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THE JUNE 12 AGREEMENT: A COMMON PROJECT FOR QUEBEC'S FUTURE

by Daniel Turp

The evening of April 7, 1995, might well have been a turning point in the history of contemporary Quebec and Canada. On that evening, Lucien Bouchard, the leader of the Bloc québécois, delivered the opening speech to the first national Convention of the Bloc québécois. He proposed that the sovereigntist project "quickly take a turn (*virage*) which will bring it closer to Quebeckers and open a credible future avenue for new relationships between Quebec and Canada, responding to their legitimate concerns."

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SOVEREIGNTY … BUT WHERE'S THE ASSOCIATION?

Analyzing the Three-Party Blueprint for Quebec Secession

by Robert Howse

"… toute société sans loix ou sans Chefs, toute union formée ou maintenue par le hasard, doit nécessairement dégénérer en querelle et dissention à la première circumstance qui vient à changer; l'antique union des Peuples de l'Europe a compliqué leurs intérêts et leurs droits de mille manières; … leurs divisions sont d'autant plus funestes, que leurs liaisons sont plus intimes; et leures fréquentes querelles ont presque la cruauté des guerres civiles."

J.-J. Rousseau, *Extrait du projet du paix perpétuelle de Monsieur L'Abbé de Saint Pierre*

On June 12, 1995, the Parti québécois, the Bloc québécois and the Action démocratique party (Mario Dumont) formally agreed on a blueprint for Quebec secession. The three-party agreement is often de-

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Virage

Much has been written and said about the *virage* initiated by the Bloc. Yet, the thrust of Mr. Bouchard's argument was simple and straightforward: sovereigntists should give effect to the direction Quebeckers want reflected in the proposal that they would be called to vote on in the 1995 referendum. This direction was expressed loud and clear during the hearings of the regional and national commissions on the future of Quebec. The path Quebeckers were clearly asking their leaders to embark on was one where the relationship that Quebec should propose to Canada (after having opted for sovereignty) would be defined in a more clear and explicit fashion than in the *Draft Bill on the Sovereignty of Quebec*. In his speech, Mr. Bouchard attempted to address those concerns and present a more detailed foundation for a Quebec-Canada economic union. He suggested that the establishment of a new economic partnership could flow from a global agreement and suggested the common institutions of such an economic union—that is, a Parliamentary conference, a community council, a secretariat and a court.

Mr. Bouchard's proposal was echoed in the report of the National Commission on the Future of Quebec released on April 19. It recommended, among other things, that the government and the future *Bill on Sovereignty* authorize a sovereign Quebec to propose and negotiate common and mutually advantageous political structures. In the meantime, Mr. Bouchard's proposal was being refined by a Bloc québécois' Working Group on the Economic Union and Common Institutions (that I was called upon to chair and which heard leading experts). This group looked into foreign experiences of economic and political integration and, in particular, at the ongoing experience within the European Union. While the Working Group was drafting its report and recommendations, preliminary discussions followed by formal negotiations between the Parti québécois, the Bloc québécois, and the Action démocratique du Quebec began. These discussions led quickly to an agreement in principle that was initialled by the leaders on June 9, approved by the three parties on June 11, and finally signed and sealed by the leaders in Quebec City on June 12, 1995. A common project for Quebec's future had thus matured rapidly and been designed only two months after Mr. Bouchard's call for a *virage*.

> *"The uniqueness of the past, present, and future relationship between Quebec and Canada deserves to be pursued through an original deal that establishes common jurisdictions and an inventive institutional framework."*

The Camp du changement

This agreement is of great historical consequence. It is the result of a skillfully drafted compromise that takes into account the varying sensibilities of the promoters of sovereignty for Quebec and underscores the solidarity of the *camp du changement*. This expression, coined by Jacques Parizeau, describes those parties, groups and individuals that favour change in the constitutional and institutional status of Quebec and maintain that the *status quo* is inadmissible. This *camp* now includes the Action démocratique du Quebec, which put forward its own blueprint for a new Quebec-Canada Union on May 5—*Une nouvelle Union Québec-Canada: institutions et principes de fonctionnement*. It joined with the Parti québécois and the Bloc québécois in reaching "agreement on a common project to be submitted in the referendum, a project that responds in a modern, decisive and open way to the long quest of the people of Quebec to become masters of their destiny." These three parties have furthermore agreed "to join forces and to coordinate efforts so that in the coming referendum, Quebeckers will be able to vote for a real change: to achieve sovereignty for Quebec and formally propose a new economic and political partnership with Canada, aimed particularly at consolidating the existing economic space."

A careful reading of the agreement, as well as the report of the Bloc québécois' Working Group on the Economic Union and Common Institutions, "Sovereignty and Interdependence—Harmonizing the Essential with the Inevitable: A Proposal for an Economic and Political Partnership Between Quebec and Canada," reveals that Quebec will offer Canada a partnership that is primarily economic. This partnership would focus on the maintenance of the free flow of goods, persons, services and capital within a common economic space comprising a sovereign Quebec and Canada. The partnership could also have some political features, including citizenship. It also foresees the possibility that the member states of such a partnership could reach agreement in areas of common interest such as international representation, defence policy, environment protection and the fight against arms and drug smuggling, to take but a few of the examples listed in the agreement in principle. These features could be enhanced by an institutional framework that proposes not only that a council of ministers be the main architect of the partnership, but also that a Parliamentary

assembly look into the work of such council and periodically assess the state of the partnership.

The agreement states, on the other hand, that this proposal reflects the interests of both Quebec and Canada. It does note, however, that the decision that Canadians will take in this regard cannot, of course, be predicted. Canadians should take a close look at the agreement. They will find a novel form of union with Canada, novel even in its *appellation* (naming), since there are no *partenariats* or partnerships of this kind anywhere in the international community. The uniqueness of the past, present, and future relationship between Quebec and Canada deserves to be pursued through an original deal that establishes common jurisdictions and an inventive institutional framework.

Canadians should also realize that this agreement shows the extent to which political parties in Quebec are committed to the idea of maintaining a mutually advantageous link with Canada following sovereignty. This proposal only reiterates in reality what has been a longstanding position of sovereigntist parties, groups, and movements in Quebec. It should not be forgotten that René Lévesque presented in September 1967 a manifesto in his *Option-Quebec*, another historic document in Quebec's quest for sovereignty. All political parties in Quebec, including Robert Bourassa's Liberal Party during the post-Meech period, have contributed to the consolidation of a consensus that envisages sovereignty and association as a solution to Quebec's future, rather than breakup or separation. That explains why Quebeckers and their political parties do not favour severing economic or even political ties with Canada. It is also why slogans used by the detractors of sovereignty such as "no to separation," sound hollow. Such slogans will be of little help in an eventual referendum campaign.

Sovereigntists believe that the agreement and the set of proposals that it contains are a valid answer to the wishes and concerns of a great majority of Quebeckers. Current polls indicate that the agreement in principle is well-received in Quebec. The CROP poll conducted from June 15–25 gives a slight advantage to the sovereigntist forces in Quebec. Some believe that a better knowledge of the agreement will confer a more decisive lead to the sovereigntist forces in the weeks and months ahead. During *l'hiver de la parole* (the winter of words), Quebeckers partook in a very stimulating exercise in participatory democracy before regional and national commissions on the future of Quebec; *le printemps du virage* (the springtime of change) led to the June 12 historic agreement and *l'été est à l'espoir*.

Daniel Turp is a Professor of Law, Université de Montréal and President of the Policy Committee of the Bloc québécois. Professor Turp was also a member of the enlarged National Commission on Quebec's future.

Canada Watch

Practical and Authoritative Analysis of Key National Issues

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scribed in press reports as a "virage" (turnaround) from a hard-line separatist position as a third option or as "sovereignty-association." However, nothing in the three-party agreement envisages an association between Canada and Quebec that would differ in kind or intensity from the relations that exist between most separate, sovereign states in the world today.

Thus, the three-party agreement represents a major victory for Jacques Parizeau over those Quebec nationalists who wanted a genuine "third option" (for instance, a European Union-like arrangement) to be the basis of the "oui" campaign. And the price that Parizeau has paid for this victory is minimal. The agreement is scattered with comforting turns of phrase like "partnership," "integration," "common institutions," and "parliamentary assembly." But the actual *proposals* are for arrangements no more and no less integrating than what Canada has today, either bilaterally or multilaterally with scores of separate states.

The three-party agreement's proposal for a treaty between Canada and a sovereign Quebec begins by covering subject matter that would, admittedly, have to be dealt with in *any* treaty that allowed for an orderly secession, such as division of federal assets and the debt. The three-party agreement then goes on to state that the treaty is to ensure that the "partnership" "is capable of taking action" to deal with matters such as the free flow of goods, individuals, service and capital, as well and labour mobility and citizenship. However, this is redundant; according to the general principles of international law, *any* two or more sovereign states have, through mutual consent, the capacity to enter into binding obligations that cover these areas of cooperation.

The agreement goes on to list a number of other areas where "nothing will prevent the two member states reaching agreement," among them defence policy, financial institutions, monetary and fiscal matters, trans-boundary pollution, trade in hazardous wastes, arms and drug trafficking, postal services, and transportation. All these areas are (taken together) the subject of dozens, perhaps hundreds, of existing treaties or accords between separate, sovereign states; most are also in the domain of one or more international institutions whose members are separate, sovereign states. In the defence area, one could cite NATO and NORAD; in the case of financial institutions, the Basle Committee of the Bank of International Settlements; in transportation, the International Civil Aviation Organization and the bilateral "open skies" accords between Canada and the United States; with respect to the environment, the Montreal Protocol and the Basle Hazardous Wastes Convention; in monetary matters, the IMF; in fiscal matters, the proliferation of bilateral tax treaties. In sum, to say that nothing impedes agreement between Canada and a sovereign Quebec in such areas of common interest is merely to make a platitudinous restatement of the potential scope of contemporary international relations.

