CANADIAN ISSUES
THÈMES CANADIENS

The Right Honourable / La très honorable Michaëlle Jean

Howard Pawley

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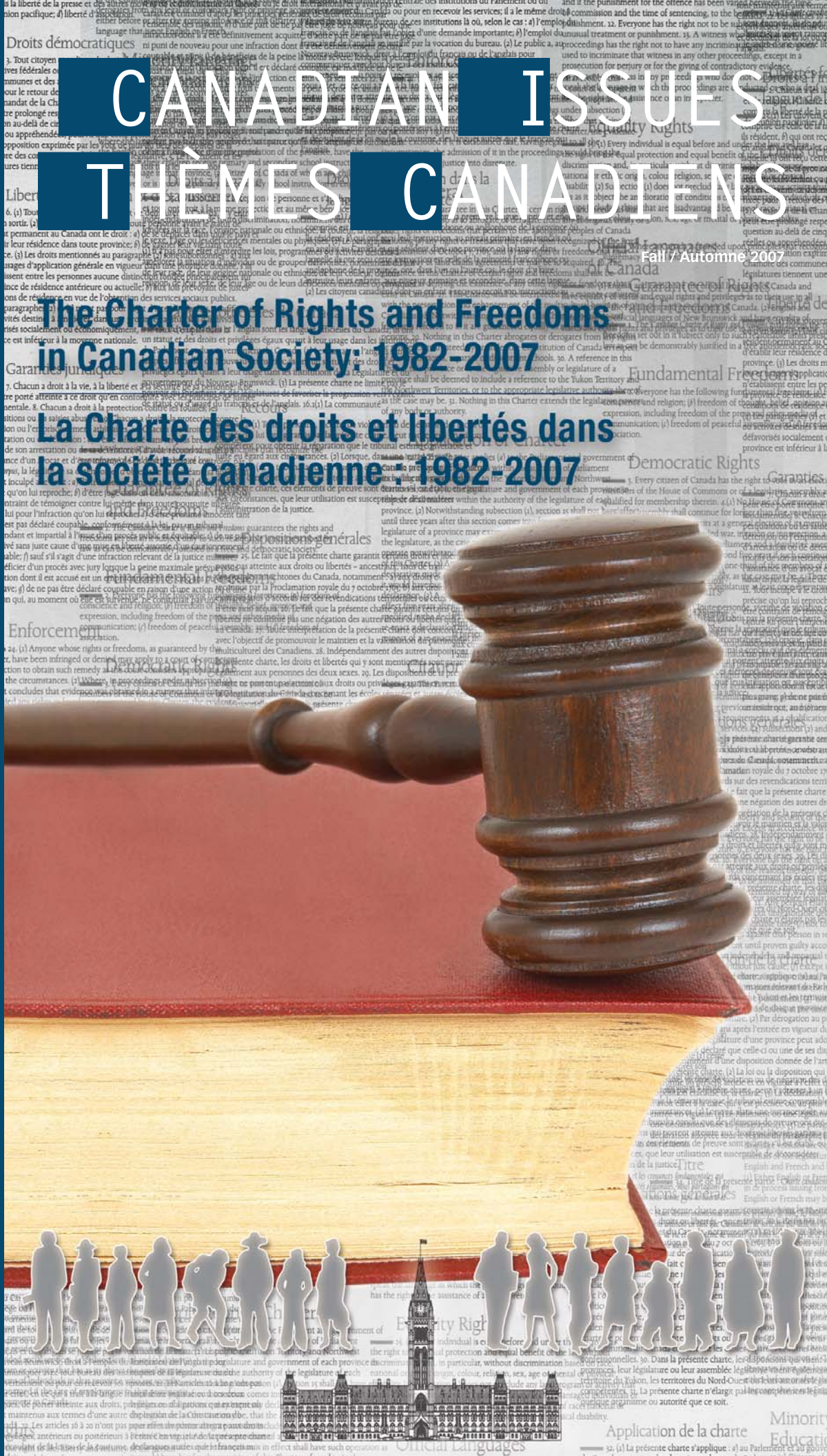
Fall / Automne 2007

The Charter of Rights and Freedoms in Canadian Society: 1982-2007

La Charte des droits et libertés dans la société canadienne : 1982-2007



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Canadian Issues is published by
Thèmes canadiens est publié par

ACS • AEC
Association for Canadian Studies • Association d'études canadiennes

CANADIAN ISSUES
THÈMES CANADIENS

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Bang Marketing (514) 849-2264 – 1-888-942-BANG
info@bang-marketing.com

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mp.desjardins@acs-aec.ca
(514) 925-3099

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695 Westney Road South, Unit 14
Ajax Ontario L1S 6M9

CITC/ACS ADDRESS / ADRESSE CITC/AEC
1822, rue Sherbrooke Ouest, Montréal (Québec) H3H 1E4
Tel / Tél. : (514) 925-3096 – Fax / Téléc. : (514) 925-3095

RUN OF 2,500 COPIES / TIRAGE DE 2 500 EXEMPLAIRES

CANADIAN ISSUES / THÈMES CANADIENS (CITC) – ISSN 0318-8442
CONVENTION POSTE PUBLICATION, 41006541

Patrimoine canadien Canadian Heritage

Canadian Studies Program
Programme des études canadiennes

CITC is a quarterly publication of the Association for Canadian Studies (ACS). It is distributed free of charge to individual and institutional members of the Association. CITC is a bilingual publication. All material prepared by the ACS is published in both French and English. All other articles are published in the language in which they are written. Opinions expressed in articles are those of the authors and do not necessarily reflect the opinion of the ACS. The Association for Canadian Studies is a voluntary non-profit organization. It seeks to expand and disseminate knowledge about Canada through teaching, research and publications. The ACS is a scholarly society and a member of the Humanities and Social Science Federation of Canada. The ACS is also a founding member of the International Council for Canadian Studies.

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CITC acknowledges the financial support of the Government of Canada through the Canadian Studies Program of the Department of Canadian Heritage and the Canada Magazine Fund for this project.

CITC bénéficie de l'appui financier du Gouvernement du Canada par le biais du Programme d'études canadiennes du ministère du Patrimoine canadien et du Fonds du Canada pour les magazines pour ce projet.

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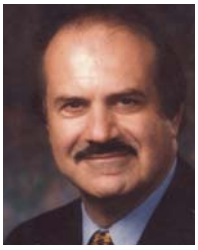

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Since 1983, the Award of Merit is given annually by the Association for Canadian Studies to a person, group, or organization who has continuously and significantly contributed to the development of Canadian Studies in Canada and/or dissemination of knowledge about Canada. The Award of Merit is generously sponsored by the Royal Bank of Canada Charitable Foundation.

Depuis 1983, l'AEC remet chaque année un Certificat de mérite à une personne, un groupe ou un organisme qui a contribué de façon importante et soutenue au développement des études canadiennes au Canada et/ou à la diffusion des connaissances sur le Canada. Le Certificat de mérite est généreusement parrainé par la Fondation charitable de la Banque royale du Canada.

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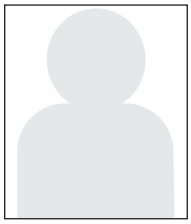
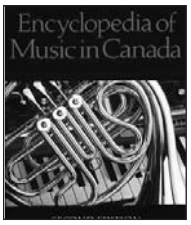


1996 Béatrice Kowaliczko

Former Executive Director of the Association for Canadian Studies and Associate Provost (Academic Services) at McGill University, Béatrice Kowaliczko was praised for her ability to bring together members of the Canadian Studies community despite their divergent languages, regions and cultures.

1997 Colin Howell – Blood, Sweat and Cheers: Sport and the Making of Modern Canada

Intended as an introduction to the way in which social historians approach the history of sport, Colin Howell introduces readers to a number of important issues, including amateurism and professionalism, race and ethnicity, regionalism and nationalism, the impact of British and American sporting traditions upon Canadian sporting life, and the contemporary meaning of sport in a globalizing capitalist economy. He investigates discourses about respectability and the display of the body, gender construction and sexual identities, the changing nature of the sporting marketplace over time, as well as the involvement of spectators, the media, and the state in the production of our national sporting life.



1998 Helmut Kallmann and Gilles Potvin – Encyclopedia of Music in Canada

The Encyclopedia has been recognized as a monumental record of the music of Canada, an indispensable guide to all kinds of music: popular, folk, religious, concert, and other forms. Compiled by scores of experts, the Encyclopedia presents our musical heritage in all its aspects: historical, educational, critical, administrative, and commercial.

1999 Sister Nancy LeClaire, Earle Waugh and George Cardinal - Alberta Elder's Cree Dictionary

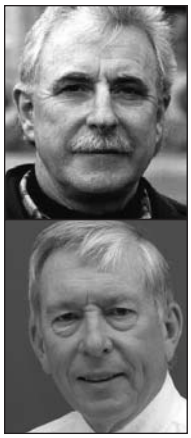
George Cardinal, Earle Waugh and Sister Nancy LeClaire (deceased) have been recognized for their efforts in producing the Alberta Elders' Cree Dictionary. The Cree Dictionary project was initiated in the late 1960s by Sister Nancy LeClaire, a respected Elder of the Samson Cree Nation. The publication of the dictionary has made a major cultural contribution to the Cree community in preserving and rejuvenating the Cree language.

2000 William H. New

William New, OC, FRSC, taught Canadian /Postcolonial Literatures at UBC until his retirement in 2003, and from 1977 to 1995 he edited the critical journal Canadian Literature. His more than forty books range from anthologies and bio-bibliographical compilations to critical studies, poetry, and children's writing. Recent works include A History of Canadian Literature (2nd ed. 2003) and Encyclopedia of Literature in Canada (2002).

2001 Desmond Morton

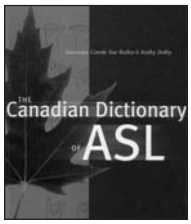
Desmond Morton is Hiram Mills Professor of History Emeritus at McGill University and founding director of its Institute for the Study of Canada. He is the author of forty books on Canada's military, political and labour history. He is an officer of the Order of Canada and received the Canadian Forces Decoration.



2002 John Fielding & Thomas Dickson Mansfield

During his 37 years as a teacher of history, both at the secondary school and university levels (Queen's, Faculty of Education, 1989-2003), John Fielding focused on making the learning of Canadian History an engaging experience. In 1991 he took on a new role as education consultant and learning resource developer for The CRB Foundation Heritage Project/Historica. In this role he presented literally hundreds of workshops introducing new and exciting ways to teach Canadian History. He is an author of four Canadian History school textbooks, and many learning resources produced for Library and Archives of Canada and others.

Dickson Mansfield has been an instructor at the Faculty of Education, Queen's University since 1989. Prior to that, he was a senior elementary and secondary school teacher of Geography, as well as a program consultant, secondary school administrator, and an Education officer for the Ontario Ministry of Education. He has been directly involved in the development of Canadian Studies resources for elementary and secondary students across Canada. He has also been involved with the Royal Canadian Geographical Society and the National Geographic Society in the development of the Canadian Council for Geographic Education.



2003 Carole Sue Bailey & Kathy Dolby – The Canadian Dictionary of ASL

Developed in conjunction with the Canadian Cultural Society of the Deaf, this comprehensive new dictionary of American Sign Language (ASL) has over 8700 signs, many unique to Canada. Material for this extensive work has been drawn from many sources and includes input gathered from members of Canada's Deaf community over the past twenty years. The Canadian Dictionary of ASL is a valuable reference for Deaf and hearing users alike and will prove to be the standard reference for years to come.

2004 Society for Educational Visits and Exchanges in Canada Société éducative de visites et d'échanges au Canada (SEVEC)

SEVEC's mission is to create, promote and facilitate enriching educational opportunities for youth within Canada for the development of mutual respect and understanding through programs of exploration in language, culture, and community. Vision – SEVEC believes that every child in Canada should have the opportunity to learn, first-hand, about another part of the country and its people. Commitment – SEVEC believes that visiting another part of Canada or sharing the experience of an exchange has a lasting positive impact on the lives of all those involved-individuals, families, organizations and communities.

2005 Ian E. Wilson

In 2004, Mr. Ian E. Wilson was appointed Librarian and Archivist of Canada. In his former position as National Archivist of Canada, appointed July 1999, he and National Librarian, Roch Carrier, developed and led the process to create a new knowledge institution for Canada in the 21st century. The career of Mr. Wilson is distinguished in many areas, including archival and information management, university teaching and government service. Mr. Wilson has been involved with the Canadian archival and library communities for over 30 years. He has worked diligently to make archives accessible and interesting to a wide range of audiences. He has published extensively on history, archives, heritage and information management and has lectured nationally and internationally.

2006 Victor Rabinovitch

Victor Rabinovitch is the President and Chief Executive Officer of the Canadian Museum of Civilization Corporation. Previously, Dr. Rabinovitch served as Assistant Deputy Minister for Cultural Development and Heritage, Canadian Heritage, from 1995 to 1998. He was responsible for policies and programs in broadcasting, cinema, publishing, sound recording, copyright, museums and performing arts.

SON EXCELLENCE LA TRÈS HONORABLE MICHAËLLE JEAN

Discours à l'occasion de l'ouverture de la conférence de l'Association d'études canadiennes
« Droits et libertés au Canada : les 25 ans de la Charte »
Ottawa, le lundi 16 avril 2007

Au Canada, nous sommes libres.
Libres d'exprimer nos points de vue sans crainte de persécution.
Libres de professer notre foi comme nous l'entendons.
Libres de choisir qui gouvernera notre pays.

Pourtant, un simple coup d'œil sur notre histoire nous permet de constater que cette liberté ne nous est pas venue du jour au lendemain.

Si nous pouvons, aujourd'hui, poursuivre nos rêves et nos aspirations, c'est grâce à la longue lutte que des femmes et des hommes, jeunes et moins jeunes, ont menée pour que règnent la liberté et la justice à la grandeur du pays.

À l'occasion de notre célébration du 25e anniversaire de la *Charte canadienne des droits et libertés*, j'aimerais réfléchir avec vous aux notions de justice et de liberté dans notre société.

L'un des grands principes de la démocratie est le devoir qui incombe à l'État de protéger et de garantir les droits démocratiques et les libertés fondamentales de ses citoyennes et citoyens. Ici, la liberté ne se limite pas à la quête d'avantages matériels.

Elle se pratique en fait à un niveau plus global, c'est-à-dire par une démarche axée sur la réflexion et l'action pour le bien de la collectivité.

Pour une société pluraliste, cette façon d'envisager la liberté pose des défis particuliers. Car il arrive que des individus aient une compréhension différente de ce qu'est le bien commun.

En fait, certaines notions de ce qui est bien ne correspondent pas toujours avec les façons de voir de la majorité.

De là l'importance que l'on doit accorder, plus que jamais, au devoir de protéger les droits et les libertés et de multiplier les occasions de dialogue et d'échange dans un contexte pluraliste, de façon inclusive.

Au Canada, cette mobilisation de la société autour des droits et libertés ne s'est réellement manifestée que dans les dernières décennies.

Pensons-y. Durant la première moitié du 20e siècle, notre pays a vécu de dures épreuves, comme l'internement et la déportation d'un grand nombre de ses citoyennes et citoyens.

Nombreux étaient les travailleurs qui ont été détenus dans des circonstances douteuses.

Et nous avons vu comment les préjugés contre les minorités raciales, religieuses et ethniques ont limité leur capacité de prospérer dans notre société.

Certes, les Canadiennes et les Canadiens ne sont pas restés indifférents face à ces injustices.

Animés par la conviction profonde que les droits des êtres humains sont inaliénables, des groupes de femmes, de francophones et anglophones, de minorités

ethniques et raciales, de religions différentes se sont donnés la main pour exiger que les libertés et droits fondamentaux des Canadiennes et des Canadiens, sans distinction, soient respectés et protégés.

Les répercussions de ces mouvements sont considérables. D'une part, ils ont donné lieu à l'adoption d'une Déclaration canadienne des droits en 1960, sous le leadership du premier ministre John Diefenbaker.

D'autre part, ils ont favorisé l'émergence d'une culture collective solidement ancrée au pays et largement acceptée, qui prônait avant tout la dignité et la liberté de chaque être humain.

C'est justement dans le courant de cette mouvance sociale que le jeune intellectuel, Pierre Elliott Trudeau, s'est joint à d'autres qui, comme lui, voyaient la nécessité pour notre pays de se doter d'une déclaration constitutionnelle visant à améliorer la protection des droits humains pour toute la population et à offrir des garanties quant au statut des langues officielles.

Durant la seconde moitié du 20e siècle, les assemblées législatives d'un bout à l'autre du pays ont répondu aux appels à une protection accrue des droits de la personne, en émettant des décrets pour protéger les droits fondamentaux.

Le Québec s'est distingué à cet égard, grâce aux efforts de centaines de citoyennes et citoyens et de législateurs qui ont vu se concrétiser la ratification à l'unanimité de la *Charte des droits et libertés de la personne* du Québec en 1975.

Cette charte est sans doute celle qui va le plus loin en Amérique du Nord en vue de protéger les droits et libertés des citoyens.

C'est le 17 avril 1982 qu'a été adoptée la *Charte canadienne des droits et libertés*. Cela représente un moment mémorable de notre histoire. Le Canada proclamait ainsi son engagement inébranlable de tracer sa propre voie, conformément aux principes fondamentaux de justice, de démocratie et de liberté.

Depuis ce jour, nos gouvernements sont tenus de créer des lois et des politiques qui respectent les droits et les libertés de chaque citoyenne et citoyen.

À partir de ce jour, les Canadiennes et les Canadiens se sont vus protégés contre les fouilles et saisies arbitraires de la part des responsables de l'application de la loi.

À partir de ce jour, l'égalité des droits a été graduellement rehaussée grâce aux efforts accomplis pour s'assurer que la teneur et la portée de nos droits et libertés soit garanties par la loi.

Et maintenant, 25 ans plus tard, nous voici à la croisée des chemins. La jurisprudence découlant de la *Charte* a pris de la maturité, à l'image d'un grand chêne qui, de l'avis de plus d'un, s'est transformé en un saule pleureur!

J'estime qu'il est juste de dire que la *Charte* a aidé d'une manière importante à faire avancer la justice et la liberté, au point d'influencer le résultat de divers cas dans des pays comme le Royaume-Uni, l'Afrique du Sud et la Nouvelle-Zélande. Nous avons donc toutes les raisons d'être fiers de ces réalisations!

> C'est maintenant, plus que jamais, que nous devons renouer avec notre histoire collective en faveur de la liberté et de la justice, afin d'éviter que ne se reproduisent les erreurs du passé.

Depuis mon installation comme 27e gouverneur général du Canada, j'ai été touchée de voir comment l'esprit de la *Charte* a captivé le cœur et l'esprit des citoyennes et des citoyens d'un océan à l'autre, car elle incarne à leurs yeux un élément central de l'identité canadienne.

Permettez-moi de vous dire qu'au cours de mes périples à travers le pays, j'ai été émue d'entendre des citoyennes et des citoyens, jeunes et moins jeunes, exprimer à leur façon leur vision d'un pays qui permet à chacune et à chacun de s'épanouir librement.

J'ai été impressionnée de constater à quel point il leur importe de protéger les valeurs et les droits fondamentaux qui nous sont si chers.

J'ai été encouragée de voir à quel point ils souhaitent travailler ensemble pour faire en sorte que personne ne soit laissé pour compte.

Nul doute que ces expériences m'ont grandement rassurée, alors que j'éprouve de plus en plus d'inquiétudes face à la disparition des espaces destinés au dialogue public, à la réflexion et aux échanges.

Même la pensée critique, le questionnement des idées reçues, est un acte qui se manifeste de moins en moins en ce monde où le tapage des images commerciales et des nouvelles sensations contribue à la fragmentation et à l'atrophie sociales, un phénomène qui touche également notre société.

De plus en plus, des sonneries d'alarme se font entendre, pour nous rappeler de respecter notre

engagement collectif envers la démocratie, la justice et la liberté.

Chaque sonnerie résonne au plus profond de moi, car j'ai déjà dû fuir un pays où régnait la tyrannie et où la liberté était un luxe réservé à quelques « happy few ».

Les gens qui tentaient de dire la vérité à la face du pouvoir se retrouvaient souvent, le lendemain, sans vie en bordure de la route.

Comme les milliers d'autres qui ont choisi de s'établir au Canada, j'apprécie au plus haut point les libertés et les droits que la *Charte* a conférés à chacune et à chacun des membres de notre société.

J'estime donc que c'est maintenant, plus que jamais, qu'il nous faut résister à la tentation de refuser à nos concitoyennes et nos concitoyens leurs droits les plus fondamentaux.

C'est maintenant, plus que jamais, que nous devons répondre aux cris des groupes vulnérables qui cherchent à avoir pleinement accès à la justice.

C'est maintenant, plus que jamais, que nous devons renouer avec notre histoire collective en faveur de la liberté et de la justice, afin d'éviter que ne se reproduisent les erreurs du passé.

Diefenbaker n'a-t-il pas déjà dit : « L'histoire montre que si l'on permet d'enfreindre les droits d'un citoyen ou d'une citoyenne, quel qu'il soit, cela veut dire que tous les autres risquent, tôt ou tard, de perdre également leurs droits. »

N'oublions jamais que nous sommes un modèle pour le monde entier.

Parmi le concert des nations, notre pays incarne l'espoir – un pays qui a trouvé la formule secrète permettant à des autochtones, à des francophones et à des anglophones, à toutes les religions, aux asiatiques, aux Noirs et aux Blancs, aux gais, aux lesbiennes et aux hétérosexuels, de travailler ensemble pour le bien commun.

À titre de gouverneure générale du Canada, j'espère que cette importante conférence vous permettra de trouver des moyens pour que la Charte continue à favoriser notre vivre ensemble.

L'ensemble que nous formons témoigne de l'interprétation des mondes, des cultures, des langues, des histoires et des parcours. Les défis ne sont que plus nombreux, que plus grands, et font appel à l'esprit de nuances. Cette charte que nous célébrons nous offre la possibilité d'examiner ces défis, de poser les diagnostics qui s'imposent et d'envisager des solutions autour de ces principes que nous voulons rassembler.

Je vous suis très reconnaissante de m'avoir invitée. Sachez que je suivrai vos délibérations de près.

Merci.

HER EXCELLENCY THE RIGHT HONOURABLE MICHAËLLE JEAN

Speech on the Occasion of the Opening of the Association for Canadian Studies Conference
"Canadian Rights and Freedoms: 25 Years under the Charter"
Ottawa, Monday, April 16, 2007

In Canada, we are free.
Free to express our views openly without fear of persecution.
Free to worship in our own way.
Free to choose who will govern our country.

Yet, when we examine our shared past, we realize that freedom did not come to us overnight.

Our ability to pursue our dreams and aspirations today flows from the long struggle that women and men, young and old, waged to ensure that freedom and justice would be available to all on Canadian soil.

As we celebrate together, the 25th anniversary of the *Canadian Charter of Rights and Freedoms*, I would like to share my thoughts with you on the significance of justice and freedom in our society.

A cardinal principle of democracy is the duty of the State to protect and guarantee the basic rights and freedoms of its citizens. Here, freedom does not only encompass the pursuit of material benefits.

It really intimates a higher and more universal state of being that encapsulates thinking and acting for the common good.

Pluralistic societies pose particular challenges in this regard. Their members often differ in their understanding of the common good, and the responsibilities that it implies.

In fact, their understanding of what is good often challenges the conventional views of the majority.

Hence, the duty to safeguard rights and freedoms and to provide opportunities for inclusive dialogue and open exchange becomes more important than ever.

In Canada, the mobilization around this duty has only really occurred in the last few decades.

Think about it. During the first half of the 20th century, our country was faced with the internment and deportation of many of its citizens.

We saw many of our workers detained under dubious circumstances.

And, we witnessed how prejudices against racial, religious and ethnic minorities limited their ability to flourish in our society.

Yet in the face of these injustices, Canadians were far from indifferent.

Animated by a profound belief in the inalienable rights of human beings, groups of women, Francophones and Anglophones, ethnic and racialized minorities, religious groups joined hands to demand that the basic rights and freedoms of all Canadians be respected and protected without discrimination.

What I find significant about these movements is that not only did they lead to the enactment of a federal *Bill of Rights* in 1960, under the leadership of Prime Minister John Diefenbaker.

But, they also fostered the emergence of a robust and widely accepted Canadian public culture, which held the inherent dignity and freedom of every human being as paramount.

And it is precisely in the midst of this *mouvance sociale* that the young intellectual, Pierre Elliott Trudeau, joined others in musing on the need for a constitutional declaration to enhance human rights protections for all and to provide official languages guarantees.

During the second half of the 20th century, legislatures across the country responded to the calls for greater human rights protections by enacting ordinances to protect fundamental rights.

Quebec stood out in this regard, as hundreds of citizens and legislators saw the unanimous ratification of la *Charte des droits et libertés de la personne* du Québec in 1975, a charter that went perhaps the furthest in North America in addressing the rights and freedoms of citizens.

It was on April 17, 1982 that the *Canadian Charter of Rights and Freedoms* was adopted. This represents a watershed moment in our history: Canada proclaimed its unwavering commitment to chart its own path according to the fundamental principles of justice, democracy, and freedom.

From that day on, our governments were bound to create laws and policies that respect the rights and freedoms of every citizen.

From that day on, Canadians had guarantees against arbitrary searches and seizures by law enforcement officials.

From that day on, equality rights were gradually enriched by efforts to ensure that the substance of our rights and freedoms is guaranteed by the law.

And now, 25 years later, we find ourselves at the crossroads. *Charter* jurisprudence has matured into a living oak tree – although some would argue that it has morphed into a weeping willow!

I think it is safe to say that the *Charter* has contributed significantly to furthering justice and freedom, even influencing the outcome of cases in such countries as the United Kingdom, South Africa and New Zealand. And so, we have every reason to be proud of these achievements!

Since my installation as 27th governor general of Canada, I have been touched to see how the spirit of the *Charter* has captivated the hearts and minds of citizens, from coast, to coast, who see it as a central component of Canadian identity.

As I have travelled across the country, I have been moved to hear citizens, both young and old, convey in their own way their passionate vision of a country in which everyone has an equal opportunity to flourish.

I have been impressed by their conviction that the fundamental rights and values we all cherish must be protected jealously.

I have been emboldened by their commitment to work together to ensure that no one is left behind.

These experiences have definitely been a source of great reassurance for me, as I watch with growing concern spaces and opportunities for public dialogue, reflection and exchange gradually disappear.

Even the very act of thinking critically, questioning received beliefs, is being stifled as the clamour of commercial images and new sensations are bringing social fragmentation and atrophy right to our doorsteps.

It is now more than ever that we must reconnect with our shared history of struggle for freedom and justice, so that we do not repeat the mistakes of the past.

More and more, we are hearing alarm bells ringing, calling upon us to stay fast to our shared commitment to democracy, justice and freedom.

Each bell resonates deeply within me, because I once fled from a country where tyranny was king and freedom was the luxury of a select few.

People who dared to speak truth to power were often found the next day, bludgeoned on the side of the street.

Like the thousands who have decided to make Canada their home, I have a special appreciation for the freedoms and rights that the *Charter* has brought to each member of our society.

So, I believe that it is now more than ever that we must resist the temptation to deny our fellow citizens their most basic rights.

It is now more than ever that we must answer the cries of vulnerable groups seeking full access to justice.

It is now more than ever that we must reconnect with our shared history of struggle for free-

dom and justice, so that we do not repeat the mistakes of the past.

For as Diefenbaker once said, "History shows that if you permit the rights of a citizen to be impinged upon, regardless of who the citizen may be, every other person is a step nearer to a loss of his rights."

Let us not forget that the world holds us up as an example.

Among the concert of nations, we are touted as a success story – a country that has discovered the secret elixir that enables Aboriginal, French and English, all religious groups, Asian, Black and White, and gay, lesbian and heterosexual, to work together for the common good.

As governor general of Canada, I hope that this important conference will allow you to find ways to see how the *Charter* can continue to enrich, as we say in French, *notre vivre ensemble*.

Canada is a model of how worlds, cultures, languages, histories and journeys should be interpreted, and because of this, it faces a greater number of challenges that require us to seek nuances. Thanks to the *Charter* we are celebrating, we can examine these challenges, make a diagnosis, and come up with solutions that focus on the principles we would like to rally around.

Thank you for inviting me, and I will follow your deliberations closely.

PRESENT AT THE FRAMING

ABSTRACT

In this article, I will discuss my particular relationship with the events leading to the Royal signing, on April 17, 1982. In doing so, I hope the political climate, responsible for the birth of the *Charter*, including the strengthening of clauses protecting women and members of the aboriginal community, may be better understood.

During the fall of 1981 in the middle of the Manitoba election, Premier Sterling Lyon was engaged in the tortuous negotiations leading to the eventual adoption of the *Canadian Charter of Rights and Freedoms*. During this process, he was generally recognized as one of the most vociferous opponents of the *Charter*. Lyon resolutely believed that the *Charter* would weaken parliamentary supremacy. He was deeply troubled by the direction he thought Prime Minister Trudeau was taking Canada and the possible erosion of values he held dear.

Sterling Lyon enjoyed a reputation as a combative spokesperson for the Premiers, chairing the annual first minister's meetings in their two-year constitutional battle with Trudeau. Some did see him as being too boisterous and extreme in his opposition to Trudeau. However, his adversarial relationship with Trudeau certainly endeared him to most Manitobans who, like many others in western Canada, rightly or wrongly, were less than enamored with the Prime Minister. There had been speculation that the Premier had been patiently waiting for the Supreme Court decision on Trudeau's constitutional package, which would have permitted him to run against Ottawa.

New Democratic Premier Blakeney of Saskatchewan was also concerned about the impact a charter might have on our political system. Interestingly, Premier Blakeney's concerns principally dealt with his fear that the *Charter* would result in a shift in power from duly elected political representatives to un-elected and un-accountable judges. Most critical, according to Premier Blakeney, would be the additional power the *Charter* would provide to corporate and wealthy interests.[1] In his opposition during these high profile discussions, Premier Blakeney found himself in opposition to his federal leader, Ed Broadbent, and many in the federal New Democratic Party: sharp differences were revealed at the 1980 NDP convention in Vancouver.

It was reckoned that Premier Lyon's high profile participation at the upcoming constitutional negotiations would greatly aid his re-election to a second term of government: no provincial government had ever been denied a second term in Manitoba's history. Moreover, Lyon's win in 1977 was achieved with the highest popular vote in Manitoba history. There can be no doubt about Lyon's strength as an effective spokesman for dissident Premiers and his skill at articulating his sincerely held objections to an entrenched charter of rights. Lyon is described as being, "The premier most ideologically opposed to an entrenched charter of rights, Lyon is also the one most obviously playing to the television camera: he has about two weeks to go in a provincial election campaign".[2] In an interview with the *Globe and Mail*, Sterling Lyon recalled, "we weren't just being ill-tempered. It all goes back to a grade school

HOWARD PAWLEY

Howard Pawley was an Associate Professor of Political Science at University of Windsor. He is now an Associate Emeritus at University of Windsor. Previously, he has been Minister of Municipal Affairs, Attorney-General and Premier of Manitoba.

understanding of the hierarchy of power in a parliamentary system. I said time and again to the Prime Minister: "you're taking power from parliament – the representatives of the people – and giving it to nine people. What you are doing is importing an alien appendage into our parliamentary system".[3]

In November 1981, heading into an election, as the Opposition Leader for less than three years, I enjoyed far less public profile than Premier Lyon and was generally considered the underdog in the campaign. However, Premier Lyon seriously miscalculated the mood of the Manitoba electorate. Contrary to Lyon's expectation, the patriation and the *Charter* ranked much lower on the public's priorities than the anger from the recession of the early 80s over the loss of thousands of jobs. The electorate was not in a forgiving frame of mind. Lofty expectations about a spectacular economic performance in the neo-conservative revolution promised by the Tories had been soundly deflated.

Sterling Lyon's fierce opposition to the *Charter* did not enjoy majority support in the province: It drove a deepening wedge between him, important sectors of the diverse Manitoba population, i.e. women, aboriginal, ethnic, and Francophone. However, it was not the overriding issue in the election. To many Manitobans, the continued debate about the constitution appeared to highlight misplaced priorities by all governments. I recall receiving enthusiastic ovations throughout the province whenever I called for the "patriation of our sons and daughters to Manitoba." There was a large exodus of young people who were seeking employment outside the province. Politicians were perceived as being too obsessed with endless constitutional talks: they were blamed for failing to take proactive steps to attack the mounting economic crisis. The consequences of such public disillusionment would target Premier Lyon at a risky political time for him.

