fields where constitutional questions are up for decision, a Canadian minority happens to form a provincial majority.

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THE CHARTER OF RIGHTS AS A MURDERER'S BEST FRIEND

BY ALAN YOUNG

For the past two years I have been writing an obituary for the *Charter of Rights* on the basis that the Supreme Court of Canada has in recent years taken a rather parsimonious approach to providing remedies for constitutional violations. In 1995, I wrote that "to date, the Court has mastered the rhetoric of rights-adjudication, but more work is needed with respect to the practical exercise of creating or prompting necessary institutional adjustment" for the provision of effective remedies. In 1996, I suggested that the "living tree" we call the *Charter* is a unique tree which is capable of shrinking, but not necessarily dying, in the face of lack of nourishment: "The past year [1996] will not go down in history as an exciting one for *Charter* jurisprudence. In fact, 1996 was probably the most boring and pedestrian year of *Charter* jurisprudence since the enactment of the *Charter* in 1982. It appears that the love affair with the *Charter* is over and courts are beginning to take a sober, second thought with respect to the application of *Charter* rights in the criminal process".

The Court's performance in the 1997 term clearly indicates that my report of the death of the *Charter* is both premature and unfounded. Despite the fact that the 1995 decision in *O'Connor* (1995), 103 C.C.C. (3d) 1, left the distinct impression that a stay of proceedings would rarely be granted for prosecutorial non-disclosure, in 1997 the Court stayed two proceedings on the basis of non-disclosure or lost disclosure (see *Carosella* (1997), 112 C.C.C. (3d) 289; *MacDonnell* (1997), 114 C.C.C. (3d) 145). In addition, the Court ordered new trials for two convicted murderers on the basis that probative evidence should have been excluded at trial (*Stillman* (1997), 113 C.C.C. (3d) 321; *Feeney* (1997) 115 C.C.C. (3d) 129).

This brief comment will focus on the windfall opportunity gained by these two murderers with a view to determining whether these rulings should be celebrated as due process triumphs or whether these two decisions are merely a reflection of a Court which is adrift in a sea of confusion.

In 1991, Pamela Bischoff was brutally raped and murdered by William Stillman. In the same year Frank Boyle was brutally beaten to death by Michael Feeney. Both accused were convicted at trial but, in 1997, the Supreme Court of Canada ordered new trials for both men; however, both new trials will likely result in acquittals as a result of the Court ordering the exclusion of critical pieces of evidence. In a nutshell, William Stillman received a new trial on the basis that bodily samples were seized from him for DNA testing in the absence of valid authority. The bodily samples constituted non-discoverable, conscriptive evidence and as such were excluded on the basis that the admission of the evidence would affect or impair the fair trial rights of the accused. Michael Feeney received a new trial on the basis

that he was unlawfully arrested in his home and as such various items of non-conscriptive evidence were excluded on the basis that the police conduct constituted a serious breach of the accused's right to privacy. In both cases the police exceeded the scope of the common law power to search incident to arrest and, as a result, two guilty murderers will apparently go free.

At least at the level of rhetoric, the Supreme Court has consistently promoted an expansive perspective on the right to privacy in section 8 of the Charter, *and these decisions may be seen as a strong warning to state officials that needless and unjustified intrusions upon privacy will not go unremedied.*

For the due process advocate, these decisions represent a high-water mark for employing constitutional legal rights to preserve and protect an individual's right to privacy and the right to bodily integrity. At least at the level of rhetoric, the Supreme Court has consistently promoted an expansive perspective on the right to privacy in section 8 of the *Charter*, and these decisions may be seen as a strong warning to state officials that needless and unjustified intrusions upon privacy will not go unremedied. It cannot be said that the state has been ambushed or surprised by the *Stillman* and *Feeney* decisions, because the Court had without reservation signalled a protective approach to privacy and bodily integrity.

American courts and lower courts in Canada characteristically adopted an "assumption of risk" approach to privacy, in which vulnerability to intrusion and detection dictated the extent of constitutional protection. Until 1990, it appeared that privacy in Canada would become as moribund as it has become in the United States. One commentator graphically described the state of privacy protection in American jurisdictions in the following manner: "Anyone can protect himself against surveillance by retiring to the cell, cloaking all windows with thick caulking, turning off the lights and remaining absolutely quiet. This much withdrawal is not required in order to claim the benefit of the fourth amendment, because if it were, the amendment's benefit would be too stingy to preserve the kind of open society we are committed to. What kind of society is that?"

Just as Canadian courts appeared to be adopting this Orwellian conception of privacy, the Supreme Court forged a new path by rejecting the restrictive "assumption of risk" approach to privacy (*Duarte*, [1990] 1 S.C.R. 30; *Wong*, [1990] 3 S.C.R. 36). With respect to participant monitoring, video surveillance, and beeper monitoring, the Court moved from a descriptive approach (i.e., what risks of detection does a person face) to a normative approach, in which the relevant question is not which risks of intrusion/detection an individual must be presumed to accept, but which risks the individual should be forced to assume in a free society. Although the Court has wavered somewhat by concluding that the seizure of hydro records does not violate a reasonable expectation of privacy, it has remained resolute in ensuring that "informational privacy", "territorial privacy", and "privacy of the person" (*Dyment*, [1988] 2 S.C.R. 417) are fully respected.

Despite the fact that this same Court in 1986 ruled that the police had the right at common law to enter a private dwelling home to effect a warrantless arrest... the Court in Feeney *overruled its previous decision on the basis that the "emphasis on privacy in Canada has gained considerable importance" in the* Charter *era.*

Although the normative and theoretical approach to privacy flourished, there remained some concern because of the mixed messages created by the application of the exclusionary rule to violations of the right to privacy. The *Collins* real/conscripted distinction appeared to relegate the privacy interest to playing second fiddle to violations of the right of the accused not to be compelled to be a testimonial source. Although flagrant violations of section 8 tended to attract exclusion (see, for example, *Greffe*, [1990] 1 S.C.R. 755; *Genest*, [1989] 1 S.C.R. 59), good faith violations (however defined) of privacy which yielded real evidence tended not to attract any remedy (see, for example, *Hamill*, [1987] 1 S.C.R. 301; *Simmons*, [1988] 2 S.C.R. 495; *Duarte*, *supra*; *Wong*, *supra*; *Wise*, [1992] 1 S.C.R. 527; *Silveira*, (1995) 97 C.C.C. (3d) 450; *Evans*, (1996) 104 C.C.C. (3d) 23).

In *Feeney*, the Court gave the theoretical endorsement of the right to privacy as a real practical bite. Despite the fact that this same Court in 1986 ruled that the police had the right at common law to enter a private dwelling home to effect a warrantless arrest (*Landry* (1986), 25 C.C.C. (3d) 1), the Court in *Feeney* overruled its previous decision on the basis that the "emphasis on privacy in Canada has gained considerable importance" in the *Charter* era. Regardless of whether the suspect is living in a ramshackle hut (*Colet*, [1981] 1 S.C.R. 2) or a trailer (*Feeney*), the Court ruled that entry into a private dwelling home to effect an arrest could only occur upon the obtaining of judicial authorization. Only in cases of hot pursuit would the Court allow for a warrantless entry to effect an arrest.

Without question, the primary ruling in *Feeney* is both sensible and consistent with recognized *Charter* values. A warrant establishes the authority of the state to intrude and it serves to ensure that intrusions are objectively premised upon probable cause. The case law clearly establishes that warrantless entries to effect arrests lead to resistance and altercations between police and homeowners (see, for example, *Landry*, *supra*; *Plamondon*, [1997] B.C.J. No. 2757, unreported decision of the B.C.C.A., December 11, 1997). Nonetheless, the interesting question remains as to why Mr. Feeney would receive the benefit of

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the exclusionary remedy whereas in other cases of intrusions upon the privacy of a dwelling home the Court turned a blind eye to the violations.

[O]ne must wonder how an exclusionary remedy which is purportedly designed to maintain and enhance the integrity of the judicial process can achieve this objective when it serves to allow guilty murderers to escape justice on a consistent and recurring basis.

Prior to *Feeney*, the Court had admitted evidence in cases in which the police lied to secure entry into a home (*Edwards* (1996), 104 C.C.C. (3d) 136), in which the police entered and detained the residents prior to obtaining a search warrant (*Silveira*, *supra*), and in which the police employed a "knock on" olfactory search at the front door of a home despite the clarity of previous rulings forbidding warrantless perimeter searches of private property (*Evans*, *supra*).