> *"One would have to be extremely naive, or entirely ignorant of the recent course of world events, to think that these conflicting territorial claims will permit a straightforward peaceful reconciliation. Any proposal for the future of Quebec-Canada relations after secession that ignores this reality is, in the last analysis, a dangerous fairy tale."*

The three-party agreement also envisages the possibility (although not the *requirement*) that Canada and a sovereign Quebec would take common positions from time to time in various international forums or negotiations. Such alliances, leagues, or groupings of like-minded separate states are as old as the history of international relations. *Ad hoc* arrangements of this nature should be distinguished from the concept of a common external commercial policy and a common foreign policy where the members of an economic and political union commit themselves to speak with one voice to the rest of the world.

The three-party agreement proposes three institutions to manage Canada-Quebec relations. The first, "the partnership council," would be made up of ministerial representatives of both countries. It would make decisions on the implementation of the Canada-Quebec treaty, subject to a veto by each country on any such decision, and would be served by an expert secretariat. Treaties between separate, sovereign states often involve this kind of institutional infrastructure. An obvious example is the Free Trade Commission provided for in NAFTA, which is made up of "cabinet-level representatives" of Canada, the United States, and Mexico, and is charged with supervising the implementation of NAFTA, overseeing its further elaboration and related tasks. These kinds of treaty-implementation bodies should be clearly distinguished from institutions such as the Council of Ministers and the Commission in the European Union. These European bodies have crucial and well-defined roles in the making of laws and regulations applicable throughout the entire Un-

ion. No such function is envisaged for the Canada-Quebec partnership council or its secretariat. In this, as in all other things, the agreement follows the traditional model of relations between completely separate states rather than the more integrating "economic and political union" model exemplified by Europe today.

The second institution proposed by the three-party agreement is called a "parliamentary assembly." This is a joint body to be composed of representatives appointed from the national parliaments of each country, *not* directly elected by the citizens to sit in this body. Far from being a genuine supranational democratic body (like the European Parliament is now in the process of becoming), the parliamentary assembly lacks the capacity to legislate. It is limited to passing "resolutions" (in international law a resolution is not generally seen as a binding legal act) and making "recommendations" to the council. Arrangements of this general nature already exist between separate, sovereign states—for example, the Canada-United States Inter-Parliamentary Group, a body formed in 1958 consisting of 24 Canadian parliamentarians and 24 US legislators (12 Senators and 12 Congresspeople), which meets annually to deliberate on matters of mutual consent.

The final institution proposed in the three-party agreement, the "tribunal," is to be modelled on the dispute settlement arrangements in the NAFTA and the GATT/WTO, as well as the arrangements in the Canadian Agreement on Internal Trade (the dispute settlement provisions in this last instrument are themselves based on the NAFTA/GATT model, albeit with a few important variations). Inasmuch as the Tribunal is to deal with trade and related economic disputes, it may be largely redundant. Assuming that a separate Quebec were to join GATT and NAFTA, disputes between Quebec and Canada on most trade matters could be handled through the mechanisms that already exist in those international economic regimes.

All the arrangements proposed in the three-party agreement are, of course, subject to negotiation and agreement with Canada. The agreement rightly emphasizes that the size and importance of the trade and other economic links between Quebec and the rest of Canada would make it in both parties' interests to come to terms. However, in principle, and provided both parties act in accordance with economic self-interest, a stable basis for future economic ties could largely be assured through adhesion to international rules and institutions such as those of GATT/WTO and NAFTA, and/or through the continued application of the principles embodied in the Agreement on Internal Trade. However, this last instrument is a political accord, the provisions of which do not in themselves have the status of law. On many matters, the norms in the Agreement on Internal Trade are less comprehensive and less integrating than those of the GATT/WTO. In sum, there would be an "economic association" between Canada and a separate, sovereign Quebec, just as there is an economic association between Canada and the United States, or Canada and the European Union, and it would be governed by many of the same rules and norms.

"The agreement proposes the kind of relationship that now prevails between separate, sovereign states during periods of relative peace and stability. The question, of course, is whether even this will be easy to build from the ashes of what may become a bitter conflict of absolutes."

The interdependence of interests between Canada and a separate Quebec does, of course, mean that there will be a significant bilateral relationship on some issues, many of which could be described as more political than economic. Yet, as the quotation from Rousseau/St. Pierre at the beginning of this article suggests, interdependence far from guarantees friendly relations among interdependent states, much less the possibility of an economic and political union.

Of course, what is proposed in the three-party agreement and what might happen between Canada and a separate Quebec over the long run, are two different things. It could be pointed out that the European Union itself began on paper as little more than an inter-state treaty about coal and steel (even if some of its idealist founders, like Jean Monnet, had more ambitious goals right from the start). No one can credibly claim to predict the future, and it is within the realm of historical possibility that, over time, the separation model proposed in the agreement could evolve into an economic and political union model where the common institutions have genuine powers of lawmaking and governance.

The best we have to go on is the evidence of past secessions that suggests the unlikelihood of such a possibility. Nor should one abstract from the nationalist core of the separatist project in analyzing these prospects. In addition to claims of minority rights by Anglophones and perhaps Allophones, the imminent possibility of secession will probably provoke a strong counter-claim to self-determination by Aboriginal

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nations within Quebec. One would have to be extremely naive, or entirely ignorant of the recent course of world events, to think that these conflicting territorial claims will permit a straightforward peaceful reconciliation. Any proposal for the future of Quebec-Canada relations after secession that ignores this reality is, in the last analysis, a dangerous fairy tale. Failing a negotiated settlement before the referendum, in the case of a "yes" vote, Canada will be forced to choose between the Aboriginal and the separatist territorial claims and will have to choose quickly. This choice will have a fateful impact on the future of the Canada-Quebec relationship.

A careful analysis of the three-party agreement reveals at least one thing—that what the sovereigntists are after is separation *tout court*, not an economic and political union, a third option, or a decentralized confederation. The agreement proposes the kind of relationship that now prevails between separate, sovereign states during periods of relative peace and stability. The question, of course, is whether even this will be easy to build from the ashes of what may become a bitter conflict of absolutes.

Professor Robert Howse is an Associate Professor of Law at the University of Toronto where he teaches international economic law, conflict of laws, and legal and political philosophy.

EDITORIAL

The Charter's Impact on the Criminal Justice System

by Jamie Cameron

The Politics of Justice

As Canada heads into summer, justice issues continue to command the public's attention. Barely a day or week passes without Justice Minister Rock announcing a new policy initiative or defending others already in process. A short time ago, Parliament enacted the Minister's gun control legislation, as well as a sentencing bill, which creates enhanced penalties for crimes motivated by bias, including discrimination against gays. While the ink on those measures was drying, a mandatory DNA testing law was introduced and passed in one day. Yet to come is legislation which will outflank the Supreme Court of Canada's controversial drunkenness decision, a statutory solution to the income tax/child custody/equality quagmire, and amendments to federal human rights legislation that will add sexual orientation to the existing list of prohibited grounds of discrimination.

The politics of justice this year have been dominated by a cacophony of noisy, fractious voices. Though debate on controversial issues has always been spirited, who would have predicted such powerful resistance to gun registration or the vehemence of opposition to "special rights" for gays? There can be little doubt that the Charter has ignited the debate on these issues. No longer are groups and individuals content to express polite interest: as stakeholders under the Charter they demand a voice and role in the process.

In the courts, the Charter has wreaked havoc on Canada's system of criminal justice; today the accused enjoys protection that would have been unimaginable ten years ago. As might be expected, the public vented its anger when the Charter caused thousands of criminal charges to be stayed and accepted extreme intoxication as a defence to sexual assault.

Meanwhile, the Charter has been quietly altering the underlying assumptions of our *system* of justice. Changes to the system, which up to now were less dramatic, have been exploded by the Bernardo trial.

The Homolka-Bernardo Proceedings

Canada will be a long time recovering from the crimes of Karla Homolka and Paul Bernardo. It is now comprehensible that an attractive married couple could plan and carry out the abduction and protracted sexual torture of two teenage girls, without arousing suspicion. The sordid details of a third death, Ms. Homolka's own sister, have also entered the public domain. These acts are only comprehensible because they are indisputably a matter of fact, having been recorded, in a twisted bid for posterity, on several hours of audio-video tape.

From the time Ms. Homolka turned herself in to authorities in 1993 to the present, the public's right to know has been hotly debated, and has come sharply into conflict with competing interests such as the accused's right to a fair trial and the privacy and dignity of the victims and their families. Two years ago, when Ms. Homolka's plea and sentence were settled, members

of the public and foreign press were excluded from the courtroom. The Canadian press was granted access, albeit under threat of contempt for any breach of a publication ban that was near absolute.

That ban was not lifted until May 1995, when the Crown's case against Mr. Bernardo began. In the interim, the sex tapes found their way to the Crown's office. Those tapes provoked a face-off between the press and the families of the victims (including one surviving victim), who bypassed the Crown and went directly to court. They sought to close the courtroom and seal the file of that evidence or otherwise prevent those in court from hearing and seeing the audio-video record of these crimes. The press, in turn, invoked the public's right to know, not only about Mr. Bernardo's deeds, but Ms. Homolka's deal with the Crown as well.

For a time, the Crown and accused were relegated to secondary status in the proceedings. In the end, the trial judge struck a compromise that restricts access to the videos involving the victims, but broadcasts the soundtrack in the courtroom. On further appeal, the Supreme Court of Canada declined to intervene.