To make things worse, Premier Lyon was unable to remain until the end of the constitutional negotiations; an urgent message arriving, warning him of rapidly sinking Conservative support, forced his premature return to the election campaign. Manitoba, like Quebec, was not represented by its Premier when the agreement by the First Ministers was finally achieved. Indeed, it is reported that Premier Lyon was somewhat reluctant to agree to the compromise and Ontario's Attorney-General, Roy McMurtry, and Hugh Segal called Senator Nathan Nurgitz, Sterling Lyon's campaign manager, at a little before 6:00 A.M. Manitoba time and warned him that "the gang of eight has now become the gang of two, I wouldn't presume to advise you on Manitoba politics." The prospect of being isolated with a separatist Premier of Quebec in the final days of an election campaign was more than a little worrying for Nurgitz and his leader. This message was reinforced by subsequent calls by Premier Lougheed and Manitoba's Attorney-General Gerry Mercier.[4]

Twenty-five years later, I have a renewed respect for not only the arguments articulated by Prime Minister Trudeau, but also greater sympathy for some of the insight contributed to the debate by Premiers Lyon and Blakeney. They all contributed as great Canadians to the debate.

On November 17, 1981, Premier Lyon was soundly defeated and the NDP was victorious. In the aftermath of the campaign, some national pundits argued that Lyon's hard-line position alienated critical blocks of support in Manitoba resulting in his defeat. In the *Globe & Mail*, Hugh Winsor surmised, "maybe it was the women of Manitoba, or maybe it was the native people or maybe was the women and native people together who did in the Manitoba Premier Lyon because of his stand against legislating human rights." Winsor further suggests that, "Mr. Lyon's repudiation by the voters go beyond the borders of Manitoba… in a more immediate sense, it should cause us to reflect on the relevance of the constitution. Did Sterling Lyon, who was one of the most obstreperous foot-draggers in the whole affair, one of the vituperative critics of Prime Minister Trudeau and the *Charter of Rights*, represent the views of Manitobans? Did any Premier have the right to speak for the people of his province? Or should, in cases of fundamental importance such as the constitution, the people be consulted directly?"[5]

Although Lyon's opposition to the *Charter* consolidated traditional NDP constituencies – aboriginal, women and the large multicultural community, the reality is that the *Charter* itself was not a decisive factor in the outcome of the election campaign. Nevertheless, the public image of Premier Lyon vigorously opposing an entrenched

charter of rights did succeed in consolidating the ethnic vote and resulted in some additional political inroads in those communities for the NDP. It is true that many observers were also startled to find that the British representative parliamentary system endorsed so firmly by the Premiers and most particularly by Premier Lyon was rightly or wrongly no longer the deeply cherished dream of many Canadians. Canada was less of a British country.

The new Manitoba NDP government assumed a much more rights orientated position than that of the Lyon government. Winsor is correct when he asserts that the message conveyed across Canada was: provincial Premiers were not necessarily reflecting the opinion of their constituents. Edward McWhinney claims, "the premiers by and large, demonstrated themselves as out of touch with the times and with their own constituencies… new, post war immigrant communities have failed to penetrate into the political processes… The social base of provincial government is too limited, restrictive and not representative, and it will have to change dramatically. Fundamental constitutional changes are to be accorded credibility (Canada and the Constitution 1979-1982, University of Toronto Press, 1982)."[6]

Momentum culminated in stronger recognition of Women and Aboriginal rights and their inclusion within the newly created *Charter*. As the new Manitoba Premier, I removed the caveat imposed by Lyon and Mercier during the dying moments of the First Ministers negotiations requiring ratification for the protection of the minority education rights by the Manitoba Legislature.

In the polarized politics at the time in Manitoba, I disagreed with Premier Lyon about the merits of the *Charter*: I favored the *Charter* and was prepared to go further by strengthening protections for Women and the Aboriginal community and I expressed public opposition to Section 33, the override provision part of the compromise that Trudeau had agreed to in order to bring dissident Premiers on side.

Retrospectively, the process pursued, like the Meech Lake process a few years later, failed to engage the public in the debate. More than governments must be involved in constitutional discussions. As Allan Cairn's points out, "the elites of the groups with *Charter* recognition have stakes in the constitution. They have left the audience and are now on the playing field, as are the aboriginal peoples for whom the constitution is a potential lever to a less marginalized future."[7] It is not only governments that now have a stake in the constitutional process.

The public must now be more actively consulted than they have been in the past. A different process in 1981-1982 and subsequently with Meech Lake (1987-1990) could have contributed to greater Canadian unity rather then the divisions we have seen since. Hugh Winsor was correct in asserting in 1981 that there was distrust among Canadians about whether First Ministers speak for them when it comes to constitution-making – that remains the case.

Twenty-five years later, I have a renewed respect for not only the arguments articulated by Prime Minister Trudeau, but also greater sympathy for some of the insight contributed to the debate by Premiers Lyon and Blakeney. They all contributed as great Canadians to the debate.

Questions remain unanswered. Has the *Charter* enhanced democracy or restrained it? Does legalized *Charter* politics inherently discriminate against the socially disadvantaged? Are there more advantages than disadvantages to a notwithstanding clause? Has the *Charter* tilted the power further toward benefiting special interests groups and Corporations? Has the *Charter* contributed toward the lessening of the influence of political parties in favor of special interest and extra-parliamentary groups? Has the *Charter* contributed at least in part to the steady decline in voting turnout, which has occurred since its adoption? What have the consequences been for women and Aboriginal peoples? Has there been an impact on Multiculturalism?

Has there been a shift in power to the Federal as opposed to provincial governments or has the shift been visa versa? Have we become more Americanized? Has the emphasis on individualism promoted laissez-faire as opposed to collective rights? Has the *Charter* contributed to this?

I trust that twenty-five years from now, it will be easier to answer these questions.

Notes

Much of this paper presented April 17, 2007, is contained in (2002) 21 Windsor Y.B. Access to Justice and was presented to the Canadian Rights and Freedoms: 25 Years Under the *Charter* Conference held by the Association for Canadian Studies.

[1] Blakeney's position was well summed up by Andrew Petter, "Immaculate Deception: the Charter's hidden agen-

da" in the advocate 45: 857-866 as being "a 19th century document let loose on 20th century state. The rights in the Charter are founded on the belief that the main enemies of freedom are not disparities in wealth nor concentrations of private power, but the state."

[2] Sheppard and Valpy. (1982). The national deal: The fight for a Canadian constitution. Toronto: Fleet Books.

[3] Has democracy been dulled? (2002, April 10). The Globe and Mail, pp. A 4.

[4] Sheppard and Valpy. (1982). The national deal: The fight for a Canadian constitution. Toronto: Fleet Books.

[5] Winsor, H. (1981, November 19). A pall on a style of politics. The Globe and Mail.

[6] McWhinney, E. (1982). Canada and the constitution: 1979 -1982. Toronto: University of Toronto Press.

[7] Cairns, A. C. (1991). Disruptions: Constitutional struggles. In D. E. Williams (Ed.), The Charter to Meech Lake (pp. 261). Toronto: McClelland & Stewart Inc.

LA MISE EN ŒUVRE DES DROITS SOCIAUX PAR LA *CHARTE CANADIENNE DES DROITS ET LIBERTÉS*

Texte d'allocution de l'honorable J. J. Michel Robert lors de la conférence «*Droits et libertés au Canada : Les 25 ans de la Charte*» 16-17 avril 2007, Université d'Ottawa

Introduction

La mise en œuvre des droits sociaux par le truchement de la *Charte canadienne des droits et libertés* est encore à un stade embryonnaire, mais offre cependant des possibilités de développement assez intéressantes depuis notamment l'affaire *Chaoulli*.[1] Mon but est d'examiner seulement la mise en œuvre de ces droits par le truchement de l'article 7 et de mesurer le chemin parcouru par la Cour suprême du Canada, depuis *Gosselin*[2] jusqu'à *Chaoulli*. Également, j'ai l'intention brièvement d'examiner certaines dispositions de la *Charte québécoise des droits et libertés* dans un but de comparaison.

Quelques constats de nature générale

La Charte canadienne des droits et libertés ne contient pas de section spécifique portant sur les droits économiques et sociaux et si on compare ce document avec d'autres instruments de droits provinciaux ou internationaux, la Charte canadienne fait figure d'exception. L'article 7 se retrouve dans une section intitulée «Garanties juridiques» alors que l'article 15 se trouve coiffé du titre «Droit à l'égalité».

La France révolutionnaire s'est mobilisée autour du motto «Liberté, égalité, fraternité». Si les deux premiers concepts ont été par la suite bien enracinés dans les instruments modernes de droits, le volet fraternité a été plus négligé que les deux premiers.

La Charte québécoise des droits et libertés contient un chapitre 4 intitulé «Droits économiques et sociaux» comportant les articles 39 à 48 inclusivement. L'article 45 prévoit spécifiquement ce sui suit:

> Toute personne dans le besoin a droit, pour elle et sa famille, à des mesures d'assistance financière et à des mesures sociales, prévues par la loi, susceptible de lui assurer un niveau de vie décent.

La Déclaration universelle des droits de l'homme, adoptée par l'Assemblée générale des Nations-Unies le 10 décembre 1948, contient dans un cinquième considérant un engagement de «favoriser le progrès social et à instaurer de meilleures conditions de vie dans une liberté plus grande». De plus, l'article 22 stipule ce qui suit:

> Toute personne, en tant que membre de la société, a droit à la sécurité sociale; elle est fondée à obtenir la satisfaction des droits économiques, sociaux et culturels indispensables à sa dignité et au libre développement de sa personnalité, grâce à l'effort national et à la coopération internationale, compte tenu de l'organisation et des ressources de chaque pays.

L'HONORABLE J. J. MICHEL ROBERT
L'honorable J. J. Michel Robert C.P., C.R., B.A., LL.L. fut nommé Juge en chef du Québec en 2002. Précédemment, il fut nommé juge puîné à la Cour d'appel du Québec en 1995 et il fut membre du Comité de surveillance des activités de renseignement de sécurité le de 1991 à 1995. Il fut assermenté au conseil privé le du Très honorable B. Mulroney en 1991.

Le Pacte international relatif aux droits économiques, sociaux et culturels, adopté le 16 décembre 1966 et entré en vigueur au Canada le 19 août, contient des dispositions pertinentes. L'article 9 se lit ainsi:

Les États parties au présent Pacte reconnaissent le droit de toute personne à la sécurité sociale, y compris les assurances sociales.

L'article 11 ajoute:

Les États parties au présent Pacte reconnaissent le droit de toute personne à un niveau de vie suffisant pour elle-même et sa famille y compris une nourriture, un vêtement et un logement suffisants ainsi qu'à une amélioration constante de ses conditions d'existence.

Par contre, la Convention de sauvegarde des droits de l'homme et des libertés fondamentales, qui est entrée en vigueur le 3 septembre 1953, ne semble pas contenir de dispositions particulières concernant le droit à la sécurité sociale ou à un niveau de vie suffisant ou décent.

La portée de l'article 7 de la *Charte canadienne*

L'article 7 tel que rédigé protège-t-il un droit ou deux droits et selon la réponse que l'on donne à cette question, l'article peut être interprété de façon à garantir certains droits sociaux.

Sommes-nous en présence de l'unicité d'un droit ou d'une certaine dualité? S'il s'agit d'un seul droit, on peut formuler la règle de la façon suivante. Il ne peut être porté atteinte au droit à la vie, à la liberté et à la sécurité de la personne qu'en conformité avec les principes de justice fondamentale.

Nous serions alors en présence d'une clause classique de « due process » que probablement les constituants considéraient comme seulement procédurale mais que la Cour suprême a rapidement transformée en un « due process » substantif. Dans un tel cas, la vie, la liberté et la sécurité sont protégées de façon indirecte et non en tant que droits autonomes.

De plus, un contexte juridictionnel ou judiciaire est nécessaire pour assurer la protection du droit et la protection est négative plutôt que positive vis-à-vis une mesure arbitraire de l'État.

Voici quelques-uns des arguments favorables à cette première interprétation. Le titre « *Garanties juridiques* » et la règle « *ejusdem generis* » permettent alors de dire que les articles 8 à 14 sont des droits dérivés particularisés du principe général consacré à l'article 7.

On peut ajouter aussi la majorité des décisions de la Cour suprême du Canada et des cours d'appel à l'exception des arrêts *Gosselin* et *Chaoulli* qui ne font peut-être qu'entrouvrir la porte. Enfin, on peut ajouter les mots « principes de justice fondamentale », qui ont un caractère technique et que l'on retrouve généralement dans un contexte juridictionnel.

L'interprétation dualiste

Dans cette autre conception, deux droits sont protégés : d'abord le droit à la vie, à la liberté et à la sécurité de la personne est protégé en tant que droit autonome. Ensuite il ne peut être porté à ce droit qu'en conformité avec les principes de justice fondamentale. Cette seconde partie devient une sorte de clause limitative, semblable à l'article 1, qui est spécifique à l'article 7. Dans une telle interprétation, le contexte juridictionnel n'est plus nécessaire pour permettre l'application de l'article 7.

La protection n'est plus seulement négative puisque dans certaines circonstances, la disposition peut créer un devoir positif de l'état de garantir le droit à la vie, à la liberté et à la sécurité de la personne. Dans ce contexte par exemple, l'état pourrait être appelé à fournir des services de santé, d'aide sociale et de police. La portée est alors ouverte pour la mise en œuvre des droits sociaux.

Arguments favorables à cette seconde interprétation

Les principaux arguments peuvent se résumer ainsi. D'abord, le texte de la disposition elle-même qui, après avoir énoncé le premier droit, utilise ensuite en français le point virgule et dans la version anglaise la préposition « et » (and). De plus, on retrouve dans la seconde partie les mots « ce droit » et en anglais « the right ». Ensuite, on peut y ajouter un argument logique: pour être privé d'un droit, il faut au préalable en être titulaire.

La jurisprudence énonce que les titres des sections ne doivent pas être utilisés pour limiter les droits.

La doctrine de l'arbre vivant par opposition à l'intention originale des constituants est également d'un certain secours, d'autant plus qu'elle a été adoptée par la Cour suprême et notamment dans le Renvoi sur l'assurance-chômage.

On peut également tirer un argument favorable à partir d'une étude comparative des autres instruments de droit. Ainsi la Déclaration universelle consacre le droit à la vie, à la liberté et à la sûreté de sa personne par son article 3. Le *Pacte relatif aux droits civils et politiques* reconnaît le droit à la vie à son article 6 et le droit à la liberté et à la sécurité de la personne à l'article 9.

La Convention européenne consacre le droit à la vie à l'article 2 et le droit à la liberté et à la sûreté à son article 5. Dans tous ces cas, le droit est consacré de façon autonome sans lien avec le droit de le restreindre.

De *Gosselin* à *Chaoulli*

Dans *Gosselin* à la Cour d'appel du Québec[3], les juges Baudouin, Mailhot et le soussigné étions tous d'accord pour donner à l'article 7 une portée limitée. Selon la Cour, l'article ne pouvait servir de fondement à un droit social.

À la Cour suprême, la majorité (la juge en chef, Gauthier, Iacobucci, Major et Binnie ainsi que LeBel pour des motifs distincts) a conclu à la non-application de l'article 7 mais a pris soin de ne pas fermer la porte pour l'avenir.

Par ailleurs, les juges L'Heureux-Dubé et Arbour ont conclu à l'application de l'article 7 en l'espèce. Selon elles, l'article 7 pouvait protéger des droits sociaux à l'extérieur d'un cadre judiciaire et pouvait imposer à l'État des obligations positives.

En 2005, la Cour suprême rend l'arrêt *Chaoulli*. La majorité (la juge en chef, Major, Bastarache et Deschamps) se divise en deux groupes. D'une part la Juge en chef, Major et Bastarache soulignent que l'aspect économique des droits revendiqués n'est pas leur aspect le plus important et se prononcent sur l'applicabilité de l'article 7 au cas *Chaoulli* parce que la mesure est contraignante et qu'il y a une possibilité de sanction administrative. Par ailleurs, ils semblent écarter la possibilité d'imposer une obligation positive à l'État par le truchement de l'article 7.

La juge Deschamps par ailleurs ne se prononce pas sur l'article 7 comme tel parce qu'elle se fonde plutôt sur l'article 1 de la *Charte des droits et libertés de la personne* du Québec. L'article 1 se lit ainsi et ne réfère nullement à un contexte juridictionnel:

> Tout être humain a droit à la vie, ainsi qu'à la sûreté, à l'intégrité et à la liberté de sa personne.

Les trois juges dissidents (LeBel, Binnie et Fish) par ailleurs adoptent une interprétation plus restrictive de la portée du droit à cause notamment de l'application des règles de justice fondamentales.

La portée de l'article 7 comme fondement de droits sociaux est encore en évolution. Rien n'est fixé de façon définitive. L'arrêt *Chaoulli* est prometteur mais nous devons faire preuve d'un optimisme prudent.

L'article 15 de la *Charte* comme fondement de la reconnaissance des droits sociaux

Cette disposition ne pose pas de problème particulier sur le plan juridique sauf évidemment l'application des principes de l'arrêt *Law* aux faits de l'espèce dans *Gosselin*. La question qui se posait alors était de savoir si les programmes proposés par le Gouvernement du Québec portaient atteinte à la dignité des jeunes assistés sociaux de moins de trente ans.

Il s'agissait d'une différence de traitement fondée sur l'âge mais, selon la majorité de la Cour Suprême du Canada, cette différence de traitement n'était pas préjudiciable aux jeunes adultes et avait pour but de les aider et non de leur nuire. La principale difficulté provenait de la question de savoir s'il fallait considérer la facture et l'intention des auteurs des programmes ou l'effet de la mise en vigueur de ces programmes.

Car pour toutes sortes de bonnes et de mauvaises raisons, les programmes n'avaient pas produit les effets escomptés. D'ailleurs, ils ont été abandonnés en 1989 et remplacés par un autre programme fondé non pas sur l'âge mais sur l'employabilité.

Un mot enfin sur la Charte québécoise et plus particulièrement sur l'article 45.

La *Charte* a, dans un sens, une portée plus large que la *Charte canadienne*. En effet, elle couvre spécifiquement certains droits économiques et sociaux et vise non seulement les actions gouvernementales mais aussi les rapports entre les citoyens privés. Par ailleurs, elle ne s'applique qu'aux matières relevant de l'autorité législative de l'Assemblée nationale du Québec. En ce sens, elle n'est pas constitutionnelle mais plutôt quasi-constitutionnelle.

Mais c'est au chapitre de la mise à exécution des droits que la Charte québécoise perd beaucoup de sa force. En effet, l'article 52 de la Charte québécoise se lit ainsi:

> Aucune disposition d'une loi, même postérieure à la *Charte*, ne peut déroger aux articles 1 à 38, sauf dans la mesure prévue par ces articles, à moins que cette loi n'énonce expressément que cette disposition s'applique malgré la *Charte*.

Il s'agit d'une clause non pas de primauté absolue comme l'article 52 de la *Charte canadienne*

mais d'une clause interprétative qui ne confère qu'une primauté relative et seulement quant aux articles 1 à 38, ce qui n'inclut pas les droits économiques et sociaux.

De plus, l'article 49 n'a pas l'ampleur et les dents de l'article 24 de la *Charte canadienne*, surtout selon l'interprétation que lui a donnée la Cour suprême du Canada dans l'affaire *Béliveau – St-Jacque*s. Malgré cela, madame la juge Deschamps dans *Chaoulli* applique la Charte québécoise en annulant certaines dispositions d'une loi québécoise. De plus, elle propose une intéressante grille d'analyse lorsque les deux chartes sont susceptibles de s'appliquer en même temps et aux mêmes faits. Encore là, nous sommes à l'heure de l'optimisme prudent.

Notes

[1] [2002] 4 R.C.S. 429.

[2] [2005] 1 R.C.S. 791.

SHARED CANADIAN VALUES, SOCIAL COHESION AND THE CHARTER OF RIGHTS: IT IS TIME TO RETHINK THE TERMS OF THE DEBATE

ABSTRACT

Are the rights and freedoms respectively incorporated in the Quebec and Canadian charters a reflection of our fundamental values? On the occasion of the 25th Anniversary of the *Canadian Charter of Rights and Freedoms*, how do the equality rights in particular contribute to the ongoing effort to define shared Canadian values and promote social cohesion? Or should we rethink both shared values and social cohesion as dominant paradigms in academic and policy discussions? ACS executive director Jack Jedwab suggests that it is time to rethink some of the terms currently employed that risk muddling debates about rights and freedoms.

JACK JEDWAB

Jack Jedwab is Executive Director of the Association for Canadian Studies.

In the first decade of our new century one of the more intensely debated issues in political and academic circles involves the search for shared Canadian values. Many decision-makers insist that there exist a set of common Canadian values. Increasingly media, government and academic discourse is replete with references to shared Canadian values and the desire for social cohesion without which some ominously warn our society might cease to exist. Amongst these "shared Canadian values" most often mentioned are a commitment to democracy; universal respect for human rights; equity; fairness; diversity; and solidarity (Bourgon, 2003). Following this logic, the legal documentation which codifies such ideals are the distillations of the shared values. Recent debates in Quebec over reasonably accommodating religious minorities have abounded in pleas for respect for the shared values of Quebecers. Beyond the issue of gender equality however, discussions around accommodation reveal significant divergence over other shared values.

Do Quebecers and other Canadians possess a set of shared values (or two sets of values, given the presumed distinct set of values shared by Quebecers?) To what extent can the *Canadian Charter of Rights* (for that matter its Quebec equivalent) be described as the embodiment of such values? Or are such debates simply confronting the powerful rhetorical appeal of loosely defined notions such as shared values and social cohesion?

In a lecture entitled "*The Myth of Shared Values*", political philosopher Joseph Heath contends that like other liberal democratic societies, neither Canadians nor Quebecers possess a set of shared values. He maintains that "…shared values are neither necessary nor sufficient for social integration. Not only is the idea that we have shared values a myth, but the idea that we *need* shared values is also a myth."

Are the rights and freedoms respectively incorporated in the Quebec and Canadian charters a reflection of our fundamental values or as an expression of shared principles? Public opinion surveys directly asking whether the *Charter of Rights* reflect Canadian values generally elicit a high level of agreement. Are the rights themselves values rather or are they best described as value-laden? Tibbitts and Rehman (2003) point out that: "rights are based on reason: they exist regardless of whether or not they are codified by law. As such, these rights are non-conditional

and available to all. Furthermore, these rights are understood to have certain qualities or values. They are universal, inalienable, indivisible and interdependent." In other words, values may evolve, but codified rights may not change. However, interpretation can shift under modified circumstances.

Detractors of the *Charter of Rights and Freedoms* have traditionally raised concerns with the codification of rights and freedoms on the one hand, and on the other hand, their interpretation being relegated to a select group of unelected officials. Their views cannot be dismissed as they contribute to debates around checks and balances in the respective authority of the legislature and the judiciary. Even the most ardent defenders of the *Charter* can acknowledge the philosophical issues to which the presence of provisions that call for reasonable limits on certain rights as well as a clause that permit overriding rights under exceptional circumstances.

The *Charter* valued?

But critics of the *Charter* have been less effective in making the case that the *Charter of Rights* is neither a reflection of Canadian values nor an expression of Canadian identity. On the occasion of the 25th anniversary of the *Charter of Rights*, the President of SES Research, Nick Nanos, unsuccessfully attempts to articulate the view that "*Charter* values don't equal Canadian values". Unfortunately he provides no meaningful evidence for this assertion, since the survey he conducts in defense of his view asks no such question. Nanos arrives at this conclusion by asking two questions which do not permit a causal relationship to be established. The first question reads as follows: "Based on what you know, would you say that the *Charter of Rights and Freedoms* in Canada is moving our society in the right direction or in the wrong direction?" To this question, Nanos finds that nearly six in ten Canadians agree that the *Charter* is moving the country in the right direction. He then proceeds to ask a top of mind question as to why it moves the country in either direction, which ends up inviting over thirty unprompted responses as grouped by Nanos.

On this basis, the pollster concludes that the *Charter* is by no means central to Canadian identity, as even amongst its supporters, when "unprompted", only 5.3 percent, one Canadian in 20, thought the *Charter* "makes Canada a great country". And among those who said the *Charter* was moving the country in the right direction, only 3.1 percent said it is because it "Reflects our values". Following Nanos' "logic", it might be assumed that some 97% of *Charter* supporters don't think that it reflects Canadian values. He does not suggest that the 29% saying that the *Charter of Rights* "protects rights and freedoms" (the most common response) and the 16% saying "it works" implies that a substantial majority believe it neither works nor protects rights. Those who are supporters of the *Charter* needn't worry however, because only 10% of those saying the *Charter* goes in the wrong direction say people have too many rights, 9% say it divides society/undercuts Canadian identity, and 15% say it doesn't work. This is very reassuring news for *Charter* supporters, as only a small share of its critics when unprompted say that people have too many rights, that it doesn't work and that it divides society or undercuts Canadian identity.

Elsewhere in the SES Survey, when asked whether the Courts or Parliament should have the final say in right issues, Nanos says "a clear majority, 54 percent" responded that the Courts should have the final say (his analysis would likely have been different if he based his conclusion on how many people said this in the unprompted answers). Nanos further notes that a "strong majority, 61.8 percent" supports the inclusion of gay rights amongst equality rights in the *Charter*. However, Nanos concludes that "fewer" than six out of ten Canadians (58.2%) said that the *Charter* was moving society in the right direction, thus giving it what this pollster describes as a thumbs-up or thumbs-down question. This demonstrates just how elastic the thumb can be when it comes to defining just how clear or strong the "level" of majority opinion needs to be.

The results Nanos describes as a "drilling down" of public opinion must have come as a surprise to those who have asked Canadians whether they thought that the *Charter of Rights*, its equality provisions or other aspects of it (i.e. language rights accorded to francophone and anglophone language minorities) reflected Canadian values. In effect, by directly asking questions on whether the *Charter* reflected Canadian values, most surveys find that a clear majority would agree with that view (Nanos would likely argue that such questions are leading the respondents, although on other matters pertaining to the *Charter*, he has no problem in similarly formulating the question).

An April 2007 survey of some 1500 Canadians commissioned by the Association for Canadian Studies from the firm Leger Marketing asked the

following question: "There has been much debate recently about the need to define things that reflect the shared values of Canadians. Do you think that the following issues and symbols are very important, somewhat important, not very important or not important at all?"

As observed below, when the question is put this way, some 69% of Canadians describe the *Charter of Rights* as "very important", and another 22% describe it as "somewhat important." Equality between men and women is considered "very important" by 76% and another 18% consider it "somewhat important". Universal health care seems to be the highest rated, with 76% describing it as "very important" and another 20% as "somewhat important".

There has been much debate recently about the need to define things that reflect the shared values of Canadians.

Do you think that the following issues and symbols are very important?

If anything, the results generated by Nanos on the basis of his 30 plus unprompted responses to questions about the *Charter* reinforce the argument made by Heath about the plurality of views in our society that discourse on shared values risks concealing. Again, much depends on the way the notion of values is defined. According to Heath, political philosophers use the term "value" to refer to a "conception of the good." A value specifies, not what we desire, but rather what we should desire or put another way what we think is good. A value serves as a standard to evaluate our own plans and preferences.

Heath states that conceptions of the good are intimately tied up with our personal identity: the values that one subscribes to essentially define what sort of person one would like to be (i.e what role to assign to family, where to live, how to spend our leisure time, and so on). Heath rightly observes that our society is characterized by an important pluralism of fundamental values. In a multicultural country like Canada, he concludes there is no single blueprint for how life should be lived.

The ACS-Leger marketing results do not speak directly to the question of shared values. Rather the preamble infers a relationship between the items listed and the values held by Canadians. To suggest these items are shared values invites a definition of the notion of values that risks being problematic. Hence the results do suggest that universal health care, gender equality and the *Charter of Rights* are indeed things that Canadians value. The approach provides a much closer approximation of whether the *Charter of Rights* may be value-laden than the SES method, which absurdly requires that the word values be evoked by respondents in order to meet the test of Canadian values – something never referred to by Nanos.

In the ACS-Leger survey, we also have chosen to drill-down and dig deeper into respondent's views by using the SPSS program to correlate the responses to various questions to determine whether any pattern emerges. As observed below, the connections made by respondents in this regard are undeniable. Those who regard the *Canadian Charter of Rights* as "very important" also to a greater extent consider as "very important" such things as universal health care, gender equality, reducing income gaps, patriotism and multiculturalism as "very important".

Value of culture or cultural values?

Issues of values are often discussed interchangeably with cultural differences when comparing communal and national identities. Differences between Quebec and the rest of Canada or Canada and the United States are often expressed in terms of differences in values. But cultural differences do not imply diverging values as various cultural groups can share values irregardless of differences in language, customs and traditions. Ostensibly, Quebecers and other Canadians are committed to respecting fundamental rights and freedoms and, when asked about the *Charter of Rights*, generally express favorable opinions on its basic tenets. Many Quebecers express disapproval about the process by which the *Canadian Charter of Rights* came into being and some have gone so far as to pretend there are fundamental differences of values between the *Canadian Charter* and the Quebec Charter of Rights which was adopted seven years earlier.

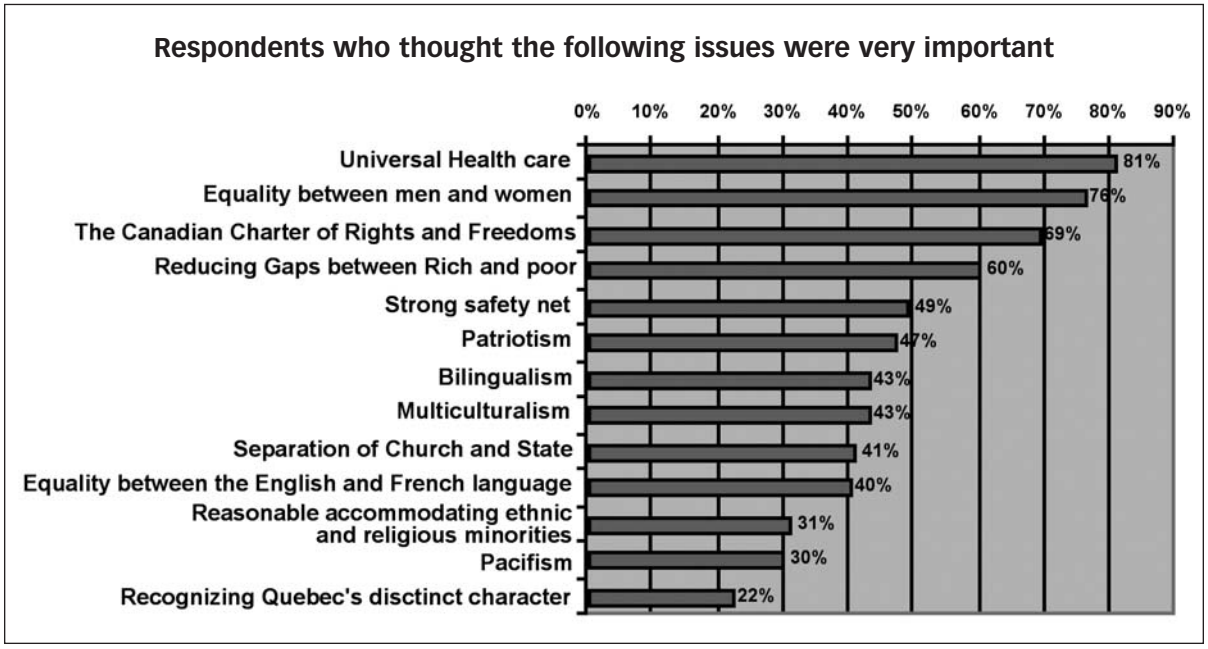
Undoubtedly, the interpretation of certain rights gives rise to competing views. Current debates over the issue of reasonable accommodation in Quebec have given rise to a growing perception of conflict between religious freedom and gender equality. By consequence, many Quebecers have reiterated that gender equality is a shared value in thinking that it faces a threat from the *Charter*'s extension of religious expression. Is gender equality less of a Canadian value – or for that matter a

Western value – than it is a Quebec value? The ACS-Leger marketing survey provides no support for the idea that Canadians outside of Quebec attribute any lesser degree of importance to gender equality than do Quebecers.

Paradoxically, the effort to make shared Canadian values a strategy for uniting Canadians and/or rallying them around the idea that the *Canadian Charter* is a shared value has perhaps reinforced the resolve of other "nations" or communities within Canada to make their autonomous or sovereignist claims on the basis of their "distinct-shared values". In fact, the survey does reveal that there are differences in the value attributed to cultural priorities that some may construe as uniquely Canadian values. This raises the question of whether such things as bilingualism, the equality of the English and French languages and the recognition of Quebec's distinct character are values; as opposed to something which many Canadians value as reflecting important elements of their cultural identity. It is a distinction that is not made sufficiently in discourse around values.

However, it is worth noting that there is an important gap in the degree to which Quebecers and other Canadians attribute importance to pacifism, a difference often explained by the historic experience with international conflict. On this issue, there may be a case made that value differences underlie the divergence.

There has been much debate recently about the need to define things that reflect the shared values of Canadians. Do you think that the following issues and symbols are very important…?