Arguably, the violations in the previous three cases were as serious, if not more serious, than the violation in the *Feeney* case. In *Feeney*, the police were acting spontaneously in response to information received concerning a brutal homicide. Although the police did not follow proper procedures in gaining entry into the suspect's dwelling, there was no suggestion of a concerted plan to disregard the demands of the Constitution. In the previous three cases, the police were not responding to an apparent emergency and they had ample time to determine the constitutionally proper way to effect an entry and a search. In the previous three cases, the Court upheld the conviction of guilty drug traffickers in the face of apparent *Charter* violations, whereas in *Feeney* a guilty murderer was the fortunate beneficiary of *Charter* violations which were arguably not as flagrant and serious as the violations in the three drug cases.

It is easy to rely upon some pedestrian cliche like Justice Frankfurter's famous statement, that "it is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people" (*U.S.* v. *Rabinowitz* (1950), 339 U.S. 56 at 69, to justify the windfall benefit obtained by murderers like Feeney and Stillman. In fact, the Supreme Court of Canada relied upon its own rendition of the cliche by stating that "we should never lose sight of the fact that even a person accused of the most heinous crimes, and no matter the likelihood that he or she actually committed those crimes, is entitled to the full protection of the *Charter*" (*Feeney*, *supra* at 170). Nonetheless, one must wonder how an exclusionary remedy which is purportedly designed to maintain and enhance the integrity of the judicial process can achieve this objective when it serves to allow guilty murderers to escape justice on a consistent and recurring basis.

There is no doubt that restricting Charter remedies solely to violations which occur in the course of the investigation of minor offences would trivialize the great majesty of the constitutional document; however, it must also be remembered that the exclusionary remedy was designed to be flexible and discretionary and that the Court has acknowledged that the "concept of disrepute involves some element of community views" (Collins).

Prior to *Stillman* and *Feeney*, the Court had on numerous occasions excluded confessions made by arguably guilty murderers (see, for example, *Clarkson*, [1986] 1 S.C.R. 383; *Brydges* (1990), 53 C.C.C. (3d) 330; *Evans* (1991), 63 C.C.C.(3d) 289), without expressing the same compunction and reservations expressed by the Court in freeing an obviously guilty drug trafficker. There is no doubt that restricting *Charter* remedies solely to violations which occur in the course of the investigation of minor offences would trivialize the great majesty of the constitutional document; however, it must also be remembered that the exclusionary remedy was designed to be flexible and discretionary and that the Court has acknowledged that the "concept of disrepute involves some element of community views" (*Collins* (1987), 56 C.R. (3d) 193).

The problem in a nutshell is that the Court, in its attempt to instantiate the concept of disrepute contained in section 24(2), has boxed itself into a framework of analysis which does not cohere with either community views or the intent of the drafters. In *Stillman*, the Court endorsed the *Collins* framework of analysis and added a refinement to the assessment of how and why conscripted evidence should be excluded. The Court provided a clear exposition of the approach to excluding conscriptive evidence:

"1. Classify the evidence as conscriptive or non-conscriptive based upon the manner in which the evidence was obtained. If the evidence is non-conscriptive, its admission will not render the trial unfair and the court will proceed to consider the seriousness of the breach and the effect of exclusion on the repute of the administration of justice.

2. If the evidence is conscriptive and the Crown fails to demonstrate on a balance of probabilities that the evidence would have been discovered by alternative non-conscriptive means, then its admission will render the trial unfair. The Court, as a general rule, will exclude the evidence without considering the seriousness of the breach or the effect of exclusion on the repute of the administration of

justice. This must be the result since an unfair trial would necessarily bring the administration of justice into disrepute.

3. If the evidence is found to be conscriptive and the Crown demonstrates on a balance of probabilities that it would have been discovered by alternative non-conscriptive means, then its admission will generally not render the trial unfair. However, the seriousness of the *Charter* breach and the effect of exclusion on the repute on the administration of justice will have to be considered" (*Stillman, supra* at 364-65).

In *Stillman*, conscripted evidence was further defined as being constituted by "statements or the use as evidence of the body or bodily substances". Most of the evidence collected from Mr. Stillman was comprised of bodily substances and as such it was excluded as non-discoverable, conscripted evidence. The remedy of exclusion in this case appears justifiable as a response to the unauthorized intrusions upon the body of the accused; however, the framework of analysis is still fraught with inconsistencies which unfortunately have a tendency to inure to the benefit of persons charged with serious predatory crimes. This windfall occurs because bodily substances tend to exist as trace evidence only in crimes of personal violence.

At the outset, it should be noted that the characterization of the use of the body and bodily substances as conscripted evidence appears to be mistaken. Although the relationship between conscripted evidence and the fairness of a trial has never been clearly elucidated by the Court, presumably, the logic underpinning this association is aptly summarized by Professor Paciocco: "What, then, is the theoretical basis for the 'unfair trial' characterization? One might surmise that it is a corollary of our notion that a fair trail is one in which the Crown must establish the guilt of the accused without calling him as a witness against himself. To compel the accused to answer before trial, and then use his words against him at the trial, would be tantamount to calling him as a witness against himself, thereby rendering the trial unfair. It would enable the Crown to do indirectly what it cannot do directly. This theoretical basis can even be stretched with some considerable generosity to include other evidence produced through the compelled participation of the accused: things like breath samples, or the enforced participation of the accused in police line-ups. In a broad sense, by assisting the Crown in furnishing evidence against himself, he is effectively a 'witness' against himself".

Statements obtained in violation of the *Charter* clearly constitute conscripted evidence because currently there is no lawful mechanism available to the state to compel the accused to provide testimonial evidence. However, with the exceptions of the use of the body for lineups, sobriety tests, and handwriting samples, there does exist (as of July 13, 1995; see sections 487.04-487.091 of the *Criminal Code*) lawful authority allowing the state to collect bodily substances from the accused prior to trial. Therefore, it is far from clear how bodily substances can constitute conscripted evidence in light of the fact that the state could, if proper procedures were followed, obtain this evidence for use at trial. In the case of collecting bodily substances, the state is not doing indirectly what it is prohibited from doing directly.

Conscripted evidence should not be automatically excluded without some consideration of the seriousness of the offence and the seriousness of the violation, and the analysis of the seriousness of the violation for non-conscripted evidence should not be done in a factual vacuum which does not factor in the seriousness of the offence.

Second, the fact that lawful procedures now exist for the collection of bodily substances exposes another contradiction within the *Collins/Stillman* framework of analysis. Conscripted evidence will not affect the fairness of the trial if it was otherwise discoverable through lawful means. Accordingly, in most cases in which a lawful arrest has been effected, the police would invariably be entitled to apply for a DNA warrant to collect the types of bodily substances taken in *Stillman*. If in the ordinary course this type of evidence is discoverable, then the framework of analysis requires the Court to determine if the seriousness of the violation warrants exclusion of discoverable evidence. Whereas the availability of constitutionally proper methods for collection of bodily substances removes the evidence from the category of virtually automatic exclusion, the availability of other lawful methods of collection tends to make the alleged violation more serious. As Lamer C.J.C. stated in *Collins*, "the availability of other investigatory techniques and the fact that the evidence could have been obtained without the violation of the *Charter* tends to render the *Charter* violation more serious". When exposed to careful scrutiny, it appears that the Court has constructed a test for exclusion which collapses under the weight of its own internal contradictions, as on the one hand discoverability militates in favor of exclusion, and on the other hand it is an aggravating factor with respect to the seriousness of the violation.

If the evidence is not conscriptive, as in *Feeney*, then the Court is directed to focus on the seriousness of the violation as the barometer for determining if exclusion is warranted. Once again, this determination is fraught with inconsistency and incoherence. One could argue that the police in *Feeney* were confronted with an urgent situation demanding an immediate response. In addition, it could be argued that the police acted in good-faith reliance upon the ruling in *Landry*, allowing then to enter a private dwelling to effect an arrest. Although it does appears that the police in *Feeney* arrogated to themselves a power not provided by law, it is difficult to draw an inference that this was a bad

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faith violation premised upon a deliberate attempt to circumvent *Charter* rights.