Criminal Justice and the Charter

These proceedings are a powerful example of the Charter's impact on the process of criminal justice. Trials no longer conform to an erstwhile conception of justice, which pitted the Crown against the accused, in a contest regulated by the judge and jury. Armed with the Charter, third parties, which include the public, the press, victim/witnesses and advocacy groups, have entered the fray. As a result, the equilibrium of traditional relations between the Crown, the accused, and the judge has been upset. Common law justice is based on a set of assumptions that simply cannot accommodate third-party stakeholders under the Charter.

> *"Trials no longer conform to an erstwhile conception of justice, which pitted the Crown against the accused, in a contest regulated by the judge and jury. Armed with the Charter, third parties, which include the public, the press, victim/witnesses and advocacy groups, have entered the fray."*

The roles and responsibilities of the Crown, accused, and judge have been thrown into confusion as a result. In the past, the Crown represented the public in criminal proceedings and, in doing so, made difficult choices that were accepted, for the most part, as a matter of public trust. The Charter has shattered the fiction of a monolithic public and caught the Crown in an awkward net of conflicts. Decisions once made in the public interest are now challenged by third parties who claim a direct point of entry into the system. It is no longer clear who, and by what authority, the Crown represents in criminal proceedings.

Meanwhile, the accused has unquestionably reaped benefits from the Charter. Investigative procedures are subject to the Charter and in prosecuting charges, the Crown is lumbered by a variety of constraints. One advantage of common law justice was that the accused confronted a single adversary: the Crown and its witnesses. The Charter's third-party entitlements have due process implications for the accused who now may face any number of parties, in addition to the Crown, in court.

Still, the judges are most deeply affected. Ironically, their powers have been both contracted and expanded by the Charter. At common law, the judiciary had extraordinary authority to control criminal proceedings. Rightly or wrongly, third-party participation and access to the courts have become matters of entitlement under the Charter, not a privilege to be bestowed or withheld by judges. The trial of O.J. Simpson is a compelling example of the public's right to know run amok: while Judge Ito struggles daily to control in-court proceedings, the out-of-court media circus has unquestionably tainted the integrity of justice in America. When the public's right

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With this issue, Jamie Cameron steps down as Co-Editor of *Canada Watch*. Professor Cameron, who was *Canada Watch*'s Legal Editor in 1992-93 and Co-Editor from 1993-95, will be on sabbatical leave next year.

Professor Patrick Monahan, who was Co-Editor of *Canada Watch* in 1992-93, its first year of publication, will return as Co-Editor along with Professor Daniel Drache, Director of the Robarts Centre for Canadian Studies.

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to know will peak and at what cost is anybody's guess.

While undercutting the judiciary's authority to control the trial process, the Charter has granted judges extraordinary powers to shape and decide public policy. By recalibrating the scales of criminal justice, the judiciary has triggered demands for greater accountability and transparency in the justice system. The judiciary has responded to its loss of authority with publication bans, sealing orders and other restrictions on access. In the circumstances, measures that frustrate the public's demand for accountability can only arouse suspicion and cause a loss of legitimacy.

"By recalibrating the scales of criminal justice, the judiciary has triggered demands for greater accountability and transparency in the justice system."

A Sea Change

We are witnessing a sea change in Canada's justice system. The upheaval of traditional assumptions about the trial process is accompanied by dramatic shifts in the public's perceptions and expectations of the system. The time is now for a response. First and foremost, legislation is needed to establish rules of access and participation in criminal proceedings. Just as important, we must begin the difficult task of rethinking the underlying assumptions of our justice system.

Jamie Cameron is an Associate Professor at Osgoode Hall Law School, York University. The Centre for Public Law and Public Policy will publish a book titled The Charter's Impact on the Criminal Justice System *later this year.*

Let's Talk—The Quebec Referendum and Canada's Future

Part One

by James Tully

Slightly different uses of the key terms of Canadian constitutionalism provide most Canadians with their identity as citizens. This is where the constitutional problem arises. The last five rounds of negotiations have shown that there is no single comprehensive description of Canada's constitutional characteristics agreeable to all. For example, Quebeckers tend to see Canada first as an association of two nations, but federal governments regard it first and foremost as a single, bilingual and multicultural nation. Many westerners recognize Canada as a union of ten identical provinces while the majority of Aboriginal peoples identify it as an assembly of 600 First Nations in treaty relations with the non-Aboriginal federation. Charter sovereigntists construe Canada as a single society of free and equal persons, but to linguistic minorities or the Maritime provinces, yet other characteristics are given priority. If Canadians are to recognize the diverse character of their association, they must be willing to enter into negotiations of mutual recognition with the aim of reaching agreement on a form of accommodation that gives due recognition to the similarities and differences of the different descriptions of the association.

The Meech Lake and Charlottetown accords provide evidence that this form of negotiation works. In both cases, the participants in the multilateral negotiations and public dialogues surrounding them were able to reach agreement on a form of constitutional accommodation acceptable to all. Conversely, those who did not participate, and who judged the accords unilaterally from within their customary descriptions of the association, tended to misunderstand the accommodative nature of the accords, to take the most intolerant stances and to vote them down.

In the current impasse, the claim to the sovereignty of Quebec is said to be incompatible with Canadian federalism. Is there a way to recognize and accommodate both positions? Let us see by listening first to the sovereigntists, then to the federalists.

Quebec's Right to Secede and Two Concepts of Federalism

There are four constitutional arguments that justify Quebec's right to secede.

1) The *Canadian Charter of Rights and Freedoms* was enacted in 1982 without the consent of the people of Quebec through their representatives in the provincial assembly. This constituted an injustice from Quebec's viewpoint because it violated one of the basic constitutional conventions of the federation: the common law and liberal convention of *quod omnes tangit* (what affects all must be agreed to by all or by their representatives). On this view of liberal federalism, a fundamental amendment to the constitution requires the consent of the provincial assemblies affected. Yet, although the Supreme Court ruled that the convention would be breached, nine provinces and the

federal government, all of whose consent was given, proceeded without the consent of the Quebec Assembly, and with its express dissent, even though Quebec was affected the most. This was unprecedented. The Supreme Court was unable to find one constitutional amendment prior to 1981 that was passed without the consent of the province most affected.

2) The 1982 amendment violated not only the procedural convention of consent, but it also transferred to the federal court final jurisdiction over aspects of language, education, cultural and civil rights, and other areas that have always been under provincial jurisdiction. Furthermore, it brought in a 7/50 amending formula that unilaterally abolished the convention of consent of the provincial assembly affected. This breached a second fundamental convention of federalism from the viewpoint of Quebec: the common law convention of political and legal continuity. That is, the political and legal constitution by which a province governs itself continues into any federation a province joins and it cannot be altered or diminished by the other provinces or the federal government unless and until the provincial assembly agrees to the alteration.

This longstanding convention was guaranteed to Quebec in 1760, reaffirmed in the *Quebec Act of 1774*, put beyond doubt in *Campbell v. Hall* (1774), challenged by the *Durham Report* and the *Act of Union of 1840* and reaffirmed and extended to every province in 1867. This enlightened convention of global constitutionalism (first used in the common law to protect Anglo-Saxon liberties through the Norman Conquest) has always stood in opposition to the feudal or Hobbesian counter-convention of discontinuity: that is, in joining a federation, the political and legal constitutions of the members are discontinued, either by subordination or extinguishment, to federal sovereignty. Prior to 1982 in Canada, discontinuity had been attempted against Quebec only twice: in 1763, but this was overturned in 1774, and in the *Durham Report* and the *Act of Union of 1840*, but this was overturned in 1867.

Hence, the conventions of consent and continuity protect the coordinate sovereignty of the provincial assemblies. Lord Watson authoritatively interpreted the 1867 constitution in explicit opposition to discontinuity or Hobbesian federalism in the following way:

> The object of the Act of Confederation was neither to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to create a federal government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy.

It is unsurprising, therefore, that the Charter is often described in Quebec as a new form of conquest or Durhamism.

"The effect of the Charter is thus to assimilate Quebec to a pan-Canadian national culture, exactly what the 1867 constitution, according to Lord Watson, was established to prevent."

In addition, the Charter cut very deeply into the political and legal character of Quebec. When the Quebec Assembly seeks to preserve and enhance Quebec's character as a modern, predominantly French-speaking society, it finds that its traditional sovereignty in this area is capped by a Charter in terms of which all its legislation must be phrased and justified, but from which any recognition of Quebec's distinct character has been completely excluded. The effect of the Charter is thus to assimilate Quebec to a pan-Canadian national culture, exactly what the 1867 constitution, according to Lord Watson, was established to prevent. Hence, from this perspective, the Charter is "imperial" in the precise sense of the term that has always been used to justify independence: it is an alien yoke imposed over a people without their consent and thwarting their freedom to govern themselves by their own laws and ways.

It is important not to misunderstand Quebeckers' objection to the Charter. They have no objection to the individual and collective rights and freedoms in the Charter. They have their own charter of rights and they have a better record of recognizing and protecting the rights of the Anglophone minority and the 11 First Nations than the other provinces. And the ways in which Quebeckers are dealing with their multicultural character while preserving French as the host language is surely no worse than the other provinces.

Rather, their objection is that the Charter is not pluralistic enough. For all its recognition of the multicultural members of Canada, it fails to recognize one further aspect, namely, Quebec's distinctness. The majority of Quebeckers want a way to affirm their commitment to the values of the Charter and to affirm their equal commitment to Quebec as a distinct society, or nation, in the light of which the rights and freedoms of the Charter can be in-

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terpreted and applied. What I am emphatically saying here is that contemporary Quebec citizens are able to relate to Canada under these two overlapping aspects, whereas, say, charter patriots and older Quebec nationalists, are not. In Quebec, this is called the "patriotism of ambiguity," but for me, it is simply a sign that Quebeckers recognize and affirm the diverse character of the Canadian association.