Very Important	Charter of Rights Very Important	Charter of Rights Somewhat Important	Charter of Rights Not Important
Universal Health Care	89	65	62
Gender Equality	84	62	53
Reducing Gaps Between Rich and Poor	66	46	46
Strong Safety Net	57	33	29
Patriotism	54	33	34
Multiculturalism	53	22	15
Equality between the English and French languages in Canada	45	29	25
Separation of Church and State	45	30	37
Bilingualism	40	25	24

On shared values and cohesion

While the *Charter of Rights and Freedoms* is something that Canadians value and many of the principles that it embodies are widely supported by Canadians, it does not by definition mean that it provides the basis for public policy decisions based on shared values. This is in part because the rights prescribed therein give rise to lively debate about values in pluralistic democracies. Deliberations over the equality provisions of the *Charter of Rights* are designed to reinforce the very kind of pluralistic views and values that worry shared values enthusiasts and concerned cohesionists – very frequently the same group. Ringing support for shared values and social cohesion tends to transcend ideological differences, that is, until thinkers on the left or right of the ideological spectrum meet to identify the way to achieve the goal of cohesion based on common values. When it comes to the *Charter of Rights*, some will contend that to achieve cohesion, certain rights need to be limited, while others may argue that the rights need to be expanded (this may involve such issues as the wearing of hijabs by Muslim women to the recognition of same-sex couples). In the pursuit of shared values and social cohesion, some will argue that we need to ban the wearing of hijabs in public schools, while others will argue that doing so is the far greater threat to social cohesion.

There appear to be three types of cohesionists, those who say that it is about reducing inequities between individuals and communities, those who believe it is about stressing the things we share over our differences and those who say it is simply about establishing collective goals. As Eliadis (2007) notes; "Canada's basic concern is equality; it is not cohesion-nor should it be. We know this for two reasons. First a cohesive society that is capable of effectively implementing collective goals may be implementing the wrong ones…the second reason is that cohesion is conspicuously absent from our constitution, including the equality rights contained in the *Charter*".

Heath argues that to reach consensus, values get defined in terms of extremely abstract ideas like "diversity," "community," "democracy," or "dialogue emerging from a process of "redescription". Social cohesion needs to added to the list of "values" that are too abstract so as to permit a facile commitment to it. Sharing itself is a value that, in principle, often more so than in practice, is widely endorsed. Often the biggest challenge to sharing is the explanation of the benefits and costs associated with it which when discovered this basic cohesionist goal.

Still the rhetorical power of shared values and cohesionist discourse is not to be underestimated. We may say that Canadians value "cohesion" and to reinforce this statement ignore the fact that, when we possess the liberty to attain this obscure end, we very often diverge over the means to get there.

Very Important	Quebec	Rest of Canada	Difference
Equality Between Men and Women	75	77	-2
Universal Health Care	65	86	-21
Reducing Gaps Between Rich and Poor	58	61	-3
Equality Between the English and French Languages in Canada	57	35	+22
Separation of Church and State	56	42	+14
The Canadian Charter of Rights and Freedoms	55	73	-18
Bilingualism	54	30	+24
Pacifism	51	23	+28
Strong Safety Net	51	48	+3
Recognizing Quebec's Distinct Character	46	15	+31
Multiculturalism	33	46	-13
Patriotism	29	53	-24
Reasonably Accommodating Ethnic and Religious Minorities	28	33	-5

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SOCIO-ECONOMIC RIGHTS UNDER THE *CANADIAN CHARTER*

This is an abridged version of a chapter to appear in M. Langford, ed., *Socio-Economic Rights Jurisprudence*: *Emerging Trends in Comparative International Law* (Cambridge: Cambridge University Press, forthcoming). The authors thank Vince Calderhead for his comments and assistance.

ABSTRACT

The *Canadian Charter* contains no explicit reference to socio-economic rights. However, there are compelling grounds for recognizing these rights as key components of existing *Charter* guarantees. The wording of the right to equality and the inclusion of disability as a prohibited ground of discrimination under section 15, in particular, were the result of disadvantaged groups mobilizing to ensure positive *Charter* obligations on governments to protect socio-economic rights. While corporate economic and property rights were excluded from the *Charter*, the Supreme Court of Canada has left open the possibility that the *Charter* protects a range of rights recognized under the *International Covenant on Economic, Social and Cultural Rights.* Thus, the *Canadian Charter* still has the potential to enhance the domestic and global understanding of socio-economic rights as central to all human rights.

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Introduction

Louise Arbour, the UN High Commissioner of Human Rights and a former Justice of the Supreme Court of Canada, has observed in commenting on the scope of constitutional rights in the *Canadian Charter of Rights and Freedoms*[1] (the *Charter*) that 'the potential to give economic, social and cultural rights the status of constitutional entitlement represents an immense opportunity to affirm our fundamental Canadian values, giving them the force of law.'[2] Meeting this challenge is, however, at best a work in progress. The constitutional status of socio-economic rights in Canada remains, to a large extent, an open question – perhaps the most central unresolved issue in *Canadian Charter* jurisprudence.

The *Charter*, marking its twenty-fifth anniversary in 2007, contains no explicit reference to any of the guarantees in the International Covenant on Economic, Social and Cultural Rights[3] (ICESCR). The closest the *Charter* comes to recognising a socio-economic right is the section 23's right to publicly funded minority language education at the primary and secondary levels, 'where numbers warrant.' The minority language education guarantee has been interpreted by the Supreme Court as a 'novel form of legal right' which 'confers upon a group a right which places positive obligations on government to alter or develop major institutional structures.'[4]

As High Commissioner Arbour explains, however, when the *Charter* is considered in light of the historical expectations and broader values surrounding its adoption, it is clear that the obligations of governments to maintain and develop 'major institutional structures' in support of substantive rights need not be limited to minority language rights. Of particular importance in this respect are the equality rights guarantees in section 15 of the *Charter,*[5] and the right to 'life, liberty and security of the person' in section 7.[6] These rights, which might otherwise be classified as 'civil and political' are best understood in the Canadian context as

including both civil and political and socio-economic dimensions. When the *Charter* was adopted in 1982, equality rights experts and advocacy groups considered the adequacy and accessibility of publicly funded programs, such as social assistance, universal healthcare, education and unemployment insurance, as implicit in these broadly framed *Charter* rights.[7]

Historical context of the *Charter*

Canadian rights culture in the 1960s and 70s was significantly affected by the civil rights movement in the US. In this period, broad anti-discrimination guarantees were introduced in federal and provincial human rights legislation across Canada. Considerable attention was paid to emerging civil rights jurisprudence from the US, but at the same time, Canadian rights culture absorbed a distinctive commitment to social rights and to an emerging system of international human rights protections in which Canada was directly engaged.[8] Prime Minister Pierre Elliot Trudeau, who presided over the initiative to adopt a constitutional charter of rights after his re-election in 1980, linked the proposal to his ideal of a 'just society.' In an article on 'Economic Rights' he wrote as a law professor in 1962, Trudeau had affirmed that: 'if this society does not evolve an entirely new set of values … it is vain to hope that Canada will ever reach freedom from fear and freedom from want. Under such circumstances, any claim by lawyers that they have done their bit by upholding civil liberties will be dismissed as a hollow mockery.'[9]

Unlike the US, Canada ratified the ICESCR in 1976 at the same time as the International *Covenant on Civil and Political Rights* (ICCPR)[10] . In 1980-81, the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada considered including an explicit reference to ICESCR rights under section 36 of the *Constitution Act*, 1982.[11] As enacted, section 36 states that federal and provincial governments 'are committed to… providing essential public services of reasonable quality to all Canadians.'[12] However, rather than pressing for explicit inclusion of socio-economic rights under section 36 or the *Charter*, most human rights experts and advocacy groups emphasised the importance of framing rights, such as the right to equality, as expansively as possible. The *Charter* could then be applied to require governments to take positive action to address the needs of vulnerable groups, to remedy systemic inequality, and to maintain and improve social programs on which the enjoyment of equality and other *Charter* rights depends.[13]

Section 15 of the *Charter*, originally entitled 'non-discrimination rights' was renamed 'equality rights' and significantly expanded after an unprecedented lobbying campaign by women's groups, disability rights groups and others. Section 15 was reworded to guarantee both equality 'before and under' the law, and the equal 'protection and benefit' of the law. This wording (unique at that time) was intended to ensure that equality rights applied to social benefit programs, such as welfare and unemployment insurance, and that the positive obligations of governments toward disadvantaged groups were constitutionally recognised and affirmed.[14] As the Canadian Bar Association noted at the time: '[it] is an equality rights section, not merely an anti-discrimination section. The difference between an equality purpose and an anti-discrimination purpose is that the former is broader and more positive than the latter.'[15]

In addition, as a result of energetic lobbying by disability rights groups, Canada became the first among constitutional democracies to include disability as a constitutionally prohibited ground of discrimination.[16] This signalled the importation into Canadian constitutional law of an approach to equality that had already been accepted under provincial human rights legislation: remedial in its focus, and recognising that discrimination could include a failure to take positive measures to accommodate the unique needs of protected groups, even in the absence of discriminatory intent.[17] An 'undue hardship' test had been adopted under Canadian human rights legislation as the standard for determining whether 'reasonable steps' or 'reasonable measures' had been taken to accommodate the needs of protected groups in view of cost, health and safety and other relevant factors.[18] However, Canadian courts and tribunals adopted a significantly more rigorous standard than was applied by US courts.[19] In this sense, the type of obligations contained in article 2 of the ICESCR, to take reasonable steps based on a maximum of available resources, had already become familiar to Canadians in their approach to human rights protections. This is particularly true for Quebec, where socio-economic rights were explicitly included under the *Quebec Charter of Human Rights and Freedoms*.[20]

The wording of section 7 of the *Charter*, which guarantees the 'right to life, liberty and security of

the person' and the right not to be deprived thereof 'except in accordance with principles of fundamental justice', similarly reflects historical Canadian values linked with socio-economic rights. A proposed amendment to add a right to 'the enjoyment of property' to the *Charter* was rejected in part because of fears that property rights would conflict with Canadians' commitment to social programs and give rise to challenges to government regulation of the private market. Provincial governments opposed *Charter* recognition of property rights on the grounds that constitutional entrenchment of such rights could give rise to challenges to government regulation of corporate interests and control of natural resources.[21] Similarly, the phrase 'fundamental justice' was preferred over any reference to 'due process of law' because of concerns around the use of the due process clause in the US during the *Lochner* era as a means for propertied interests to challenge the regulation of private enterprise and the promotion of social rights.[22]

Socio-economic rights in sections 7 and 15 of the *Charter*

In light of the *Charter's* wording and historical context there is significant opportunity, as High Commissioner Arbour has suggested, for Canadian courts to interpret substantive *Charter* obligations, particularly under sections 7 and 15, to include most, if not all, components of the rights contained in the ICESCR.[23] While Supreme Court of Canada jurisprudence has not yet moved clearly in this direction, neither has it foreclosed it.

From its earliest decisions under the *Charter* to its most recent, the Supreme Court has been careful to leave open the possibility that the *Charter* may protect a range of socio-economic rights. In its 1986 decision in *Irwin Toy*,[24] the Court rejected attempts by corporate interests to situate their economic claims within the scope of section 7, finding that private property rights had been intentionally excluded from the *Charter*. However, the Court was careful to distinguish what it characterized as 'corporate-commercial economic rights' from 'such rights, included in various international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and shelter.' The Court found that it would be 'precipitous' to exclude the latter class of rights at so early a moment in *Charter* interpretation. [25]

During the 1990s, most Canadian lower courts called upon to consider socio-economic rights claims rejected such challenges on the basis that economic rights were beyond both the scope of section 7 and the legitimate purview of the courts.[26] At the Supreme Court level, however, the question left unanswered in *Irwin Toy*, about the status of ICESCR rights under section 7, lay essentially dormant for seventeen years. During this period, few socio-economic rights cases reached the appellate level and no case involving poverty or social assistance was heard by the Supreme Court. In the 2003 *Gosselin* case, the Supreme Court considered a challenge to grossly inadequate levels of social assistance benefits in Quebec, paid to employable recipients not enrolled in workfare programs. In an important dissenting judgment (supported by Justice L'Heureux-Dubé), Justice Arbour found that the section 7 right to 'security of the person' places positive obligations on governments to provide those in need with an amount of social assistance adequate to cover basic necessities.[27] The majority of the Court left open the possibility of adopting this 'novel' interpretation of the right to security of the person in a future case, but found that there was insufficient evidence in this case to make such a finding. Chief Justice McLachlin stated, for the majority:

> The question therefore is not whether s.7 has ever been – or will ever be – recognized as creating positive rights. Rather, the question is whether the present circumstances warrant a novel application of s.7 as the basis for a positive state obligation to guarantee adequate living standards. I conclude that they do not.[28]

While its approach to section 7 has been inconclusive, in its early section 15 of *Charter* jurisprudence, the Supreme Court of Canada played a leading role, internationally, in affirming and developing a notion of substantive equality that includes important dimensions of socio-economic rights and places positive obligations on governments to remedy disadvantage. The Supreme Court has recognised that programs such as social assistance for single mothers are 'encouraged' by section 15, and has justified positive remedies to under-inclusive benefit programs on that basis. [29] In several key cases, the Court issued positive remedial orders extending or increasing parental, social assistance and pension benefits and extending legislative protections under security of tenure and human rights legislation.[30] These decisions suggested that the Court would fulfil its constitutional mandate to ensure that govern-

ments met their substantive equality rights obligations, notwithstanding a steady stream of media and right wing criticism about the Court's excessive 'judicial activism.' [31]

However, even in its most progressive equality rights decisions, the Supreme Court has insisted on sidestepping the issue of whether, in the absence of an under-inclusive program or benefits scheme, the *Charter* imposes a positive obligation on governments to provide benefits or social programs necessary to address the needs of disadvantaged groups.[32] The Court has stepped back from an explicit affirmation of a key element of the notion of equality that was advanced by groups during the pre-*Charter* debates about the wording of section 15 and that is also at the core of Canada's international human rights obligations – the obligation of governments to protect vulnerable groups through appropriate legislative measures and to take positive action to remedy socio-economic disadvantage that is independent of the obligation to ensure that existing legislation and benefit schemes are not under-inclusive or discriminatory.[33]

Future expectations

In light of the historical expectations of rights holders; the *Charter*'s open-ended and expansive wording; its balancing of individual rights and collective values; the important interpretive role the ICESCR can play both in determining the scope of rights and the responsibilities of governments; and the broad range of remedies available for *Charter* violations; there is no reason why the Canadian courts should not play an active role in safeguarding socio-economic rights in Canada. As yet, however, the courts have largely failed to fulfil the *Charter*'s promise in this regard. As High Commissioner Arbour has pointed out, this may be due to timidity on the part of litigants as well as the courts.[34] Few socio-economic rights cases have been brought before the courts in the first quarter century of constitutional democracy in Canada. And, as the UN Committee on Economic, Social and Cultural Rights (CESCR) points out, one cannot absolve Canadians governments from responsibility either. Why, the CESCR has asked, should governments not be encouraging courts to consider Canada's international human rights obligations when interpreting the *Charter*, rather than arguing against interpretations that would provide effective remedies for these rights?[35]

While there have been some important *Charter* victories for socio-economic rights claimants, there have also been very disappointing losses. Courts have sidestepped the issue, so central to international human rights law in general and to socio-economic rights in particular, of whether governments do indeed have a positive constitutional duty to attend to the needs of those who are without adequate food, housing, healthcare, education or decent work, in a country with such an abundance of resources that all should enjoy these core human rights. As long as the obligation of governments to protect and promote socio-economic rights is considered ancillary to *Charter* compliance rather than as central to it, socio-economic rights will continue to be marginalised in Canada.

If, however, Canadian rights claimants have suffered from the disadvantage of a lack of any explicit *Charter* recognition of socio-economic rights, they have also benefited from the ability to frame socio-economic rights claims as fundamental issues of constitutional inclusion. This is Canada's potential contribution to the field of socio-economic rights – to enhance the understanding of these rights as central to all human rights, rather than as a separate category of rights. Given the historical expectations associated with the adoption of the *Charter*, those who are faced with hunger or homelessness amidst affluence see issues of constitutional interpretation as being linked to underlying issues of equal citizenship and social inclusion. In cases where Canadian courts have suggested that homelessness or poverty do not engage equality rights or the right to security of the person, or that those who can afford to buy it have a right to healthcare while those who rely on publicly funded healthcare do not, the courts have not been seen to be merely deciding the scope of particular words or provisions. Rather, such decisions are considered by rights claimants and by an increasing number of commentators as serious assaults on the very values of dignity and equal citizenship that the *Charter* embodies.

It is in this sense that the constitutional status of socio-economic rights in Canada is much more than a matter of the scope of particular *Charter* guarantees. It is, fundamentally, a question of the integrity with which the *Charter* will be interpreted and applied, and the values that will be conveyed to governments and citizens, as those that are deserving of constitutional status. As Chief Commissioner Arbour has eloquently summarized it:

> Whatever cause there may have been to question the equal status and justiciability of economic, social and cultural rights 60 years ago, one thing is clear: there is no basis for categorical disclaimers today… The legality of judicial review of all human rights is not open to question under the Canadian constitutional system.[36]

Notes

[1] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 [*Charter*].

[2] Louise Arbour, "'Freedom from want' – from charity to entitlement" (LaFontaine-Baldwin Lecture, Quebec City, 3 March 2005), online: United Nations Commissioner for Human Rights <http://www.unhchr.ch/huricane/huricane.nsf/0/58E08B5CD49476BEC1256FBD006EC8B1?opendocument> at 7.

[3] *International Covenant on Economic, Social and Cultural Rights* (16 December 1966) 993 U.N.T.S. 3 (entered into force 3 January 1976) [ICESC].

[4] *Mahe v. Alberta*, [1990] 1 S.C.R. 342, at 389, [1990] S.C.J. No. 19, 22 D.L.R. (4th) 24 [*Mahe* cited to S.C.R.].

[5] Section 15 provides that: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

[6] Section 7 provides that: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

[7] Bruce Porter, "Expectations of Equality" (2006) 33 Sup. Ct. L. Rev. 23 [Porter, "Expectations of Equality"].

[8] *Ibid*. at 23-35.

[9] Pierre Elliott Trudeau, "Economic Rights" (1961-1962) 8 McGill L.J. 122 at 125. Subsequently, as federal Minister of Justice, Trudeau released a discussion paper on the Liberal government's proposal for a new *Charter of Rights* in which he suggested that, while a constitutional guarantee of economic rights was desirable and "should be an ultimate objective of Canada" it "might take considerable time to reach agreement on the rights to be guaranteed." On that basis, Trudeau concluded that it was "advisable not to attempt to include economic rights in the constitutional bill of rights at this time." See Pierre Elliott Trudeau, "A Canadian *Charter of Human Rights*" (Ottawa: Queen's Printer, 1968) at 27.

[10] *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976).

[11] Canada, Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada, *Minutes of Proceedings and Evidence* 32nd Parl. 1st sess., No. 49 (30 January 1981), at 65-71. Section 36 is set out in Part III of the *Constitution Act*, 1982.

[12] Canada has stated in its Core Document to UN treaty monitoring bodies that the provisions of section 36: "are particularly relevant in regard to Canada's international obligations for the protection of economic, social and cultural rights." However, the justiciability of the governmental 'commitments' in section 36 has never really been tested. See Lorne Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (Toronto: Carswell, 1999) at 184-91; Aymen Nader, "Providing Essential Services: Canada's Constitutional Commitment Under Section 36" (1996) 19 Dal. L.J. 306. See also *Winterhaven Stables Ltd. v. Canada (Attorney General)* [1988] A.J. No. 924, 53 D.L.R. (4th) 413 (Alta. C.A.), at 432-434.

[13] Porter, "Expectations of Equality", *supra* note 7 at 23.

[14] *Ibid*.

[15] Canada, The Sub-committee on Equality Rights of the Standing Committee on Justice and Legal Affairs (Boyer Committee), *Written Submission of the Canadian Bar Association*, 33rd Parl. 1st sess. (National Archives of Canada Accession No. RG14 File No. 6050-331-E1), cited in Bruce Porter, "Twenty Years of Equality Rights: Reclaiming Expectations" (2005) 23 Windsor Y.B. Access Just. 145-192 at footnote 83 [Porter, "Reclaiming Expectations"].

[16] See generally Yvonne Peters, "From Charity to Equality: Canadians with Disabilities Take Their Rightful Place in Canada's Constitution", in Deborah Stienstra, Aileen Wight-Felske & Colleen Watters, eds., *Making Equality: History of Advocacy and Persons with Disabilities in Canada* (Concord Ontario: Captus Press, 2003) 119; M. David Lepofsky, "A Report Card on the *Charter's* Guarantee of Equality to Persons with Disabilities after 10 Years – What Progress? What Prospects?" (1998) 7 N.J.C.L. 263.

[17] *Ontario (Human Rights Commission) v. Simpsons Sears*, [1985] 2 S.C.R. 536, S.C.J. No. 74.

[18] *Ibid.* paras. 20-29.

[19] *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970, 141 N.R. 185, 13 B.C.A.C. 245, 6 W.W.R. 193, 71 B.C.L.R. (2d) 145, S.C.J. No. 75.

[20] *Charter of human rights and freedoms*, R.S.Q. 1977, c. C-12. For a discussion of the socio-economic rights guarantees under the Quebec *Charter*, see Pierre Bosset, "Les droits économiques et sociaux, parents pauvres de la Charte? Étude no. 5", in Commission des droits de la personne et des droits de la jeunesse du Québec, ed., *Après 25 ans: La Charte québécoise des droits et libertés, Volume 2: Études* (Montreal: Commission des droits de la personne et des droits de la jeunesse du Québec, 2003) at 229-244, online: Commission des droits de la personne et des droits de la jeunesse du Québec <http://www.cdpdj.qc.ca/fr/droits-personne/bilan_charte.asp?noeud1=1&noeud2=16&cle=0.

[21] Sujit Choudhry, "The *Lochner* Era and Comparative Constitutionalism" (2004) 2:1 Int'l J. Constitutional Law 17.

[22] *Ibid*.

[23] For elaboration of this possibility, see Martha Jackman, "The Protection of Welfare Rights Under the *Charter*" (1988) 20:2 Ottawa L. Rev. 257; Bruce Porter, "Judging Poverty: Using International Human Rights Law to Refine the Scope of *Charter* Rights" (2000) 15 J.L. & Soc. Pol'y 117 [Porter, "Judging Poverty"]; David Wiseman, "The *Charter* and Poverty: Beyond Injusticiability" (2001) 51:4 U.T.L.J. 425; Reem Bahdi, "Litigating Social and Economic Rights in Canada in Light of International Human Rights Law: What Difference Can it Make?" (2002) 14:1 C.J.W.L. 158; The Honourable Claire L'Heureux-Dubé, "A Canadian Perspective on Economic and Social Rights" in Yash Ghai & Jill Cottrell, eds., *Economic, Social And Cultural Rights In Practice: The Role of Judges in Implementing Economic, Social and Cultural Rights* (London: Interrights, 2004) 42; Margot Young, "Section 7 and the Politics of Social Justice" (2005) 38 U.B.C. L. Rev. 539.

[24] *Irwin Toy Ltd. v. Québec (Attorney General)*, [1989] 1 S.C.R. 927, S.C.J. No. 36.

[25] *Ibid*. at 1003-1004.

[26] See, for example, *Masse v. Ontario Ministry of Community and Social Services* (1996), 134 DLR. (4th) 20 (Ont. Sup. Ct. J.), leave to appeal to Ontario Court of Appeal denied, (1996) 40 Admin. LR 87N, leave to appeal to the Supreme Court of Canada denied, (1996) 39 CRC. (2d) 375. See generally Debra Parkes, "Baby Steps on the Way to a Grown up *Charter*: Reflections on 20 Years of Social and Economic Rights Claims" (2003) 52 U.N.B.L.J. 279; Martha Jackman, "Poor Rights: Using the *Charter* to Support Social Welfare Claims" (1993-1994) 19 Queen's L.J. 65; Porter, 'Judging Poverty', *supra* note 23.

[27] *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429 at paras. 82-83, S.C.J. No. 85 [*Gosselin* cited to S.C.R.].

[28] *Ibid*. para. 82.

[29] *Schachter v. Canada*, [1992] 2 S.C.R. 679 at para. 41, S.C.J. No. 68 [*Schachter* cited to S.C.R.].

[30] Melina Buckley, "*Law v. Meiorin*: Exploring the Governmental Responsibility to Promote Equality Under Section 15 of the *Charter*" in Fay Faraday, Margaret Denike & M. Kate Stephenson, eds., *Making Equality Rights Real: Securing Substantive Equality Under the Charter* (Toronto: Irwin Law, 2006) 179.

[31] Porter, "Expectations of Equality", *supra* note 7 at 36-38; Bruce Porter, "Beyond *Andrews*: Substantive Equality and Positive Obligations After *Eldridge* and Vriend" (1998) 9 Const. Forum 71; Martha Jackman, "'Giving Real Effect to Equality': *Eldridge v. B.C. (A.G.) and Vriend v. Alberta*" (1998) 4 Rev. Const. Stud. 352. For a discussion of the critiques of 'judicial activism' in Canada from a socio-economic rights perspective, see Lorraine Weinrib, "The Canadian *Charter's* Transformative Aspirations", in Joseph Eliot Magnet et al., eds., *The Canadian Charter of Rights and Freedoms: Reflections on the Charter After Twenty Years* (Toronto: LexisNexis Butterworths, 2003) 17; Martha Jackman, "*Charter* Equality at Twenty: Reflections of a Card-Carrying Member of the Court Party" *Policy Options* 27:1 (December 2005 – January 2006) 72.

[32] *Vriend v. Alberta,* [1998] 1 SCR 493 at para. 64, A.C.S. No. 29 [*Vriend* rcited to S.C.R.]; see generally Porter, "Reclaiming Expectations", *supra* note 15 at 180-185.

[33] For a discussion of substantive equality and positive obligations in Canadian and other jurisprudence, see Sandy Fredman, "Providing Equality: Substantive Equality and the Positive Duty to Provide" (2005) 21 S.A.J.H.R. 163; Gwen Brodsky & Selagh Day, "Beyond the Social and Economic Rights Debate: Substantive Equality Speaks to Poverty" (2002) 14 C.J.W.L. 185.

[34] Arbour, *supra* note 2 at 7.

[35] CESCR, Concluding Observations on Canada, 2006, Committee on Economic, Social and Cultural Rights, Concluding Observations on Canada, E/C.12/1/Add.31 (1998), para. 11(b), online: United Nations Human Rights Website <http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/E.C.12.1.Add.31.En?OpenDocument>; Gwen Brodsky, "The Subversion of Human Rights by Governments in Canada" in Margot Young et al., eds., *Poverty: Rights, Social Citizenship and Legal Activism* (Vancouver: UBC Press, 2007) [forthcoming].

[36] Arbour, *supra* note 2 at 7 and 9.

LES DROITS SOCIAUX ET LA *CHARTE* : REPRENDRE LE CHEMIN DU POLITIQUE

RÉSUMÉ

Les groupes et les experts ayant milité en faveur de la formulation définitive de l'article 15 de la *Charte canadienne des droits et libertés* avaient en tête une conception de l'égalité destinée à assurer la sauvegarde de l'agenda social canadien, tel qu'on le concevait à l'époque. Il faut toutefois constater l'entrée en scène concomitante de la Charte et de la transformation du modèle de l'état social au profit d'un modèle de régulation du social. La première partie de cet article explique pourquoi il faut voir un lien entre ce double phénomène et les récentes décisions de la Cour suprême du Canada concernant la distribution des biens sociaux et l'allocation de mesures de protection sociale. La deuxième partie de l'article explore les chemins de l'identité afin de démontrer comment, peu à peu, les garanties d'égalité prévues par la *Charte* ont été asservies au paradigme des préférences individuelles. L'article, en conclusion, propose que lorsqu'il s'agit des droits sociaux, la *Charte canadienne des droits et libertés* est un tissu poreux fait de valeurs nationales fragilisées et qu'il faut reprendre le chemin du dialogue démocratique *sans a priori* pour redonner aux droits sociaux la place qu'ils doivent occuper dans une société gouvernée par la règle de droit.

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Il y a quelque chose d'ironique dans le fait de revisiter le thème des droits sociaux et de la *Charte canadienne*, cinq années après les célébrations du XX[e] Anniversaire de celle-ci. 1982 fut en effet l'année de la décision de la Cour suprême dans *Gosselin*[1], un véritable *Tsunami* jurisprudentiel pour les tenants de la thèse du potentiel redistributif et de l'agenda de justice sociale dont la *Charte* assurerait la promotion.

Je me propose de soulever ici quelques pistes destinées à situer la *Charte* dans le contexte de son adoption, tout autant que dans celui de son évolution récente. Je conclurai par une proposition résolument interdisciplinaire, laquelle fait appel au besoin de re-politiser la *Charte canadienne* dans une perspective sociale plutôt qu'individualisante.

Le contexte d'adoption de la *Charte* : tout a-t-il été dit ?

On le sait, la *Charte* canadienne est muette en ce qui concerne la protection explicite des droits sociaux. Les intellectuels canadiens qui militent en faveur de la justice sociale prétendent que ce silence importe peu et qu'il est vain d'arguer sur la question de savoir si la protection effective des droits sociaux repose nécessairement sur leur enchâssement dans un paradigme d'égalité, ou encore sur l'inverse. Dans le cadre des événements entourant la célébration des 20 années de la *Charte canadienne*, mon collègue Bruce Porter[2] a procédé à une recension exhaustive et très attentive des espoirs ayant entouré sa venue. Cette recension révèle de manière convaincante deux choses : d'une part, que les groupes et les experts ayant milité en faveur de la formulation définitive de l'article 15 de la *Charte* avaient en tête une conception de l'égalité assurant la sauvegarde de l'agenda social canadien et des programmes sociaux, tels qu'on les concevait à l'époque. D'autre part, que l'on avait tout mis en œuvre pour que la protection relative à l'égalité permette le passage conceptuel et juridique d'un droit négatif à l'égalité (l'interdiction de la discrimination) vers un droit positif (incluant le devoir de l'État d'agir à cette fin). Porter ajoute que cette victoire constitue le principal élément permettant d'inscrire la Charte dans l'agenda international des droits de la personne plutôt que dans la tradition américaine du *Bill of Rights*. Il précise néanmoins que rares sont les traces de l'expression d'une préoccupation explicite eu égard à ce qui était à l'époque le plus récent

instrument destiné à la protection des droits économiques sociaux et culturels de la personne, soit le Pacte international des Nations Unies du même nom. On sait que le Québec a pris un chemin totalement différent à cet effet et que les travaux préparatoires de la *Charte des droits et libertés* du Québec révèlent une volonté de s'inspirer et de s'inscrire dans la tradition des deux Pactes des Nations Unies.[3]

En même temps que s'élaborait la *Charte canadienne*, le Canada s'inscrivait dans les réformes des politiques sociales promues par l'OCDE : la recherche accrue de solutions issues du marché, des mesures de soutien du revenu plus axées sur l'attachement au marché du travail, une préférence pour les bénéfices en argent plutôt que pour les services; et pour les dépenses plutôt que les transferts. C'est aussi l'époque qui a donné naissance aux politiques dites ciblées, dont notamment celles destinées à lutter contre la pauvreté des enfants. Rétrospectivement, et je m'inspire en cela des travaux européens récents, on ne peut que constater l'entrée en scène concomitante de la *Charte canadienne* et d'un nouvel État social. La littérature parle alors du nouveau paradigme de la régulation du social. Au-delà des techniques, ce nouveau paradigme s'analyse de diverses manières. Retenons le recours aux concepts d'état social d'activation ou encore de nouvelles régulations du social. Certains constatent que ces transformations vont de pair avec l'entrée de l'individu en politique sociale.[4] La morphologie citoyenne est donc toute autre sous le règne de l'État social d'activation, comme le révèle à merveille les travaux de Rosanvallon : de personne exposée à divers risques sociaux, le travailleur devient un individu détenteur de droits, détaché de son groupe d'appartenance et responsable de son destin.[5] Jean François Orianne a ce jeu de mot délicieux pour décrire le contexte : l'état social actif transforme les troubles de la personnalité en troubles de l'employabilité.[6]

En résumé, et lorsqu'il s'agit des droits sociaux, peut-être n'a-t-on pas pris suffisamment la mesure des transformations ambiantes dans les débats ayant mené à l'adoption de la *Charte canadienne*. Ainsi, ne pourrait-on pas aujourd'hui nourrir cette interrogation d'autres éléments contextuels, tel celui de la constitutionnalisation du Canada par l'externe (accords de commerce) ou encore celui du Deep Integration (par la voie du mystérieux Partenariat pour la sécurité et la prospérité) ?