Ultimately, the results reached in *Feeney* and *Stillman* may be proper and justifiable; however, respect for the *Charter* will diminish if the pattern of readily providing remedies for guilty murderers continues to be the stock and trade of Supreme Court decisions. Beyond the inconsistencies which hover around the periphery of the *Collins/Stillman* test, the major shortcoming of this test is the failure to incorporate an element of proportionality into the framework of analysis. Conscripted evidence should not be automatically excluded without some consideration of the seriousness of the offence and the seriousness of the violation, and the analysis of the seriousness of the violation for non-conscripted evidence should not be done in a factual vacuum which does not factor in the seriousness of the offence. Professor Paciocco explains how the principle of proportionality should be employed in the determination of whether to exclude probative evidence: "The principle of proportionality requires courts to make the decision whether to exclude evidence by comparing the severity of the breach and the seriousness of the consequences of excluding the evidence, given all of the circumstances and the long-range interests of the administration of justice. The attraction of the principle is that it enables the complex mix of competing interests to be measured on a case by case basis. This is of value because the exclusion of evidence has both costs and benefits. Sometimes the costs simply outweigh the benefits. Where this is so, the evidence should not be excluded. The exclusion of evidence should not become some kind of self-flagellation in which we, as a society, inflict disproportionate pain on ourselves to show the depth of our repentance for having violated the *Charter* rights of the accused. The fact is that so long as proportionality is eschewed completely in 'fair trial' cases, even minor, technical violations will result in the loss of critical evidence against serious offenders. What public interest is there in doing that? The fair trial dichotomy is simply too rigid to allow for the rational assessment of the competing interest that are presented when exclusionary decisions come to be made".

Upon a review of the activist and progressive stand taken by the Supreme Court in the 1997 term, one can say with certainty that the reports of the death of the *Charter* were greatly exaggerated. As Shakespeare has said, "the law hath not been dead, though it hath slept". However, if 1997 represents the waking of this sleeping giant known as the *Charter*, we may have to confront a new problem regarding the ever-widening gap between the judicial approach to rights violations and the community views as to when constitutional remedies are warranted.

Clearly, the views of the majority cannot and should not govern the approach to constitutional adjudication; however, failure to bridge the gap between reasonable community views and the *Collins/Stillman* test can only serve to foster contempt for *Charter* values. Although few people are naive enough to believe that the enactment of the *Charter* was the first step in creating a legal utopia, many people would believe that employing the *Charter* to protect Mr. Stillman and Mr. Feeney has already brought about a legal dystopia.

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THE DISCLOSURE DILEMMA: 1997 DECISIONS ON EVIDENCE

BY DIANNE L. MARTIN

Assumptions about the truth, or not, of criminal complaints were particularly visible in the Supreme Court's 1997 decisions on evidentiary issues. This is so because of some longstanding trends in the jurisprudence which are now reaching their logical conclusions, but also because of the nature of the cases and the issues. Criminal cases have dominated the law of evidence for some time and this term is no different. The key evidence decisions all concerned criminal prosecutions, with the exception of *M. (A.)* v. *Ryan*.[1] However, *Ryan*, although it is a civil case involving an action for sexual abuse brought by a patient against her psychiatrist, is an important decision in the criminal law context as well. The case itself, and the approach taken in the judgement, demonstrates the extent to which civil and criminal law rules of evidence are merging, particularly in cases involving allegations of sexual abuse by persons in authority. It also advances the discussion of one of the more difficult issues to be decided by the Court, that is, resolution of the conflicting interests engaged by the issue of access to confidential records of therapy or counselling concerning a complainant/witness. That troubling issue is considered this term in the context of discovery of the prosecution case generally and, in particular, in terms of determining what the appropriate remedy should be when the Crown fails or is unable to make full disclosure.

Disclosure was not the only issue to be considered, however. Other decisions raise important questions about the admissibility of illegally obtained evidence,[2] eyewitness identification evidence,[3] and the obligation on the Crown to call particular witnesses.[4] Nonetheless, regardless of the primary issue involved, all of the decisions demonstrate a concern with preserving convictions or, more precisely, with supporting the choices of prosecuting agencies, in a way that demonstrates considerable confidence in the essential propriety of those choices. Although the tenets of the adversary process are fre-

quently cited as worthy of respect and preservation, closely followed by (or sometimes included within) references to the importance of the goal of "truth finding", there are clearly assumptions operating about which of the adversaries is to be preferred in a contest of credibility—and in which cases. However, these assumptions are not universally, or even consistently, held by the whole Court.

The Court is frequently divided over evidence issues. The reasoning and writing of the differing opinions is often adversarial in tone, suggesting that the differences are more than doctrinal. The divisions are particularly evident in the different assumptions apparent in the disparate approaches taken to the issues posed by sexual abuse cases.

The Court is frequently divided over evidence issues. The reasoning and writing of the differing opinions is often adversarial in tone, suggesting that the differences are more than doctrinal. The divisions are particularly evident in the different assumptions apparent in the disparate approaches taken to the issues posed by sexual abuse cases. In these cases in particular, assumptions about the veracity and reliability of the facts founding the prosecution serve almost as a bellwether to the approach the Court will take on the legal questions. Without suggesting that this is anything more than an observable tendency, Justices Lamer, Sopinka, Cory, Iacobucci, and Major are frequently on one side of evidence questions, opposed by Justices La Forest, L'Heureux-Dubé, and Gonthier, and, on occasion, McLachlin. The majority position has often been led by the late Mr. Justice Sopinka and, in general, decisions from this majority have tended to support the importance of the appearance of a fair trial for the accused as an important value in itself, but not one that has been particularly grounded in a working presumption of innocence. That, however, appears to change in regard to prosecutions of sexual abuse. In these cases, there appears to be less faith in the foundation facts, and a more lively concern with a presumption of innocence than is the case in regard to criminal prosecutions generally. The minority position, on the other hand, most frequently led by Madame Justice L'Heureux-Dubé, tends to be grounded in a stance of strong support for complainants, particularly vulnerable complainants who have traditionally been effectively excluded from the criminal justice system. This position, however, tends to operate from and thus reinforce a presumption of guilt, based on assumptions about the reliability of the original investigation. Originating in a concern for fragile witnesses, particularly those alleging sexual abuse, this reliance on the prosecution perspective has in turn influenced the positions taken by (some of) these justices on criminal evidence questions generally.

These distinctions, which have been developing over a number of years, are becoming increasingly sharp and it is important to follow the course of these tendencies. To do so is the modest goal of this paper. The discussion proceeds in a straightforward manner, with a close examination of two of the decisions. *Carosella* and *La* are split decisions, and the review of the cases is as attentive to the divisions on the Court as it is to the doctrinal and background assumptions that may be driving the reasons. The paper concludes by returning to the proposition that at least some of the decisions reflect assumptions that serve to treat trials as symbolic forums for "demonstration versus determination" of guilt, and by locating the decisions both historically, and within the claims of the adversary process for fairness and accuracy generally.

THE DISCLOSURE DILEMMA

Disclosure of the prosecution case has always been an important component of a fair trial, particularly when expressed in terms of the right fundamental to fair trials in an adversary system—to know the case one must meet. More recently, however, disclosure has come to include access to material with which to challenge prosecution witnesses and evidence more generally, and to support the defence position where possible. In this expanded meaning of disclosure, difficult questions arise as to what extent the prosecution must assist the defence, in contrast with the more limited duty not to surprise unfairly. The question of what remedy should be granted, and when, for a failure to make disclosure (particularly in this wider sense), is similarly complex. These and other disclosure issues are part of what the Court grapples with in *Carosella* and *Vu (La)*. Ultimately, these are cases which demonstrate conflicts within the ideology of the adversary process as a vehicle for the "search for truth" by forcing the question—"whose truth"?

Carosella[5]

Carosella is another of the "historical sexual abuse"[6] cases to reach the Court in recent years and raises once again the question of disclosure of the complainant's confidential counselling records. This time, however, the issue focuses on the role of those who provide the counselling, and the assumptions that courts are willing to make about that role.