3) Since the 1950s, the provincial economies have grown enormously, and Quebec, along with the other provinces, has grown into a modern society in the global economy. At the same time, the provincial and federal governments have grown in a tug-of-war fashion, much like the arms race of the cold war, in which growth by one partner stimulates the growth of the other. This dynamic has been beneficial in some respects due to economies of scale, but it has also created an overlapping, duplicating and expensive edifice of federal and provincial bureaucracies which is under no one's control. For over thirty years, Quebec governments have requested that this costly labyrinth be streamlined and rendered efficient by two means: a reduction in federal spending powers in provincial jurisdictions, and the transfer of some powers to Quebec and other provinces, if they wish.

Apart from a few highly successful exceptions, such as the Quebec Pension Plan, these two requests have been consistently denied and the federal government has continued to expand into provincial jurisdictions. The inability to eliminate overlap and duplication so Quebec can exercise the powers appropriate to its economic circumstances, and so Canada can become a more efficient association, has become the single most important argument for the right to secede over the last four years.

4) The procedural and substantive injustices of the previous twelve years are now the unalterable constitutional status quo. Quebeckers were told in 1982 that the other provinces and the federal government were free to pass the constitutional amendment they wanted without the consent of Quebec, even though it affected Quebec the most. Quebeckers were told that the constitutional amendment that they wanted in Meech, and which affected it the most, required the consent of every single province. Because the conventional avenue of redress (*i.e.*, further negotiations) is now blocked by the parties who committed the breach, a majority of Quebeckers voted both provincially and federally for parties pledged to a referendum on sovereignty and secession. Neither the federal nor any provincial governments have denied Quebec's right to hold such a referendum.

These then are the four constitutional reasons that justify Quebec's right to secede. The precedent is the secession of the 13 US provinces in 1776. In this case, all the provincial assemblies, except Quebec, protested that the Crown and imperial parliament passed legislation without the consent of the provincial assemblies and in violation of the coordinate sovereignty. Quebec did not join in the protest because it was protected from this violation by the *Quebec Act of 1774* and was unaffected by the legislation. Many British Whigs, as well as Loyalists in the affected provinces, agreed with the secessionists that they had a legitimate constitutional grievance. However instead of supporting the unilateral declaration of independence in 1776, they argued that the correct constitutional step to take was to seek redress by entering into negotiations to amend the imperial constitution so it recognized the coordinate sovereignty of the provincial assemblies.

Although these provincial Loyalists failed, they brought their common law constitutionalism with them when they moved to Canada and formed the associations of 1791 and 1867. The tragic irony is that Quebec is now the greatest defender of this most tolerant and enlightened form of constitutionalism in the world today. The rest of Canada has forgotten it and since 1982 has embraced a kind of constitutional imperialism. This forces Quebeckers reluctantly to follow in the footsteps of the American secessionists of 1776. I say "reluctantly" because even such a staunch sovereigntist as Premier Parizeau has insisted as recently as January 27, in Paris, that he is for secession only because coordinate sovereignty has been denied to Quebec within Canadian federalism.

So, at the constitutional level, Quebeckers cannot determine themselves within Canada. They are determined by a power outside of themselves. The other provinces and the federal government have the power to impose constitutional change on Quebec as they please without Quebec's consent, as in 1982. They also have the power to block any attempt by Quebec to introduce a constitutional amendment that protects Quebec's political and legal identity, as in 1990, and to block the reform of federal-provincial overlap and duplication. Finally, they have the power to break off constitutional negotiations at will, as in 1992. Quebec's right of self-determination in Canada is thwarted at every turn. If, then, in international law when a right of self-determination is thwarted and constitutional redress is blocked, the people have a right to

secede, then Quebeckers have such a right. But there is still more to the story.

Sovereignty

What do Quebeckers mean by "sovereignty"? Like "federalism," sovereignty has a range of uses and we should not presume that we know what Quebeckers mean without listening to what they say. The most striking aspect of sovereignty is the way it is used in a "limited" sense in the Draft Bill tabled in the National Assembly in 1994.

The first limit is that the Draft Bill recognizes that sovereignty resides in the people themselves and is only delegated to the Quebec Assembly. The commitment to popular sovereignty is acknowledged by the role a referendum would play in bringing the Bill into force once it has been enacted by the Assembly and, as well, by the role popular consultation plays in formulating the Declaration of Sovereignty in the final drafting of the Bill itself and in the timing of the referendum. Further, sovereignty is limited by a provincial Charter, a guarantee to protect the identity and institutions of the Anglophone minority and the recognition of the right of self-government of the 11 First Nations over their own territories.

The limits to external sovereignty are just as striking. An economic association would be maintained with the rest of Canada. Canadian citizenship and currency would be retained. Quebec would assume all the obligations of the treaties and international conventions to which Canada is a signatory. A sovereign Quebec would also apply to the UN and retain membership in the Commonwealth, NATO, NAFTA, GATT, and others. Finally, the entire system of Canadian laws and institutions now in force will continue into the new country unless and until they are amended or repealed by the Quebec Assembly.

Hence, "sovereignty" is definitely not equivalent to "separation," as the leaders of the No campaign constantly assert. Far from it. A great deal would remain the same. There are two main differences. First, although the economic and citizenship association with Canada remains, the political association is thinned down to the minimum required to regulate the harmonization of the two economies, like NAFTA, but with a higher level of integration. Second, the delegated and limited sovereignty is located wholly in the Quebec Assembly rather than being shared with the federal government.

"Like 'federalism,' sovereignty has a range of uses and we should not presume that we know what Quebeckers mean without listening to what they say."

This is a fully modern, or perhaps post-modern, concept of sovereignty. It recognizes the cultural diversity of the sovereign citizens internally and dense relations of interdependence externally. Nevertheless, the majority of Quebeckers rejected this formulation of sovereignty because it does not express fully the limits they associate with sovereignty.

The first objection is that since Quebec's right to secede is based on the failure of Canada to accord Quebec the constitutional recognition and consent it deserves, then a sovereign Quebec must ensure that it recognizes the cultural diversity of Quebec society in an analogous manner. The Draft Bill does not do this. The rights of the Anglophone minority need to be specified more clearly through consultation with them and entrenched in the constitution. The increasingly multicultural character of Quebec citizens is absent from the Draft Bill and needs to be included. Further, the 11 First Nations have a claim to sovereignty that is similar to Quebec's in many respects. This should be acknowledged and negotiations undertaken to try to work out a compatible form of mutual recognition and accommodation. The way to proceed is to separate the negotiations with the First Nations from the referendum and negotiations with Canada. This has not been done.

These recommendations relate to the majority view that sovereignty should be the expression of a "project of society." Although this phrase has taken on a number of meanings, I believe the core meaning is still the one given to it by Louis Balthazar in an interview in 1993 and reiterated by Guy Laforest. The idea is that the sovereignty movement must attract the trust of citizens from all areas of Quebec society, not just the Francophone majority. Thus, it is incumbent on the government to make their option attractive to all Quebeckers before the referendum, by governing successfully in accord with the ideals they hope to realize more fully in a sovereign country.

The second objection is that the citizenship dimension is not sufficiently clarified. For a majority of Quebeckers, "sovereignty" includes not only economic association, but also political association. Indeed, it includes not only confederal political association as envisaged by the Democratic Action Party, but federal political association by means of representation in a federal parliament. The most recent formulation of the question is a response to this objection. Canadians shake their heads at this and say Quebeckers do not know what sovereignty means. But this just shows that Canadians

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have forgotten their own constitutional history and Quebeckers have remembered it. The term "sovereignty" has always been used to describe the status of the provincial assemblies in the Canadian federation as well as in the US federation from the seventeenth to the twentieth century. Even the 1787 constitution in our sister federation to the south, which diminished provincial sovereignty more than the 1867 constitution did in Canada, was unable to eliminate the term "sovereignty" from the provincial assemblies.

Quebeckers' attachment to a degree of political association is based on the considerable benefits of being a member of a larger federation. The crux of the argument for the purpose at hand is that Quebeckers have realized through the course of the pre-referendum discussions that they would enjoy more sovereignty in a Canadian federation that recognizes their provincial sovereignty than in a sovereign nation-state. If Quebec were to secede and retain the Canadian dollar, it would reduce its control over economic policy. Quebec would have to make concessions in negotiating its way back into GATT, NAFTA, and other associations, and it would have to adopt GATT and NAFTA rules from which it is currently shielded by the Canadian federation. In taking on a portion of the Canadian debt, Quebec would pay one percentage point more in interest than it presently does (1.5 billion dollars more per year). Equalization payments and agricultural subsidies would end. These and similar arguments of economy of scale and partnership thus corroborate the good federal sense of most Quebeckers: a properly ordered federation enhances rather than diminishes the sovereignty of its members.

The attachment to Canada runs deeper still. This desire to remain part of Canada is not the weight of habit or the calculation of utility. The overwhelming majority of Quebeckers are proud of being Canadian when Canadians reciprocally recognize them for who they are: citizens of the only self-governing, French-speaking society in the Americas. They are also attached to the Francophone communities outside of Quebec and to the Quebec presence in the federal government. They are proud of sharing a history and a destiny with Canadians whose public language and culture are different, yet to whom they are related in endless ways. They respect this difference. I have never, for example, met a Quebecker who wishes to impose the Quebec Charter on the rest of Canada without their consent. They ask only that Canadians do the same. As poll after poll shows, Canada is under their skin.