Bref, on s'étonne de constater combien rares sont les études qui examinent conjointement la nouvelle question sociale et celle de la protection constzitutionnelle des droits sociaux. Au contraire, plusieurs études prennent comme point de départ la disparition du Welfare State, et en concluent qu'une version substantive de la règle de droit devrait raviver ce dernier de ses cendres. Cela semble assez circulaire et il est clair que la proposition tendant à amalgamer la protection fondamentale de l'égalité et la protection substantive des droits sociaux tient de plus en plus difficilement la route. Car l'essentialisme individuel consacré par les nouvelles régulations sociales ne peut à lui seul déterminer les contours moraux et politiques de la bonne société et du juste contrat social. Cette dernière aspiration, en effet, dépasse la technique juridique et les préférences individuelles et identitaires et exigent l'affirmation de l'autonomie et de la spécificité du droit social. Ce dernier est entendu comme une prise en compte par le droit positif des rapports de force au sein d'une société et du rééquilibrage que ces rapports exigent aux fins de la bonne société.

Ce débat n'est pas que théorique. La littérature qui milite en faveur d'une interprétation substantive et juste de l'article 15 de la *Charte* milite aussi en faveur d'une plus grande rigueur dans la recherche de l'essence et de l'intention législative à la source d'une loi sociale dont on revendique les bénéfices : le régime canadien de pensions, par exemple. Il n'est toutefois pas impensable que l'essence de ces législations ait muté depuis l'évanescence du Welfare State au Canada. Par exemple, dans un article qu'elle publiait en 2003, Gwen Brodsky reproche à la Cour suprême, dans la décision *Gosselin*, d'avoir erronément conclu que la Loi québécoise sur l'aide sociale de l'époque avait notamment pour objectif de favoriser l'insertion professionnelle et sociale des jeunes alors qu'à l'évidence, dit-elle, il s'agissait plutôt d'assurer le revenu de base de tous les plus démunis.[7] Les militants du Québec savent toutefois que nous avions dès lors perdu la bataille du droit à l'aide sociale[8], ce qui fait de l'argument de Brosdky un argument hautement décontextualisé.

Il existe donc un lien entre le contexte général d'adoption et d'évolution de la *Charte* et les récentes décisions de la Cour suprême du Canada concernant la distribution des biens sociaux et l'allocation de mesures de protection sociale. Mais ce n'est pas là la seule cause du *Tsunami*.

L'identité est le propre de l'humain. Le Welfare State avait ceci de particulier qu'il attribuait en fonction des situations de travail ou de non travail, avec tous les effets discriminatoires que l'on sait, un statut juridique à l'individu. L'État social actif brise ce processus de catégorisation et met en compétition des individus. Robert Castel propose l'image de l'escalier mobile pour décrire le dernier demi-siècle de l'état social contemporain.[9] Précédemment, tout le monde avait accès à la mobilité garantie par le mouvement de l'escalier mobile. Cependant, tous n'avaient pas le pied sur la même marche. L'escalier mobile évoque ici l'image d'un continuum des conditions sociales, lequel est aujourd'hui fracturé. Cette fracture remet en cause les gains d'égalité démocratique enregistrés précédemment par les plus vulnérables.

Ainsi, le modèle d'analyse construit en fonction des exigences de l'article 15 de la *Charte* et qui repose sur une comparaison inter-groupe (inclus-exclus) n'autoriserait dorénavant à se comparer que ceux et celles qui sont déjà dans l'escalier. Les autres peuvent toujours marcher … mais ce n'est pas l'affaire de la Cour dans l'éventualité où l'ordonnance recherchée aurait quelque incidence sur l'allocation des ressources publiques. Une abondante littérature experte décrit au Canada les hauts et les bas de la méthodologie d'analyse issue de l'article 15, mais aussi de la relation entre cet article et l'article premier de la *Charte*. Pour plusieurs, les plus récentes décisions de la Cour suprême, notamment, restreignent l'analyse comparative propre à l'article 15 à un enjeu compétitif et «inter-groupes» qui consiste à rechercher l'inclusion au sein du groupe privilégié, dit groupe de référence. D'autres ajoutent que non seulement cela constitue-t-il un recul qui consacre l'absence de volonté des tribunaux de s'aventurer sur les chemins des obligations positives de l'État au chapitre de l'égalité, mais en sus, que cette méthodologie a tendance à limiter à la lutte conte le stéréotype l'objet d'un droit positif à l'égalité, droit dont l'accomplissement devrait consister, disent-ils, à prévoir des mesures qui répondent aux besoins des membres des groupes les plus vulnérables. Il est du devoir des universitaires de porter une attention soutenue et critique aux décisions des tribunaux. Mais je crois qu'il est aussi de notre devoir de tenter de comprendre les récents reculs enregistrés au chapitre de l'article 15 dans une perspective multidisciplinaire.

> Quoi qu'il en soit, un fait demeure. Lorsqu'il s'agit des droits sociaux, la Charte canadienne des droits et libertés est un tissu poreux fait de valeurs nationales fragilisées.

Les identités compétitives et le champ du social : que peut-on en tirer ?

Chez les économistes alternatifs, il existe un courant qui se destine à mesurer le bien être en fonction de la participation sociale. A l'intérieur de ce courant, certains ont créé l'école du *Economics of Identity and Global Justice*. Pier Luigi Sacco, par exemple, propose ce qui suit : dans les sociétés riches, plusieurs n'ont aucune expérience de la rareté des biens de base. Ils sont riches. Conséquemment, le bien rare devient l'identité elle-même. Il ne s'agit plus tant de consommer que de consommer afin d'appartenir au groupe des identités privilégiées. Ainsi, la ressource ou le bien rare devient l'identité convoitée ou acquise. Dans cette foulée, l'individualisation et la privatisation des communs participent à la construction identitaire et au phénomène des identités compétitives. Sacco utilise un graphique saisissant. Ainsi, dès qu'un certain revenu est franchi, les tranches excédentaires de revenu par rapport à ce revenu de départ ne contribuent en rien à l'amélioration du bien être. Sacco propose que dans de telles conditions individualisées et captées par le marché de la consommation, il est vain d'espérer tirer quoi que ce soit de l'aspiration de justice sociale et encore moins de la justice globale. Il faut, dit-il, *a priori* déconstruire et reconstruire les identités en fonction de la valeur économique et de bien être de la participation sociale. Il faut donc disposer de l'identité à titre de bien économique rare.[10]

Au-delà des distinctions juridiques nécessaires et importantes qu'il conviendrait de faire dans la décision de la Cour suprême dans *Chaoulli*[11], je crois que le cadre d'analyse de la majorité de la Cour dans cette affaire fait écho aux thèses de Sacco. Ce qui compte, donc, c'est de pouvoir consommer des soins de santé selon ses besoins, et

non, de savoir jusqu'à quel point la sécurité physique et psychologique de l'appelant est compromise par un régime public et universel. Je lis en faisant le même constat le tout premier paragraphe du jugement de la Madame la juge en chef McLaughlin dans *Gosselin*. Louise Gosselin, une femme à l'identité désarticulée par un droit social qui a lâché prise, n'appartient pas au groupe des identités de luxe. Elle ne pouvait donc faire face à la compétition inter-groupe, contrairement, par exemple, à d'autres qui peuvent au moins prétendre posséder assez pour avoir été injustement privé d'un bien économique et ainsi participer au grand jeu de la compétition des identités individuelles. Je pense ici notamment, à titre illustratif, aux affaires *Hodge*[12] ou *Granovsky*[13] à titre de contre-exemple.

Que de chemin idéologique parcouru (dans le mauvais sens, probablement) entre l'évocation du contrat social canadien par M. le Juge Iacobucci dans Vriend[14] et la consécration du droit de consommer des soins de santé par Madame la Juge Deschamps dans Chaoulli.

Joseph Singer a récemment publié dans le cadre des cahiers de recherche de la Faculté de droit de Harvard un article intitulé « *Things That We Would Like to Take for Granted : Minimum Standards for the Legal Framework of a Free and Democratic Society* ».[15] Le professeur Singer conclut qu'il est inutile de s'enfermer dans la théorie juridique et économique, et notamment dans celle qui consiste à jauger les préférences individuelles à titre de droits, afin de définir les contours de la bonne société. Il en appelle plutôt au besoin de resituer le cadre juridique de la règle de droit dans un paradigme moral et politique commun.

A cette fin, la dernière question que je souhaite soulever aujourd'hui est délicate. Se peut-il que les défenseurs de la *Substantive Rule of Law* errent dans la définition du paradigme moral et politique qui serait aujourd'hui celui de la société canadienne ? Cette société est-elle plus intoxiquée qu'on ne souhaite le croire par *l'économie des identités* ? Ou encore, plus avancée qu'on ne le croit sur le chemin des nouveaux réseaux de participation sociale, lesquels, selon la théorie, ne sont constitués ni par l'État ni par le marché ? Le Canada vit-il une crise d'identité sociale et par voie de conséquence, une crise de solidarité ?

Où en est la société canadienne ?

Des collègues de l'Université de Toronto ont récemment publié un livre assez étonnant intitulé *Dilemmas of Solidarity*.[16] Ce livre prend prétexte du débat entourant le déséquilibre fiscal au Canada. En conclusion de l'ouvrage, les éditeurs prétendent que l'on prend souvent pour acquis que le Canada « social » repose sur une volonté et une pratique politique de solidarité. Toutefois, notent-ils, les communautés remettent de plus en plus en cause non pas la solidarité mais les lieux et les modes d'expression de cette dernière. Elles rejettent souvent l'idée des gouvernements centraux et se meuvent dans des communautés éphémères et mouvantes. C'est, et je cite, le *challenge to state centered identity* dont il s'agit. Pour reprendre l'analyse du philosophe français Bachelard, on pourrait dire que le fait de prendre pour acquis la solidarité devient un obstacle épistémologique à la consistance des idées fédératrices.

Ces scénarii, toutefois, sied-ils aux plus faibles ? Hélas non. Peut-on en conséquence condamner les exclus à une quête compétitive de l'identité protégée par les droits fondamentaux, dont le droit à l'égalité? Non plus, me semble-t-il.

Que faire? Dans un commentaire que ma collègue Martha Jackman publiait récemment dans la revue *Options politiques*, elle en appelait aux politologues afin qu'ils imaginent des arrangements institutionnels propres à la fédération canadienne et qui rendraient les acteurs publics réellement imputables au titre d'une redistribution de la richesse destinée à corriger la pauvreté grandissante des Canadiens.[17] Patrick Macklem, dans un article qu'il publiait en 2006 et intitulé « *Social Rights in Canada* », précisait pour sa part qu'on n'a jamais vu des arrangements de gouvernance se substituer à un projet de société.[18] Alain Noel tire de ses recherches comparatives le même verdict dans sa contribution à l'ouvrage *Dilemmas of Solidarity.*

Quoi qu'il en soit, un fait demeure. Lorsqu'il s'agit des droits sociaux, la *Charte canadienne des droits et libertés* est un tissu poreux fait de valeurs nationales fragilisées. La fibre de ce tissu sera-t-elle dorénavant décrite comme un produit sans nom, confectionné quelque part et assemblé ailleurs, ou comme un produit artisanal porté par les nostalgiques, comme une fleur dans les cheveux ? A l'ère du déficit démocratique, je ne vois pas comment les tribunaux peuvent répondre à ces questions à notre place sinon pour faire écho aux valeurs ambiantes. J'en conclus qu'il faut reprendre le chemin du dialogue démocratique *sans a priori* pour redonner aux droits sociaux la place qu'ils doivent occuper dans une société gouvernée par la

règle de droit. Cette démarche ne relève pas de la compétence exclusive des politologues, mais bien plutôt du travail et de l'engagement de tous les citoyens.

Notes

[1] [2002] 4 RCS 429.

[2] Bruce Porter, *Twenty Years of Equality Rights: Reclaiming Expectations,* in 2005 23 Windsor Yearbook of Access to Justice, 145.

[3] Voir les articles 39 et suiv. de la *Charte des droits et libertés de la personne du Québec.*

[4] Jean Michel Bonvin et Pascale Vielle, *Activation Policies : A Capabilities Perspective,* 2002, à : http://www.havenscenter.org/VSP/readings2sort/pdf/vielle bonvin.PDF

[5] Pierre Rosanvallon, *Le nouvel âge des inégalités*, Seuil, 1996, p. 217.

[6] Jean François Orianne, *Troubles de l'employabilité et traitement clinique du chômage*, Association Internationale de Sociologie, Comité de recherche 52, Sociologie des Groupes Professionnels, Conférence Intermédiaire 22-24, Septembre 2004 : « Savoirs, travail et organisation », à : http://www.printemps.uvsq.fr/Com_oria.htm

[7] Gwen Brosdky, « Autonomy with a Vengeance » (2003) 15 *Revue Femmes et Droit* 194.

[8] Lamarche, Lucie, « La nouvelle loi sur la sécurité du revenu au Québec: quel¬ques réflexions d'actualité », *Revue de droit de l'Université de Sherbrooke*, vol. 21 (1991), no 2, 335-372.

[9] Robert Castel, *Propriété privée, propriété sociale, propriété de soi,* Fayard, 2000.

[10] Consulter notamment la retransmission d'une conférence de P. L. Sacco en ligne sur : CBC Ideas, *Economics and Social Justice*, 13 octobre 2006.

[11] [2005[1 RCS 791.

[12] [2004] 3 S.C.R. 357.

[13] [2000] 1 S.C.R. 703.

[14] [1998]1 RCS 493.

[15] Disponible en ligne à : http://papers.ssrn.com/sol3/papers.cfm?abstract_id=946108

[16] *Dilemmas of Solidarity*: *Rethinking Distribution in the Canadian Federation*, S. Choudhry, J.F. Gaudreault-Desbiens et L. Sossin (éds.). University of Toronto Press, 2006, 224 p.

[17] Martha Jackman, « Canadian Charter Equality at 20: Reflections of a Card-Carrying Member of the Court Party » (Dec. 2005 - Jan. 2006) 27:1 *Policy Options* 72-77.

[18] Disponible en ligne à : http://papers.ssrn.com/sol3/papers.cfm?abstract_id=894327

SOCIAL AND ECONOMIC RIGHTS IN CANADA: WHAT ARE THEY AND WHO CAN BEST PROTECT THEM?

ABSTRACT

This article examines the development and current status of positive social and economic rights in Canada. Exploring the comparative competence of legislatures, courts and human rights tribunals, Wayne MacKay suggests that courts should depart, with caution, from their traditional deferential role to legislators. Due to their flexibility and accessibility, HR Tribunals should supplement the role of the courts and legislatures in giving effect to social and economic rights, which should form part of a holistic package of human rights in Canada.

The *Canadian Charter of Rights and Freedoms* has had a profound impact on Canada in its first twenty-five years. However, its impact on social and economic rights has been small. When there has been a significant social or economic consequence, it has been incidental rather than direct or intentional. Even after the arrival of the *Charter* in 1982 (and the equality provisions in 1985) the courts have continued to be deferential to the elected branch of government on matters of broad social and economic policy, involving as they do, conflicting social fact evidence and the allocation of scarce resources.[1]

Problems of definition

Defining social and economic rights is not a simple matter. There is no all-encompassing definition in the *International Covenant on Economic, Social and Cultural Rights*, but rather a collection of rights including education, health, social and economic supports and other forms of minimal guarantees of economic subsistence. This *Covenant* along with its more clearly defined companion, the International *Covenant on Civil and Political Rights*, were intended to give effect to the broad guarantees in the *Universal Declaration of Human Rights*, adopted by the United Nations in 1948. Some have suggested that the separation of civil and political rights from their economic, social and cultural cousins distorts the intimate and holistic connection between all these rights. I agree with this assertion. While the link between "cultural" as well as social and economic rights makes sense at an international level, it makes less sense in a Canadian context, where cultural rights may well be a third broad category of rights.

Even if the international commitments did offer more guidance, their enforceability at the international level is suspect, and their impact within Canada indirect at best. Since the arrival of the *Charter*, courts generally, and the Supreme Court of Canada in particular, have paid more attention to international human rights commitments and they have often been regarded as persuasive in interpreting the Canadian *Charter of Rights*. This view was articulated early in the evolution of *Charter* interpretation.

> The general principles of constitutional interpretation require that these international obligations be a relevant and persuasive factor in *Charter*

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> interpretation. As this Court stated in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344. Interpretation of the *Charter* must be "aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection." The content of Canada's international human rights obligations is, in my view, an important indicia of the meaning of "the full benefit of the *Charter*'s protection." I believe that the *Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.* (para 59)
>
> *In short, though I do not believe the judiciary is bound by the norms of international law in interpreting the Charter, these norms provide a relevant and persuasive source for interpretation of the provisions of the Charter,* especially when they arise out of Canada's international obligations under human rights conventions. (para 60)[2]

As encouraging as that sounds, it was articulated in the context of civil and political rights under the *Charter* and not social and economic ones. Although the right to strike could certainly be viewed as an economic right as well as the civil right to freedom of association, the focus was on association. This emphasizes the artificial nature of the distinction between the different categories of rights within the two International Covenants and the importance of how you categorize a right.

Internationally, the United Nations Committee on Economic Social and Cultural rights, in its December, 1998 Concluding Observations on Canada's performance under the *International Covenant on Economic, Social and Cultural Rights*, expressed concern about Canada's record on social and economic rights. The Committee urged federal, provincial and territorial governments "to expand protection in human rights legislation […] to protect poor people in all jurisdictions from discrimination because of social or economic status."[3] I will return to the suggested amendment to human rights legislation later. More general concerns about Canada's failure to live up to its international commitments in this area were also expressed in a series of earlier United Nations Reports under the Covenant.

Within Canada, Quebec, New Brunswick, and the Northwest Territories expressly include social condition within their human rights legislation. The latter two, for whom social condition is a relatively recent addition[4], provide objective definitions focusing on 'social or economic disadvantage', while the Quebec act does not provide a statutory definition. In early Quebec cases, attempts were made to apply social condition to the high end of the economic scale, such as, doctors or "snow birds' flying south for the winter. The focus has now shifted to the lower end of the socioeconomic scale and a more appropriate emphasis on vulnerability. The Quebec Human Rights Tribunal has also articulated a broad definition, which offers some guidance.

> [T]he definition of 'social condition' contains an objective component. A person's standing in society is often determined by his or her occupation, income or education level, or family background. It also has a subjective component, associated with perceptions that are drawn from these various objective points of reference. A plaintiff need not prove that all of these factors influenced the decision to exclude. It will, however, be necessary to show that, as a result of one or more of these factors, the plaintiff can be regarded as part of a socially identifiable group and that it is in this context that the discrimination occurred.[5]

Social condition in the context of section 10 of the Quebec *Charter of Rights and Freedoms*[6] is more a negative "freedom from" than a positive "right to" economic security. Section 45 of the Quebec *Charter* referring to "standard of living", "financial assistance" and "social measures", is in a more positive form but has limited enforceability. This is also true of the package of more positive rights in sections 39-48 of the Quebec *Charter*. Attempts by Chief Justice of Quebec, Michel Robert, to breathe life into these positive rights did not succeed. [7]

When social and economic rights are defined in positive terms, either at the international or state levels, they are rarely enforceable. If the rights are not defined or articulated in a broad way, there is concern about their potentially broad scope and sweeping societal impact. Whatever the form of definition, it has been problematic and leaves much room for interpretation and broad discretion in respect to implementation.

Implementation and comparative institutional competence

In broad terms, there are three major vehicles for implementing social and economic rights – elected legislatures, appointed courts and delegated administrative tribunals. Even after the *Charter*, courts continue to be deferential to the elected legislatures when it comes to both the articulation and implementation of social and economic policy. This is particularly true if there are issues of conflicting social science evidence and/or the allocation of scarce resources.[8] On matters such as providing benefits to same sex partners, the courts have been deferential to legislatures, while on redefining marriage to include same sex unions, the judges have been willing to second guess the legislators.[9] The role the courts are willing to play may also depend upon how they characterize the right in question. In *Chaoulli v. Quebec (A.G.)*,[10] the majority of the Supreme Court defined access to private health care as a matter of security of the person and even life, while the dissenters defined the issue in terms of broad health policy, thus falling more appropriately within the political realm. How the right is categorized is vital to whether it will receive *Charter* protection.

The limited role of the courts in advancing social and economic rights through the *Charter of Rights* should not really be surprising. There are few social and economic rights in the text of the *Charter* itself. This means that two of the documents broadest sections – the guarantees of life, liberty and security of the person (section 7) and equality (section 15) – have had to be argued as embracing a socioeconomic component. These arguments have been hard to make and have rarely met with success.

The exclusion of express guarantees of economic and social rights in Canada's *Charter* was not accidental. Government drafters steeped in the traditions of parliamentary supremacy, saw matters of social and economic policy as outside the proper scope of the courts and more appropriate for the legislative branches. What might broadly be termed as the "left" in Canada was generally opposed to the *Charter* as promoting an illusion of rights, and thus did not lobby to have social and economic rights included within the text.[11] While women, people with disabilities and Aboriginals were lobbying to be fully included in the *Charter* text, the advocates of social and economic rights were largely boycotting the process. The only recourse for judges wanting to read social and economic rights into the *Charter* is to broadly interpret sections 7 and 15 of the document.

The question of economic rights reared its head early in *Charter* jurisprudence but in the context of corporate rights in *Irwin Toy v. Quebec (A.G.)*.

> What is immediately striking about [s. 7] is the inclusion of "security of the person" as opposed to "property"… First, it leads to a general inference that economic rights as generally encompassed by the term "property" are not within the perimeters of the s.7 guarantee. *This is not to declare, however, that no rights with an economic component can fall within "security of the person." Lower courts have found that the rubric of "economic rights" embraces a broad spectrum of interests, ranging from such rights, included in various international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and shelter, to traditional property* – contract rights. To exclude all of these at this early moment in the history of *Charter* interpretation seems to us to be precipitous. We do not, at this moment, choose to pronounce upon whether those economic rights fundamental to human life or survival are to be treated as though they are of the same ilk as corporate-commercial economic rights. In so stating, we find the second effect of the inclusion of "security of the person" to be that a corporation's economic rights find no constitutional protection in that section.[12]

While closing the door on economic rights for corporations, the Supreme Court left the window open for "economic rights fundamental to human life or survival." It is a window that is still open but also not yet entered. Madame Justice Louise Arbour (as she then was) in *Gosselin v. Quebec (A.G.)*[13] in a spirited dissent, argued that section 7 should apply to prevent social assistance falling below the poverty level for young people like Ms. Gosselin.[14] The majority of the Supreme Court did not feel that *Gosselin* was the case to expand the law but did not close the *Irwin Toy* window for a future case.

In the very different context of access to health care in a reasonable time, the majority of the Supreme Court did take an expansive approach to section 7 of the *Charter*, but not under the banner of economic rights but rather the fundamental rights to life and security of the

person.[15] This decision has been much criticized by academics and even Professor Martha Jackman, who has generally supported a broad role for the courts in advancing social and economic rights, was forced to rethink her position.[16] However, it has also been described as a positive step towards extending section 7 of the *Charter* to embrace economic rights.

> … the decision may yet have a surprisingly progressive influence on *Charter* jurisprudence. By establishing the connection between deprivations of the basic necessaries of life and fundamental rights, *Chaoulli* may well be the first step through the doors left open in *Irwin Toy* and *Gosselin*… If state obligations to those in need are not foreclosed under the constitution .. then it is hard to imagine more compelling settings for elaborating such obligations than in the basic need for health care and sustenance of those dependent on state support.[17]

The guarantees of equality in section 15 of the *Charter* could also be interpreted as encompassing social and economic rights. However, when put to the test in *Gosselin v. Quebec (A.G.)*[18] the majority of the Supreme Court failed to rise to the challenge. Forcing young people to live below the poverty line by providing low levels of social assistance was not viewed as a violation of their dignity. The good intentions of the legislators were considered at the first stage of *Charter* analysis (the violation stage) and the majority of the Court concluded that there was no breach of equality. This decision has been criticized as advancing stereotypes about the young and putting too high a burden on *Charter* claimants.[19] It also represents a general retreat on equality whereby conflicting rights are balanced at the violation stage rather than as part of a section 1 justification. This puts the burden of proof on the claimant rather than the state and makes it easier to justify *Charter* violations.

Courts continue to play their traditional roles as protector of the constitution, promoter of fair process and preventer of arbitrary action by the state. They have generally avoided entering the contested domain of social and economic policy. This hesitance should be reconsidered and judges should be open to expanding their role in the socioeconomic domain – albeit with caution and respect for the other branches of government.

Human rights commissions and social condition

Administrative tribunals, such as human rights commissions, offer an interesting option for implementing social and economic rights. They are created by statute and are thus consistent with the Supremacy of Parliament and deference to the legislators. They also can be more flexible than courts in providing diverse judicial styles of implementation. Unlike the *Charter*, human rights commissions are not limited to the public domain but have jurisdiction over both the public and the private sector. These agencies also offer a broader range of dispute resolution mechanisms. They also are more accessible to claimants in terms of cost than the courts.

An initial problem is that Quebec is the only province with a track record on interpretation of social condition as a prohibited ground of discrimination. This has been a cause for concern at the international level in terms of Canada fulfilling her human rights commitments, as discussed earlier. Social condition should be added as a ground of discrimination in both the federal and provincial human rights statutes.[20]

Former Supreme Court Justice LaForest advocated the addition of social condition in his 2000 study – *Promoting Equality: A New Vision.*

> We were asked to consider whether social condition should be added as a prohibited ground of discrimination in the Act. None of the current grounds are specifically economic in nature. However, we certainly came to understand the *close connection between many of the current grounds and the poverty and economic disadvantage suffered by those who share many of the personal characteristics already referred to in the Act.*[21]

Drawing upon the experiences of the Quebec Human Rights Commission, other commissions can supplement the roles of courts and legislatures in giving effect to social and economic rights as they evolve in Canada. This is a matter of legislative and administrative reform.

Concluding thoughts

Social and economic rights should form an integral part of the interconnected package of human rights in Canada. More efforts must be made to define the scope of these rights within the Canadian context and to devise effective mechanisms of implementing these rights at the legislative, judicial and administrative levels. By so

doing, Canada can also better live up to its international commitments under the *International Covenant on Social, Economic and Cultural Rights.* We should all do out part to advance Canada's performance in this emerging frontier of human rights.

In keeping with the spirit of the *Charter of Rights*, the courts should take a broad and flexible approach to interpreting sections 7 and 15 of the text. This strategy should include a cautious but open approach to social and economic rights, as part of a holistic and integrated package of human rights. Recognizing their institutional limitations, judges need to be mindful of the roles of the legislatures and administrative bodies as partners in advancing Canada's social and economic safety net.[22] To fulfill their roles as guardians of the Constitution and truly champion the interests of the vulnerable and less advantaged in our society, Canada's judges cannot ignore the social and economic dimensions of our citizens.

Notes

[1] *McKinney v. University of Guelph* [1990] 3 S.C.R. 229, dealing with mandatory retirement in universities, is a clear articulation of this deferential role for courts.

[2] *Reference Re Public Service Employee Relations Act (Alberta),* [1987] 1 S.C.R. 313 Paras 57-63. [emphasis added].

[3] LaForest G.V., Canada. Department of Justice. Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision* (Ottawa: Department of Justice, 2000), Chapter 17e.

[4] New Brunswick added 'social condition' in 2005, the Northwest Territories added it in 2007.

[5] *Commission des droits de la personne du Québec v. Gauthier* (1993), 1993 CanLII 2000 (QC T.D.P.) (Docket 500-53-000024-925). Commission des droits de la personne du Québec v. Gauthier, [1994] R.J.Q. 253 (T.D.P.Q.) – appeal. The Senate also proposed adding social condition to the Canadian Human Rights Act in Bill S-11 (1st Session, 36 Parliament, 46 Elizabeth II, 1997, but did not solve the definition problem. The bill did not become law.

[6] R.S.Q. c. C-12.

[7] Robert J. in dissent in *Gosselin c. Quebec (Procureur général),* [1999] J.Q. no 1365. (Que. C.A.).

[8] *Supra* note 1 and *Egan v. Canada* [1995] 2 S.C.R. 513 (spousal benefits for same sex partners).

[9] *Halpern v. A.G. Canada* (2003) 65 O.R. (3d) 161 (C.A.).

[10] [2005] 1 S.C.R. 791.

[11] William Shabas advanced this view at the Association of Canadian Studies conference entitled – *Canadian Rights and Freedoms: 25 Years under the Charter,* Ottawa, April 16-17, 2007.

[12] *Irwin Toy Ltd. v. Quebec (Attorney General),* [1989] 1 S.C.R. 927 at para 95. [emphasis added].

[13] *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429.

[14] Interestingly, Louise Arbour continues her crusade for social and economic rights for the poor in her new role as United Nations High Commissioner for Human Right in Geneva.

[15] *Supra* note 10.

[16] M. Jackman, "The Last Line of Defence for [Which?] Citizens: Accountability, Equality and the Right to Health in *Chaoulli*" (2006) 44 *Osgoode Hall L.J.* 349.

[17] Lorne Sossin, "*Towards a Two-Tier Constitution? The Poverty of Health Rights*" in: Colleen M. Flood, Kent Roach & Lorne Sossin, eds., *Access to Care, Access to Justice: The Legal Debate Over Private Health Insurance in Canada* (Toronto: University of Toronto Press, 2005) 161 at 178.

[18] *Supra* note 13.

[19] N. Kim and T. Piper, "*Gosselin v. Quebec:* Back to the Poorhouse" (2003) 48 McGill L.J. 749.

[20] W. MacKay, T. Piper and N. Kim, *Social Condition As A Prohibited Ground of Discrimination Under the Canadian Human Rights Act*, Submitted to the Canadian Human Rights Act Review Panel, December, 1999.

[21] *Supra* note 3. [emphasis added].

[22] W. MacKay, "In Defence of the Courts: A Balanced Judicial Role in Canada's Constitutional Democracy" (2007) 21 *National J. of Const. Law* 239.

GENETIC DETERMINISM AND DISCRIMINATION: A CALL TO RE-ORIENT PREVAILING HUMAN RIGHTS DISCOURSE TO BETTER COMPORT WITH THE PUBLIC IMPLICATIONS OF INDIVIDUAL GENETIC TESTING

ABSTRACT

Genetic testing can not only provide information about diseases but also respecting their prevalence in ethnic, gender or other vulnerable populations. While offering the promise of significant therapeutic benefits and serving to highlight our commonality, genetic information also raises a number of sensitive human rights issues touching on identity and the perception thereof, as well as the possibility of discrimination and social stigma. Moreover, the stoicism with which the public tends to greet such data is of particular relevance to its eventual impact on rights in the genomics age. It stands to reason that the results of individual screenings could haplessly be used to make *general* assumptions about entire ethic or gender groups. In this manner, genetic information can directly influence identity impacting and perhaps even reframing conceptions of group rights and dimensions of self-identification, thus importing constitutional scrutiny on questions of dignity and discrimination in particular. Is there a risk of collective stigmatization deriving from discrete testing of self-identified individuals? Would such stigmatization impinge on individual dignity by the exogenous imposition of ethnic or gender/sexual identity? If so what norms can most adequately respond if and when individual and group interests diverge? These questions will be examined from a Canadian and comparative perspective.

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"Privacy considerations no longer arise out of particular individual problems; rather, they express conflicts affecting everyone." [1]

Along with the promise of assuaging the scourge of disease, the so-called genetic revolution unquestioningly imports a slew of thorny human rights issues that touch on matters such as dignity, disclosure, and the subject of this article – genetic testing and the social stigma potentially deriving therefrom.

It is now rather evident that certain otherwise therapeutically promising forms of research can inadvertently involve social risks exceeding the individual preoccupations of eclectic study participants.[2] With that being the case, the following proposes to examine the peculiar stigma attached to genetic information and its potential human rights implications extending beyond the insurance and employment context. In so doing, it raises the intersection of interests between self-identified members of historically vulnerable groups and the group itself, which the law seems to take for granted in the genetics context. While this paper purports to offer no more that an initial reflection on point, its immediate objective is to expand the examination of human rights issues arising from individual genetic testing to include the potential ramifications for vulnerable groups, which may be adversely affected by such research findings and bio-banking in the larger sense.[3]

While human rights scholarship has traditionally centered on individual civil liberties,[4] the rapid emergence and radical progression of biotechnology, genetic research in particular, may well prompt us to reorient – or at the very least revisit – human rights discourse. More specifically, it stands to reason that the results of individual screenings could haplessly be used to make *general* unintended assumptions about entire ethnic or gender groups, thus compelling a re-examination of individually-oriented human rights mechanisms. For instance, in fall 2005, a local psychiatrist **caused** a stir in Montreal when he declared on a popular radio talk show that people of color were somehow *innately* – or genetically programmed to be – less intelligent.[5] Quite significantly, he hoisted the shield of science in defense of his unpalatable assertions.[6]

Arguably similar in certain respects, a scientific paper published in the *Journal of Biosocial Science*,[7] not only suggests that one group of humanity is more intelligent than others, but explains the genetic process that supposedly brought this about. The group is Ashkenazi Jews. The process is natural selection, and the article discusses a dozen or so disease genes that are common in Ashkenazi Jews and their purported role in this intelligence process. While seemingly complimentary at first glance, anyone even moderately familiar with Jewish history can immediately grasp how contentions such as these (respecting ostensible Jewish exceptionality or "genius") can prove a breeding ground for racism (reminiscent of eugenics[8]).[9]

Harvard University's embattled former president, Lawrence H. Summers, is no exception, as he too was the target of vociferous attacks and calls for resignation[10] following comments he made suggesting that innate genetic differences between the sexes may be one explanation for why fewer women succeed in careers in math and science. In the same vein, the comments are a source of particular unease by reason of their purported scientific justification.[11]

These incidents and others unequivocally highlight the growing impact of emerging genomics on traditional human rights discourse and protective mechanisms. As a comparative survey of the Canadian and American normative framework undertaken herein reveals, traditional human rights theory and instruments may not lend themselves particularly well to the radical changes occasioned by genomic science. Indeed, the above-cited example respecting the purported "intelligence" of certain cohorts illustrates how the results of individual screenings could be used to make *general* assumptions about entire ethnic or gender groups.[12] The *public* human rights ramifications of genetic information are becoming impracticable to ignore,[13] yet the individualistic orientation adopted by the tools for their promotion and protection subsist.