The appellant was charged early in 1992 with committing a gross indecency some thirty years ago, when he was the complainant's teacher. The disclosure and related issues the Court ultimately had to resolve began with a request by the appellant, made after a jury had been selected, for notes of counselling the complainant received from a local rape crisis centre ("the Centre") on March 16, 1992, the day before she made her first complaint to the police. All parties consented to the order which was made by the trial judge on October 26, 1994. It was then learned that the file the Centre produced to the court did not contain any notes of that counselling session (or any of the subsequent sessions), and that the notes could not be produced because they had been shredded in April 1994. When it became known that they were destroyed as part of the Centre's policy to avoid disclosing confidential notes

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in cases of possible "police involvement", the trial judge granted a stay of proceedings based on the disclosure breach.

[Carosella] appears to be crystal clear that at issue is the denial to the defence of material to which they (now) have a constitutionally guaranteed right. The material was disclosable; it was not produced; a breach has therefore occurred and a remedy must be granted.

In February 1997, a 5-4 majority of the Supreme Court of Canada held that the stay of proceedings was appropriate. The majority (Sopinka J., writing for Lamer C.J.C., Cory, Iacobucci, and Major JJ.) appears to elevate the duty on the Crown to disclose their case to the defence, to the level of a constitutional *right* enjoyed by an accused. The language seems clear, both as to the right and the entitlement to a remedy. Upon demonstration that they have been denied disclosable material, the defence is entitled to a remedy, with no further showing of prejudice.

The decision appears to be crystal clear that at issue is the denial to the defence of material to which they (now) have a constitutionally guaranteed right. The material was disclosable; it was not produced; a breach has therefore occurred and a remedy must be granted.

Given the difficulty in establishing prejudice, it appears clear that the primary ground upon which the granting of a stay was upheld is the mere fact of non-disclosure. The trial judge had concluded that the notes "would more likely than not tend to assist the appellant", but this conclusion is not well supported by the evidence, as the worker who made them had no recollection of their contents. Sopinka J. struggled with that rather bald conclusion, but in the end, however, he accepted it. His reasons indicate that he did so because he was prepared to make some rather speculative assumptions about how the counselling session progressed and how it would differ from a police interview. First, he argued that the notes might have given the appellant (unspecified) ammunition for cross-examination. Next, he claimed that the notes might have "revealed the state of the complainant's perception and memory" or might have pointed the appellant to other witnesses. There is no discussion as to why the notes made by the Centre might contain such information when it was not contained in the lengthy statements given to police. There is no attempt to articulate why these notes would reveal the state of the complainant's memory in a way that the police interview would not. One is left to speculate that the majority assumes that a complainant will admit to weaknesses in her recollection and doubts about her allegations when speaking to a counsellor, but that this will not occur (or will not be recorded) when she speaks to the police. However, Sopinka, J. was clear that the defence need *not* be forced to speculate about possible uses of the destroyed material in order to establish that there has been a breach of a constitutionally protected right. To force them to do so would be to force them into an impossible "catch-22" position.

It is quite clear that the majority is at least equally concerned with the destruction of the notes, and the intent behind it, as with the actual effect of that destruction on the rights of the accused. Similarly, the effect of the conduct on the appearance of justice to the accused supersedes any requirement that an actual injustice be established.

One can be forgiven for reading the majority as strengthening disclosure rights. There is almost no hint that the key to the decision is not the defence's loss of disclosable material, but rather the conduct of the Centre. However, as becomes obvious in subsequent decisions, the majority in *Carosella* are less interested in supporting the presumption of innocence and providing the defence with tools to challenge the prosecution case, than they are with "punishing" the Centre for its efforts to thwart anticipated disclosure and/or discovery orders. Although expressed in the language of disclosure rights, the majority are clearly angered by the Centre's preemptive action, which is treated as a form of contempt, bordering on a criminal obstruction of justice.

It is quite clear that the majority is at least equally concerned with the destruction of the notes, and the intent behind it, as with the actual effect of that destruction on the rights of the accused. Similarly, the effect of the conduct on the *appearance* of justice to the accused supersedes any requirement that an actual injustice be established.

La Forest, L'Heureux-Dubé, Gonthier, and McLachlin JJ. dissented in the result, and in the approach taken by the majority to the facts, the issues, and the law. They do not accept that a third party, a member of the public at large, can be bound by the Crown's disclosure obligations, nor that the records are sufficiently relevant or weighty that their absence from the trial must result in a stay of the proceedings, without a showing of actual prejudice. The distinction between third parties and the prosecution is rigorously maintained, in contrast with the majority's reasoning which attempted to cast the Centre as an agent of the state. L'Heureux-Dubé J. frames the ultimate issue on that distinction, while personalizing the claim for relief as one involving the assertion of a case of actual prejudice.

This characterization of the appellant's position is somewhat disingenuous, and stems more from the position of the majority than from Carosella or his counsel. The majority had

attempted, not particularly successfully, to clothe the notes with some actual relevance and thus to identify some actual, as contrasted with speculative, prejudice occasioned by their destruction. L'Heureux-Dubé J. is particularly successful in challenging this proposition. In the place of bald assertions of relevance and probative worth, and speculation about prejudice, L'Heureux-Dubé J. sets out the state of the record on the notes, reproducing the relevant testimony.

In R. *v.* La (or Vu), *the divisions apparent in* Carosella *are maintained as the Court continues to consider some of the difficult questions left unresolved or problematic in that decision, including the scope of the apparently new direction the Court was taking in regard to disclosure.*

This is a strong argument. However, L'Heureux-Dubé J. does not rest her case solely on the factual frailty of the majority opinion. She goes further, and argues that in order to establish that there has even been a breach on any constitutionally protected rights, the accused must *prove* that there has been prejudice to the right to make full answer and defence, or establish that this is one of the "clearest of cases" of abuse of process which thereby necessitates a stay. Just as the majority were not fully persuasive in arguing for the relevance and materiality of the lost evidence, the minority is not entirely successful on this point. No real effort is addressed to the difficult issue of just how the defence might "prove" abuse of process in such a case, or demonstrate prejudice to the degree required when the material that might permit that showing is unavailable.

In the result, both sets of reasons are somewhat troubling; the majority's, for its apparent willingness to engage in rather broad speculation about what of relevance may have taken place in an initial interview at a Rape Crisis Centre; the minority's, for the almost insurmountable burden it is prepared to impose on the defence which has been denied material that, at the very least, might have been helpful in the difficult task of defending events alleged to have taken place some thirty years ago. What is quite clear is that the issues posed in *Carosella* have not been successfully resolved by either position, and that much is left for subsequent decisions to clarify.

La[7]

In *R.* v. *La (or Vu)*, the divisions apparent in *Carosella* are maintained as the Court continues to consider some of the difficult questions left unresolved or problematic in that decision, including the scope of the apparently new direction the Court was taking in regard to disclosure. One must look to *La* to determine whether *Carosella* should be read almost as an aberration and limited to its facts (an historic sexual assault and a rape crisis centre shredding its files), or whether it forges a new direction in crafting a constitutionally protected *right* to disclosure, with a concomitant right to a remedy. The answer is partial. *La* concerns important, disclosable evidence (a taped interview with the chief Crown witness in charges of sexual assault and child prostitution) developed and lost by the police. The original stay of proceedings based on non-disclosure of this tape is reversed. Clearly the Court in *La* resiles from the apparently sweeping protection for disclosure expressed in *Carosella*, and no new approach to disclosure problems caused by the police emerges. An intriguing, related question concerns what is happening to the common law remedy of abuse of process; although somewhat beyond the scope of this analysis, this question is also addressed again.

Sopinka J. (for Lamer, C.J.C., Cory, Iacobucci, and Major J.J.) posed the issue as a question as to whether or not there was a breach of disclosure at all when "through innocent inadvertence" the prosecution loses the relevant evidence. He thus commences the reasons from the conclusion that the primary issue will be, in effect, the intention of the prosecution in regard to the evidence, and not the effect of its loss, although effect may be considered in the alternative. A (new) constitutional duty to *explain* the reason for the failure to disclose is swiftly identified as a prerequisite to a conclusion that a breach has occurred.

This new explanatory duty on the Crown apparently replaces, or at least refines, the constitutional *entitlement* to disclosure accorded to the accused in *Carosella.* This new explanatory duty is located in a duty to preserve evidence gathered which does not apparently yet extend to a duty on the police to obtain evidence, for example by making an accurate record of it. Sopinka J. does, however, recognize that"[t]he right of disclosure would be a hollow one if the Crown were not required to preserve evidence that is known to be relevant". A sliding scale of care is identified—the more relevant and probative, the greater the duty to preserve it from loss—along with a sliding scale of fault. Deliberate destruction by police or Crown officers of material known to be relevant will amount to an abuse of process, but so might "an unacceptable degree of negligent conduct". Thus in *La*, the prosecution's explanation that a tape recording of a complainant's first version of her allegation has been inexplicably forgotten and then lost by a police officer is accepted, while in *Carosella* the prosecution's explanation that a third party, beyond their control and with no duty to make or preserve evidence, has destroyed notes of an interview, is not.