This explains why the campaign strategy of the No side to equate a vote for sovereignty with "separation" has proved so effective. If Quebec were to separate without any association, this would literally sever a crucial aspect of the identity of Quebeckers. The threat by the federal government to revoke Canadian citizenship in the event of a "yes" vote has the same powerful effect. The Yes campaign counters this by equating a "no" with the constitutional status quo, which, as we have seen, severs the other crucial aspect of Quebeckers' identity.

The Quebec government can respond by writing a higher degree of association into the Draft Bill, but this will not meet the objection. The government cannot guarantee that Canada will accept this degree of association in the negotiations after a "yes" vote. Canada would probably negotiate a fair degree of economic association—less than the present yet probably more than NAFTA. But dual citizenship would probably be phased out within two years and both Quebeckers and Canadians would be less well-off in the short- to medium-term. Finally, to respect popular sovereignty, a second referendum is required at the end of the negotiations following a "yes" vote, so that the people can accept or reject whatever ... .

Two conclusions follow. First, an independent nation-state is not the solution to Quebec's struggle for recognition of sovereignty. An independent nation-state does not provide the kind of sovereignty the overwhelming majority aspire to achieve. Therefore, the exercise of the right to secede without a guarantee of association is not the solution to Quebeckers' aspirations. Second, for the last 14 years, Canadians outside Quebec have unjustly imposed a form of unilateral constitutionalism that elevates the Charter above other characteristics of the federation, subordinated Quebec's sovereignty to the will of the majority of the other provinces and the federal government, and made it clear that they have no intention of negotiating away their position of domination.

So Quebeckers are faced with two unsatisfactory choices: accept an unjust status quo that fails to recognize their sovereignty and discontinues their distinct constitutional identity that has been defended through centuries of struggle, or opt for an independent nation-state that, again, fails to realize the kind of sovereignty they seek.

But is this true? Is Canadian federalism as non-negotiable as it appears from the side of Quebec sovereigntists? To answer this, we need to cross over to the other side and listen to what they have to say about federalism.

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Egan Case a Breakthrough for Gay Spouses

But Supreme Court Takes Right Turn in Equality Trilogy

by Bruce Ryder

Suzanne Thibaudeau and James Egan emerged as losers in a trilogy of Supreme Court of Canada decisions on equality rights released in May. Nevertheless, they can both claim moral victories since their *Charter* challenges have advanced the law reform agendas they championed. However, far more disturbing than the immediate results of these cases is the rightward ideological shift in the Court's interpretation of s. 15's guarantee of equality.

The State and the Bedrooms: The *Egan* and *Miron* Decisions

A 5–4 majority rejected Jim Egan's challenge to the exclusion of gay and lesbian couples from entitlement to spousal allowances under the *Old Age Security Act*. In the third case of the trilogy (*Thibaudeau* is not discussed further here), *Miron v. Trudel*, a 5–4 majority held that the Ontario government had discriminated against unmarried heterosexual couples by denying them the accident benefits in standard automobile insurance contracts that married couples could claim.

The fundamental point of contention in *Egan* and *Miron* was whether s. 15 prohibits the state from legislating a three-tiered hierarchy of intimate relationships, with married spouses favoured over unmarried heterosexual spouses, and both favoured over gay or lesbian spouses. The Court split into sharply differentiated liberal and conservative factions on this issue.

The conservative minority, led by Gonthier and La Forest JJ., defended the status quo, stating that "Parliament may quite properly give special support to the institution of marriage" because of "the biological and social realities that heterosexual couples have the unique ability to procreate." In their view, the laws at issue that denied benefits to either same-sex couples (*Egan*) or all unmarried couples (*Miron*) were not discriminatory since the exclusions were relevant to the state's goal of supporting marriage.

A majority of five judges rejected this circular reasoning. In their view, laws that favour a category of spouse defined by reference to marital status or sexual orientation are discriminatory. McLachlin J. wrote that the state must respect "a matter of defining importance to individuals"—namely, "the individual's freedom to live life with the mate of one's choice in the fashion of one's choice." Cory J. noted that the exclusion of same-sex couples from benefits reserved for spouses "reinforces the stereotype that homosexuals cannot and do not form lasting, caring, mutually supportive relationships with economic interdependence in the same manner as heterosexual couples." It followed, in Iacobucci J.'s words, that "differential treatment between married and common law spouses is constitutionally suspect," as is "differential treatment of relationships based on sexual orientation." In the result, five judges invoked s. 15 to broaden the legal definition of spouse to include common law couples in *Miron*, and four judges reached the same result for same-sex couples in *Egan*.

> *"The position that unequal treatment of gay and lesbian couples is not a human rights issue, so stubbornly maintained by many legislators in recent years, is no longer tenable."*

Sopinka J. broke ranks with his liberal colleagues in *Egan* at the second stage of *Charter* analysis—namely, the question whether the government's violation of Egan's equality rights could be justified as a reasonable limit pursuant to s. 1. In his view, discrimination against same-sex couples in old age spousal allowances was justified on the grounds that government should be given leeway to choose between disadvantaged groups in extending social benefits.

In cases not involving the allocation of scarce public funds among competing disadvantaged groups, the result may be different; since Sopinka J. joined his other four colleagues in declaring a heterosexist definition of spouse to be discriminatory, *Egan* can be summed up as a victory for fiscal conservatism and a defeat for moral conservatism.

Implications of the *Miron* and *Egan* Rulings

Most of the legal differences between married and unmarried heterosexual couples have been erased by legislative reforms over the course of the last 25 years. Some important differences remain. For example, property rights in provincial family law legislation can be invoked only by marriage partners. The reasoning in *Miron* suggests that *Charter* challenges to these remaining legal dif-

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ferences may succeed, perhaps ultimately obliterating any legal distinctions between marital status and "living in sin."

In contrast, the differences in the current legal treatment of same-sex couples and heterosexual couples are legion. With few exceptions, Canadian legislatures have chosen not to recognize gay or lesbian relationships. After *Egan*, laws and policies according unequal treatment to same-sex couples will be found to be discriminatory by human rights tribunals and courts.

For example, Chris Vogel had been seeking legal recognition of his gay relationship for over 20 years with no success. Following *Egan*, the Manitoba Court of Appeal found that the denial of spousal benefits to his same-sex-partner, under his employment benefits plan, was discriminatory treatment under provincial human rights legislation.

Meanwhile, an Ontario court held that denying same-sex couples the right to adopt children is a "blatant example of discrimination." Other ongoing court challenges, for example, to the exclusion of same-sex couples from provincial family laws and the right to marry, have also been given a significant boost by the *Egan* ruling. This is because the extension of these laws to gay and lesbian couples will not impose financial burdens on government.

Individual Fairness or Group Parity?

The May trilogy signalled a fundamental ideological shift in the Supreme Court judges' understanding of equality. Ever since the Court's first decision interpreting s. 15 (*Andrews*, 1989), Canadian equality jurisprudence has been characterized by a contest between two very different conceptions of equality. The traditional and dominant view sees the essence of equality as *individual fairness*. Discrimination results from judging people according to group stereotype or irrelevant personal characteristics rather than individual merit. The competing view sees the essence of equality as *group parity* of powers and resources. Discrimination results from actions that have the effect of perpetuating patterns of group-based disadvantage associated with personal characteristics such as gender and race.

The influence of both the individual fairness and group parity models of equality (often referred to as "formal equality" and "substantive equality," respectively) can be found in unresolved tension in the Court's pre-trilogy jurisprudence. Equality rights activists and organizations (such as LEAF) have vigorously promoted the group parity model with some success. Prior to the trilogy, Chief Justice Lamer described the "overall purpose" of s. 15 equality rights as preventing "discrimination against *groups* subject to stereotyping, historical disadvantage and political and social prejudice in Canadian society." Likewise, Abella J. of the Ontario Court of Appeal summarized the s. 15 jurisprudence as condemning "only those distinctions which perpetuate disadvantage for an historically disadvantaged group." Although litigants have had little success in using s. 15 to challenge sources of systemic group-based disadvantages, statements like these have sustained those who believe in s. 15's nascent progressive potential.

> *"The message to legislators is clear: change the legal definitions of spouse, or have them changed in court."*

Substantive Equality Rejected

No more. The goal of remedying group-based disadvantage vanished in the trilogy. L'Heureux-Dubé J. was the only judge even to mention it as "an important, though not necessarily exclusive, purpose of s. 15." The other eight members of the Court appear intent on abandoning the substantive equality potential of s. 15. Now the "overarching purpose" of s. 15 is to ensure that all persons are treated according to their individual merits rather than group stereotypes.

What is the significance of identifying individual fairness, rather than group parity, as the value at the heart of Canadian anti-discrimination law? For one, it can no longer be asserted that only members of disadvantaged groups are entitled to bring s. 15 claims. Unfair treatment of either the rich or the poor appears now to be equally the concern of s. 15.

Another consequence is that controversies regarding the legitimacy of group equity programs (or affirmative action) can be expected to spill into Canadian courts. It was once thought that, by explicitly authorizing them, s. 15(2) put the constitutionality of equity programs beyond debate. This may turn out to be wishful thinking by the proponents of group parity. According to the individual fairness model, group-based remedies are exceptions to, rather than illustrative of, the constitutional guarantee of individual equality. Since exceptions to constitutional guarantees are interpreted narrowly, judges are now much more likely to circumscribe what qualifies as a valid affirmative action program.