Tellingly, while the debate among jurists on point has for the most part focused on whether genetic information is an *exceptional* form of *personal* information,[14] warranting separate normative treatment, it has done so almost exclusively in the insurance[15] and employment[16] – specifically, from the perspective of the individual subjected to genetic screening.[17] But what of persons belonging to what the Supreme Court of Canada refers to as "historically vulnerable groups"?[18] Curiously, the *social*[19] human rights implications of ethnicity through the prism of genomic knowledge have been the object of little scrutiny.[20]

Notwithstanding, it bears repeating that some forms of research may carry risks of public import[21] extending far beyond the individuals[22] undergoing genetic testing,[23] particularly when these individuals belong – or are externally perceived as belonging – to a vulnerable gender or ethnic group.[24]

To complicate matters even further, personal and group interests may quite plausibly diverge in the genetic context, thus shattering the oft-presumed intersection of interests between a minority group member and her community that the law seems to take for granted.[25] We need look no further for an example than the BRCA gene controversy,[26] whereby certain individual Jewish women may wish to be tested for the gene, whereas at the same time, Jewish women as a community are increasingly voicing concern over the stigma of the "Jewish breast cancer gene"[27] and its collective implications.[28]

This is the dilemma of *intersectionalities*[29] that the law pertaining to discrimination must struggle to address in the area of genetics.[30] Conceived from this angle, even the proposed "therapeutic-benefit test,"[31] which advocates genetic testing only if it offers health benefits to the subject, may be of little use since while individual may indeed profit,[32] the test results may eventually serve to promote harmful stereotypes of the group with which the tested person is associated – even though he may not self-identify with the cohort in question.[33]

One such example – arguably most pressing to inspect from a human rights perspective – is the study of behavioral propensities (most notably susceptibility to violence)[34] as they intersect with ethnicity.[35] As shall be further discussed in Part II, scientists have already uncovered "neural mechanisms of genetic risk for impulsivity and violence in humans." [36]

While it is beyond the scope of this present endeavor to fully flesh out these multiple and highly complex issues, the implications for human rights both within and without criminal justice are staggering, particularly when we are reminded that the very term "race" was coined in the context of "scientific" research.[37] If "the harms of racially targeted testing extend beyond the individual to entire social groups" as Lee *et al*. suggest,[38] can even *distinctive* statutory vehicles fashioned within "our current, individually focused system for protecting human subjects in research… provide adequate protection" from the *public* consequences of genetic testing?[39]

My purpose here again is to spark preliminary reflection on this very matter, past the prevailing individualistic privacy discourse. Cognizant of the value and tremendous potential of genetic research, I will attempt to revisit the legal analysis of genetic testing in terms of human rights, in an effort to highlight the potential risk of discrimination that biobanking may inadvertently have upon ethnic or other vulnerable groups and the need to adjust individually-oriented human rights theory accordingly. By endeavoring to *reframe* the legal debate surrounding genetics – now focusing primarily, if not exclusively, on personal information in the employment and insurance context – with a view to realigning legal discourse with the imperatives of remarkable scientific advances, this initial reflection serves as a prelude to rethinking the relevant normative framework in light of the leveled critiques. From a human rights perspective, such an approach would recognize the *multiplicity of interests* at stake and the interplay of intersectionalities in order to promote more informed policy decisions.

To sum up the predicament addressed in this article: First, as discussed in Part I, which summarily exposes the relevant *Charter* provisions, the debate is almost entirely confined to the employment/insurance ramifications of genetic discrimination.[40] Secondly, the law generally assumes identity of interest between an individual and his or her social group, and thirdly, it seems to disregard the stoicism[41] with which the public tends to greet scientific data,[42] and the media's oftentimes simplistic presentation thereof as addressed in Part II. Finally Part III sets forth a number of preliminary recommendations aimed at forming the basis for addressing the leveled critiques.

Part I

With an eye towards igniting debate on these pressing questions, this article will first briefly review the *Charter* framework relevant to the protection of human rights in the genetics context in Canada. As conducting a thorough normative survey would be beyond the scope of this undertaking, the following concise *apercu* is tendered with the sole intention of highlighting the law's seeming single-minded focus on the individual ramifications of genetic information and its consequent insufficiency from a human rights perspective.

Individual rights

In contradistinction to what appears to characterize the American experience at the state level,[43] many Western democracies have chosen not to recognize "genetic exceptionality,"[44] preferring instead to let the traditional juridical mechanisms pertaining to personal information govern the matter. Regardless of the approach, such data has been construed primarily through the optic of *personal privacy* rather than dignity,[45] which follow the individualized approach.

Canada is no exception, having to date refrained from crafting any distinctive legislative vehicle to deal with genetic information[46] (apart from legislation dealing specifically with the use of DNA in criminal investigations and those relating strictly to reproductive technologies).[47] Instead, most provisions relevant to genetic discrimination are found in general norms drafted in abstract of genetics and often long prior to the so called "genetic revolution." Chief amongst these is Canada's constitutional law, data protection (privacy protecting measures) instruments, and human rights statutes. According to this approach, genetic discrimination can be dealt with under the normative structure designed for personal information and privacy generally. A closer look is mandated at this juncture.

The *Canadian Charter of Rights and Freedoms* offers some measure of protection for personal information from government intrusions. Based on the ICCPR, the *Charter* is an individualistic

document, whose focus is on individual – rather than collective rights – as much as it is on state rather than private infringements thereupon.[48] For our purposes, this document is most significant in light of the potential public or group implications of genetic testing – problems the *Charter* may be ill-equipped to address.

While *Charter* protections of personal information and privacy are by no means explicit (nor do they specifically pertain to genetic or even health information), the *Charter* is deemed a "living tree," able to evolve with the imperatives of the time, including advances in science and technology.

Therefore, while privacy is not actually an enshrined Charter value, privacy principles are gleaned from *Charter* jurisprudence, the most relevant provisions being s.7, liberty and security of the person and s.8, freedom from unreasonable search and seizure. While the right to privacy has been crowned the most natural casualty of improper genetic testing, it stands to reason that the social implications deriving therefrom are liable to affect group rights, most notably equality and dignity.

Arguably then, an equally pertinent *Charter* value relevant to the present context is section 15(1), which protects against prohibited discrimination and is said to be predicated on human dignity. It is precisely the dignity-based rationale that may best comport with the protection of sensitive information pertaining to group defamation. Particularly since in the leading case of *Law v. Canada* (Minister of Employment and Immigration) where the dignity prong of the equality test was set forth, the Supreme Court of Canada seemed to make a rare reference to group rights, declaring:[49] "Human dignity is harmed when individuals *and groups* are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society." (Emphasis added.) In a word, therefore, discrimination is to be assessed from the optic of dignity.

A few caveats: Here again, identity of interests between the individual and group is simply presumed. Furthermore, *Charter* rights are not absolute but may be reasonably violated, provided that the infringement is proportionally justified as per section 1 of the Charter (evaluated using the Oakes test). More importantly perhaps, only discrimination at the hands of government is constitutionally proscribed.

However, because *Charter* values are said to permeate the law's understanding of private dealings, the *Canadian Charter's* values must infuse the interpretation of all legislation, particularly provincial human rights codes.

Human rights instruments

While the *Charter's* own application to the private realm is at best indirect, provincial human rights instruments *explicitly* govern private dealings. Chief amongst them is the Quebec *Charter*, which unlike its counterparts is a document of quasi-constitutional stature. Moreover, in contradistinction to the *Canadian Charter*, the Quebec *Charter* offers explicit protection for privacy, equality and dignity.

Part II

While specific attention is rarely given to genetic information, any focus appears to be on the employment and insurance context. Remarkably, however, the question of the social implications of genetic discrimination has gone largely unconsidered by lawmakers and jurists in both countries.

In other words, while the U.S. has chosen to specifically legislate at the state level and Canada has not, both focus on employment and insurance from an individual perspective. Moreover, genetic discrimination seems to be construed through the prism of personal privacy. Nevertheless, it may in fact hold significant collective implications, as it gradually relates to defined ethnic groups. This shift may in turn invite us to revisit – perhaps even reframe – the debate.

Plainly put, while genetic information may very well resemble other forms of predictive health data for purposes of insurance and employment, its public ramifications, specifically its impact on popular understanding, or misunderstanding of race and ethnicity, appears rather distinctive and is therefore meritorious of closer examination.

The peculiarity of scientific data

To paraphrase Irwin Cotler that if science is indeed the "secular religion of our time,"[50] then the heightened preoccupation relating to the public impact of genetic information derives from its perceived flawlessness. Seen from that angle, its uniqueness if nowhere else lies in its peculiar ability to transform perceptions of the differences among us as "genetic" and therefore immutable,[51]

thus leading to a "medicalization" of racism or sexism[52] that is presented as scientific fact.[53]

Edifying on this last point, the emergence and popularity of "race science" in 19th century European academia resulted in a "belief, backed by the now unassailable authority of science, that racial groups were fixed and immovable, and that nature itself prescribed the domination of superior races over inferior races." [54] As Hudson warns, "We need to be especially wary of the kind of racism linked to the pronouncements of scientists"[55] if only by reason of its unparalleled tenacity. So deeply inculcated are the assertions of the so called "race science" of past centuries, that even subsequent unequivocal evidence of their accuracy could not entirely erase their poisonous vestiges. Scientists enjoy the trust that politicians have lost: Put on a white robe and earn quasi-automatic legitimacy.[56] What is more, members of both the media[57] and the legal profession tend to turn careful equivocal scientific assertions into unequivocal statements.[58] The paradox, as Arthur Caplan observes, is therefore as follows: "Although the predicting capacity of genetic information is flawed at best, people's perceptions of their genes [and those of others] is peculiar" (emphasis added) and indeed fatalistic if not utterly stoic. Dr. Caplan further points out that people tend to be convinced that genetic information is somehow "revealing about their inner blueprint or their inner programming."[59] For her part, Bartha Knoppers labels this "the phenomenon of reductionism," which she refers to as "genes are us, driven by the perception that you are your genes, and you are fatally determined and predisposed by your genetic code."[60]

As previously noted, this is most likely to occur indirectly, even insidiously, as individuals, who happen to belong to or be associated with ethnic or gender minorities susceptible to discrimination, independently seek out the therapeutic benefits of genetic testing. These results can be subsequently compiled used to draw general conclusions in their regard.

While genetic information may ultimately happily serve to disrupt simplistic and misleading notions of ethnicity from whence much of racism derives and potentially lead us to discard *dichotomous* terminology of "race,"[61] the stoicism with which the public tends to embrace "scientific" conclusions[62] arouses concern as to its potential manipulation. Policymakers frequently know too little about science to regulate effectively; the public knows even less.

A related worry is that non-genetic factors will be left unaddressed. As Lee *et al.* caution, "Human cultural identity is relegated to a simplistic biological standar… The elision of economic factors such as poverty, employment, and unequal access to resources… are subsumed within a genetics discourse that reifies notions of physiological difference."[63]

The Canadian Charter of Rights and Freedoms offers some measure of protection for personal information from government intrusions.

Importantly, genes only give us *part* of the picture as Yanai Ofran observes, offering the poignant example of Leptin: While mice lost a significant amount of weight, in clinical trials humans surprisingly did not, as scientists had discounted social facts. Ofran points out that people, unlike mice, eat for various social reasons – least amongst them, arguably, is hunger.[64]

As noted above, not only do genetic traits sometimes translate into physical and mental illnesses, they may also manifest themselves as tendencies towards certain behaviors, including violence. To use the example of the reported link between the MAOA gene and abnormally aggressive behavior, such as arson, attempted rape, and exhibitionism. This is far from fiction. A gene closely associated with violent behavior in men has been identified.[65]

In France, children of convicts and other violent offenders have been tested genetically at the embryonic stage, with a recommendation to follow-up with certain children until adulthood for violence propensities purportedly uncovered genetically.[66]

What will happen, as Müller-Hill has asked, if additional "crime genes" related to mutational events are identified and are found to vary in frequency among ethnic groups?[67] As Patrick S. Florencio correctly observes: "whereas non-genetically influenced behavior will be seen as mal-

leable and the product of free will, genetically influenced behavior will be misinterpreted as being unmalleable and beyond the control of the affected individual. This belief has been referred to as "neurogenetic determinism" or "genetic fatalism." [68]

Perhaps of greater concern, as noted, is that our individually centered system, which deems genetic information "personal", is arguably ill-equipped to deal with its public implications, especially where there is discord among particular group members regarding the benefits of testing.

To paraphrase Michel Rosenfeld in a different context, genetic information can "produc[e] individual injuries on account of group affiliation"[69] but also group injuries on account of individual testing. This in turn may, as noted, give rise to a conflict between the best interests of the test subject and his or her group, which the law has yet to address.

Part III

What then can and must we do?

The modest purpose of this endeavor is to draw attention to the social ramifications of genetic discrimination as a first yet necessary step towards reframing the "genetic" legal debate, now narrowly centering chiefly if not solely on personal information primarily in the employment and insurance context.

It is likewise to ensure that any legal responses that are ultimately offered are informed by rights – both individual *and* group – rather than considerations relating exclusively to privacy or health, since the "therapeutic benefits test" as noted, may not always offer the requisite solution in this context. From a human rights perspective, such an approach would recognize multiplicity of interests at stake, beyond privacy, in order to promote more informed policy decisions, most importantly, as noted, human dignity.[70] Finally, in light of science's above-described peculiar propensity to elicit stoic and resilient public acceptance and the simplistic distortion of scientific data in the media, the hope is to similarly invite a renewed focus on the language employed by genetic researchers and those who report on their findings and its potential social implications.

Researchers, as Bhopal cautions, "cannot be responsible for the public's perception of genetics but must be aware of the potential impact of their work on social relations,"[71] particularly when the scientific accuracy of genomic knowledge is – at this early stage – questionable at best.[72] The same holds true for the media and those who premise their arguments on genetic data, *a fortiori*. In her own research, Celeste Condit[73] has emphasized the need to subject the language that genomic researchers employ in their genetic accounts for human variation to greater scrutiny.[74] Even more so do those outside the scientific community, whose parlance tends to be far more unequivocal, need to tread with caution in this vein. It is here perhaps that jurists and indeed the law may have the most valuable informative role to play through increased multidisciplinary collaboration in the area of genomics, for "when we discuss genetics, our words have different meanings." [75]

The discursive constructions of law often dictate the enforcement of prevailing moral and social norms and serve to mold our perception of issues most sensitive to the body politic, such as the exogenous imposition of ethnic or gender/sexual identity. While the intersection between law and culture is nothing new, the manner in which law's linguistic sphere of influence impinges upon budding genomic knowledge pertaining to gender and ethnicity impels further consideration from the optic of human dignity, without the employment and insurance context.

The ultimate goal of human rights scholarship in the area of genetics therefore appears to be developing a broader, more inclusive framework that will assist policy makers and courts in their quest to confront the impact of new technology on the law's development, an undertaking that will occupy both lawmakers and the courts as they struggle with law in the age of the ongoing genomic revolution.

The article (a more detailed version) is forthcoming in the *Journal of Law Medicine and Ethics.*

Notes

[1] S. Simitis, "Reviewing Privacy in an Information Society", *University of Pennsylvania Law Review* 135 (1987): 707 at 709.

[2] E. T. Juengst, "FACE Facts: Why Human Genetics Will Always Provoke Bioethics", *Journal of Law, Medicine & Ethics* 32, no. 267 (2004), at 270-272.

[3] S. Labman, "Genetic Prophecies: The Future of the Canadian Workplace", *Manitoba Law Journal* 30, no. 2 (2004): 227-247 Labman provides the example of a company that screened only African Americans for sickle-cell anemia indicators. The FDA also approved a drug exclusively tailored to African Americans; see S. Saul, "FDA Approves a Heart Drug for African Americans", *New York*

Times, June 24, 2005, at C2. For a thorough discussion and critique of the advent of "race-based medicine" and medical "racial profiling", see S. Hoffman, "Racially-Tailored Medicine Unraveled", *American University Law Review* 55 (2005): 395-452, *available at* <http://www.wcl.american.edu/journal/lawrev/55/hoffman.pdf?rd=1> (last visited February 21, 2007).

[4] See e.g., I. Berlin, "Two Conceptions of Liberty" in Four Essays on Liberty (Oxford University Press, 1969).

[5] CTV.ca News Staff, "Quebec Radio Shrink Sparks Complaints of Racism", (September 29, 2005), *available at* <http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20050928/mailloux_defends_050928/20050928?hub=Canada> (last visited April 17, 2006).

[6] *Ibid*. On his French-language program, broadcast by radio station CKAC, Pierre Mailloux suggested the artificial selection inherent to slavery left black and Native North Americans with an intellectual deficit: "Those blacks who were too intelligent, too tricky, they were slaughtered", Mailloux said. "It's the consequence of an artificial selection. They can run faster, they're stronger, but their IQs are consistently lower."

[7] G. Cochran, J. Hardy, and H. Harpending, "Natural History of Ashkenazi Intelligence", *Journal of Biosocial Science* 35, no. 5 (2006): 659-693, available at <http://homepage.mac.com/harpend/.Public/AshkenaziIQ.jbiosocsci.pdf> (last visited February 21, 2007).

[8] See J. A. Barondess, "Care of the Medical Ethos, with Some Comments on Research: Reflections after the Holocaust", *Perspectives in Biology and Medicine* 43, no. 3 (2000): 308-324. As Green *et al.* note, "Historically, genetic information has been used to discriminate against individuals and groups, particularly Jews and other minorities." See H. Markel, "The Stigma of Disease: Implications of Genetic Screening", *American Journal of Medicine* 93, no. 2 (1992): 209-215. Markel observes that stigmatization and ostracism of those who are found to have "undesirable" traits after genetic screening could increase. Comparing genetic screening to quarantine, he reminds us that the healthy separated themselves from the "ill", providing two examples of when genetics were applied to American social policy: the early 20th century eugenics movement and the 1970s screening programs for sickle cell anemia.

[9] It should be noted that not surprisingly perhaps, interest in Jewish genetics has been particularly keen. Thus, for instance, the tradition that Kohanim (Jewish High Priests of the Jerusalem Temple) are descended from Aaron was supported by genetic testing. See Skorecki et al., "Y Chromosomes of Jewish Priests", *Nature* 385, no. 6611 (1997): at 32. Research similarly suggests that a significant percentage of Ashkenazi maternal ancestry is also of Middle Eastern origin. A 2006 study by Behar *et al*., based on haplotype analysis of mitochondrial DNA (mtDNA), suggested that about 40% of the current Ashkenazi population is descended matrilineally from just four women. These four "founder lineages" were "likely from a Hebrew/Levantine mtDNA pool" originating in the Near East in the first and second centuries CE. According to the authors, "The observed global pattern of distribution renders very unlikely the possibility that the four aforementioned founder lineages entered the Ashkenazi mtDNA pool via gene flow from a European host population." See D. M. Behar et al., "The Matrilineal Ancestry of Ashkenazi Jewry: Portrait of a Recent Founder Event", *The American Journal of Human Genetics* 78 (2006): 487-497.

[10] Summers ultimately resigned. See Letter from L. H. Summers, "Harvard University: The Office of the President", (February 21, 2006), *available at* <http://www.president.harvard.edu/speeches/2006/0221_summers.html> (last visited February 21, 2007).

[11] In Summers' January 14 remarks, he proposed that innate genetic differences between the sexes may be one explanation for why fewer women succeed in math and science careers. See National Organization for Women, Press Release, *NOW Calls for Resignation of Harvard University's President,* (January 20, 2005), National Organization for Women Website, *available at* <http://www.now.org/press/01-05/01-20-Harvard.html> (last visited February 21, 2007).

[12] See R. A. Zilinskas and P. J. Balint, eds., *The Human Genome Project and Minority Communities: Ethical, Social and Political Dilemmas*, (Westport, CT: Praeger, 2001).

[13] M. A. Rothstein, ed., *Genetic Secrets: Protecting Privacy and Confidentiality in the Genetic Era* (New Haven: Yale University Press, 1997).

[14] A. Epstein, "The Legal Regulation of Genetic Discrimination: Old Responses to New Technology", *Boston University Law Review* 74 (1994): See R. M. Green and A. M. Thomas, "DNA: Five Distinguishing Features for Policy Analysis", *Harvard Journal of Law and Technology* 11, no. 3 (1998): 571-591. Green and Thomas state: "[T]he influx of genetic science into biomedicine and research raises the question of whether predictive or diagnostic information derived from the molecular analysis of DNA merit distinctive legal consideration or policy treatment." See C. S. Diver and J. Maslow Cohen, "Genophobia: What is Wrong with Genetic Discrimination?" *University of Pennsylvania Law Review* 149 (2001): 1439 See also G. J. Annas, "Genetic Prophecy and Genetic Privacy – Can We Prevent the Dream from Becoming a Nightmare?" American Journal of Public Health 85 (1995): 22(1): 109-34, 1996. [hereinafter cited as Annas, "Genetic Prophecy"]. Annas believes that genetic information is "uniquely private and personal" for three reasons: "It can predict an individual's likely medical future; it divulges personal information about one's parents, siblings, and children; and it has a history of being used to stigmatize and victimize individuals." See also L. O. Gostin and J. G. Hodge Jr., "Genetic Privacy and the Law: An End to Genetic Exceptionalism", *Jurimetrics* 40, no. 1 (1999): 21-58 (hereinafter cited as Gostin and Hodge, "Genetic Privacy").

[15] R. J. Pokorski, "Use of Genetic Information by Private Insurers", in T. F. Murphy and M. A. Lappé, eds., *Justice and the Human Genome Project*, (Berkeley: University of California Press, 1994): at 91; T. E. Morelli, "Genetic Discrimination by Insurers: Legal Protections Needed From Abuse of Biotechnology", *HealthSpan* 9:8 (1992): 811R. Mykitiuk and S. Penney, "Screening for Deficits: The Legal and Ethical Implications of Genetic Screening and Testing to Reduce Health Care Budgets", *Health Law Journal* 3 (1995): 235 ((1995) 3 *Health Law Journal* 235-268.) For a comparative perspective see T. Lemmens, "Insurance and Human Genetics: Approaches to Regulation" in David N. Cooper, ed., *Nature Encyclopedia*

of the Human Genome (New York: Nature Publishing Group, 2003): 495-498. T. Lemmens and P. Bahamin, "Genetics in Life, Disability and Additional Health Insurance in Canada: A Comparative Legal and Ethical Analysis" in B. M. Knoppers, ed., *Socio-Ethical Issues in Human Genetics* (Montreal: Yvon Blais, 1998): 108-275; T. Lemmens, "Can Insurance Law Accommodate the Uncertainty Associated with Preliminary Genetic Information?" Canada Bar Review 83 (2004): 357-409); B. M. Knoppers et al., "Genetics and Life Insurance in Canada: Points to Consider" supplement to "Physicians, Genetics and Life Insurance", *Canadian Medical Association Journal* 170 (2004): 1421-1423, Canadian Medical Association Website, *available at* <http://www.cmaj.ca/cgi/data/170/9/1421/DC2/1> (last visited February 21, 2007) ; T. Lemmens, "Genetics and Insurance Discrimination: Comparative Legislative, Regulatory and Policy Developments and Canadian Options", Special Edition: Precedent and Innovation: Health Law in the 21st Century, *Health Law Journal*, Special Supplement 41 (2003); T. Lemmens, "Selective Justice, Genetic Discrimination and Insurance: Should We Single Out Genes in Our Laws?" *McGill Law Journal* 45 (2000): 347-412 [hereinafter cited as Lemmens, "Selective Justice"].

[16] P. S. Miller, "Is There a Pink Slip in my Genes? Genetic Discrimination in the Workplace", *Journal of Health Care Law and Policy* 3 (2000): 225-265 P. S. Miller, "Genetic Discrimination in the Workplace", *Journal of Law, Medicine & Ethics* 26, no. 3 (1998): 189-197; P. S. Miller, "Analysing Genetic Discrimination in the Workplace" in S. Krimsky and P. Shorett, eds., *Rights and Liberties in the Biotech Age: Why We Need a Genetic Bill of Rights* (Rowman & Littlefield, 2005): 173-178 Lanham:; L. B. Andrews, M. J. Mehlman, and M. Rothstein, *Genetics: Ethics, Law & Policy* (St. Paul, MN: West Publishing, 2002); Paul Steven Miller, "Commentary: Genetic Discrimination in the Workplace", Genetics in Medicine 3 (2001) 165-168; M. R. Natowicz, J. K. Alper, and J. S. Alper, "Genetic Discrimination and the Law", *American Journal of Human Genetics* 50 (1992): 465-475.

[17] D. Hellman, "What Makes Genetic Discrimination Exceptional?" *American Journal of Law and Medicine* 29 (2003): 77-116; P. S. Miller, "Genetic Discrimination: Does it Exist? What are its Implications?" *Journal of Law and Health* 16 (2001): 39- see generally, T. Lemmens and D. R. Waring, eds., *Law and Ethics in Biomedical Research: Regulation, Conflict of Interest, and Liability* (Toronto: University of Toronto Press, 2006). See also L. O. Gostin and J. G. Hodge Jr., "Personal Privacy and Common Goods: A Framework for Balancing under the National Health Information Privacy Rule", *Minnesota Law Review* 86 (2002): 1439-1479.

[18] *Law v. Canada (Minister of Employment and Immigration)*, 1 S.C.R. 497 at paragraph 16 (1999), Canadian Legal Information Institute Website, *available at* <http://www.canlii.org/ca/cas/scc/1999/1999scc17.html> (last visited February 21, 2007) [hereinafter cited as Law].

[19] See G. Bernstein, "Accommodating Technological Innovation: Identity, Genetic Testing and the Internet", *Vanderbilt Law Review* 57 (2004): 963-1040. Bernstein suggests "a socially oriented approach that focuses on the impact of technological innovation on social structures, institutions, and values and on our ability to mold these social influences by restructuring uses of new technologies: reciprocal interaction between the technological, social, and legal spheres – our normative conceptions of identity; genetic testing and the Internet continuously alter the social structures through which we perceive our identity, thereby causing social transformation."

[20] R. Bhopal, "Is Research into Ethnicity and Health Racist, Unsound, or Important Science?" *British Medical Journal* 314 (1997): 1751-1756.

[21] T. Caulfield and G. Robertson, "Eugenic Policies in Alberta: From the Systematic to the Systemic?" *Alta. Law Review* 35 (1996): 59-79.

[22] G. J. Annas, "Mapping the Human Genome and the Meaning of Monster Mythology", *Emory Law Journal* 39 (1990): 629-664 [hereinafter cited as Annas, "Mapping the Human Genome"].

[23] T. H. Murray, "Genetic Exceptionalism and 'Future Diaries': Is Genetic Information Different from other Medical Information" in M. A. Rothstein, ed., *Genetic Secrets: Protecting Privacy and Confidentiality in the Genetic Era* (New Haven: Yale University Press, 1997): at 60. See also M. A. Rothstein, "Genetic Privacy and Confidentiality: Why They are So Hard to Protect", *Journal of Law, Medicine & Ethics* 26, no. 3 (1998): 198-204.

[24] L. Gannett, "Racism and Human Genome Diversity Research: The Ethical Limits of 'Population Thinking'", *Philosophy of Science* 68 (2001): S479. Gannett's article raises concerns of racism in the Human Genome Diversity Project by UNESCO, noting that the medical information obtained thereby could be misused by people seeking to propagate racism.

[25] S. Becker, "Constitutional Classifications and the 'Gay Gene'", *Journal of Law and Health* 16 (2001): 27-32.

[26] For a general discussion see B. M. Dickens, N. Pei, and K. M. Taylor, "Legal and Ethical Issues in Genetic Testing and Counselling for Susceptibility to Breast, Ovarian and Colon Cancer", *Canadian Medical Association Journal* 154 (1996): 813818 .

[27] Considered to be a side effect of genes selected for their role in boosting brain function – a thesis set forth in the above-cited research; see Cochran, Hardy, and Harpending, *supra* note 7. See also Labman, *supra* note 4. The article discusses people's reticence to participate in 'genetic' cancer research studies for fear of being stigmatized as having a predisposition towards cancer. See also Green and Thomas, *supra* note 15, at 586-587.

[28] S. G. Stolberg, "Concern Among Jews is Heightened as Scientists Deepen Gene Studies", *New York Times*, April 22, 1998, at A24. See H. T. Greely, *Neuroethics*: *The Neuroscience Revolution, Ethics, and the Law,* paper presented for the Regan Lecture, April 20, 2004, Markkula Center for Applied Ethics Website, *available at* <http://www.scu.edu/ethics/publications/submitted/greely/neuroscience_ethics_law.html>. Somewhere between 50 and 85 percent of women born with a pathogenic mutation in either of those genes will get breast cancer; 20 to 30 percent (well under half) will get ovarian cancer.

[29] L. Soleymani Lehmann et al., "A Population-Based Study of Ashkenazi Jewish Women's Attitudes toward Genetic Discrimination and BRCA 1/2 Testing", *Genetics in Medicine* 4 (2003): at 346, 348 (observing that thirteen

percent of Jewish women surveyed feared that "that BRCA 1/2 testing will lead to increased anti-Semitism"). J. G. Hodge Jr., "Health Information Privacy and Public Health", *Journal of Law, Medicine & Ethics* 31, no. 4 (2003): 663-683 (hereinafter cited as Hodge, "Health Information Privacy").

[30] J. K. Frizzley, "Ethical Issues in Breast Cancer Susceptibility Testing", *Health Law Review* 6, no. 2 (1991): 14-23.

[31] P. S. Florencio, "Genetics, Parenting and Children's Rights in the Twenty-First Century", *McGill Law Journal* 45 (2000): 527-558 ; see generally K.C. Glass, "Research Involving Humans" in J. Downie, T. Caulfield, and C. M. Flood, eds., Canadian Health Law and Policy, 2nd ed. (Toronto: Butterworths Canada, 2002): 459-500 E. J. Emanuel et al., eds., *Ethical and Regulatory Aspects of Clinical Research:* Readings and Commentary (Baltimore, MD: Johns Hopkins University Press, 2003); S. Krimsky, "Human Gene Therapy: Must We Know Where to Stop Before We Begin", *Human Gene Therapy* 1 (1990): 71.

[32] A. Goldworth, "Informed Consent in the Genetic Age", *Cambridge Quarterly of Healthcare Ethics* 8 (1999): 393-400. For example, Goldworth focuses on the importance of autonomy and the need to give informed consent.

[33] See Stolberg, *supra* note 30.

[34] See Annas, "Mapping the Human Genome", *supra* note 23.

[35] Ritchie Witzig, "The Medicalization of Race: Scientific Legitimization of a Flawed Social Construct", *Annals of Internal Medicine* 125 (1996): 675-XXX.

[36] Regarding impulsive violence, see the groundbreaking research conducted by A. Meyer-Lindenberg *et al*., "Neural Mechanisms of Genetic Risk for Impulsivity and Violence in Humans", *Proceedings of the National Academy of Sciences of the United States of America* 103 (2006): 6269-6274 [hereinafter cited as Meyer-Lindenberg, "Neural Mechanisms"]. "Our data identify differences in limbic circuitry for emotion regulation and cognitive control that may be involved in the association of *MAOA* with impulsive aggression, suggest neural systems-level effects of X-inactivation in human brain, and point toward potential targets for a biological approach toward violence." See also Andreas Meyer-Lindenberg *et al*., "Neural Correlates of Genetically Abnormal Social Cognition in Williams Syndrome", *Nature Neuroscience* 8 (2005): 991-993, Unit for Systems Neuroscience in Psychiatry Website, *available at* <http://snp.nimh.nih.gov/Papers/Nature%20Neuroscience%202005c.pdf> (last visited February 21, 2007).

[37] See N. Hudson, "The Race Debate", *The Globe and Mail*, June 20, 2005, at A18. "The term 'race,' understood as a label for large groups characterized by traits such as skin colour, did not emerge until the late 18th century when it was coined by scientists Georges-Louis Leclerc Buffon and Johann Friedrich Blumenbach."