Sopinka J. does not deal with this apparent inconsistency directly. Nor does he offer any guidance as to how the relevance of missing material can be determined, or what background assumptions about relevance will be persuasive. Rather, he distinguishes the two situations in two ways, one more successful than the other. First, he asserts, as if it strengthens the case, that in *Carosella* "the documents which were destroyed were relevant and subject to disclosure under the test in *O'Connor*". The taped interview of the first police interview with a complainant, *before* charges are laid, is obviously relevant, of a high level of reliability, and must be disclosed. In contrast, the degree of relevance of notes from

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confidential counselling sessions, like those in *Carosella*, is, of course, a matter of considerable debate, and, *per O'Connor*, must be assessed with a considerable amount of care.[8] Neither relevance nor disclosure of such material can simply be assumed as this passage implies, particularly when the records do not exist and their specific contents are unknown. Because the records are in the hands of third parties, and because of the confidentiality and other policy constraints generated by their nature (a therapeutic, confidential counselling relationship), disclosure (as compared to production to the court) is by no means automatic, as it would be in the case of police investigative files. The most that might be said is that records such as those in *Carosella* might be ordered *produced* to the trial judge (in contrast with being *disclosed* to the defence) so that actual relevance might be determined.

However, the second point of distinction has more weight. That is, that the reason that the records could not be produced to the court to be considered for disclosure to the defence is that they were destroyed deliberately to prevent that very determination. In the rather inflated terms of *Carosella*: "The conduct of the Sexual Assault Crisis Centre destroyed the accused's right under the *Charter* to have those documents produced. That amounted to a serious breach of the accused's constitutional rights and a stay was, in the particular circumstances, the only appropriate remedy".

Although the interests of the accused, as well as the public interest in determining the truth of the allegation, are the same regardless of the reason for the lost evidence, the Court introduces a supervisory aspect to the determination, reminiscent of that used in section 24(2) of the *Charter*. Once again the reason for the loss is critical: "Where, however, the evidence has been inadvertently lost, the same concerns about the deliberate frustration of the court's jurisdiction over the admission of evidence do not arise".

The Court's decision to dispose of this case as it did, based on a particular vision of the adversarial nature of criminal proceedings, effectively confirms that some adversaries are more equal than others, and that other is the Crown.

There is a residual right, however, or more accurately an opportunity, to demonstrate actual prejudice. When an accused has been denied the disclosure to which he is entitled but the prosecution explanation for that loss is acceptable to the trial judge, he may still obtain a remedy if he "establishes" either that the circumstances of the loss amount to an abuse of process, or that the right to make full answer and defence is thereby impaired. The judgement does not articulate the standard of proof for establishing the conditions for either of these alternative remedies, but it is apparently lower than "the clearest of cases" test previously associated with the abuse of process doctrine.[9]

The dissent of Justices La Forest, L'Heureux-Dubé, Gonthier, and McLachlin, written by L'Heureux-Dubé J., concerns the majority's reasons, not the result. The dissent continues the arguments that divided the Court in *Carosella*. That is, whether or not the identification of the prosecution's duty to make disclosure as a distinct constitutional right represents a marked and unwarranted development in doctrine, and to what extent the standard of proof to establish either a breach of section 7 or an abuse of process has changed or should change. In regard to the former, L'Heureux-Dubé J. makes a compelling case that the case law concerning disclosure, from and including the reasons of Sopinka J. in *Stinchcombe*,[10] did not originally, until *Carosella*, treat it as a distinct right of the accused guaranteed under section 7 of the *Charter*.

It is difficult to assess the reason for this change, as Sopinka J. does not acknowledge that one has occurred in his reasons, except to recognize that it was essential to the result in *Carosella*. The other terrain of dispute, the scope of and remedy for breaches of section 7 of the *Charter*, and for a finding of an abuse of process, is almost as obscure. However, the effect of the position of the dissent is that it will almost never be possible to establish a case for a remedy for a failure to make disclosure, identifying a concomitant duty on trial judges to assess the explanation and to call the witness themselves in a proper case in the interests of justice. The Court's decision to dispose of this case as it did, based on a particular vision of the adversarial nature of criminal proceedings, effectively confirms that some adversaries are more equal than others, and that other is the Crown.

CONCLUSION: THE DEMONSTRATION OF GUILT

In the "guilt assuming" model, the truth-seeking function of the trial is served primarily by devices that limit barriers to the recounting of the "truthful" testimony of prosecution witnesses. Thus accommodation will be made for vulnerable and reluctant witnesses,[11] limits will be placed on the cross-examination of those witnesses,[12] and expert opinion evidence that supports their credibility will be admitted.[13]

Limits will only be imposed on the discretion of prosecution officials when it is clearly demonstrated, through proof on a balance of probabilities, that prosecution conduct has deliberately infringed a Charter *right or guarantee, or that it amounts to an abuse of process.*

The values of "justice" or "fairness" to the accused, on the other hand, while serving an important legitimation function, will often be required to give way to the public interest, which is defined in terms of the assumption that the validly

commenced prosecutions are against the "correct" accused. Thus the accused in *La,* who was deprived of disclosable material, was required to affirmatively prove that he was prejudiced before claiming a remedy. The operating presumption, in other words, is of guilt. Limits will only be imposed on the discretion of prosecution officials when it is clearly demonstrated, through proof on a balance of probabilities, that prosecution conduct has deliberately infringed a *Charter* right or guarantee, or that it amounts to an abuse of process. This type of confidence in the reliability of the facts that are used and presented in courts to justify arrest, and the other discretionary powers of criminal justice officials, leading to an operational presumption of guilt, has been evident as an unarticulated but influential background assumption in many of the judgements written about evidence in the past decades.[14] It is clearly apparent in the judgements from the 1997 term.

NOTES

1. [1997] 1 S.C.R. 157. The litigation issue in *Ryan*, as in *Carosella*, is sexual abuse; in *Ryan* by a psychiatrist, in *Carosella* by a teacher. In both the evidence question concerns access to confidential records on the hands of third parties. The leading decision, *R.* v. *O'Connor* [1995], 4 S.C.R. 411, involved a priest/teacher. See J.M. Gilmour & D.L. Martin, "Whose Case is it? Standing and Disclosure in Civil and Criminal Law Contexts", forthcoming.

2. *R.* v. *Stillman,* [1997] 1 S.C.R. 607, deals with the admissibility of DNA evidence based on samples obtained illegally from a suspect. *Stillman* is one of the few cases this term to join criticism of prosecution conduct—in this case by the police—with a remedy. The seizure of physical evidence from the youthful offender without his consent was held by the majority to warrant the exclusion of the evidence.

3. *R.* v. *Nikolovski,* [1996] 3 S.C.R. 1197, deals with the use a trial judge may make of a video of a crime when sitting as the trier of fact, in a case where identity is the sole issue and the eyewitness cannot make a positive identification. Although the complainant eyewitness could not identify the accused as his assailant, the Court upheld the trial judge's decision to rely upon her own perception of the proof of identity contained in a video recording of the robbery. The trial judge compared the video to the appearance of the accused and was satisfied as to guilt.

4. *R.* v. *Cook* deals with the failure of the Crown to call the victim of the offence as a witness, or to explain the decision to the trial judge.

5. [1997] 1 S.C.R. 80

6. The label identifies the fact that they deal with allegations about events far in the past.

7. (1997), 148 D.L.R. (4th) (S.C.C.).

8. See, for example, Parliament's efforts to the same end in the new s. 278.1 of the *Criminal Code*.

9. At common law, abuse of process was only available on proof of "the clearest of cases"—a rare circumstance. However, given the reworking of the doctrine in *O'Connor*, the burden of proof for either a *Charter* breach or an abuse of process are now presumably the same—that is, proof on a balance of probabilities. See U. Hendel & P. Sankoff, "*R.* v. *Edwards*: When Two Wrongs Might Just Make a Right" (1995) 45 C.R. (4th) 330.