Conclusion

The *Egan* case signals a turning point in the battle for recognition of the equality rights of same-sex cou-

ples. A Supreme Court majority now supports the view that the scores of laws that exclude gay and lesbian couples from definitions of spouse are discriminatory. The position that unequal treatment of gay and lesbian couples is not a human rights issue, so stubbornly maintained by many legislators in recent years, is no longer tenable. In the end, Egan lost his case, but Sopinka J.'s s. 1 escape hatch is temporary and limited to benefit programs. The message to legislators is clear: change the legal definitions of spouse, or have them changed in court.

The Court's rhetoric in the May decisions veered to the right by emptying of any substantive content the ideal of equality enshrined in s. 15. The open defence of hierarchy in the minority opinions in *Miron* and *Egan* represents the most conservative contribution to equality jurisprudence since *Lavell*, *Bliss*, and other infamous *Bill of Rights* decisions of the 1970s. It comes as a cruel surprise that this position could attract the support of Chief Justice Lamer and miss by a single vote becoming the majority view on equality rights in the 1990s. The questionable empirical assumptions relied on to dismiss the claim in *Thibaudeau*, and the cavalier approach to s. 1 taken by Sopinka J. in *Egan*, are further signs of a Court not interested in taking the lead in advancing equality. Equality rights activists enter s. 15's second decade with seriously diminished expectations regarding its potential to instigate judicial contributions to progressive law reform.

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Supreme Court Takes Step Forward on Equality Rights

Recent Cases Signal Protection for Individual Rather Than Group Rights

by Patrick J. Monahan

Three Supreme Court equality decisions handed down at the end of May attracted considerable media attention, most of it focusing on the winners and losers in the cases. The media scorecard showed that the losers were divorced or separated mothers (who would continue to be taxed on their child support payments), and same-sex spouses (who were denied a spousal allowance available to opposite-sex couples); the sole winner, on the other hand, was a man permitted to claim on his common-law wife's auto insurance policy. There was considerable speculation about a "shift to the right" in the High Court's approach to the Charter.

Of far greater significance than the results in the cases, however, was the reasoning used to get there. While this reasoning is not always as clear as one might have hoped (the judgments in the three cases total 400 pages and there is no single majority opinion in any of them), the Court does seem to be groping its way toward a clarification of the meaning of equality. And the Court's emerging new approach, particularly McLachlin J.'s ringing endorsement of equality rights as a protection for individual human dignity, is clearly a step in the right direction.

Confusion Reigns

For the past six years, lower courts had been struggling to make sense of the Supreme Court's first equality case, the 1989 *Andrews* decision. Despite the expansive language of s. 15 (*i.e.*, "Every individual is equal before and under the law"), *Andrews* had said that only laws that distinguish between individuals based on the characteristics specifically enumerated in s. 15 (*i.e.*, "Race, national or ethnic origin, colour, religion, sex, age or mental or physical disability"), or on grounds analogous to those characteristics, could give rise to an equality claim. Further, the Court had stated that the law had to "discriminate" before it would violate s. 15, but the term "discrimination" was not clearly defined.

"Despite a surfeit of concurring and dissenting judgments in the three cases, a strong majority ... endorses the view that s. 15 protects the rights of individuals, rather than groups."

Lower courts had been bedeviled trying to make sense of the *Andrews* decision, particularly the requirement that a law "discriminate" before there could be a s. 15 violation. The confusion was only deepened by subsequent Supreme Court decisions in the early 1990s, which seemed to suggest that s. 15 was intended to protect the rights of "disadvantaged groups" rather than individual citizens. Section 15(2) of the Charter already contained a saving provision for affirmative action programs designed to remedy the past discrimination suffered by dis-

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advantaged groups. Yet, some post-*Andrews* decisions claimed that the guarantee of equality itself was linked to the goal of remedying past disadvantage, as opposed to being a general guarantee that the state could not discriminate against any of its citizens.

The irony was that in determining whether someone was a member of a "disadvantaged group," courts were drawn into making the same kinds of stereotypical and unsubstantiated value judgments that the guarantee of equality was originally designed to prohibit. For example, in the *Miron* case (involving the claim by a man for accident benefits under his common-law spouse's auto insurance policy), the Ontario Court of Appeal had dismissed the s. 15 claim on the basis that unmarried couples were not members of a "disadvantaged group" who had suffered "social, political and legal disadvantage in our society." Yet, how the Court came to this judgment is simply baffling, since there was no explanation offered as to how to determine whether or not a particular group is "disadvantaged." And, in any event, what possible difference could it make that common law spouses were or were not a "disadvantaged group" if this particular law was discriminatory and unjustified? The Court seemed to be saying that unjustified and discriminatory laws are acceptable, as long as they are directed at "non-disadvantaged groups." This threatened to make a mockery of s. 15, and stand the concept of equality on its head.

Back to Basics

The recent trilogy of equality cases goes some considerable distance to clarifying the confusion that had been spawned by the *Andrews* case. Despite a surfeit of concurring and dissenting judgments in the three cases, a strong majority (eight of nine judges) endorses the view that s. 15 protects the rights of individuals, rather than groups. Moreover, eight of nine judges also agree that s. 15 claims can be brought by any citizen, not just by members of "disadvantaged groups."

The clearest and most compelling endorsement of this view is set out in the well-reasoned judgment of Madam Justice McLachlin in the *Miron* case. McLachlin J. returns to first principles, and attempts to identify the larger purpose of s. 15. This larger purpose, she says, is simply the protection of individual human dignity and freedom. Human dignity and freedom is violated whenever individuals are denied opportunities based on the "stereotypical application of presumed group characteristics rather than on the basis of individual merit, capacity, or circumstance." In other words, equality is violated when you deny someone a benefit, not because you have determined that this particular person is unworthy, but simply because you presume that someone with certain kinds of characteristics (*i.e.*, their race, gender, sexual orientation) is unworthy. Madam Justice McLachlin states that laws that distinguish between people based on the grounds specified in s. 15 will almost always be a product of stereotypical value judgments, and will be found to be in violation of s. 15.

> *"[The Court's analysis] marks a reaffirmation of the basic values that have formed the underpinning for human rights triumphs around the world over the past thirty years—namely, that every person has a right to be treated based on his or her own merits and not on the basis of group characteristics."*

In my view, this hard-hitting analysis turns the Court's equality jurisprudence in precisely the right direction. It marks a reaffirmation of the basic values that have formed the underpinning for human rights triumphs around the world over the past thirty years—namely, that every person has a right to be treated based on his or her own merits and not on the basis of group characteristics. McLachlin's approach also puts an end to the idea that only certain groups have a right to bring equality claims, an invidious suggestion that, if ever accepted, would be certain to bring both the Court and s. 15 into public disrepute.

McLachlin J. was joined by the three Ontario members of the Court (Iacobucci, Cory, and Sopinka JJ.) in affirming this "back to basics" approach to equality. But her principled and well-reasoned analysis represents an important breakthrough in s. 15 jurisprudence and, hopefully, will serve as the anchor for the Court's equality analysis in the years ahead.

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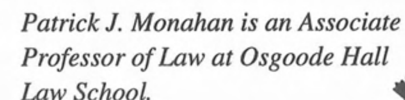

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A Three-Sided Deal: Who Won, Who Lost?

by Daniel Latouche

The agreement signed in early June between Lucien Bouchard, Jacques Parizeau, and Mario Dumont is one of the most interesting pieces of political craftsmanship to have occurred in Canada in a long time. Inter-party agreements are rare in a parliamentary system and it is an even rarer case when such an agreement involves parties operating at both the federal and provincial levels.

The agreement tells us a great deal not only about how the sovereignty camp intends to conduct its fall campaign, but also about how the rest of the country perceives Quebec and how it intends to work to re-configure the country to adapt it to the new global age. In short, the Bouchard-Parizeau-Dumont agreement tells us more about Canada than it does about the "separatists." And here the omens do not look very promising.

Omens in Canada

Of course, no one was expecting any official endorsement from Ottawa or any other provincial capitals, but no one was quite prepared either for the animosity and scorn with which these rather mild and, to some extent, quasi-federalist proposals were received. Of the more than five hundred MLAs in Canada, not one has been quoted as even suggesting that such a proposal was a step in the right direction. This unanimous rejection also includes organizations and segments of the Canadian public which, in the past, have been somewhat favourable to Quebec and which include trade unions, intellectuals, French-Canadian and Acadian minorities, teachers, socialists, anti-poverty organizations, Francophile parents, university professors, students, churches, community groups, scientists, the NDP, anti-racist organizations, women's groups, artists, and philosophers. It has been argued that this unanimity will dissipate as the date of the referendum approaches and that it will completely evaporate if the Yes side wins a significant mandate. This is undoubtedly true, but misses the point entirely. There is no doubt that following a Yes victory, voices will be raised in the rest of the country to suggest than accommodating Quebec is in Canada's and Ontario's best interests. Rationality and having one's back to the wall usually brings a little sanity to the public discourse.

> *"That it is the Quebec sovereigntists and not Queen's University or the Bureau of Federal-Provincial Relations that would come up with a plan to re-confederate Canada tells us a great deal about the capacity of this country for self-renewal."*

A Lack of Will

Few people in Quebec are really worried about the attitude of English-Canada the morning after a referendum victory. For obvious strategic reasons, sovereigntists tend to underplay the obstacles in the path of a post-referendum agreement and few actually believe in the rose-tinted scenario of Mr. Parizeau. But what is more worrisome is the apparent lack of interest and even of political will in the rest of the country to contemplate the possibility of significant change in the constitutional fabric of the country. The apoplectic reaction to the Bouchard-Parizeau-Dumont proposals clearly reveals that English-Canada has now lost all interest in Canada as a "work-in-progress." They seem to believe that Canadian history is over and should only be learned in school and celebrated in parades. Few will insist that the institutional framework of the country is perfect and most will agree that some reforms are, indeed, necessary and possible, but at best these are seen as marginal adjustments to a political architecture that is largely completed and that will either swim or sink on its own.