[38] S. Soo-Jin Lee, J. Mountain, and B. A. Koenig, "The Meanings of 'Race' in the New Genomics: Implications for Health and Disparities Research", 1 *Yale Journal of Health Policy, Law, and Ethics* 1 (2001): at 33-75, at 60.

[39] See J. Burley, ed., *The Genetic Revolution and Human Rights: The Oxford Amnesty Lectures* 1998 (Oxford: Oxford University Press, 1999). See also R. E. Howard-Hassmann, "Canadians Discuss Freedom of Speech: Individual Rights Versus Group Protection", *International Journal on Minority and Group Rights* 7, no. 2 (2000): 109-138. Although the focus of this particular piece is freedom of expression, its discussion of individual versus group rights, with particular respect to vulnerable groups, is relevant.

[40] See also D. L. Wiesenthal and N. I. Wiener, "Privacy and the Human Genome Project", *Ethics and Behavior* 6 (1996): 189-202.

[41] R. S. Schwartz, "Racial Profiling in Medical Research", *New England Journal of Medicine* 44 (2001): 1392-1393; see Annas, *supra* note 15. Annas argues Federal protections are lacking.

[42] B. M. Knoppers, "Human Genetics: Parental, Professional and Political Responsibility", *Health Law Journal* 1 (1993): 13-23.

[43] At the state level only, as addressed *infra*. For a more detailed discussion see S. Hoffman, "Legislation and Genetic Discrimination", *Journal of Law and Health* 16 (2001): 47-51.

[44] See Gostin and Hodge, *supra* note 15.

[45] *Ibid*. See also P. S. Florencio and E. D. Ramanathan, "Secret Code: The Need for Enhanced Privacy Protections in the United States and Canada to Prevent Employment Discrimination based on Genetic and Health Information", *Osgoode Hall Law Journal* 39 (2001): 77. 116.

[46] T. Lemmens forcefully argues that anti-discrimination legislation is not necessarily required as it is doubtful that genetic information can be demarcated from other health related data for purposes of insurance, for instance: "It is debatable whether genetic information is sufficiently distinct from other medical information as to justify its special treatment by the law, such as through the enactment of specific genetic privacy and anti-discrimination legislation." (See Lemmens, *supra* note 16, at 83).

[47] In Canada, the only legislation that deals directly with genetic information, outside of the DNA warrants and other criminal law stuff in the Code, are the provisions dealing with human cloning in the *Assisted Human Reproduction Act,* R.S.C. 2004 c. 2, s.40.

[48] This is of particular concern in light of what is described as the likely expansion of the private market for genetic testing. For a more detailed discussion see B. Williams-Jones, "Private Genetic Testing in Canada: A Summary", *Health Law Review* 9 (2001): 10, Health Law Institute Website, *available at* <http://www.law.ualberta.ca/centres/hli/pdfs/hlr/v9_3/brynfrm.pdf> (last visited February 21, 2007). In the same vein, see T. A. Caulfield, M. M. Burgess, and B. Williams-Jones, "Providing Genetic Testing through the Private Sector – A View from Canada", *Canadian Journal of Policy Research* 2 (2001): 72-81, Canadian Journal of Policy Research Website, *available at* <http://www.isuma.net/v02n03/caulfield/caulfield_e.shtml> (last visited February 21, 2007). The authors observe: "Genetic testing technologies are rapidly moving from the research laboratory to the market place. Very little scholarship considers the implications of private genetic testing for a public health care system such as Canada's. It is critical to consider how and if these tests should be marketed to, and purchased by, the public. It is also imperative to evaluate the extent to which genetic tests are or should be included in Canada's public health care system, and the

impact of allowing a two-tiered system for genetic testing. A series of threshold tests are presented as ways of clarifying whether a genetic test is morally appropriate, effective and safe, efficient and appropriate for public funding and whether private purchase poses special problems and requires further regulation. These thresholds also identify the research questions around which professional, public and policy debate must be sustained: What is a morally acceptable goal for genetic services? What are the appropriate benefits? What are the risks? When is it acceptable that services are not funded under health care? And how can the harms of private access be managed?"; see also N. A. Holtzman, "The UK's Policy on Genetic Testing Services Supplied Direct to the Public – Two Spheres and Two Tiers", *Community Genetics* 1 (1998): at 48-52, at 49; and T. A. Caulfield and B. Williams-Jones, eds., *The Commercialization of Genetic Research: Ethical, Legal and Policy Issues* (New York: Kluwer Academic/Plenum Publishers, 1999): at 181.

[49] The Honorable Robert K. Rae, "The Courts and Group Rights in Canada", *Saint Louis University Law Journal* 42 (1997): 539-544. See *Law*, *supra* note 20

[50] Irwin Cotler refers to human rights as the "secular religion of our times" in "Human Rights and the New Anti-Jewishness", *Justice* 38 (2004): at 24-30, at 27.

[51] "The root of genetic discrimination is what George Annas has dubbed "genism", which he defines as "the theory that distinctive human characteristics and abilities are determined by genes."

[52] With respect to women particularly, see F. Miller et al., *eds., The Gender of Genetic Futures: The Canadian Biotechnology Strategy, Women and Health. Proceedings of a National Strategic Workshop Held at York University, February* 11-12, 2000 (Toronto: York University, 2000), National Network on Environments and Women's Health Website, *available at*<http://www.yorku.ca/nnewh/english/pubs/genderofgeneticfuturesfull.pdf > (last visited February 22, 2007).

[53] As was the case of the above-cited Montreal psychiatrist. As Barondess warns, "[w]e face the possibility of a new eugenics that is immensely more powerful because it is based on valid science." See Barondess, *supra* note 9.

[54] See Hudson, *supra* note 39.

[55] *Ibid*.

[56] For a more detailed reflection on the trust accorded scientists from a sociology perspective, see K. M. Leisinger, "Science and Public Trust", lecture presented to the Engelberg Forum, October 2002, Novartis Foundation for Sustainable Development Website, *available at* <http://www.novartisfoundation.com/pdf/leisinger_science_public.pdf> (last visited February 22, 2007).

[57] See J.-P. Rogel, *Genetique et Medias: Histoire d'un Malentendu?*, paper presented to When Science Becomes Culture International Symposium, April 1994, Centre interuniversitaire de recherche sur la science et la technologie Website, *available at* <http://www.cirst.uqam.ca/PCST3/PDF/Communications/ROGEL.PDF> (last visited February 22, 2007). See above article for a discussion on the media's tendency to aggrandize and unequivocate scientists' statements relating to their research in genetics.

[58] T. Duster, "Human Molecular Genetics and the Subject of Race: Contrasting the Rhetoric with the Practices in Law and Medicine", keynote address presented to the West Harlem Environmental Action conference and community dialogue on Human Genetics, Environment, and Communities of Color: Ethical and Social Implications, February 2002. See generally W. M. Sage, "The Lawyerization of Medicine", *Journal of Health Policy* 26 (2001): 1179-1195.

[59] According to Dr. Caplan, people tend to believe that their genes are somehow "revealing about their inner blueprint or their inner programming." See A. Caplan, "Are We Ready for Mass Genetic Testing: Ethical and Social Hurdles?", lecture presented to the Annual Meeting of Women in Biotechnology, October 2002, at 5, New York University School of Medicine: Research Computing Resource Website, *available at* <http://mcrcr0.med.nyu.edu/training/caplan.pdf > (last visited February 22, 2007).

[60] B. M. Knoppers, "Overview of Law and Policy Challenges", Special Issue, *Louisiana Law Review* 66 (2005) 21-31.

[61] See Gannett, *supra* note 25. See also Duster, *supra* note 85.

[62] J. C. Hoeffel, "The Dark Side of DNA Profiling: Unreliable Scientific Evidence Meets the Criminal Defendant", *Stanford Law Review* 42 (1990): 465-492.

[63] A related issue is the growing enthusiasm for drugs that are tailored for use with specific racial or ethnic groups. This concept is based on the problematic assumption that race can be used as a visible marker for a certain genotype, an assumption that is bound to be false in some cases and could lead to stereotyping with serious health implications. Studies have shown that existing drugs for treatment of cardiac patients were not effective in African Americans. See e.g., D. V. Exner et al., "Lesser Response to Angiotensin-Converting-Enzyme Inhibitor Therapy in Black as Compared with White Patients with Left Ventricular Dysfunction", *New England Journal of Medicine* 344 (2001): 1351-1357. (For a good review, see R. S. Cooper, J. S. Kaufman, and R. Ward, "Race and Genomics", *New England Journal of Medicine* 348 (2003): 1166-1170. See J. Kahn, "How a Drug Becomes 'Ethnic': Law, Commerce, and the Production of Racial Categories in Medicine", *Yale Journal of Health Policy Law and Ethics* 4:1 (2004): 1-46), for a very interesting discussion of how the FDA subsequently approved a "new" drug exclusively for use in African Americans, essentially allowing the drug company to extend patent protection on an existing drug. If these kinds of drugs continue to be developed, it could lead to a surge in the number of individuals seeking testing, which in turn could further enhance the idea in the general population that cardiovascular disease in African Americans is entirely genetic, when in fact it is just as likely to be the result of poor diet and other social determinants of health factors related to systematic oppression and poverty.

[64] Y. Ofran, "What Can We (and What Can't We) Infer from Biological Information (2005)", University of Haifa Faculty of Law Website, *available at* <http://law.haifa.ac.il/events/event_sites/gen/Presentations/yanay.pdf> (last visited February 22, 2007).

[65] See Meyer-Lindenberg, *supra* note 38: "Our data identify differences in limbic circuitry for emotion regulation and

cognitive control that may be involved in the association of *MAOA* with impulsive aggression, suggest neural systems-level effects of X-inactivation in human brain, and point toward potential targets for a biological approach toward violence."

[66] S. Simitis, *The Legal Limits of Genetic Research and Results*, report presented to the XIIth Congress of the International Academy of Comparative Law, July 2006.

[67] B. Müller-Hill, "Truth, Justice, and Genetics", *Perspectives in Biology and Medicine* 43 (2000): 577-583.

[68] See Annas, *supra* note 15; see also E. Toback and H. M. Proshanky, eds., *Genetic Destiny: Race as a Scientific and Social Controversy* (New York: AMS Press, 1976).

[69] M. Rosenfeld, "Can Human Rights Bridge the Gap between Universalism and Cultural Relativism? A Pluralist Assessment Based on the Rights of Minorities", *Columbia Human Rights Law Review* 30 (1999): 249.

[70] J. Harris and J. Sulston, "Genetic Equity", *Nature Reviews Genetics* 5 (2004): 796-800, at 796.

[71] See Bhopal, *supra* note 21.

[72] While genetic knowledge is, as Professors Harris and Sulston astutely observe, at the zenith of its "prestige", its scientific accuracy, paradoxically, is not. These leading researchers, particularly Nobel laureate Sir Sulston, urge the development of a moral and legal "compass" to inject equity into the furtherance of genomic knowledge. (See Harris and Sulston, *supra* note 95).

[73] A professor of speech communication at the University of Georgia who specializes in biomedical issues.

[74] Condit argues: "Usually scientists are very careful in developing their technical vocabulary. But it's hard to describe the geographic dispersion of people properly – and they have these easy [racial] terms in their heads." Quoting Carolyn Abraham: "Despite the long and ugly social history of race, there is no clear-cut definition for the term. Is a person's race defined by skin colour, that most visible of markers? By language, country of birth, the food they eat or the religion they practice? Not even scientists can agree…[i]f you have a [genetic] sample from Nigeria, can you really say that it represents Africans? Is that the same as African Americans? [In some studies], Jews are white, sometimes they're not. Sometimes they're compared to Caucasians." C. Abraham, "Race", *The Globe and Mail*, June 18, 2005, at F1. See also C. Condit *et al.*, "Psycho-social, Clinical and Scientific Barriers to Race-Based Genetic Medicine?" (2004), University of Georgia Biomedical and Health Sciences Institute Website, *available at* <http://www.biomed.uga.edu/RaceBasedMedicine2.pdf> (last visited February 22, 2007).

[75] E. M. Petty and S. R. Kardia *et al.*, "Genetic Variation, Race and Culture", *Journal of Law, Medicine & Ethics* 29 (2001): 39.

WHAT RIGHTS FOR WOMEN? BRIAN DICKSON, THE *CHARTER*, AND GENDER ISSUES

ABSTRACT

Brian Dickson used his role as the first chief justice under the *Charter of Rights and Freedoms* to spell out crucial aspects of the new document, with a primary goal of exploring how individual and group rights can be protected against the dangers of governmental power. He also applied "*Charter* reasoning" to other cases in the field of human rights. Focusing on gender issues, I discuss Dickson's strategies as they were employed in three important cases. I then argue that Dickson's approach remains central in understanding how the Supreme Court functions in the current era.

In 1984, as the first *Charter* cases reached the Supreme Court, Chief Justice Bora Laskin died, and Prime Minister Pierre Trudeau appointed Brian Dickson, a member of the Court since 1973, to succeed Laskin. Soon after his appointment, Dickson reflected on the new document: "My own view is that the Charter marks the opening of a dramatic and historic new chapter in Canada's constitutional and jurisprudential evolution." He noted that the Court would need to provide "a liberal and purposive interpretation" of its provisions.[2]

The advent of the "*Charter* era" generated an array of important decisions that advance the position of women toward equality, and Dickson had a leading role in this revolution.[3] In this brief essay, I describe Dickson's general approach to the *Charter* and discuss his analysis in three gender-rights contests – one *Charter* case, and two human-rights statutory cases that were strongly influenced by "*Charter* reasoning." In the final paragraphs, I argue that Dickson's approach has had continuing influence in the field of gender, most recently in the area of gay rights.[4]

The influence of "*Charter* reasoning": Confronting bias at CNR

When the first cases under the *Charter* reached the Supreme Court, Dickson demonstrated his readiness to broaden the Court's role. In his first *Charter* opinion, *Hunter v. Southam* (1984), Dickson asserted that the Court must take a "broad, purposive approach," use the *Charter* "for the unremitting protection of individual rights and liberties," and be prepared to "constrain governmental action inconsistent with those rights and freedoms." Two years later, in *R. v. Oakes*, Dickson argued that the Court would be guided by fundamental values, including "respect for the inherent dignity of the human person [and] commitment to social justice and equality"; and he outlined an array of hurdles that would confront governmental action that might infringe on individual freedoms. In both cases, the Court was unanimous.[5]

Before Dickson and his colleagues could apply these broad principles to a *Charter* case concerned with women's rights, they faced an important case outside the *Charter*, under federal anti-discrimination legislation (the *Canadian Human Rights Act*). Here, it can be argued, Dickson demonstrated the critical and creative stance he was developing in the early Charter cases[6]. In *Action Travail des Femmes v. Canadian National Railway Co.* (1986), a federal human-rights tribunal found discriminatory attitudes at the Railway, and a workforce with only 6.11% women. The tribunal ordered CNR to hire "at least one woman for every

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four non-traditional jobs filled in the future," until the goal of "having 13% of non-traditional positions filled by women is achieved."

CNR objected to the proposed "mandatory quotas" as a remedy not permitted under the *Canadian Human Rights Act*, and the federal Court of Appeal agreed with the railroad. At the Supreme Court, however, Dickson endorsed the affirmative-action order. In his opinion for a unanimous court, Dickson argued that the tribunal's quota system was consistent with the intent of the federal law, and that the statute must be given a "large and liberal interpretation." The tribunal's strategy was essential, he concluded, as a way to "destroy discriminatory stereotyping and to create the required 'critical mass' " of women, so the behavior of CNR workers and senior officials might then become self-correcting.

The *Charter* applied to abortion rights

The 1988 *Morgentaler* case was perhaps the most contentious litigation in the field of women's rights during Dickson's years on the Court. We begin in 1969, when the Canadian Parliament acted to make abortion, previously a criminal act, legal in one circumstance: "when the continuation of the pregnancy of the woman would or would be likely to endanger her life or health" (*Criminal Code of Canada*, section 251). That determination would not be made by the woman and her physician, however; under s.251, it would be made by a "therapeutic abortion committee," comprised of "not less than three" doctors appointed by the hospital board where the abortion would take place. The doctor who would perform the abortion could not be one of the three. These and other hurdles in the law were challenged by advocates for women's rights, and Dr. Henry Morgentaler performed an abortion outside the guidelines. He was convicted and appealed, arguing that the law violated the *1960 Bill of Rights*. At the Supreme Court, Dickson wrote the majority opinion. "The values we must accept for the purposes of this appeal," he concluded in 1976, "are those expressed by Parliament" in the *Criminal Code.* Legislative supremacy won the day, the *1969 Act* was legal, and Dr. Morgentaler spent ten months in prison for violating the law.[7]

After the *Charter of Rights and Freedoms* was enacted, Dr. Morgentaler, now joined by two colleagues, again violated the requirements of section 251 of the *Criminal Code*. The government proceeded against the three, who argued that the law conflicted with section 7 of the *Charter*: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

The case reached the Supreme Court in 1986, and the Court finally handed down its decision in January, 1988.[8] In urging that section 251 be allowed to stand, counsel for the Crown used the legislative supremacy argument: "it is not the role of the judiciary… to evaluate the wisdom of legislation enacted by our democratically elected representatives, or to second-guess difficult policy choices that confront all governments." Dickson, who wrote one of four opinions in the case, embraced a quite different perspective: "Canadian courts are now charged with the crucial obligation of ensuring that the legislative initiatives… conform to the democratic values expressed in the *Canadian Charter of Rights and Freedoms*."

Dickson decided to focus only on the issue of whether section 251 met the "procedural standards of fundamental justice." The *Charter's* section 7 protected the "security of the person" and Dickson explored in detail the obstacles that the provinces and the hospitals placed in the path of a woman seeking an abortion. Hospitals were not required to establish "therapeutic abortion committees" – and most hospitals in Canada had not done so. Moreover, some committees "routinely refuse abortions to married women unless they are in physical danger." Dickson's conclusion: the system created by Parliament "is manifestly unfair. It contains so many barriers to its own operation" that the choice of an abortion will often be unavailable or available only at great cost. Section 251 violated "principles of fundamental fairness."

Dickson was joined by Justice Antonio Lamer and (in a separate opinion) by Justices Jean Beetz and Willard Estey. Dickson's analysis did leave open the possibility that Parliament could design "an appropriate administrative and procedural structure" to protect the lives and health of women, and also to protect fetal interests. Justice Bertha Wilson provided the fifth vote to overturn section 251, though she was not pleased with Dickson's approach; Wilson argued that any effort to compel a pregnant woman to meet externally imposed constraints, in the early stages of pregnancy, was a violation of the *Charter*. Until Parliament could design a "structure" that would meet the concerns of Dickson and his colleagues,

Canada would have no law restricting a woman's right to an abortion.

Advocates of women's rights were, by and large, pleased with Dickson's opinion and with the overall outcome. Those who would leave the choice on abortion to the woman and her doctor would have preferred wider Court support for Wilson's opinion. Yet the possibility, left open by Dickson and his colleagues, that legislators could design a constitutional law on abortion meant that the Supreme Court had, in a sense, dodged a bullet. The political pressure would be focused on Parliament, rather than on the Court, in solving a problem that has roiled the political waters through many decades in both Canada and the United States.[9]

Reversing *Bliss*: A broader view of equality

In *Bliss v. A.G. of Canada* (1979), Dickson and all his colleagues concluded that discrimination based on pregnancy was *not* discrimination based on sex, and therefore the equality provisions of the 1960 *Bill of Rights* statute were not violated.[10] Ten years later, the justices again faced the "pregnancy" issue. In 1983, Susan Brooks and two other employees of Canada Safeway filed a complaint, arguing that the reduced benefits provided for pregnant women – compared with benefits available for all other health-related absences from work – constituted discrimination on the basis of sex, in violation of Manitoba's human-rights statute. Writing for a unanimous Court, Dickson flatly rejected the rationale he had once embraced in *Bliss*: "It is difficult to conceive that distinctions… based upon pregnancy could ever be regarded as other than discrimination based upon sex."[11] Dickson noted that more recent cases – including *Action Travail* – support the position that human-rights statutes must be given a "large and liberal interpretation," and he cited a *Charter* case recently decided, *Andrews v. Law Society of B.C.* (1989), to underscore the need to interpret equality rights broadly. Finally, Dickson drew attention to an argument by Safeway's counsel: failure to include pregnancy – or any other health risks not covered in its plan – was not discrimination, the advocate had argued, but only a reasonable decision to cover some risks and not others. Such "underinclusion", Dickson commented, can be a "backhanded way of permitting discrimination" – and so it was in this case. Dickson's analysis here would be drawn upon in future gender cases.

The case reached the Supreme Court in 1986, and the Court finally handed down its decision in January, 1988. In urging that section 251 be allowed to stand, counsel for the Crown used the legislative supremacy argument: "it is not the role of the judiciary . . .

Dickson's influence on the evolution of Canadian Jurisprudence

The main outlines of Dickson's approach to the *Charter* have remained intact at the Court since he retired in 1990. The Court has continued to use a "broad, purposive approach" (Southam) and it has generally employed the *Oakes* test in addressing the issue of whether governmental action that infringes on *Charter* rights is justified.[12]

As the Canadian courts have moved into new and controversial domains, the perspective that Dickson brought to the *Charter* is evident. In *Vriend v. Alberta* (1998), for example, the Supreme Court majority emphasized that the *Charter* was "part of a redefinition of our democracy," providing new and independent powers to the judiciary. They then quoted Dickson's opinion in *Oakes*, emphasizing the importance of accommodating "a wide variety of beliefs, [and] respect for cultural and group identity." And they cited his opinion in *Brooks* to underscore the principle that "discrimination can arise from underinclusive legislation." Employing these standards, the Court concluded that the government of Alberta had violated the *Charter's* equality provisions, by omitting *sexual orientation* from a 1990 provincial law that barred discrimination based on race, religion and other grounds. As Justice Frank Iacobucci concluded, "the exclusion of sexual orientation from the [Alberta law] does not meet the requirements of the Oakes test and accordingly, it cannot be saved under s.1 of the *Charter*." The Court majority then inserted "sexual orientation" into Alberta's anti-discrimination statute.[13]

Three years later, provincial courts grappled with the question of same-sex marriage, and Dickson's way of framing and analyzing the issue shaped the judges' analysis. In Ontario, Judge

LaForme asserted that the issue must be approached by "applying a progressive approach" to the *Charter*, as "judiciously noted in *Hunter v. Southam.*"[14] He then argued that denying civil marriage to same-sex couples would violate the equality provisions of the *Charter*. But was that violation of *Charter* rights justifiable under section 1? Here LaForme quoted Dickson's *Oakes* opinion: "The Court must be guided" by such values as "commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity…". Given this perspective, it is not surprising that LaForme concluded, after reviewing the Attorney-General's arguments for excluding same-sex couples from civil marriage, that "the infringement of the Applicants' *Charter* rights cannot be justified under s.1 of the *Charter*." Marriage licenses would soon be issued to heterosexual and gay couples on an equal basis in Ontario and across Canada.

The gender issues of greatest moment in the Supreme Court have shifted since Chief Justice Dickson retired in 1990, but his influence – in creatively framing and vigorously exploring the major issues to be considered in protecting gender rights – remains.

References

[1] My thanks to my fellow panelists at the ACS conference in Ottawa in April 2007 – Mary Eberts, Louise Langevin and Andrée Côté – for their suggestions, and to James Hendry, Kristine Connidis and Warren Newman for their comments on a draft of this essay.

[2] Brian Dickson, "The Canadian Charter of Rights and Freedoms and its Interpretation by the Courts," Princeton, NJ, April 25, 1985, pp.7-18.

[3] Dickson served as chief justice from 1984 until his retirement in 1990. He was joined by Justices Bertha Wilson and Claire L'Heureaux-Dubé as forceful advocates for the rights of women.

[4] James Hendry argues (communications to the author, June 27, 28, 2007) that the Supreme Court's evolving support for human-rights legislation against discrimination preceded the *Charter*, and that my interpretation places too much emphasis on the *Charter* as crucial to Dickson's actions in the 1980s. My own view is that the *Charter* was the most important factor in Dickson's thinking on the issues discussed below; see for example his 1985 speech (quoted above) and his opinions in such early cases as *Southam* (below).

[5] *Hunter v. Southam*, [1984] 2 SCR 145; R. v. Oakes, [1986] 1 SCR 103.

[6] On Dickson's active intertwining of *Charter* and human-rights thinking, see Robert J. Sharpe and Kent Roach (2003), Brian Dickson: A Judge's Journey, esp. ch. 19. Toronto: University of Toronto Press, 2003.

[7] *Morgentaler v. The Queen*, [1976] 1 SCR 616.

[8] *R. v. Morgentaler*, [1988] 1 SCR 30.

[9] Even the sharpest critics of the Supreme Court's "generous interpretation" of *Charter* rights seemed to be persuaded by Dickson's framing of the problem as simply procedural: "The majority of Supreme Court justices struck down Canada's abortion law in *Morgentaler* not by explicitly siding with the pro-choice position but by emphasizing the procedural defects of the law." (F. L. Morton & Rainer Knopff, The *Charter* Revolution and the Court Party, Peterborough, ON: Broadview Press, 2000, p.158). In my own view, a close reading of Dickson's opinion leads to the conclusion that the "procedural" weaknesses in the statute – as described by Dickson and his colleagues – were probably fatal. Legislators, sharply divided as they were known to be, would have great difficulty agreeing on a statute to restrict the right of a woman to make her own decision (at least in the first 3-5 months of pregnancy) and still meet Dickson's standards of "fundamental justice." Later efforts to enact a bill failed.

[10] *Bliss v. Attorney-General Canada*, [1979] 1 SCR 183. Writing for the Court in *Bliss*, Justice Roland Ritchie offered the view that "pregnant women" were denied benefits "because they are pregnant and not because they are female." The *1971 Unemployment Insurance Act,* which limited benefits available for pregnant women, was left intact.

[11] *Brooks v. Canada Safeway*, [1989] 1 SCR 1219.

[12] Peter W. Hogg, Constitutional Law of Canada (2005), chapter 35. Scarborough, ON: Thomson/Carswell, 2005.

[13] *Vriend v. Alberta*, [1998] 1 SCR 493. The Alberta law is called the *Individual's Rights Protection Act*; in legal parlance, the Supreme Court "read in" sexual orientation.

[14] He then quoted from Dickson's opinion in that case: the *Charter* must "be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers." *Halpern v. Canada* (A.G.), [2002], Ontario Superior Court.

GLOBALIZATION AND THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

ABSTRACT

The phenomenon of globalization impacts on all of our various domains of human interaction, including that of human rights. Looking at globalization in light of the development of the *Canadian Charter of Rights and Freedoms*, we can first examine the influence that globalization and the global rights movement has had on the development of the *Charter*. The impact of the international human rights movement is evident in the adoption and text of the *Charter*, as well as in the way in which the *Charter* has been interpreted. Second, we must also consider the impact the *Charter* itself has had on "global constitutionalism" and the application of international human rights law and jurisprudence.

THE HONOURABLE IRWIN COTLER

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Introduction

We are witnessing – and have been witnessing for some time – the phenomenon of globalization, one which impacts on all domains of human interaction. Indeed, we have experienced what can only be characterized as the globalization of everyday life, involving globalization of the media and markets; of technology and trade; of culture and communications; of ideas and ideology; of politics and policies; of paradigms and pandemics; of rights and writs; and of justice and injustice.

Certainly, the prevalence and pervasiveness of the very term "globalization" is reflected in its appearance in Canadian newspapers more than 30,000 times since 1990.[1] Yet, despite its prevalence and pervasiveness in some 11 enumerated areas of human affairs from psychic globalization to economic globalization to societal globalization to ecological globalization, "'globalization' is a word without a single, precise meaning."[2]

It might be useful, therefore, to examine the phenomenon of globalization in light of its impact on the *Canadian Charter of Rights and Freedoms*. Accordingly, I propose to organize my remarks around two themes: First, I will discuss the impact of globalization and the global rights movement on the *Canadian Charter of Rights and Freedoms*. This is evident in its very construction as well as the way in which the *Charter* jurisprudence has developed. Second, and conversely, I will turn briefly to the impact and contribution of the *Charter* to the global rights movement, be it to global constitutionalism or be it to the development and application of international human rights law and jurisprudence.

Part one: Impact of globalization on the *Charter*

The transformative and revolutionary impact of the *Charter* – underpinned and catalyzed by the global rights movement – can best be understood by appreciating the domestic insularity and limitation of rights protection in the pre-*Charter* era.

Simply put, any narrative of Canadian social history is very much a narrative of exclusion or marginalization of historically oppressed groups – Aboriginal people, women, racial and religious minorities, refugees and immigrants –

coupled with the absence of constitutionally entrenched rights and remedies. This is not to say that there were no rights and remedies.

There were the protections at common law such as those afforded by the Rule of Law principle; article 1053 of the *Civil Code of Quebec*, characterized as a mini-bill of rights; the statutory protections of the *Canadian Bill of Rights*; the implied *Bill of Rights* doctrine; and the dialectics of legal federalism.

But none of these protections involved constitutionally entrenched rights and remedies, while the influence and impact of international human rights law was almost non-existent. Indeed, any inquiry into Canadian constitutional law during the first 115 years of confederation would reveal a preoccupation with the distribution of powers between the federal and provincial governments – sometimes known as the "powers process" or legal federalism – rather than the rights of people, sometimes known as civil liberties or the rights process. And so whenever a civil liberties or rights issue came before the courts, the question was, as former Chief Justice Bora Laskin put it, which of the two levels of government has the power to work the injustice, rather than how the injustice could be prevented. Simply put, legal federalism trumped rights analysis.

What has been the impact of the Charter of Rights on the global human rights movement? There are four distinct contributions that I will briefly note at this point.

The advent of the *Charter*, inspired by and anchored in the global human rights movement, was a veritable human rights movement. Former Chief Justice Lamer has remarked that the advent of the *Charter* was "a revolution on the scale of the introduction of the metric system, the great medical discoveries of Louis Pasteur, and the invention of penicillin and the laser."[3]

It is not surprising, therefore, given the transformative impact of the *Charter*, that we moved from being a parliamentary democracy to a constitutional democracy; from the sovereignty of parliament to the sovereignty of the constitution; from the courts as arbiters of legal federalism to the courts as the guarantors of human rights, because parliament vested in them that power; from individuals and groups as passive objects in inter-jurisdictional disputes to individuals and groups as rights claimants, rights holders; and from the advocacy of rights to the constitutionalization of remedy.

In particular, the global human rights movement – the global human rights revolution and the internationalization of human rights and the humanization of international law – has had an impact on the adoption, text, interpretation and enforcement of the *Charter*.

Adoption of the *Charter*

Justice Minister Pierre Elliot Trudeau, when tabling a white paper in parliament in 1968 entitled "A *Canadian Charter of Rights and Freedoms,*" noted the confluence between International Human Rights year as proclaimed by the United Nations in 1968, and a Charter reflecting that inspiration.[4]

Successive drafts of the *Charter*, in which I participated in as a special advisor to then Justice Minister John Turner, drew upon the corpus of international rights law, specifically the *Universal Declaration of Human Rights, the International Covenant of Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights*, and the *European Convention on Human Rights.*

This international inspiration has been noted in Canadian jurisprudence. For instance, as Former Chief Justice Dickson stated in Re: *Public Service Employee Relations Act (Alta.):* "The *Charter* conforms to the spirit of this contemporary international human rights movement, and it incorporates many of the policies and prescriptions of the various international documents pertaining to human rights." [5]

The text of the *Charter*

If the adoption and successive drafts were inspired by the international human rights movement, it should not be surprising then that the actual text of the *Charter* – the language of the Sections themselves – was derived from international human rights law. Indeed, as Professors Maxwell Cohen and Ann Bayefsky put it shortly after the *Charter* came into effect, the *Charter* was

"a bridge between municipal law and international law to a degree, and with an intensity, not heretofore known in any of the multitude of links between Canadian and international legal orders."[6]

The evidence of the international influence on the text of the *Charter* found expression in several specific sections.

To begin, the very existence of the limitations clause in s.1 of the *Charter* reflects the influence of international human rights instruments, especially the *International Covenant on Civil and Political Rights and the European Convention on Human Rights.* Indeed, it was the more refined invocation of international human rights language by human rights groups that appeared before the joint House and Senate Committees that transformed the original draft of s.1 into one that was more reflective and representative of the higher bar set by international human rights law.

The section on Fundamental Freedoms, s.2, was derived not from American law – which expressed these fundamental freedoms in absolutist terms – but again from international human rights law. These freedoms were also present, like s.1, at the 1971 Constitutional Conference and what is known as the resulting *Victoria Charter*.

Section 6, the section guaranteeing mobility rights, was influenced by the international freedom of emigration movement then underway behind the Iron Curtain, which found expression then in the *Helsinki Final Act*, in whose adoption Canada played a central role.

The legal rights section, ss.7-14, were also very much influenced by international human rights law. For example, s.11(g) of the *Charter* is derived directly from international criminal law and the Nuremberg principles, and contains the only direct and express textual reference to international human rights law in the *Charter*.