10. [1991] 3 S.C.R. 326.

11. In *R.* v. *Levogiannis*, [1993] 4 S.C.R. 475, L'Heureux-Dubé J., writing for the Court, upholds s. 486(2.1) of the *Criminal Code* which provides for the use of a screen or otherwise to permit "obstructed view testimony", or testimony outside the courtroom entirely in the case of vulnerable witnesses making complaints of sexual abuse. The concern of the accused that such a procedure effectively undermines the presumption of innocence—the reason the witness requires this consideration is because she or he has been abused—is dismissed as a matter that can be dealt with by the trial judge in her or his instructions. Similarly, in *R.* v. *L. (D.O.)*, [1993] 4 S.C.R. 419, the Court unanimously (L'Heureux-Dubé J. writing concurring reasons for herself and Gonthier J.) upheld s. 715.1 of the *Criminal Code* which makes admissible, if adopted, videotaped complaints of witnesses under the age of eighteen making complaints of sexual abuse or assault. The assumption of investigative reliability is obvious.

12. The limits operate specifically in regard to the cross-examination of complainants in cases of sexual assault. For example, s. 276 of the *Criminal Code* limits severely any cross-examination on other sexual activity. See also *R.* v. *Seaboyer*, [1991] 2 S.C.R. 577.

13. In *R.* v. *B.(G.)*, [1990] 2 S.C.R. 30, the Court upheld the use of expert opinion evidence about the causal connection between abuse and the behaviour of abused children. See also *R.* v. *Marquard*, [1993] 4 S.C.R. 223, where expert evidence was permitted to rehabilitate the credibility of a child complainant.

14. For example, the use of statements by prosecution witnesses to police was regularized in *R.* v. *Milgaard* (1971), 2 C.C.C. (2d) 206 (Sask. C.A.); 4 C.C.C. (2d) 566n (S.C.C.), in a judgement which rests on clear assumptions about their truth. More that twenty-five years later, it is learned that not only was Milgaard innocent, but that there are significant doubts about those very statements and how they were obtained by the police: see D. Roberts, K. Makin, "DNA test exonerates Milgaard" *The Globe and Mail* (July 19, 1997) at A1.

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THE SUPREME COURT OF CANADA'S 1997 CONSTITUTIONAL DECISIONS: A STATISTICAL OVERVIEW[1]

BY PATRICK J. MONAHAN

In last year's *Canada Watch* analysis of the Supreme Court of Canada's constitutional cases, we raised the question of whether the Court was about to commence a retreat from its previous activism in *Charter of Rights* cases.[2] We raised this issue in light of the fact that *Charter* claimants succeeded in only about 10% of the *Charter* decisions handed down by the Court in 1996, the lowest "success rate" for *Charter* claimants this decade.[3]

The Court's 1997 constitutional decisions[4] indicate the folly of attempting to deduce any long-term trends based on a single year's results. In the 20 *Charter* decisions rendered by the Court in 1997, the *Charter* claimant succeeded in 10 cases, for a 50% success rate. While the results in particular years tend to fluctuate due to the small number of cases decided in a single year (i.e., success rate down in 1996, up in 1997), overall the Court appears to have established a fairly steady approach to its interpretation of the *Charter*; *Charter* claimants tend to succeed, on average, in close to one-third of cases. Thus, of the 230 *Charter* decisions handed down by the Court over the past seven years, the *Charter* claimant succeeded in 73 cases, a 31.74% success rate (see TABLE 1, SUCCESS RATE IN *CHARTER* CASES, 1991-97).

[W]hile the success rate for Charter *claimants who actually reach the Court is fairly constant over time, the Court has had to become more selective in the cases it decides to hear.*

While the success rate in the Court's *Charter* decisions appears to have found its overall equilibrium at approximately the one-third mark, it should be noted that it is becoming more difficult to obtain leave to appeal to the country's highest tribunal. Over the past decade, the Court has granted leave to appeal in anywhere from 65 to 85 cases annually. However, over that same period, the number of leave applications has increased by nearly 60%, which translates into a steadily decreasing percentage of leave to appeal applications being granted (see TABLE 2, APPLICATIONS FOR LEAVE; note that the numbers in this table include all cases appealed to the Court, not just constitutional or *Charter* cases). In this sense, while the success rate for *Charter* claimants who actually reach the Court is fairly constant over time, the Court has had to become more selective in the cases it decides to hear.

In assessing these numbers, it is important to remember that about one-third of the Supreme Court's docket in recent years has been composed of cases in which there was an automatic right of appeal, mostly in criminal cases where an acquittal had been set aside in a court of appeal. In April 1997, Parliament amended the *Criminal Code* to narrow slightly the circumstances in which such an automatic right of appeal would apply. Last year, there were 34 notices of appeal as of right filed with the Court, the lowest number this decade.[5] It is unclear whether the lower number of appeals as of right filed in 1997 is a reflection of the impact of the *Criminal Code* amendment. If, indeed, the number of appeals as of right falls to about 30 per year as opposed to the average of 50 filed over the previous four years, more room would be freed up on the Court's docket for the hearing of cases in which leave is granted.

What kinds of *Charter* claims are more likely to succeed at the Supreme Court level? As we noted in last year's analysis, the four most frequently litigated *Charter* provisions at the Supreme Court level are section 7 ("principles of fundamental justice"), section 8 ("search and seizure"), section 10(b) ("right to counsel") and section 11(b) (right to "independent and impartial tribunal"). Of these "big four" provisions, the Court has generally been most receptive to claims based on section 11(d), the guarantee that persons charged with an offence have the right "to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal." Over the past seven years, the Court has ruled in favour of the *Charter* claimant in about one of every two

Key Findings

- One-quarter of the Court's 1997 decisions were constitutional cases
- Overall success rate for *Charter* claims over the past 7 years is 31%
- It is significantly more difficult to obtain leave to appeal to the Supreme Court today than it was a decade ago
- The number of appeals as of right filed last year was the lowest this decade
- Most successful *Charter* claim is right to be tried within reasonable time by an independent and impartial tribunal
- The Court has been more receptive to equality rights claims in the past few years
- Chief Justice Lamer and Justice Major are the justices more likely to side with *Charter* claimants, while Madame Justice L'Heureux-Dubé and Justice Gonthier are most likely to side with government
- The Court is more likely to strike down federal legislation than provincial legislation

TABLE 1: Success Rate in Charter Cases, 1991-97

	CHARTER CHALLENGES	INFRINGEMENT FOUND	SUCCESS RATE
1991	35	15	42.86%
1992	38	12	31.58%
1993	42	9	21.43%
1994	26	11	42.31%
1995	33	8	24.24%
1996	35	8	22.87%
1997	20	10	50%
TOTAL	230	73	31.74%

cases in which section 11(d) claims have been raised (see TABLE 3, SUCCESS RATE OF CONSTITUTIONAL CHALLENGES BY *CHARTER* SECTION, 1991-97). This predisposition in favour of section 11(d) claims was reflected this past year in the Court's ruling that the attempt by some provinces to roll back provincial court judicial salaries was an unconstitutional infringement of the independence of the judiciary. This controversial decision has attracted considerable commentary from the contributors to this special issue of *Canada Watch*, including the articles by Peter Russell and Jamie Cameron.