Behind the contempt and derision with which the coalition proposals were received probably lies not only a profound irritation directed against Quebec and the sovereigntists for once more trying to fudge the issue of "separation," but also a certain quiet resignation at the fact that the federal union has lost much of its usefulness. There is even some soreness directed at those sovereigntists who seem the only people who still believe in the importance of political institutions, constitutions, and partnerships in bringing about a better future for citizens. That it is the Quebec sovereigntists and not Queen's University or the Bureau of Federal-Provincial Relations that would come up with a plan to re-confederate Canada tells us a great deal about the capacity of this country for self-renewal.

The negative reaction by the rest of the country has clearly had the effect of a cold shower on Quebeckers' reaction to the "virage." With only a few positive signs com-

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ing out of the country, one could have easily expected a 15 percent jump in public support, from about the 40–45 percent mark where the pro-sovereignty forces had been stuck for the last 10 months, to something in the 55–60 percent range. The 60 percent mark has long been recognized as a realistic estimate of the upper end of the pro-sovereignty camp, one which includes those people who are likely to vote "yes" following a bandwagon effect. These 15 percentage points coincide more or less with the 25 percent of the population that believes sovereignty to be a good idea, but only if it leads to the final resolution of the Canada-Quebec conflict and to profound changes in the federal union. These are the famous "soft" nationalists who for the moment have "parked" their vote with Mario Dumont's Action démocratique.

But a cold shower, however cold, remains a shower. It brings water, and water brings life. For the sovereigntists, a 5–10 percent jump in public opinion support is better than no movement at all. As Premier Parizeau himself remarked, "In February, the experts were arguing where we stood in the 40–45 percent range; now they are arguing if we are slightly above or slightly below the 50 percent mark." It is difficult to argue with his analysis although, as he knows very well, what goes up can also come down.

One of the unexpected results of this slight movement in public opinion will be to increase the possibility of effectively having the referendum in the fall (probably November 6 or October 30). Until now, there was still a possibility that Premier Parizeau would call the entire thing off. This possibility actually increased with the signing of the tripartite deal since it would have allowed the Premier to reneg on his promise by pretexting the obligation to respect the advice of his "partners."

THE *RAPPORT DE FORCE*

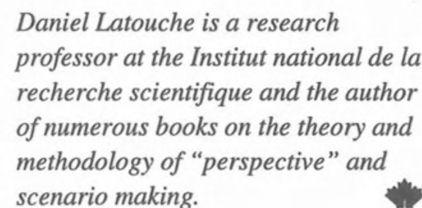
Has the *rapport de force* changed within the sovereignty camp? Most certainly, but not necessarily in the direction predicted by commentators who have tended to interpret the signing of the "Entente pour le changement" as either a defeat for Mr. Parizeau, who had to let go of his hard-line strategy, or a surrender by Mario Dumont, who will simply be "incorporated" into the Parti québécois. This simplistic vision again misses the point and shows how unfamiliar we all are with European-like political coalitions.

The tripartite Parizeau-Bouchard-Dumont coalition is not a "Union sacrée" on the model of the Meech or Charlottetown coalitions. It is simply three double deals that have been made to converge. First, there is the obvious Bouchard-Dumont deal to force Jacques Parizeau to show some flexibility on both the content and the process of the referendum. Then there is the Parizeau-Bouchard deal to force Dumont into the open and convince him to support not only the idea of a fall referendum (to which the leader of the Action démocratique was strongly opposed), but also of participating in a sovereignty coalition. And then, there is the little-talked-about, but very important Parizeau-Dumont agreement to ensure Bouchard would not walk away with the prize and modify his claim as to the ephemeral character of the Bloc québécois and his lack of interest in the provincial scene. Both Mario Dumont and Jacques Parizeau have a vested interest in making sure Lucien Bouchard remains the most popular politician in Quebec and does not decide to become either the PQ or the AD leader following either a "no" or a "yes" vote at the referendum. More than ever, he is now committed to staying in Ottawa or going back to the Saguenay following the fall campaign.

Who won? Who lost? Which of the three side deals is the most important? That remains to be seen. In the short run, the three leaders have each reinforced their own leadership position. With approximately 50 percent of his supporters (contrary to 10 percent in February) now saying they are willing to back the Yes side, Mario Dumont has shown that he does, indeed, have some influence on the middle-ground voters, a fact that will no doubt invite him to demand a more visible role in the sovereignty coalition. But how far can his two partners go to accommodate him without undermining their own positions? As Meech and Charlottetown showed before, coalitions rarely last long enough to enjoy the ultimate prize.

Who lost? Daniel Johnson is an obvious candidate—he is proving more and more his complete uselessness even to his own allies. But he is not alone. By remaining silent, those who still believe (but do they, indeed) that Canada is viable only as a partnership between the three nations of this land have not helped their cause: tactically perhaps, but certainly not strategically. And as someone once said, "The future lasts a very long time."

Daniel Latouche is a research professor at the Institut national de la recherche scientifique and the author of numerous books on the theory and methodology of "perspective" and scenario making.



From the Projet de société to Brokerage Politics: Forging a New Country or Winning the Campaign?

by Jane Jenson

Since the unilateral announcement of *le virage* on the road to sovereignty by Bloc québécois leader Lucien Bouchard, and the Parti québécois' decision to return to a position hardly different from that of 1980, the sovereigntists' game plan has obviously been altered. One aspect about which little has been explicitly said is the strategic shift away from a model of constitution writing to one of designing a winning electoral campaign. Sovereigntists' actions are now driven much more by the goal of minimizing the chances of losing the vote than by the effort to achieve a mandate for independence centred on a definition of the character of the future country and its citizenship.

Brokerage Politics

As Lucien Bouchard made very clear during his news conference on June 21, marking the first days of the referendum campaign, he believes that victory will go to the camp that conducts "the best campaign" and he intends to do all that is necessary to strategize such a campaign. One element of the campaign involves describing institutions that no one has the power to institute. But more important is the promise that change will really bring no change. The latter is a classic strategy of brokerage politicians. Resort to this trick of the politicians' trade signals the extent to which there has been a shift.

What difference does this replacement of one model by another make? Will the mandate resulting from a focus on winning at almost any cost differ from one generated by debates about real constitutional futures? The answer is quite simply yes. It is ironic that the referendum that so many on both sides expected, and hoped, would provide a clear choice, has come to mimic the murkiness of electoral debate with its lack of informative political discourse and its by efforts to be all things to all people.

Short-term perspectives and obscurantism are the most common features of electoralism in Canada. The politics of campaigning necessitates the presentation of a rosy future accompanied by generalities about modalities. As Lucien Bouchard said, "As you've noticed, we have not been very explicit about what kind of mechanism should be set up."

> *"Sovereigntists' actions are now driven much more by the goal of minimizing the chances of losing the vote than by the effort to achieve a mandate for independence centred on a definition of the character of the future country and its citizenship."*

Democracy is not well served by the ways in which electoral politics have come to be conducted in Canada, as a form of brokerage politics in which jockeying for advantage drives out any tendency to debate clear alternatives. The democratic credentials of the post-*virage* politics are much less impressive than were those of the procedure set out in December 1994 by Jacques Parizeau. He laid down a procedure that satisfied almost all the complaints democrats had made about the referendum of 1980, the Meech Lake process and the run-up to the Charlottetown accord. The government would ask Quebeckers to vote on a specific constitutional text. Wide-ranging public consultations were organized. All Quebeckers were given a chance to consider the draft law in their neighbourhoods and towns. This consultation process was supposed to end with a binding referendum in which sovereignty, defined in the bill, would be voted up or down.

This process was democratic and in many ways a distinct improvement on earlier efforts. Putting a constitutional text to a referendum was supposed to avoid the confusion of the vague 1980 question seeking a "mandate to negotiate sovereignty association." Even if it was not the question about "separatism" that federalists said they wanted, it would be a clear question about change. That such a process would be more democratic than that undertaken by the "eleven white men in suits" that gave us Meech Lake, goes without saying. It was even more open and wide-ranging than the public consultations that led to the Charlottetown accord.

The Projet de société

Nonetheless, the regional and specialized commissions resembled the Charlottetown process in at least one way. The commissioners found—some to their joy, some to their distress—that ordinary citizens treated this opportunity to design their constitutional future very seriously. Those who appeared before the commissions viewed it as a moment of exchange among citizens

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rather than the simple process of "explanation and clarification" that the PQ originally intended it to be. The commissioners also found, as did Canadian politicians in 1992, that citizens were not willing simply to sit back and let the politicians pontificate. They wanted more details about the consequences of constitutional change. They wanted specificity about what a Quebec state would do with its new powers or about what they would gain, and lose, in an independent Quebec.

The result of a certain enthusiasm for these democratic consultations was that many participated, including federalists who had been initially discouraged from doing so by the boycott of the provincial Liberals. But more than that, many people coming from the grass-roots to testify before the commissions had high *expectations*. They believed that the government was, indeed, interested in hearing their views, in listening to their concerns and in responding to their calls for further specification of the *projet de société*, which would justify creating a sovereign Quebec.

What was entailed in such calls for specificity? Sometimes, to be sure, it was little more than a convenient new language for speaking of the old fears that the benefits that came from Ottawa were threatened by independence. This was the reading that the proponents of a *virage* gave to the commissions. But often it was much more than that. For many people the questions were: Why choose sovereignty? Will Quebec's constitution provide guarantees of economic and social rights? Will it define the government as having a legitimate role in protecting all citizens of Quebec from the unruly forces of unhappy chance and the markets? Or when Quebec becomes the capital of an independent country, will it be no more than a neo-conservative Ottawa writ small?