As well, s.10(5) of the *Charter* confers upon an arrested person the "right to retain and instruct counsel without delay" though it does not make it clear whether counsel is to be paid for by the government or the accused person. The International Covenant of Civil and Political Rights, under article 14(3)(d), however, confirms upon an accused person the right to "legal assistance," and goes on to stipulate that the legal assistance is to be provided "without payment by him… if he does not have sufficient means to pay for it." International law, therefore, imposes upon Canada an obligation to supply legal aid to an indigent accused, and Canadian courts could interpret s.10(b) of the *Charter* as having "constitutionalized" this international obligation.

S.15, the Equality Rights provision, reflects not only the equal rights language of international human rights law,[7] but also the influence of equality seeking social movements, and their impact on the drafting of the *Charter*. Suffice it to say that s.15 would not read the way it does without the concerted human rights advocacy of the international human rights movement in general, and that of the women's movement in particular, who – wary of the language used in, and the jurisprudence resulting from, the *Canadian Bill of Rights* – secured the equality rights provision as it now reads in s.15.[8] Not unmindful of the fate of the Equal Rights Amendment in the United States[9] advocates also secured the only sweeping unconditional "notwithstanding clause" in the *Charter* with s.28.[10]

Interpretation of the *Charter*

If the adoption of the *Charter* and its subsequent text were influenced by both international human rights law and the international human rights movement, the interpretation of the *Charter* by the courts through recourse to international law is yet another expression of the impact of globalization of law – and the globalization of rights – on the interpretation and application of the *Charter*.

As Justice Dickson said in *Re: Public Service Employee Relations Act:* "The various sources of international human rights law – declarations, covenants, conventions, judicial and quasi judicial decisions of international tribunals, customary norms – must, in my opinion, be relevant and persuasive sources for interpretation of the *Charter's* provisions."[11] In the 20 years that have passed since this statement – moreover, in the 25 years since the *Charter* came into being – Canadian courts have cited international human rights instruments and jurisprudence in literally hundreds of cases.

For example, in the second edition of his book *International Human Rights Law and the Canadian Charter,* William Schabas published a list of some 400 cases in which international human rights law was cited by the Canadian courts.[12] In the third edition, the dramatic number of cases cited had grown such that it became impossible to cite them individually.

Pre-*Charter* references to international human rights law had been all but non-existent.

Drummond Wren[13] – which made reference to international conceptions of non-discrimination – was later effectively repudiated by *Nobel v. Alley.*[14] In post-*Charter* interpretation – however numerous the cases in which international law was cited – the courts have not yet developed a coherent theory, as such, of binding or non-binding international human rights law. Nonetheless, the reference to international human rights law as a "relevant and persuasive source" in the interpretation of the *Charter*, analogous to the reference to comparative law, has offered the courts greater flexibility, adaptability, "dynamism", scope and ultimately greater impact. The absence of a concrete, theoretical approach to the application of international law has left Canadian courts appear free to use a variety of sources, regardless of factors such as ratification, to inform their decisions. [15]

A case study of where international human rights law and jurisprudence has served as such, a relevant and persuasive authority has been in the upholding of the constitutionality of anti-hate legislation, notably in *Keegstra*[16] *, R v. Andrews*[17] and *Canada (Human Rights Comm.) v. Taylor.*[18] The law at the heart of these cases was formed with international human rights considerations at its core: many international conventions to which Canada is a signatory, such as the *International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Prevention and Punishment of the Crime of Genocide,* bound Canada to certain general human rights norms as well as more specific obligations, such as the duty to punish hate propaganda and the promotion of genocide. When Canada's legislation was challenged, the court used reference to international objectives and human rights norms to buttress their preservation of the provisions.[19]

Of course, hate speech is not the only category in which international human rights law has had an impact. For instance, the proportionality inquiry under the s.1 *Oakes Test* – an integral part of Charter deliberation – has been informed by international human rights norms. In *Slaight Communications Inc.*[20], the Supreme Court of Canada expressly stated that Canada's international obligations with respect to human rights should inform the interpretation of the content of *Charter* rights, as well as of what qualifies as a "pressing and substantial objective" in s.1 analysis.

Furthermore, by L'Heureux-Dubé J's strong concurring opinion in *R. v. Ewanchuk*[21] referenced international principles and norms, such as those in *The Convention for the Elimination of All Forms of Discrimination against Women*, to support the finding that the defendant could not use the defence of implied consent in Canada.[22] Finally, in the landmark *Reference re Secession of Quebec*[23] the Supreme Court of Canada evaluated Quebec's theoretical claim to unilateral secession in the international context, with specific regard to the principle of self determination.

Part two: The impact of the *Charter* on the global rights movement

What has been the impact of the *Charter of Rights* on the global human rights movement? There are four distinct contributions that I will briefly note at this point.

First, the *Charter* has contributed to the development of global constitutionalism – and global rights protection – through its aggregate contributions to rights in such diverse countries as South Africa, New Zealand, Israel, India, the United Kingdom and the like. Indeed, some provisions in the South African constitution or the Israeli Basic Laws on Human Rights are direct embodiments of provisions from the *Charter*. As Adam Dodek has written, its accessible structure made the *Charter* a useful model for the drafters of the South African *Bill of Rights*, an appeal enhanced by the *Charter's* status as a "modern" rights document. The influence of the limitations clause and the s.15 is especially evident.[24] Likewise, the *Charter* provided a model for the drafters of the Israeli Basic Laws, particularly with regard to the limitations clause and the override clause.[25]

Second, post-*Charter* jurisprudence, inspired by international law and comparative law sources in the protection of human rights and described by William Schabas as "bold and innovative", has also become influential in the courtrooms of the world.[26] For example, Israel's Supreme Court has cited *Canadian Charter* jurisprudence more than any other court and the proportionality test that evolved from *R v. Oakes*[27] case has become a staple of Israeli jurisprudence. The Constitutional Court of South Africa has also drawn extensively on Canadian *Charter* jurisprudence, referring to twelve Canadian cases in an influential decision on extradition to the death penalty,[28] a decision the Supreme Court of Canada itself later relied upon.[29]

Third, *Charter* jurisprudence is important not only in the development of global constitutiona-

lism, but also because it has contributed to the international development of human rights law and jurisprudence, including the case law of the European Court of Human Rights. In particular, Canadian *Charter* decisions were utilized often by the European Commission of Human Rights before its dismantling in 1998.[30] Finally, the Canadian judiciary and Charter jurisprudence has been at the forefront of what Anne Slaughter has called trans-judicial pluralism, transnational legal processes – in the words of Harold Hongju Koh – or, simply put, judicial globalization of an ongoing transnational judicial dialogue.

Conclusion

In the year in which we mark the 25th anniversary of the *Canadian Charter of Rights and Freedoms*, it is important to include international considerations in our celebration of this document which has transformed both our laws and our lives. The influence and application of the *Charter* will continue to evolve, and, as it does, we should pay attention both here in Canada as well as abroad. For the phenomenon of globalization – the globalization of everyday life – continues, with remarkable and intriguing effects on the field of both domestic and international human rights.

Notes

[1] *Crossing Borders: Law in a Globalized World,* The Law Commission of Canada, March 2006 Discussion Paper, Her Majesty the Queen in Right of Canada, page 4.

[2] *Crossing Borders: Law in a Globalized World,* Law Commission of Canada, March 2006 Discussion Paper, Her Majesty the Queen in Right of Canada, page 4-5.

[3] F. L. Morton, and Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough, ON: Broadview Press, 2000) at 13.

[4] Trudeau, Pierre Elliott. *Canadian Charter of Human Rights,* Tabled February 1st, 1968 Sessional Paper no. 95C.

[5] *Re: Public Service Employee Relations Act (Alta.)* [1987] 1 S.C.R. 313.

[6] Maxwell Cohen and Anne F. Bayefsky, "The Canadian Charter of Rights and Freedoms and Public International Law" (1983) 61 *Canadian Bar Review* 265 at 268.

[7] For example, the *Convention for the Elimination of All Forms of Discrimination against Women*.

[8] See for instance *Murdoch v. Murdoch* [1975] 1. S.C.R. 423; *Bliss v. A.-G. Canada* [1979] 1 SCR 183; A.G. *Canada v. Lavell* [1974] SCR 1349.

[9] The *Equal Rights Amendment* has again been put before both the House of Representatives and the Senate in the current 110th Congress.

[10] Section 28 of the *Charter* reads: "Notwithstanding anything in this *Charter*, the rights and freedoms referred to in it are guaranteed equally to male and female persons."

[11] [1987] 1 S.C.R. 313.

[12] William Schabas, International Human Rights Law and the Canadian Charter, 2nd Ed. (Toronto: Thompson Canada Limited, 1996) at 255.

[13] *Drummond Wren* [1945] O.R. 778.

[14] *Noble v. Alley* [1951] S.C.R. 64.

[15] William Schabas, *International Human Rights Law and the Canadian Charter,* 2nd Ed. (Toronto: Thompson Canada Limited, 1996) at 52 and 436.

[16] *R. v. Keegstra,* [1990] 3 S.C.R. 697.

[17] *R v. Andrews* [1990] 3 S.C.R. 870.

[18] *Canada (Human Rights Comm.) v. Taylor* (1990), 13 C.H.R.R. D/435 (S.C.C.).

[19] For instance, in *Keegstra*, the majority Supreme Court ruling found that there was a powerful legislative objective at the basis of the challenged law, an opinion the Court illustrated by pointing to Canada's international commitment to "eradicate hate propaganda".

[20] *Slaight Communications Inc. v. Davidson* [1989] 1 S.C.R. 1038.

[21] *R v. Ewanchuck* [1999] 1 S.C.R. 300.

[22] For the international influence on the conception of the rights of children, see for example *Baker v. Canada (Minister of Citizenship and Immigration)* [1999] 2 S.C.R. 817.

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

[24] Adam Dodek, "*Canada as Constitutional Exporter: The Rise of "the Canadian Model" of Constitutionalism*", Paper Delivered at A Living Tree: The Legacy of 1982 in Canada's Political Evolution, Saskatchewan Institute of Public Policy, Regina, Saskatchewan, May 24, 2007. Publication forthcoming in the Supreme Court Law Review as well as in a book by LexisNexis.

[25] The Charter… in the Holy Land? (1996) 8:1 Constitutional Forum Constitutionnel 5.

[26] William Schabas and Stéphane Beaulac, *International Human Rights and Canadian Law: Legal Commitment, Iplementation and the Charter,* 3rd Ed. (Toronto: Thompson Canada Limited, 2007) at 46.

[27] *R v. Oakes* (1983), 145 D.L.R. (3d) 123.

[28] S. v. *Makwanyane*, 1995 (3) SA 391.

[29] William Schabas and Stéphane Beaulac, *International Human Rights and Canadian Law: Legal Commitment, Iplementation and the Charter,* 3rd Ed. (Toronto: Thompson Canada Limited, 2007) at 46-7.

[30] William Schabas and Stéphane Beaulac, *International Human Rights and Canadian Law: Legal Commitment, Implementation and the Charter,* 3rd Ed. (Toronto: Thompson Canada Limited, 2007) at 214-5.

LE DROIT DE PARTICIPATION DES MINORITÉS À LA VIE DE L'ÉTAT DÉCOULANT DU DROIT INTERNATIONAL ET LES DROITS LINGUISTIQUES PRÉVUS À LA *CHARTE CANADIENNE*

RÉSUMÉ

Les pratiques de plusieurs États et de certains instruments internationaux adoptées depuis le début des années 90 confirment le désir grandissant de la Communauté internationale d'envisager l'évolution de l'actuel régime de « protection » des minorités nationales, ethniques, linguistiques et religieuses vers la reconnaissance d'un véritable droit collectif de « participation » à la vie de l'État. Ce droit de participation en émergence est un droit étendu puisqu'il vise la participation des minorités à toutes les facettes de la vie de l'État, qu'elle soit culturelle, sociale, économique ou publique. Il est, en même temps, un droit à « contenu variable » adaptable aux diverses situations minoritaires puisqu'il envisage la participation des minorités à différents niveaux (local, régional ou national) suivant différents degrés (consultatif ou décisionnel) et selon diverses formes (intégratives ou autonomistes).

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La question que l'on peut se poser, en ce 25e anniversaire de la *Charte canadienne des droits et libertés* (ci-après la « *Charte* »), est de savoir si les articles 16 à 23 de la *Charte* relatifs aux droits linguistiques répondent, en tout ou en partie, aux exigences de ce nouveau droit de participation en émergence au niveau international ou, du moins, si l'interprétation qui en a été donnée par les tribunaux jusqu'à ce jour a permis de suivre cette évolution du droit international.

Les deux premiers aspects de l'article 23 de la *Charte*, soit le droit à l'instruction dans la langue de la minorité et le droit à des établissements d'enseignement, correspondent clairement à des droits de protection. Ils ne comblent donc pas l'exigence du droit de participation élaboré au niveau international. Toutefois, le troisième aspect de l'article 23 de la *Charte*, qui porte sur la gestion scolaire et qui a été développé par la jurisprudence, correspond bel et bien à un droit de participation et répond, en partie, à l'obligation des États d'assurer la participation des minorités à la « vie de l'État ». En fait, cette disposition permet plus précisément à la minorité de participer à la « vie culturelle de l'État » dans le domaine de l'éducation. Les articles 16 à 20 de la *Charte*, quant à eux, offrent des garanties linguistiques essentiellement en ce qui a trait au processus législatif, aux tribunaux et aux services gouvernementaux. Ces dispositions correspondent beaucoup plus à des droits de protection et ne sont pas suffisantes pour combler les exigences du droit de participation en émergence au niveau international.

En conséquence, les articles 16 à 23 de la *Charte* relatifs aux droits linguistiques ne couvrent clairement pas toutes les facettes du droit de « participation » envisagé par les instruments internationaux relatifs aux minorités. La jurisprudence qui a été rendue en regard de ces dispositions de la *Charte* jusqu'à ce jour n'a pas permis, elle

non plus, de suivre l'évolution du droit international des minorités dans ce domaine, mis à part en ce qui concerne l'article 23 de la *Charte*. Cela ne veut pas dire toutefois que la mise en œuvre du droit de participation des minorités n'est pas possible au Canada. Une interprétation généreuse de la *Charte*, à la lumière de l'évolution du droit international des minorités et notamment à la lumière des instruments internationaux en la matière, pourrait éventuellement servir à mettre en œuvre d'autres aspects de ce droit de « participation ».

Le droit de participation des minorités à la vie de l'État découlant du droit international et les droits linguistiques prévus à la *Charte canadienne*

L'existence de groupes en situation minoritaire ou de minorités sur le territoire de la majorité des États constitue une réalité qui entraîne des problèmes auxquels la Communauté internationale et certaines communautés régionales ont tenté d'apporter des réponses. Ces réponses ont d'abord mis l'accent sur la « protection » des minorités et de leurs membres. Toutefois, la pratique de plusieurs États et certains instruments internationaux adoptés depuis le début des années 90[1] confirment le désir grandissant de la Communauté internationale d'envisager l'évolution de l'actuel régime de « protection » des minorités nationales, ethniques, linguistiques et religieuses vers la reconnaissance d'un véritable droit collectif de « participation » à la vie de l'État. En effet, il devient de plus en plus évident que, pour assurer la survie des identités, éviter le repli identitaire et conserver la richesse de la diversité des identités, il faut plus qu'une reconnaissance de l'existence des groupes minoritaires et plus que des mesures de protection. Il faut également pouvoir assurer la participation de ces groupes « à la vie culturelle, sociale, économique et publique de l'État », car ils en font partie intégrante (1).

La question que l'on peut se poser, en ce 25e anniversaire de la *Charte canadienne des droits et libertés* (ci-après la « *Charte* »), est de savoir si les articles 16 à 23 de la *Charte* relatifs aux droits linguistiques répondent, en tout ou en partie, aux exigences de ce nouveau droit de participation en émergence au niveau international ou, du moins, si l'interprétation qui en a été donnée par les tribunaux jusqu'à ce jour a permis de suivre cette évolution du droit international (2).

1) L'évolution du droit international à l'égard des minorités

Les minorités, mais surtout leurs membres, ont bénéficié d'une reconnaissance et de la protection de certains de leurs droits dès l'adoption du *Pacte international relatif aux droits civils et politiques*[2] en *1966*. Toutefois, ces droits tenaient dans le seul article 27 du *Pacte* et n'étaient pas encore très élaborés. La question de la protection des minorités a refait surface à la fin des années 80 lors de la chute du mur de Berlin et de l'effondrement du Bloc Soviétique. De nombreux instruments internationaux ont alors été élaborés dans le cadre de *l'Organisation des Nations Unies (ONU)*[3], du *Conseil de l'Europe*[4], de la *Conférence sur la sécurité et la coopération en Europe (CSCE)* (devenue ensuite *l'Organisation sur la sécurité et la coopération en Europe (OSCE))*[5] et de la *Communauté européenne /Union européenne*[6] pour définir le cadre minimal de la protection des minorités. Parallèlement à l'adoption de ces instruments, la Communauté internationale a exprimé le désir de développer un droit plus spécifique pour un type de minorité, c'est-à-dire les populations autochtones, et des instruments internationaux ont alors été élaborés en ce sens dans le cadre de l'Organisation internationale du Travail (ci-après OIT)[7] et dans le cadre de l'ONU.[8] Deux Groupes de travail (l'un sur les minorités et l'autre sur les populations autochtones) ont également été créés au sein des Nations Unies pour examiner les moyens de promouvoir et de protéger les droits des minorités énoncés dans les instruments élaborés par cette organisation universelle.

Finalement, les règles applicables au « Droit des minorités » se retrouvent aujourd'hui définies dans deux types d'instruments dévolus, de façon distincte, aux « minorités » et aux « populations autochtones ». Ces instruments ont mis principalement l'accent sur la protection des groupes et de leurs membres. Toutefois, ils ont également offert des indices permettant d'envisager l'évolution de l'actuel régime international de protection des minorités vers la reconnaissance d'un droit complémentaire de plus grande portée et plus dynamique, tel qu'un droit de participation des minorités à la vie culturelle, religieuse, sociale, économique et publique de l'État dans lequel elles vivent. En d'autres termes, ils ont envisagé la possibilité que les minorités, non seulement à titre individuel, mais également en tant que groupe, prennent part aux décisions qui concernent divers sujets qui relèvent de la vie en société.

De façon générale, les instruments internationaux relatifs aux minorités confèrent deux obligations générales aux États : 1) l'obligation de protéger l'existence et l'identité des minorités[9] et ; 2) l'obligation de favoriser l'instauration de conditions propres à promouvoir cette identité et à assurer son développement.[10] Ces instruments internationaux ont, par ailleurs, précisés des mesures plus spécifiques que les États devaient adopter pour mettre en œuvre ces obligations. Ces mesures varient d'un texte à l'autre, mais nous pouvons les regrouper en deux catégories selon le type de droits qu'elles visent à accorder aux minorités: les droits de « protection » et les droits de « participation ».

a) Les droits de « protection »

Essentiellement, les dispositions prévues par les instruments internationaux prévoient plus particulièrement l'adoption de mesures législatives ou autres visant à permettre aux personnes appartenant aux minorités ou aux minorités elles-mêmes selon le cas :

- D'utiliser leur propre langue en privé et en public dans des secteurs particuliers : devant les assemblées législatives, devant les tribunaux, dans leurs communications avec l'administration publique, etc.;
- D'apprendre leur langue maternelle ; et
- De recevoir une instruction dans leur langue.

Nous pouvons ranger ces mesures dans la première catégorie qui vise à assurer des droits de « protection ». Ces droits servent principalement à protéger les minorités et leurs membres contre l'assimilation et à protéger l'identité des minorités en permettant à ces dernières d'exprimer leurs particularités ou leurs coutumes[11], mais ils peuvent également faciliter une meilleure intégration des minorités[12], corriger des injustices passées[13] ou compenser des inégalités sociales ou économiques.[14] Ces droits de protection peuvent être des droits purement individuels. Ils peuvent être également des droits individuels « à dimension collective » c'est-à-dire qu'ils sont accordés à des individus membres des minorités, mais s'exercent par plusieurs individus ensemble. À titre d'exemple, le droit accordé aux membres des minorités d'obtenir des services gouvernementaux locaux ou nationaux dans leur langue ; le droit pour les membres des minorités à l'enseignement dans leur langue dans des classes ou des écoles subventionnées par l'État de même que le droit pour les membres de minorités de bénéficier de l'application d'un régime civil particulier ; correspondent à des « droits de protection à dimension collective ». Enfin, ces droits de protection peuvent être véritablement « collectifs », c'est-à-dire qu'ils sont accordés à des groupes en particulier. Ainsi, le droit accordé aux minorités de créer leur propre association culturelle et d'obtenir de la part de l'État un financement pour leurs activités de même que le droit des minorités à une juste part des subventions publiques ou de l'exploitation de certaines ressources économiques correspondent à ce type de droits collectifs de protection.

b) Les droits de « participation »

Les instruments internationaux prévoient également l'adoption de mesures législatives ou autres visant notamment :

- À assurer que les personnes appartenant aux minorités puissent prendre une part effective aux décisions qui les concernent ou qui concernent les régions où elles vivent[15] ;
- À assurer la participation des personnes appartenant aux minorités à la vie culturelle, religieuse, sociale, économique et publique[16] ;
- À assurer leur pleine participation au progrès et au développement économique de leur pays.[17]

Or, nous pouvons ranger ces mesures dans la seconde catégorie qui vise à assurer un droit de « participation » aux minorités. Ces droits servent principalement d'instruments aux minorités pour faciliter leur participation à différentes facettes de la vie de l'État, qu'elle soit culturelle, économique, politique ou sociale et leur donnent voix au chapitre à différents niveaux locaux, régionaux ou nationaux. Cette participation permet aux membres des minorités de faire valoir les intérêts et valeurs de leur groupe pour exercer le plus d'influence possible sur les décisions nationales, régionales et locales afin qu'elles tiennent compte des besoins du groupe. Ces droits visent également à intégrer la diversité au sein de l'État et à rétablir le déséquilibre causé par une construction nationale entreprise, jusqu'à ce jour, pas la seule majorité. En d'autres termes, ces droits rendent possible la participation des différents groupes à un nouveau processus de construction national au sein des États sans mettre en danger leur identité et constituent un moyen d'assurer la coexistence pacifique au sein des États. Ainsi, ces « droits de participation » ne sont pas à dimension collective, mais véritablement « collectifs ». Pour se réaliser, les droits doivent être octroyés à des groupes.

Il est vrai que les instruments internationaux dont nous traitons accordent un droit de participation à diverses facettes de la vie de l'État aux « personnes appartenant à une minorité », donc à des individus.[18] Toutefois, l'interprétation de ce droit en corrélation avec les obligations plus générales conférées aux États dans ces mêmes instruments « d'assurer la protection de l'existence et de l'identité des minorités » et « de favoriser l'instauration de conditions propres à promouvoir cette identité », laisse sous-entendre que le droit de participations devrait également être considéré non seulement en tant que droit individuel, mais également en tant que droit collectif de la minorité.[19] C'est d'ailleurs de cette façon que les instruments internationaux relatifs aux populations autochtones envisagent la « participation » de ce type de minorité pour assurer leur survie.[20]

En effet, une participation « collective » est essentielle non seulement pour le développement et l'épanouissement des minorités, mais pour la survie de leur identité et de leur culture. Cette identité ne pourra être préservée que si la langue, la culture et la religion des minorités peuvent se développer dans des conditions similaires à celles de la majorité, ce qui implique au moins un certain contrôle sur les décisions qui intéressent plus particulièrement leur groupe. Or, comment peut-on assurer à une personne appartenant à une minorité un droit de participation effective à la vie de l'État sur des questions qui intéressent son groupe si l'on ne reconnaît pas à ce groupe le même droit ? À notre avis, pour que cette participation soit réellement « effective » sur les questions qui intéressent le groupe, elle nécessite que les droits accordés aient un certains poids non seulement quantitatif (plusieurs droits de personnes pris individuellement, réunis), mais également qualitatif, c'est-à-dire qui permette à ces personnes de se concerter et de revendiquer sur un pied d'égalité avec la majorité. Ceci est le mieux pour leur groupe puisqu'il s'agit justement de questions qui intéressent le « groupe » et non seulement de questions qui intéressent les personnes appartenant à ce groupe prises individuellement. Cette participation doit également être effective non seulement sur les questions qui intéressent uniquement le groupe, mais également sur les questions qui intéressent l'État dans son ensemble, car les minorités en font partie intégrante.

En effet, une participation « collective » est essentielle non seulement pour le développement et l'épanouissement des minorités, mais pour la survie de leur identité et de leur culture.

Lors du Séminaire d'experts organisé par le *European Center for Minority Issues* à Flensbourg en Allemagne en 1999 intitulé : « Vers une participation effective des minorités », les participants ont dressé, à l'intention du *Groupe de travail sur les minorités des Nations Unies,* une liste de propositions visant à répondre aux besoins et aspirations des minorités à participer à la vie publique de leur État (ci-après les « *Propositions de Flensbourg* »)[21]. Ces propositions ont également précisé que cette participation des minorités devait contribuer à la réalisation de divers objectifs et notamment à :

- « Intégrer tous les groupes en tant que composants essentiels de sociétés pacifiques, démocratiques et pluralistes ;
- Canaliser le besoin et le désir des groupes minoritaires de conserver et de développer leur identité et leurs caractéristiques propres ;
- Veiller à l'égalité entre tous les individus et groupes d'une société, garantissant ainsi l'accès aux ressources de manière non discriminatoire;
- Veiller à l'harmonie et à la stabilité à l'intérieur des frontières de l'État et au-delà, en particulier entre États « apparentés » ;
- Contribuer au respect et à la promotion des normes relatives aux droits de l'homme énoncé dans les instruments régionaux et internationaux, en particulier sur la base de la non-discrimination ;
- Mettre en place des moyens de consultations entre les minorités et le gouvernement ainsi que les moyens de régler les différends ; et
- Maintenir la diversité en tant que condition de stabilité dynamique de la société. »

En septembre 1999, la *Fondation pour les relations interethniques du Bureau du Haut Commissaire de l'OSCE* a, lui aussi, élaboré des recommandations visant à encourager et à faciliter l'adoption, par les États, de mesures

concrètes propres à assurer une participation effective des minorités à la vie publique et visant du même coup à prévenir les conflits. Ces recommandations sont mieux connues sous le nom de « *Recommandations de Lund* ».[22]

L'Institut Max-Planck, de son côté, a fait, dans le cadre de son étude de mars 2001 intitulée « Participation des minorités aux processus de prise de décision », un inventaire de certaines mesures qui ont été utilisées par les pays européens pour faciliter la participation des minorités.[23] Enfin, le professeur Tom Hadden a également dressé ce genre d'inventaire pour le *Groupe de travail sur les minorités des Nations Unies* en avril 2001 dans son Document de travail intitulé: « Integrative Approaches to the Accommodation of Minorities » où il cite en exemple plus de 47 États dans le monde.[24]

Il se dégager de ces travaux des exemples fort intéressants qui démontrent que la Communauté internationale est prête à encourager les États à adopter des mesures visant à assurer la participation effective non seulement des membres appartenant à une minorité, mais à assurer la participation effective des minorités de façon collective.

Ce droit de participation en émergence présente, selon les indices offerts par les instruments internationaux étudiés, au moins quatre caractéristiques.[25]

- Il est tout d'abord un droit étendu puisqu'il vise la participation des minorités à toutes les facettes de la vie de l'État, qu'elle soit culturelle, sociale, économique ou publique.
- Il est, en même temps, un droit à « contenu variable » adaptable aux diverses situations minoritaires puisqu'il envisage la participation des minorités à différents niveaux (local, régional ou national) suivant différents degrés (consultatif ou décisionnel) et selon diverses formes (intégratives ou autonomistes).
- Ce droit est également limité par les objectifs inhérents qu'il poursuit de sorte qu'il ne peut être mis en œuvre sans respecter un minimum de conditions et de limites acceptables dans le cadre d'un État libéral démocratique.
- Enfin, il est compatible avec la souveraineté de l'État puisqu'il se réalise à l'intérieur de l'État.

Enfin, divers moyens peuvent être envisagé pour mettre en œuvre ce droit de participation. En fait, c'est une combinaison de mesures qui permettra, en définitive, de répondre à toutes les facettes de ce droit. Ainsi, les mesures pourraient être sous forme intégrative (c'est-à-dire des mesures qui permettent la représentation des minorités au sein même des institutions de l'État, que ce soit au sein de l'organe législatifs, de l'administration publique ou de l'ordre juridique) ou encore sous forme autonomiste (c'est-à-dire des mesures permettant l'autogestion en marge des institutions de l'État par le biais d'une autonomie de type territorial ou de type personnel ou encore par la création d'institutions minoritaires de dialogue).[26]

2) L'analyse des articles 16 à 23 de la *Charte* par rapport au droit de participation

Les articles 16 à 23 de la *Charte canadienne des droits et libertés* prévoient des droits linguistiques utiles pour les communautés de langue officielle vivant en situation minoritaire au Canada. Ces dispositions assurent clairement une certaine protection à un type de minorité au sens du droit international, soit les minorités linguistiques. La question qui se pose est de savoir si ces droits permettent également de combler toutes les exigences de ce droit de participation en émergence au niveau international en regard des minorités linguistiques. En d'autres termes, ces dispositions ou l'interprétation qui a en été donnée par les tribunaux jusqu'à ce jour permettent-elle une participation des minorités à toutes les facettes de la vie de l'État? Pour répondre à cette question, il est utile d'examiner l'article 23 de la *Charte* d'une part, et les articles 16 à 20 de la *Charte* d'autre part.

a) L'article 23 de la Charte : la gestion scolaire

L'article 23 de la Charte prévoit essentiellement le droit pour les parents appartenant à une minorité linguistique de langue officielle dans la province et les territoires où ils résident[27] de faire instruire leurs enfants dans cette langue aux niveaux primaire et secondaire. Toutefois, ce droit est garanti uniquement lorsque « le nombre d'enfants le justifie ». Par ailleurs, si le nombre le justifie, ce droit à l'instruction comprend également le droit à des « établissementsd'enseignement de la minorité linguistique.

Cette disposition prévoit donc un droit général à l'instruction dans la langue de la minorité et à des établissements d'enseignement de la minorité, mais elle laisse place à interprétation quant à l'étendue de ce droit de sorte que les tribunaux et la Cour suprême du Canada ont été appelés à maintes reprises à préciser son étendue.[28]

Par ailleurs, le libellé de l'article 23 de la *Charte* ne prévoit pas expressément l'octroi d'une

autonomie à la minorité linguistique dans ce domaine. Toutefois, la Cour suprême du Canada[29] a jugé que le texte de l'alinéa 23(3) avec l'utilisation de la préposition « de » dans l'expression « établissement de la minorité linguistique » devait être interprété comme accordant à la minorité, lorsque le nombre le justifie, une « certaine mesure de gestion et de contrôle ».[30] La Cour a pris soin de préciser que cette gestion et ce contrôle sont vitaux pour respecter l'objet de l'article 23 de la *Charte* qui est de « maintenir les deux langues officielles du Canada ainsi que les cultures qu'elles représentent et de favoriser l'épanouissement de chacune de ces langues et de ces cultures dans la mesure du possible dans les provinces où elle n'est pas parlée par la majorité ».[31] Et plus loin, elle ajoute que « cette gestion et ce contrôle sont nécessaires parce que plusieurs questions de gestion en matière d'enseignement (programme d'étude, embauche et dépenses, par exemple) peuvent avoir des incidences sur les domaines linguistiques et culturels ».[32]

En fait, la Cour suprême du Canada a interprété cette disposition dans diverses causes[33] comme prévoyant un « droit à contenu variable » autant en ce qui concerne les établissements qui assurent l'enseignement dans la langue de la minorité qu'en ce qui concerne le degré d'autonomie accordé aux minorités en la matière et sa structure institutionnelle. Ce qui est requis dans chaque cas dépend de ce que « le nombre justifie » et ce nombre devrait en principe correspondre non pas au nombre de personnes qui se prévalent de ce droit, mais au nombre de personnes raisonnablement envisageables comme pouvant se prévaloir de ce droit. Ce qui est requis dans chaque cas dépend principalement de considérations pédagogiques et financières, mais dans tous les cas, l'instruction dans la langue de la majorité et dans celle de la minorité devra être de qualité équivalente.

En ce qui concerne la gestion et le contrôle accordés à la minorité, la Cour suprême a précisé que ce qui était essentiel était que le groupe linguistique minoritaire ait un contrôle sur « les aspects de l'éducation qui concernent ou qui touchent sa langue et sa culture ».[34] Elle a également précisé que selon le nombre d'élèves en cause, l'article 23 de la *Charte* pouvait justifier l'existence de conseils scolaires indépendants, mais que si les chiffres ne justifiaient pas ce niveau maximum de gestion et de contrôle, ils pouvaient être assez élevés pour exiger une représentation de la minorité au sein d'un conseil scolaire existant de la majorité. Dans ces cas, le nombre de représentants de la minorité devrait, idéalement, être proportionnel au nombre d'élèves de la minorité dans le district scolaire et ces représentants devront nécessairement avoir le pouvoir exclusif de prendre des décisions concernant l'instruction dans la langue de la minorité et les établissements où elle est dispensée, « sur les questions qui touchent la langue ou la culture ».