The second most successful kind of *Charter* claim over the past seven years has been section 10(b), the "right to counsel", where claimants succeed in slightly more than one out of every three cases. Somewhat surprisingly, given earlier trends in the jurisprudence, the Court has been rather less receptive to claims based on "unreasonable search and seizure" under section 8; while the Court finds a breach of section 8 rights in close to one-half of the cases in which such claims are made, in over half of those instances it goes on to find that evidence obtained from such an unlawful search ought nevertheless to be admitted into evidence. At the end of the day, therefore, claimants raising section 8 rights succeed in obtaining a remedy in only about one out of five cases decided by the Court. (On the other hand, it should be noted that a finding that a particular kind of search is "unreasonable" is significant—regardless of whether the evidence actually obtained is excluded—since this restricts the manner in which law enforcement authorities can conduct searches in the future. In this sense, even though section 8 litigants may

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TABLE 2: Applications for Leave

YEAR	NUMBER HEARD BY OR SUBMITTED TO THE COURT	NUMBER GRANTED (PENDING)	PERCENTAGE GRANTED
1991	480	83	17
1992	460	77	17
1993	513	84	16
1994	496	77	16
1995	445	67	15
1996	573	67	12
1997	615	62 (44)	10

TABLE 3: Success Rate of Constitutional Challenges by Charter Section, 1991-97

CHARTER SECTION	NUMBER OF CHALLENGES	INFRINGEMENTS FOUND	INFRINGEMENTS SAVED UNDER S. 1	REMEDY NOT GRANTED UNDER SS. 24(2) OR 24(1)	SUCCESS RATE
2(a)	7	1	1	—	—
2(b)	19	8	3	—	26.3%
2(d)	3	1	—	—	—
3	4	2	—	—	—
4	1	1	—	—	—
6	3	—	—	—	—
7	84	25	1	—	28.6%
8	44	21	—	12	20.5%
9	11	3	—	—	27.3%
10(a)	3	2	—	1	—
10(b)	29	13	—	3	34.5%
11(a)	3	—	—	—	—
11(b)	24	4	—	—	16.7%
11(c)	2	—	—	—	—
11(d)	38	21	2	1	47%
11(e)	2	—	—	—	—
11(f)	1	—	—	—	—
11(g)	4	—	—	—	—
12	10	2	—	2	—
13	2	—	—	—	—
14	1	1	—	—	—
15	24	9	1	1	29%
23	1	1	—	—	—
28	1	—	—	—	—
32	5	1	—	—	—
TOTAL	326				

not benefit personally, the reasoning employed by the Court will prove of value to potential litigants in the future.)

[W]here the Court finds a section 15 violation, it is extremely unlikely that it will uphold that infringement as a reasonable limit under section 1.

One significant surprise, given earlier commentary suggesting the Court's lack of receptiveness to equality rights claims, is the relative success of claims based on section 15, the equality guarantee. As Table 3 indicates, over the past seven years section 15 claims have succeeded in one-third of the cases in which they have been the subject of a Court decision. Moreover, of the nine instances in which the Court found a violation of section 15, the infringement was upheld under section 1 as a reasonable limit on only one occasion (the controversial 5-4 ruling in *Egan* in 1995). In short, where the Court finds a section 15 violation, it is extremely unlikely that it will uphold that infringement as a reasonable limit under section 1.

Overall this decade, claims based on section 15 have succeeded at approximately the same rate as those based on section 10(b), which has long been viewed as one of the most successful bases for mounting a *Charter* claim. Clearly, the perception that the Court is unreceptive to claims based on section 15 is out of step with current reality. In fact, the *Canada Watch* contributors examining the Court's performance on section 15 in 1997 note that the Court's jurisprudence has shifted significantly over the past two years, providing greater scope for claims based on section 15 to succeed.

As might be expected, there are significant variations in the attitudes of different members of the Court towards *Charter* claims. There are two members of the Court who clearly stand out in terms of their predisposition to rule in favour of *Charter* claimants. Chief Justice Lamer sides with the *Charter* claimant in 45 percent of cases in which he has participated since 1991, followed by Mr. Justice John Major at 39 percent (see TABLE 4, ANALYSIS OF VOTING BEHAVIOUR OF SUPREME COURT JUDGES IN *CHARTER* CHALLENGE CASES, 1991-97). While the Chief Justice has long been regarded as a *Charter* activist, that reputation has not generally been associated with Mr. Justice Major, which makes this statistic somewhat of a surprise. Three other Justices—the late Justice Sopinka, along with Justices Cory and Iacobucci—decide in favour of *Charter* claimants in approximately 30 percent of cases on which they sit, which is slightly below the Court's overall success rate of 31 percent. This group is followed by Mr. Justice La Forest, with a success rate of 28.6% and Madame Justice McLachlin at 26.4%. Finally, the clear *Charter* conservatives on the Court are Mr. Justice Gonthier, at 19.1%, and Madame Justice L'Heureux-Dubé at 18.7%.

It should be pointed out, however, that these same general tendencies do not necessarily apply in respect of the interpretation of all *Charter* rights. In particular, while Madame Justice L'Heureux Dubé has tended to adopt narrow interpretations of the legal rights provisions in the *Charter*, she has been one of the more activist members of the Court in terms of the interpretation of section 15. The same tendency has been evident in the approach of Madame Justice McLachlin, although in the latter instance the variation in approach to the different *Charter* rights has not been as wide.

The Court has also tended to be more divided in *Charter* and constitutional cases than in the non-constitutional por-

TABLE 4: Analysis of Voting Behaviour of Supreme Court Judges in Charter Challenge Cases, 1991-97

SUPREME COURT JUSTICE	NUMBER OF CHARTER CHALLENGE CASES PRESIDED OVER	NUMBER OF CASES IN WHICH A JUDGE FINDS AN INFRINGEMENT	CASES IN WHICH AN INFRINGEMENT IS SAVED UNDER S. 1	REMEDY NOT GRANTED UNDER SS. 24(2) OR 24(1)	SUCCESS RATE %
LAMER	163	80 (49.1%)	5	11	45%
LA FOREST	189	72 (38.1%)	11	7	28.6%
L'HEUREUX-DUBÉ	182	52 (28.6%)	7	11	18.7%
SOPINKA	212	91 (42.9%)	13	14	30.2%
GONTHIER	199	68 (34.2%)	13	17	19.1%
CORY	205	84 (41.0%)	7	14	31.7%
MCLACHLIN	208	70 (33.7%)	4	10	26.9%
IACOBUCCI	187	75 (40.1%)	7	13	29.4%
MAJOR	125	60 (48.0%)	4	7	39.2%
WILSON	10	4 (40.0%)	0	0	40.0%
STEVENSON	35	14 (40%)	2	1	31.4%
BASTARACHE	2	1 (50%)	0	1	50.0%
AVERAGE	155.9	60.9	6.6	9.5	30.3%

tion of its docket. As Table 5 indicates (UNANIMOUS VERSUS SPLIT DECISION), it has been unanimous in just 45% of its constitutional decisions over the past seven years. This compares with an overall unanimity rate of 72% during this same period, an indication that constitutional cases are significantly more contentious and divisive than the remainder of the Court's docket. Perhaps as a result, the Court's judgments are also much longer today than they were a decade ago: the 107 judgments rendered in 1997 will occupy about 3400 pages in the Supreme Court Reports, which is about 1250 more pages than were required to report the 116 judgments rendered in 1987. (Mind you, it should be noted that the Court's output in 1997 was down from the record 4600 pages in the 1990 Supreme Court Reports, required to report 146 judgments issued that year.)

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Over the years, complaints have been voiced from some quarters to the effect that the Court has become increasingly and unduly preoccupied with constitutional and *Charter* cases. The 1997 statistics tend to contradict that argument, however, with the 24 constitutional decisions handed down representing just 23% of the total of 104 judgments rendered by the Court in the year. That compares with 46 constitutional cases of the 124 judgments rendered in 1996 (37%) and 46 of the 103 judgments issued in 1995 (44%).

TABLE 6 (REVERSAL RATES OF THE PROVINCES, 1991-97) sets out the reversal rates for different Courts of Appeal in constitutional decisions of the Supreme Court of Canada over the past seven years.[6] While there are some variations in these reversal rates, overall the Court affirms the decision of the court of appeal on constitutional issues in 60 percent of the cases it hears.[7] (The court of appeal has been affirmed in 165 of the 273 constitutional decisions of the Court in the past seven years.) This, combined with the fact that the Supreme Court now denies leave in 90 percent of the applications it hears, emphasizes the leading role played by the appeal courts of the provinces in the development of constitutional jurisprudence. (One surprise, in fact, is that the Supreme Court is more likely to reverse a provincial court of appeal in a non-constitutional case as opposed to a constitutional case; over the past seven years, it has reversed the court of appeal in about 45% of all appeals heard, which is 5 percent higher than its reversal rate in constitutional cases alone.)

TABLE 5: Unanimous Versus Split Decisions

	UNANIMOUS	SPLIT	PERCENTAGE OF UNANIMOUS
1991	14	26	35%
1992	22	20	52.4%
1993	28	22	56%
1994	13	19	40.6%
1995	10	26	27.8%
1996	25	22	53.2%
1997	13	13	50.0%
Total	125	148	45.8%

Mr. Justice Sopinka's 134 judgments delivered over the 1991-97 period exceeded the total even of the Chief Justice, which is quite extraordinary in light of the fact that the Chief Justice often delivers short oral judgments from the bench on behalf of the entire Court.