In this era of economic, social and political restructuring, many of the values, as well as the specific programs central to the progressive post-war politics, have been jettisoned by parties and governments in many places. Instead of seeking new expressions of long-held and important values, there is often a tendency to embrace neo-liberal solutions, including their world views and values. Therefore, future citizens of Quebec are rightly concerned about whether an independent Quebec is willing to make commitments to social solidarity, to real equality across social groups and sexes, to guarantees of individual and collective rights, and to an active state. Entrenchment of a progressive welfare state was one manifestation of Québécois nationalism in the 1960s and 1970s. Nonetheless, the heirs of that movement, many of whom were recently found in Brian Mulroney's neo-conservative party, exhibit much less interest in addressing such matters. Calls for such a progressive *projet de société* are not yet being engaged in any serious fashion.

No Way to Forge a New Country

There are strategic reasons to avoid it, of course. Both the PQ and BQ are hybrid parties, created by social democrats, technocrats, and free-marketeers. Opening up a discussion of a societal project would risk revealing the fragility of such alliances. Therefore, party elites prefer to speak the banalities of electoralist discourse and focus on the campaign rather than its consequences.

Such big questions are legitimately asked when the agenda is constitution writing. This is because constitutions are declarations about desirable presents and futures, statements of political ideals and concrete arrangements for translating them into practice. They set out a vision of who we are and who we might be. Such definitions of democratic citizenship organize popular understandings of the relationship between the individual and the state, describe the rights and duties of citizens, designate the responsibilities of the state and encourage certain ways of making claims to the government, and empower groups and categories of citizens.

Any hints of answers to big questions are few and far between in the current campaign. The arguments for sovereignty are even more obscured since *le virage*. Indeed, the current strategy can been seen as the fruit of the unwillingness, or the incapacity, of the leaders to respond to the calls for *specification* of more about the post-referendum future than about the potential institutional relationship with Canada. Rather than responding, the process has been redesigned "a campaign," where the model is electoral politics and the goal is winning at any cost. Post-*virage* talk may seek to soothe, but it does not respond to the desire for clarity. Nor is a campaign whose theme sounds so much like that of an election—"a time for change"—any way to forge a new country.

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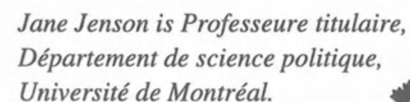

INJUSTICE AT WESTRAY: A CASE HISTORY REPEATING ITSELF

by Eric Tucker

The events surrounding the explosion that killed 26 miners on the morning of May 9, 1992, at the Westray mine in Pictou County, Nova Scotia, reveal starkly the inadequacy of the justice system, broadly conceived, in protecting the lives and health of Canadian workers. First we witnessed the results of its failure to prevent the creation of unacceptably hazardous conditions, and now we are seeing its ineffective response to a disaster that may leave other workers to suffer a similar fate.

Although there still has not been an official determination of the causes of the Westray mine disaster, ample evidence points to the failure of the governments of Canada and Nova Scotia to identify health and safety in the mine as a top priority. Dean Jobb, an investigative reporter with the *Halifax Chronicle-Herald*, has documented this neglect in his book, *Calculated Risk*. Neither level of government insisted, as a condition of their financial participation, that Curragh Resources Inc., the mine's owner and developer, establish that coal could be safely mined, despite a long history of mine disasters dating back to the nineteenth century. Once work began, the provincial department of labour did not vigorously enforce its own health and safety laws, even though repeated and ongoing violations endangered the lives of the underground miners.

A MASSIVE REGULATORY FAILURE

This massive regulatory failure was not an isolated event. Canadian governments never require would-be entrepreneurs to establish that they can conduct their activities without endangering their employees, even when those governments provide financial assistance. Furthermore, the practice of enforcing health and safety laws through "gentle persuasion" is deeply rooted and pervasive.

The enormity of the resulting injustice can be measured by the toll it takes on the lives and health of Canadian workers. Seven to eight hundred workers are killed and over half a million suffer disabling injuries or illnesses annually as a result of their work. Moreover, these figures compiled by workers' compensation boards seriously underestimate the actual totals for a variety of reasons including under-reporting, difficulties in establishing the work-relatedness of the harm suffered, and gaps in coverage.

> *"How, then, does our justice system respond to the occupational health and safety disasters that inevitably materialize? Again, the events at Westray exemplify, in dramatic fashion, deep-seated problems."*

How, then, does our justice system respond to the occupational health and safety disasters that inevitably materialize? Again, the events at Westray exemplify, in dramatic fashion, deep-seated problems.

When a highway traffic accident results in a fatality or serious injury, an investigation is immediately undertaken to determine whether charges should be laid pursuant to provincial highway traffic legislation or, in cases of more egregious misconduct, under the *Criminal Code*. Drivers frequently are prosecuted.

The same is not true when workers are killed or injured on the job. In the case of the Westray disaster, days passed before it dawned on any official that an investigation into potential wrongdoing was required or that the Westray offices needed to be secured. We are unlikely ever to know what documents were shredded in the interim.

Charges under the provincial health and safety laws were laid just before the limitation period expired, but they were dropped subsequently to clear the way for Gerald Phillips, the mine manager, Roger Parry the underground manager, and Curragh Resources Inc. to be charged with manslaughter and criminal negligence.

THE LIMITS OF CRIMINAL JUSTICE

While prosecutions under health and safety laws are relatively uncommon, criminal charges are truly rare. Indeed, to date, research has identified only eight other instances in the twentieth century in which employers have been charged in work-related deaths. It was not surprising, therefore, that the prosecution attracted great publicity.

Why are employers not routinely prosecuted when they make decisions about the conduct of their operations that recklessly or heedlessly expose workers to the risk of harm? While crude class bias may play a role, more subtle influences also are at work. The legal system has long

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been influenced by deep-rooted assumptions about the source and nature of workplace hazards. First and foremost is the belief that workers implicitly, but genuinely, consent to the risks to which they are exposed through their contracts of employment. The courts applied this assumption to deny workers compensation under the common law: now it blurs the legal perception of employers' responsibility for the hazardous workplace conditions they create.

A second assumption is that hazardous conditions are the unfortunate, but inevitable, result of socially useful activities like coal mining. Consequently, it would be wrong to criminalize risk-taking by "legitimate" entrepreneurs, even when it results in enormous harm. At worst, these are regulatory offences.

There are also more "practical" reasons for not prosecuting criminally. Convictions are difficult to obtain against corporations and white-collar defendants. Responsibility for particular actions can be fragmented and shifted within complex organizations. The activities that constitute the crime typically occur over a longer time frame, thus making it more difficult to build and prove a case. Because criminal charges will be taken very seriously by the accused, a strong legal defence is likely to be mounted, including careful scrutiny of any legal errors committed by the police and prosecution.

The Westray accused had little difficulty finding such mistakes. Earlier, errors were made in handling evidence so that it had to be returned, but, ultimately, it was the failure to disclose crucial evidence that resulted in the charges being stayed this June. Whether this resulted from skullduggery, disorganization or incompetence is not known, but the inability to obtain a conviction is not exceptional. Only one has been obtained in a health and safety criminal prosecution, when Brazeau Collieries was convicted of manslaughter after a methane gas explosion in its Alberta mine killed 29 workers in 1941. For that crime, a fine of $5,000 was levied.

Can We Learn from These Mistakes?

The criminal justice system, clearly, fails to deter this kind of misconduct, but can we learn from our mistakes? Public inquiries with a broad mandate to determine "what went wrong" and to make recommendations to avoid similar disasters in the future are commonly established in the aftermath of major health and safety disasters. Such an inquiry was established six days after the Westray disaster, but, more than three years later, hearings still have not been held and are not expected to begin until later this fall.

The major reason for this delay is the increasingly complex legal environment surrounding inquiries into matters that may involve criminal behaviour. The inquiry was stayed by the Nova Scotia court in September 1992 because it encroached on the federal criminal law power and was *ultra vires*. Although this finding was reversed on appeal, the stay was not lifted because of a concern that public hearings by the inquiry before the criminal charges were heard could infringe the accused's right to be presumed innocent and to receive a fair and impartial hearing. The stay was finally lifted by the Supreme Court of Canada in May 1995, on the basis that once the accused had elected trial by judge alone, there was no danger of prejudgment. Although the decision served the interests of judges by presenting them as demigods, it failed to provide any guidance on the constitutional questions raised by the case. As a result, public officials confront a serious dilemma. Until criminal prosecutions are ruled out or completed, it may not be possible to proceed with a public inquiry. Because of the delay, not only may workers continue to face hazardous conditions, but the likelihood of the government implementing an inquiry's recommendations may be reduced because it no longer is under the same level of political pressure to take remedial action.

Legal complexity, however, is only part of the problem. The depressing cycle of disasters, inquiries and more disasters suggests more fundamental limitations. Public inquiries tend to focus on the most immediate, technical causes of disasters; more systemic causes, including political-economic pressures operating on employers, governments and workers, are typically ignored or marginalized. As a result, despite the broad mandate of public inquiries, their recommendations tend to be narrow and fail to address the broader context that may very well become the context of future disasters.

In sum, the justice system has responded poorly to occupational health and safety disasters in the past. Tragically, history is repeating itself in the aftermath of Westray disaster.

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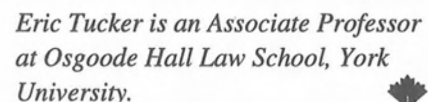

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