TABLE 6: Reversal Rates of the Provinces

	DISMISSED	ALLOWED	REVERSAL RATE
ALBERTA	11	9	45%
ONTARIO	64	26	28.9%
QUEBEC	17	17	50%
SASKATCHEWAN	6	4	40%
NEWFOUNDLAND	2	3	60%
NEW BRUNSWICK	4	6	60%
PEI	4	2	33.3%
BRITISH COLUMBIA	25	20	44.4%
FEDERAL COURT	18	7	28%
NOVA SCOTIA	11	7	38.9%
COURT MARTIAL	0	2	100%
MANITOBA	3	5	60%
TOTAL	165	108	39.5%

From time to time, provincial governments have accused the Supreme Court of being biased in favour of the federal government in its constitutional decisions. This accusation was repeated in a particularly vociferous fashion by the government of Quebec this past year at the time of the hearing of the *Reference Re: Secession of Quebec*. As Table 7 indicates (SUCCESS RATE OF CONSTITUTIONAL CHALLENGES TO FEDERAL AND PROVINCIAL LEGISLATION), the Supreme Court's performance in constitutional cases over this decade lends very little credence to the claims of these provincial critics. Federal legislation has been challenged more frequently than provincial legislation and has been more frequently ruled invalid

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TABLE 7: Success Rate of Constitutional Challenges to Federal and Provincial Legislation

YEAR	CHALLENGES TO FEDERAL LEGISLATION	SUCCESSFUL CHALLENGES TO FEDERAL LEGISLATION	CHALLENGES TO PROVINCIAL LEGISLATION	SUCCESSFUL CHALLENGES TO PROVINCIAL LEGISLATION
1991	18	9 (50%)	8	0 (0 %)
1992	22	10 (45.5%)	5	2 (40%)
1993	19	7 (36.8%)	8	3 (37.5%)
1994	8	3 (37.5%)	6	1 (16.7%)
1995	8	3 (37.5%)	9	1 (11.1%)
1996	7	1 (14.3%)	17	5 (29.4%)
1997	3	1 (33.3%)	10	5 (50.0%)
TOTAL	85	34 (40%)	63	17 (27.0%)

by the Court.

With the departure of Justices Sopinka and La Forest in late 1997, the past year may prove to be somewhat of a watershed in the Court's constitutional jurisprudence. TABLE 8, JUDGMENT OF THE JUSTICES, highlights the important role played by both these members of the Court in constitutional cases this decade. In fact, Mr. Justice Sopinka's 134 judgments delivered over the 1991-97 period exceeded the total even of the Chief Justice, which is quite extraordinary in light of the fact that the Chief Justice often delivers short oral judgments from the bench on behalf of the entire Court.[8] Table 8 also reveals that when Mr. Justice Sopinka prepared written reasons in cases where the Court was divided, he wrote on behalf of the majority 82 percent of the time; this figure was exceeded only by the Chief Justice and Mr. Justice Iacobucci. Conversely, the Justice most likely to write a dissenting opinion in a divided case is Madame Justice L'Heureux-Dubé.

This past year also saw the Court's role in relation to the legislative branches of government being subjected to increasing scrutiny and criticism. The Reform Party, in particular, suggested that the Court was overstepping its proper role and playing an unduly political role in its interpretation of the constitution. While the statistics presented here do not conclusively support or refute that claim, they do provide a context against which it can be evaluated. The bulk of the *Charter* cases coming before the Court have dealt with the legal rights provisions, sections 7-14; these cases have also tended to be those in which the Court has been most likely to rule in favour of the *Charter* claimant. This observation might be thought to cut against the claim of undue activism, since decisions dealing with the legal rights provisions will tend to have their greatest

TABLE 8: Judgment of the Justices

JUSTICE	WRITTEN MAJORITY	WRITTEN MINORITY	UNANIMOUS WRITTEN JUDGMENT	UNANIMOUS ORAL JUDGMENT	ORAL DISSENT	CO-WROTE* MINORITY	CO-WROTE MAJORITY	TOTAL ORAL	TOTAL WRITTEN	TOTAL FOR THE COURT	TOTAL JUDGMENTS
LAMER	56	8	8	21	0	2	2	21	72	29	124
IACOBUCCI	19	3	9	9	0	3	7	9	31	18	63
SOPINKA	42	9	17	23	0	1	6	23	68	40	134.5
GONTHIER	16	6	5	2	0	0	0	2	27	7	36
CORY	29	7	2	5	0	0	0	5	38	7	50
MAJOR	7	4	0	0	0	0	2	0	11	0	12
MCLACHLIN	39	20	3	2	0	0	0	2	62	5	69
WILSON	7	0	0	0	0	0	0	0	7	0	7
STEVENSON	4	2	4	0	0	0	0	0	10	4	14
L'HEUREUX-DUBÉ	30	28	4	1	2	0	0	3	62	7	72
LA FOREST	31	11	6	8	0	0	1	8	48	14	70.5
THE COURT	0	0	0	3	0			3	0	3	6

* Co-written judgments are counted as one-half of a judgment.

impact in terms of law enforcement agencies such as the police rather than on the legislative jurisdiction of Parliament or the provincial legislatures.

At the same time, the concerns of the Court's critics have been directed at particular Court decisions—such as the controversial and important *Delgamuukw* case dealing with aboriginal rights—as opposed to the Court's overall jurisprudence. The statistics presented here track overall trends and do not speak to the results in individual cases. They do remind us, however, that before any changes are made in the method of appointment of judges or the manner in which their judgments are reviewed by Parliament, we must not lose sight of the shape of the forest as a whole as we attempt to discern the significance of individual trees.

NOTES

1. Please note that the methodology used to compile the statistics presented in this article has been revised from that utilized last year. Therefore, the statistics presented in this issue supercede those published in last year's *Canada Watch* Supreme Court issue.

2. See P. Monahan & M. Bryant, "The Supreme Court of Canada's 1996 Constitutional Cases: The End of *Charter* Activism?" 5 *Canada Watch* 41 (1997).

3. Please note that the definition of "success rate" in *Charter* cases is calculated as a fraction, the denominator of which is the total number of *Charter* decisions in the relevant time period, and the numerator of which is calculated as follows: total number of *Charter* decisions in the relevant time period in which an infringement of a *Charter* right is found, minus the number of cases in which the said infringement is upheld under section 1, and minus the number of cases in which no remedy is granted under section 24(1) & (2) in respect of the said infringement. (A *Charter* case is a case in which the decision in the case (i.e., the *ratio decidendi*) was based upon the interpretation or application of a provision of the *Canadian Charter of Rights and Freedoms* (i.e., sections 1-34 of the *Constitution Act, 1982*).

4. A "constitutional case" is defined as a case in which the decision in a case (i.e., the *ratio decidendi*) was based upon the interpretation or application of a provision of the Constitution of Canada, as defined in section 52 of the *Constitution Act, 1982*.

5. The numbers of notices of appeal as of right filed for the previous four years were as follows: 1996—43 notices filed; 1995—57 notices filed; 1994—54 notices filed; 1994—54 notices filed.

6. We would point out that at a *Canada Watch* conference held in April 1998, we presented data on reversal rates for the 1994-97 period only. This data generated considerable media attention, with commentary suggesting that certain courts of appeal were weaker than others. The difficulty with drawing these kinds of inferences was that the number of cases from certain of the smaller provinces over this time period was very limited. In some instances, there were also errors made in the recording of certain cases which, combined with the small numbers of cases involved, presented a misleading impression of the performance of certain courts. We have attempted to counter this difficulty by expanding the database to include the past seven years; we have also rechecked all the entries, so as to verify the accuracy of the numbers presented over the past seven years.

7. Note that the data in Table 6 reflect the affirmation or reversal of the court of appeal on the constitutional issue considered. Thus, if the court of appeal's holding on the constitutional issue is upheld by the Supreme Court, the case is counted as "affirmed", even if the Supreme Court reverses the court of appeal on a non-constitutional issue.

8. Note that to be counted as a judgment, an opinion must state reasons or reasoning that is distinct from that set out in judgments of other members of the Court. For example, a statement by one member of the Court that he or she concurs with the opinion of another member is not counted as a separate judgment, since it does not set forth any different or distinct set of reasons.

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