Les deux premiers aspects de l'article 23 de la *Charte*, soit le droit à l'instruction dans la langue de la minorité et le droit à des établissements d'enseignement, correspondent clairement à des droits de protection au sens où nous les avons défini précédemment. Ils ne comblent donc pas l'exigence du droit de participation élaboré au niveau international. Toutefois, le troisième aspect de l'article 23 de la *Charte*, qui porte sur la gestion scolaire et qui a été développé par la jurisprudence, correspond bel et bien à un droit de participation et répond, en partie, à l'obligation des États d'assurer la participation des minorités à la « vie de l'État ». En fait, cette disposition envisage une véritable autonomie personnelle et permet plus précisément à la minorité de participer, à un certain degré (par le biais de pouvoirs consultatifs et de pouvoirs décisionnels de nature administrative) à la « vie culturelle de l'État » dans le domaine de l'éducation. Des mesures additionnelles devront cependant être trouvées pour assurer la participation des minorités aux autres facettes de la « vie de l'État ».

b) Les articles 16 à 20 de la Charte

L'article 16 de la *Charte* confirme le droit à l'égalité des deux langues officielles et la progression vers l'égalité, alors que les articles 17 à 20 de la *Charte* offrent des garanties linguistiques essentiellement en ce qui a trait au processus législatif, aux tribunaux et aux services gouvernementaux. En fait, ils offrent essentiellement la possibilité aux individus et notamment, aux membres des communautés de langue officielle, d'utiliser à leur choix le français ou l'anglais dans certaines circonstances. Ces dispositions correspondent donc, à première vue, beaucoup plus à des droits de protection.

En effet, ces dispositions ne donnent pas un droit collectif ou une voix particulière aux minorités. Elles n'accordent aucun pouvoir décisionnel aux minorités, ni même à leurs membres, et ne prévoient pas non plus un processus de consultation pour connaître les besoins et les opinions des minorités. Toutefois, indirectement et grâce à l'interprétation donnée par la jurispru-

dence, ces droits donnent une légitimité à l'utilisation de la langue. Elle lui donne un statut et favorise ainsi une certaine participation à la vie publique, car plus l'utilisation de la langue de la minorité est possible, plus les individus parlant cette langue sont enclins à se joindre au débat. Toutefois, cette participation n'est encouragée que de façon individuelle par ces dispositions. Elles ne visent à assurer aucune participation par voie collective. Ainsi, ces dispositions ne sont pas suffisantes, à notre avis, pour combler les exigences du droit de participation en émergence au niveau international.

Conclusion

Les articles 16 à 23 de la *Charte* relatifs aux droits linguistiques ne couvrent clairement pas toutes les facettes du droit de « participation » envisagé par les instruments internationaux relatifs aux minorités. La jurisprudence qui a été rendue en regard de ces dispositions de la *Charte* jusqu'à ce jour n'a pas permis, elle non plus, de suivre l'évolution du droit international des minorités dans ce domaine, mis à part en ce qui concerne l'article 23 de la *Charte*. En fait, seul l'aspect de l'article 23 de la *Charte* qui concerne la gestion scolaire peut correspondre à un droit de « participation ». Toutefois, il ne couvre même pas une facette de la « vie de l'État » en totalité. Il vise, c'est vrai, un droit de participation à la vie culturelle, mais uniquement dans le domaine de l'éducation. Quant à la participation aux autres facettes de la vie de l'État, comme la vie publique, sociale ou économique, tout reste encore à faire.

Cela ne veut pas dire toutefois que la mise en œuvre du droit de participation des minorités n'est pas possible au Canada. Il faut se rappeler que ce droit envisage une combinaison de solutions. Si les solutions pour assurer le droit de participation des minorités à toutes les facettes de la vie de l'État ne se retrouvent pas entièrement dans la *Charte*, certaines peuvent se trouver ailleurs. Le nouveau libellé de la partie VII de la *Loi sur les langues officielles* prévoyant l'obligation pour le gouvernement fédéral d'adopter des « mesures positives » visant à assurer le développement et l'épanouissement des minorités pourraient être une avenue intéressante pour entrevoir, une obligation pour l'État d'adopter des mesures visant à assurer la participation des minorités à certaines facettes de la vie de l'État, notamment par le biais de consultation.

Reste qu'une interprétation généreuse de la *Charte*, à la lumière de l'évolution du droit international des minorités et notamment à la lumière des instruments internationaux en la matière[35], pourrait également servir, dans l'avenir, à mettre en œuvre d'autres aspects de ce droit de « participation ». Même si, en principe, les instruments internationaux ne font pas partie du droit canadien à moins d'être rendus applicables par le biais d'une loi, la Cour suprême du Canada a rappelé, dans l'affaire *Baker*[36], que les valeurs exprimées dans le droit international conventionnel, surtout lorsqu'il s'agit de valeurs relatives aux droits de l'homme, pouvaient être prises en compte dans l'interprétation des lois et qu'en définitive, ces valeurs constituaient des facteurs pertinents et persuasifs pour interpréter notre droit interne.

Ainsi, une interprétation généreuse de l'article 16 de la *Charte* qui vise la progression vers l'égalité pourrait peut-être, un jour, jouer en faveur de la reconnaissance d'un droit de « participation » des minorités. Si la majorité peut clairement participer à toutes les facettes de la « vie de l'État », l'objectif de progression vers l'égalité pourrait exiger que les minorités puissent également participer à toutes les facettes de la « vie de l'État » dans des conditions semblables. Une interprétation généreuse de tous les droits linguistiques en fonction du développement et de l'épanouissement des communautés de langue officielle, conformément à ce que la Cour suprême a reconnu dans l'affaire *Beaulac*[37], est également un premier pas vers la reconnaissance d'un droit de « participation ». En effet, ce développement et cet épanouissement des minorités ne pourront se réaliser pleinement sans une telle participation de toutes les communautés de langue officielle à la « vie de l'État ».

Notes

[1] Notamment dans : 1) la *Déclaration des droits des personnes appartenant aux minorités nationales ou ethniques, religieuses et linguistique des Nation Unies*, adoptée par L'Assemblée générale des Nations Unies dans sa Résolution 467/135 du 18 décembre 1992, dans CENTRE POUR LES DROITS DE L'HOMME, *Recueil d'instrument internationaux,* vol.1 (première partie), Instruments universels, Nations Unies, New York et Genève, 1994, 976 pages, p.140-144.; 2) la *Convention cadre européenne pour la protection des minorités*, 10 novembre 1994, *dans* A. FENET, G. KOUBI, I SCHULTE-TENCKHOFF et T. ANSBACH, *Le droit et les minorités*, Bruxelles, Éditions Bruylant, 1995, 462 pages, p. 836-394; 3) *Le Document de clôture de la réunion de Vienne de l'OSCE de 1989*, dans A.

FENET, G. KOUBI, I SCHULTE-TENCKHOFF et T. ANSBACH, *Le droit et les minorités*, Bruxelles, Éditions Bruylant, 1995, 462 pages, p .396-399 et 4) *le Document de Copenhague sur la dimension humaine de la CSCE/OSCE de 1990*, dans A. FENET, G. KOUBI, I SCHULTE-TENCKHOFF et T. ANSBACH, *Le droit et les minorités*, Bruxelles, Éditions Bruylant, 1995, 462 pages, p.399-403.

[2] Article 27 *du Pacte international relatif aux droits civils et politiques*, adopté par l'Assemblée générale des Nations Unies dans sa résolution 2200 A (XXI) du 16 décembre 1966, in CENTRE POUR LES DROITS DE L'HOMME, *Recueil d'instruments internationaux*, Volume 1 (première partie), Instrument universels, Nations Unies, New York et Genève, 1994, 976 pages, pp. 20 à 40.

[3] *Déclaration des Nations Unies relative aux droits des personnes appartenant aux minorités nationales ou ethniques, religieuses et linguistiques de 1992, précitée,* note 1.

[4] *Convention-cadre pour la protection des minorités nationales, précitée*, note 1; *Proposition pour une Convention européenne pour la protection des minorités*, Commission européenne pour la démocratie par le droit, 8 février 1991, in RUDH, 1991, vol. 3, no.5, pp.189-192, *Recommandation 1201 relative à un protocole additionnel à la Convention européenne des droits de l'homme sur les droits des minorités*, Assemblée parlementaire du Conseil de l'Europe, 1er février 1993, in *RUDH*, 1993, vol.5, no.5-6, pp.189-191; *Charte européenne des langues régionales ou minoritaires*, 5 novembre 1992, in FENET (A.), KOUBI (G.) SCHULTE-TENCKHOFF (I.) et ANSBACH (T.), *op.cit.*, note1, pp.370-385.; Recommandation 1203 relative aux tsiganes en Europe, Conseil de l'Europe, Assemblée parlementaire, 2 février 1993, in FENET (A.), KOUBI (G.) SCHULTE-TENCKHOFF (I.) et ANSBACH (T.), op.cit., note 1, pp. 439-443.

[5] *Document de clôture de la Réunion de Copenhague de 1990, précitée,* note 1; *Charte de Paris pour une nouvelle Europe de 1990 in* FENET (A.), KOUBI (G.), SCHULTE-TENCKHOFF (I.) et ANSBACH (T.), *op.cit.*, note 1, pp. 403-404.; *Rapport de la Réunion d'expert de la CSCE sur les minorités nationales de Genève de 1991*, in *http://www.osce.org/docs/french/expertotherf.htm.; Texte d'Helsinki de 1992*, in FENET (A.), KOUBI (G.), SCHULTE-TENCKHOFF (I.) et ANSBACH (T.), op.cit., note 1, pp. 404-411; *Recommandation de la Haye concernant les droits des minorités nationales en matière d'éducation de 1996; Recommandation d'Oslo concernant les droits linguistiques des minorités nationales de 1998 et; Recommandation de LUND concernant la participation effective des minorités nationales à la vie publique de* 1999. Le texte de ces trois recommandations se retrouvent sur le site : http://www.osce.org/hcnm/docuements/recommendations.

[6] *Résolution KILLILEA sur les minorités linguistiques et culturelles,* Communautés européennes, Parlement européen, 9 février 1994, *in* FENET (A.), KOUBI (G.), SCHULTE-TENCKHOFF (I.) et ANSBACH (T.), *op.cit.*, note 1, pp. 411-415; *Déclaration sur les lignes directrices sur la reconnaissance des nouveaux États en Europe orientale et en Union Soviétique*, Communautés européennes, Conseil des ministres, 16 décembre 1991, *in* FENET (A.), KOUBI (G.), SCHULTE-TENCKHOFF (I.) et ANSBACH (T.), *op.cit*., note 1, pp. 438-439.

[7] *Convention no. 169 concernant les peuples indigènes et tribaux dans les pays indépendants*, Organisation internationale du travail (OIT), adoptée le 27 juin 1989 et entrée en vigueur le 5 septembre 1991, *in* CENTRE DES DROITS DE L'HOMME, *op.cit.*, note 1, pp. 486-501.

[8] *Projet de déclaration universelle sur les populations autochtones, in Examen technique du Projet de Déclaration des Nations Unies sur les droits des peuples autochtones, Additif, Nations Unies, doc. E/CN.4/Sub.2/1994/2/Add.1.*

[9] Voir notamment l'article 1 de la *Déclaration des droits des personnes appartenant aux minorités nationales ou ethniques, religieuses et linguistique des Nation Unies*; l'article 5 de la *Convention cadre européenne pour la protection des minorités*; le par. 19 du *Document de clôture de la réunion de Vienne de l'OSCE de 1989*; et le par. 33 du *Document de Copenhague sur la dimension humaine de la CSCE/OSCE de 1990*, tous *précités*, note 1.

[10] *Ibid*.

[11] Par exemple, l'allocation de ressources à des organismes ou regroupements culturels de la minorité.

[12] Par exemple, la dispense de services gouvernementaux dans la langue de la minorité.

[13] Par exemple, l'octroi de droits de chasse et de pêche à certaines minorités et notamment à des minorités autochtones.

[14] Par exemple, l'octroi de droits spéciaux en matière de logement, de services de santé ou de travail pour des minorités nomades comme les Roms.

[15] Par. 2(3) de la *Déclaration des droits des personnes appartenant aux minorités nationales ou ethniques, religieuses et linguistique des Nation Unies* et article 5 de la *Convention cadre européenne pour la protection des minorités, toutes deux précités*, note 1.

[16] Par. 2(2) de la *Déclaration des droits des personnes appartenant aux minorités nationales ou ethniques, religieuses et linguistique des Nation Unies* et article 5 de la *Convention cadre européenne pour la protection des minorités et par. 33 et 35 du Document de Copenhague sur la dimension humaine de la CSCE/OSCE de 1990, tous précités,* note 1.

[17] Par. 4(5) de la *Déclaration des droits des personnes appartenant aux minorités nationales ou ethniques, religieuses et linguistique des Nation Unies, précitée,* note 1.

[18] Voir notamment : l'article 3 de la *Déclaration des Nations Unies sur les droits des personnes appartenant aux minorités nationales ou ethniques, religieuses et linguistiques, précitée,* note 1; l'article 35 du *Document de Copenhague, précité,* note 1 ainsi que et l'article 15 de la *Convention-cadre, précitée,* note 1.

[19] Voir notamment : l'article 1 de la *Déclaration des Nations Unies sur les droits des personnes appartenant aux minorités nationales ou ethniques, religieuses et linguistiques, précitée,* note 1; l'article 33 du *Document de Copenhague, précité,* note 1; l'article 5 de la *Convention-cadre, précitée,* note 1 ainsi que la *Charte de Paris pour une nouvelle Europe, précitée,* note 5.

[20] Voir notamment la *Convention no. 169 de l'OIT concernant les peuples indigènes et tribaux dans les pays indépendants, précitée, note 10 ainsi que le Projet de Déclaration universelle sur les populations autochtones, précité,* note 7.

[21] EUROPEAN CENTER FOR MINORITY ISSUES,

Propositions du Séminaire « Vers une participation effective des minorités », Flensbourg, Allemagne, 30 avril au 2 mai 1999, Document des Nations Unies, E/CN.4/Sub.2/AC.5/1999/WP.4, 21 avril 1999, 7 pages, par. 4 à 8.

[22] FONDATION POUR LES RELATIONS INTERETHNIQUES et INSTITUT RAOUL WALLENBERG DES DROITS DE L'HOMME ET DU DROIT HUMANITAIRE DE L'UNIVERSITÉ DE LUND, *Recommandations de Lund sur la Participation Effective des Minorités Nationales à la Vie Publique, précitées,* note 5.

[23] INSTITUT MAX-PLANK, *La participation des minorités aux processus de prise de décision*, Document des Nations Unies, E/CN.4/Sub.2/AC.5/2001/CRP.6, 30 mars 2001, 33 pages.

[24] HADDEN, (T.), *Integrative approaches to the Accommodation of Minorities,* Document des Nations Unies, E/CN.4/Sub.2/AC.5/2001/WP.6, 25 April 2001, 21 pages.

[25] Pour plus de détails, voir notamment: Pour plus de détails, voir notamment : I. ROY, « Vers un droit de participation des minorités à la vie de l'État ? Évolution du droit international et pratique des États », Montréal, Édition Wilson & Lafleur, 2006, 460 pages.

[26] *Ibid*.

[27] Pour plus de détails, voir les alinéas 23(1)a) et b) de la *Charte*. Des précisions ont été apportées en regard de la question des critères d'admissibilité à l'enseignement dans la langue de la minorité notamment dans les affaires *Solski (Tuteur de) c. Québec (Procureur général), [2005] 1 R.C.S. 201, 2005 CSC 14 et Abbey c. Conseil de l'éducation du comté d'Essex* (1999), 42 O.R. (3e) 481.

[28] Notamment dans les affaires : *Mahé c. Alberta,* [1990] 1 R.C.S. 342 à la p. 362; *Renvoi relatif à la Loi sur les écoles publiques (Man.), art. 79(3), (4) et (7)*, [1993] 1 R.C.S.; *Arsenault-Cameron c. Île du Prince-Édouard,* [2000] 1 R.C.S. 3, 2000 CSC 1 et *Doucet-Boudreau c. Nouvelle-Écosse (Ministre de l'Éducation)*, [2003] 3 R.C.S. 3, 2003 CSC 62.

[29] *Mahé c. Alberta, précitée,* note 28.

[30] *Ibid*.

[31] *Ibid*.

[32] *Ibid*.

[33] Notamment dans les affaires : *Mahé c. Alberta; Renvoi relatif à la Loi sur les écoles publiques (Man.) (1993); Arsenault-Cameron c. Ile du Prince Édouard et Doucet-Boudreau c. Nouvelle-Écosse*, toutes *précitées*, note 28.

[34] *Mahé c. Alberta, précitée*, note 28.

[35] Notamment *Déclaration des droits des personnes appartenant aux minorités nationales ou ethniques, religieuses et linguistique des Nation Unies*; la *Convention cadre européenne pour la protection des minorités*; le *Document de clôture de la réunion de Vienne de l'OSCE de 1989 et* le *Document de Copenhague sur la dimension humaine de la CSCE/OSCE de 1990,* toutes *précitées*, note 1.

[36] *Baker c. Canada (Ministre de la Citoyenneté et de l'Immigration),* [1999] 2 R.C.S. 817.

[37] *R. c. Beaulac,* [1999] 1 R.C.S. 768.

CANADA'S CONSTITUTION AND *CHARTER*: AN EMERGING GLOBAL TEMPLATE FOR RECONCILING DIVERSITY, IDENTITY AND RIGHTS?

ABSTRACT

This article argues that multiethnic federal states can only ensure social stability if the federal model offers substantive equality to its minorities. Canada could be providing an emerging global template for federal states with multiethnic populations to develop such substantive equality constitutional frameworks to prevent ethnic conflict and the breakdown of federal states. Canada's judicial and socio-political experience under the Constitution and *Charter of Rights and Freedom* are hunching out principles and methods to balance collective interests and individual rights and to set down principled parameters for dealing with unilateral secessionist attempts.

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Introduction

Recent history would seem to offer up a stunning paradox that federal states may not be the best form of human governance for societies with multiethnic populations. The former Soviet Bloc had nine states, six of which were unitary states, while three were federal in structure. With the unification of Germany, the six unitary states are now five, but the three federal states, Yugoslavia, the Soviet Union, and Czechoslovakia are now 22 independent states, perhaps 23 if we include Kosovo.[1] Most of these newly independent states were forged by minorities who did not feel that their human rights were sufficiently protected by the federal structures they previously existed in. It is not an adequate counter argument to suggest that this spectacular break up of Eastern European, Soviet and Balkan multiethnic federal states was due to the ending of the oppressive authoritarian state after the end of the Cold War and the return of the historic ethnic hatreds and conflicts let loose without the restraints of the strong man and his overwhelming security forces. I suggest that ethnic identities are not predetermined to be in conflict with other groups and that the causes of ethnic conflict are not only influenced by history, but also by way in which such groups are treated. As one Bosnian Muslim teacher is reported to have said: "We were Yugoslavs. But when we began to be murdered because we are Muslims, things changed. The definition of who we are today has been determined by our killing."[2]

At first sight, this does not bode well for federations being particularly good structures for the protection of minority rights. Yet, the orthodox thesis is that it is federations rather than unitary states that can best protect minorities across diverse populations or across large territories. Perhaps this view is outdated and should be replaced with the thesis that it is only multiethnic societies, whether federations or not, that develop the appropriate constitutional and legal framework on substantive equality that can hope to remain united and avoid the human rights catastrophes that we see in multiethnic societies around the world today.

I suggest the value of substantive equality is even more important than having a formal democratic system in a multiethnic society. For example, Sri Lanka, a democratic multiethnic state, has stood accused of violating the human rights and equality rights of its Tamil minorities and found itself in a seemingly intractable civil war that has left more than 65,000 dead.[3] Similarly, other theoretically democratic multiethnic states, such as Russia,[4] are, in practice, refusing to go down the road of a democratic federalism based on respect for substantive equality – with potentially similar disastrous consequences.

The future for authoritarian non-democratic multiethnic states is even bleaker. We only have to look at the genocidal carnage in Sudan to understand this horrible future.

What does substantive equality mean in the context of minority rights?

At the core of the concept of substantive equality is the thesis that sometimes treating minorities,[5] regions, or, indeed, citizens identically can sometimes lead to unequal treatment. Substantive equality, I suggest, would promote treating all groups in a multiethnic society with equal concern and respect which often requires differential treatment, while formal equality would promote identical treatment of all minorities, regions, and citizens.[6]

The foundational act of the Canadian state, the *British North America Act,* 1867[7] is replete with provisions related to democratic pluralism. However, what is particularly interesting about the evolution of the Canadian Constitution is that it contains critical constitutional provisions that are sometimes asymmetrical and sometimes symmetrical provisions that allow differences to flourish. Examples include: the guarantee of 75 seats for Quebec in the Canadian Parliament (Section 37), a critical asymmetrical provision; the entrenchment of the provinces symmetrical jurisdiction over property and civil rights in Section 92(13), a critical symmetrical provision that allows differences between the provinces to flourish; the protection of denominational schools in Ontario and Quebec (Section 93), and the official use of English and French in the Canadian and Quebec legislatures (Section 133), both important asymmetrical provisions. Likewise, the maintenance of the Civil Law system in Quebec is another example of asymmetrical federalism entrenched in the constitutional history of the country. The genius of the founding architects of Canadian nationhood was to entrench asymmetry up to the limits of the politically possible, but then to permit differences to flourish under other symmetrical provisions.[8]

Leading American federalism theorists such as the late William H. Riker[9] argued, as did opponents of the Meech Lake Accord[10] and the Charlottetown Accord, that it is only symmetrical federalism that is truly compatible with democratic federalism. The federal bargain that created the United States, according to many American federalism theorists like Riker, would deem asymmetrical arrangements as incompatible with the fundamental principle of equality of citizens and equality of states. I suggest that the promotion by some American federalism theorists of symmetrical federalism proposes a vision of constitutional formal equality based on their particular revolutionary history. In the evolution of American federalism, the overwhelming political imperative was to minimize differences to create a national identity based on the supremacy of individual and economic liberty. This imperative is protected and safeguarded by a strong central government and a Supreme Court empowered with the strongest remedial mechanisms inherent in the power of judicial review.[11]

However, where multiethnic nations have large dominant ethnic populations and historically settled national ethnic, linguistic, or religious minorities, an insistence on symmetrical federalism would be a denial of the substantial equality of these minorities. Symmetrical federalism and formal equality can often lead to the assumption of uniformity where it does not exist and could lead to the coercive institutions of the federal state imposing such uniformity and assimilation. The result can be disastrous, as we have seen in the case of the Balkans. Asymmetrical federalism in multiethnic federations is especially important to promote the essential features of cultural self-determination of such minorities in areas such as language, education, culture, religion and, as in the case of Canada, the legal traditions and systems. Effective participation in decision making at the central level which may be asymmetrical to the proportion of the minorities' percentage of the federation's population is essential to protect against the "nationalizing" tendencies of the dominant population in a multiethnic federation.[12] This is the chief rationale of providing a permanent 75 seats to Quebec, regardless of what

percentage of the Canadian population the Quebec population comprises.

It is suggested that asymmetrical federalism within a democratic multiethnic federal state is a fundamental requirement of substantive equality. To reiterate, substantive equality differs from formal equality in that it recognizes that identical treatment can lead to discriminatory treatment of minorities and impose uniformity and coercive assimilation that would threaten the existence of such minorities.[13] Democratic multiethnic federal states, such as India,[14] Canada and Spain,[15] have learned that asymmetrical federalism has been critical to the survival of their federations.

II. Respect for human rights as a foundation for the protection of minority rights within the context of democratic federalism

As Professor Stephan has also pointed out, leading American federalism theorists, such as Riker, also claimed that an essential feature of democratic federalism is to protect individual rights against encroachments by central or state governments or by the will of the majority. [16] This is accomplished by a number of classic federal structures such as an entrenched *Bill or Charter of Rights and Freedoms*, a bicameral legislature where the will of the majority in the lower house can be restrained by an upper house based on regional representation, and, most importantly, a federal Supreme Court that protects the fundamental rights of all citizens of the federation and whose remedial orders are backed by the coercive powers primarily, but not exclusively, of the central government.[17]

The fundamental problem posed by this classic American model of the role that rights play within democratic federalism is that American jurisprudence, particularly that of the U.S. Supreme Court, has not acknowledged the existence of collective rights, which some would assert is the very marrow of minority rights. While some liberal thinkers have attempted to downplay this denial of collective rights legitimacy by pointing out that what may seem to be collective rights can be exercised by individuals and are thereby transformed into individual rights,[18] a major theoretical and practical challenge still exists. In many multiethnic federal states, individual citizens of a group can participate effectively in a "group benefiting right" only if the group obtains the effective collective right to education and access to cultural, religious, or legal institutions that are specific to their particular forms of cultural self-determination.[19] As will be discussed below, this is a fundamental aspect of distributive justice within a democratic federalist state.

Where minorities live dispersed among the majority population within a federal structure, other functional forms of protecting the essential areas of cultural self-determination in areas such as language, education, etc., are needed.

The dilemma of how to fit minority rights within a federalism framework that is liberal and democratic is being developed in theory and practice by Canadians and within the Canadian constitutional framework. Will Kymlicka argues that "group specific" rights are compatible with liberal fundamental tenets that uphold the supremacy of individual rights. Liberal think tanks like the Friedrich Naumann Foundation of Germany, linking up with Canadian political philosophers and legal experts like Kymlicka and this author, together with other experts and minority representatives from around the world, have developed a liberal manifesto on "The Rights of Minorities" that upholds the group specific rights of minorities while proclaiming the supremacy of individual or universal rights.[20] The fundamental premise of these new liberal democratic federalists is that it is because the rights and liberties of individual citizens include the right to associate that most such rights have a group related or specific dimension. Thus belonging to a minority based on common cultural, linguistic, or religious heritage is indeed an important factor of identity and indeed of human dignity for most members of such minorities. Where individuals thus freely associate, no central or state government or majority, however large, may deny the right of such groups to cultural self determination within the limits of the supremacy of individual and universal rights and the Rule of Law.[21]

Indeed, it is unlikely that the majority francophone population in Quebec or the minority francophone communities outside Quebec or the

Catalans in Spain would ever feel comfortable as equal citizens in their democratic federal states without the "group specific" rights enshrined in the respective federal constitutions of their countries.[22]

However, as with all things, the devil is in the details. The way in which national minorities are settled can often determine the way in which democratic federal states can afford them such group-specific rights. Where such minorities are living in contiguous and compact settlement areas and form a majority, granting some form of territorial autonomy to allow them to fully exercise their right to cultural self-determination can be accomplished most effectively in democratic federal structures through the establishment of a state or province where they form the majority. The province of Quebec in Canada and Catalonia in Spain are examples of such territorial autonomy.[23] However, liberal democratic federalists would insist that such territorial autonomy granted to such minorities should not come at the expense of the rights of individuals or other minority groups within the territory granted autonomy being trampled on. There is thus a need for an entrenched *Bill or Charter of Rights* enforced by an independent federal judiciary.

Where minorities live dispersed among the majority population within a federal structure, other functional forms of protecting the essential areas of cultural self-determination in areas such as language, education, etc., are needed. Examples include the constitutional guarantees for minority language education for dispersed minority francophone communities outside Quebec, which will be discussed below.

This being said, the biggest challenge still remains: how to set fundamental federal socio-economic and political objectives and both individual and group specific rights within a coherent "human rights framework" that determines the specific content of both sets of rights and how to adjudicate between them when they clash, as they inevitably will.

This is where fundamental conceptions of distributive justice which underpin the concept of substantive equality must enter the picture to set the context for the human rights framework of individual and collective rights within a democratic federalism framework and to help in adjudicating conflicts between different sets of rights.

Again, the Canadian constitutional order is "hunching" out a theoretical and practical framework for the human rights framework of individual and collective rights which seems to be based on unarticulated notions of distributive justice.

The collective rights of the growing diversity of Canadian society have been guaranteed in the *Canadian Charter of Rights and Freedoms* entrenched in our Constitution in 1982.[24] In the Constitution, we recognize the collective rights of our Aboriginal people, and our multicultural and multiracial communities. Through court decisions and provisions of the original Constitution and the *Charter of Rights*, we recognize the collective rights of our French-speaking population.

The wording of some of the provisions in the Canadian Constitution and Charter, which recognize collective rights, pose some interesting dilemmas for those who are steeped in classical liberalism in the American legal tradition. In what follows, I briefly discuss three examples, namely, section 23(3) and 27 of the *Charter*.

Section 23(3) of the *Canadian Charter of Rights and Freedoms* entrenches minority linguistic education rights of French speaking minorities outside Quebec and English speaking minorities within Quebec. The Section states:

> The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province:
> (a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision of them out of public funds of minority language instruction; and
> (b) includes, where the number of those children so warrants the right to have them receive that instruction in minority language educational facilities provided out of public funds.

This is a curious type of right to be found in a constitutional document in a Western liberal democracy, where the exercise of the right is contingent on the number of people who wish to exercise it! Imagine a similarly contingent right related to the freedom of speech. This entrenchment of linguistic rights in Canada points to the fact that collective rights require an examination of the sociological, economic and cultural backgrounds from which they arise.[25] Recently the Supreme Court of Canada, in *Arsenault-Cameron*

v. P.E.I.,[26] handed down a profound example of the critical role that distributive justice, on a conscious or unconscious level, plays in setting the context of the human rights framework for protection of minority rights within a democratic federal system.

In this case, the individual francophone parents entitled to have their children schooled in French under section 23 of the *Charter* sought to have their children schooled at the primary level in a school located in their local community of Summerside, P.E.I. The provincial Minister of Education insisted that such minority language education could be provided at an existing French language school, approximately 57 minutes away by school transportation services. The Supreme Court ruled, in a judgment delivered by Mr. Justice Bastarache, the former academic expert on linguistic rights, and Mr. Justice Major, that section 23 was not meant to uphold the status quo by adopting a formal vision of equality where the majority and minority language groups were treated alike. The Court held that the purpose of section 23 was to remedy past injustices and provide minority language communities with equal access to high quality education in circumstances where community development is enhanced. The reference to "where numbers warrant" in the section must take into account community development, even where the numbers in the Summerside area were between 49 and 155.

In a clear expression that Canada has taken a different liberal democratic route from the United States, the Court held that focusing on the individual right to instruction at the expense of the linguistic and collective rights of the minority community effectively restricts the collective rights of the minority community. Here the Minister had failed to realize that the existence of a local minority language school was the single most important institution for the survival of the linguistic minority and to prevent the assimilation of minority language children. The Court also held that the local management and control by the minority language community was critical to the enjoyment of the section 23 rights.

It is suggested that this P.E.I. decision of the Supreme Court of Canada is a paradigm example of the need to strive for substantive equality based on conceptions of distributive justice within the context of democratic federalism to protect the rights of minorities within a democratic federal system.

Protection of minorities has been confirmed as one of four foundational principles of Canadian federalism by the Supreme Court in its landmark ruling on the right of Quebec to unilaterally secede from Canada. In *Reference re Secession of Quebec*,[27] the Court held that neither the Canadian Constitution nor International Law gave the government of Quebec the right to effect secession unilaterally. However, in a landmark ruling, the first of its kind in any multiethnic democratic federalist state, the Court went much further. The Court advised that there would be a constitutional duty on all parties to negotiate if the legitimate goal of secession was supported by "*the clear expression of a clear majority*" of Quebecers.[28] Such negotiations would have to address the interests of all provinces and the federal government and the rights of all Canadians wherever they live. Most relevant to this discussion, the Court stipulated that such negotiations would have to proceed with respect for "*the same constitutional principles that give rise to the duty to negotiate: federalism, democracy, constitutionalism and the rule of law, and the protection of minorities*."[29]

I suggest that the Canadian Supreme Court has advised all democratic multiethnic federal states that the breakup of such federations are subject to much the same fundamental values as the preservation of such states as I have argued above. I also suggest that because Canada has striven hard to observe these fundamental values, there will never be a clear expression of a clear majority of Quebecers to leave the Canadian federation.

Finally, in section 27 of the *Charter*, one finds an interpretive section which reinforces the view that racial and ethnic minorities who derive their existence from immigration into Canada have socio-cultural collective rights that are different in nature from the historically settled national minority communities of French and English found across Canada. The section states:

> This *Charter* shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

This section requires that all rights and freedoms in the *Charter* be interpreted in a manner that not only ensures the survival of the collectivist principle of cultural pluralism, but also promotes its actual enhancement. Does it not seem paradoxical that individual rights found in other sections of the *Charter* must be interpreted

in a way that not only preserves but enhances the collectivist principle of cultural pluralism?

Let us examine what this collectivist principle of multicultural heritage of Canadians consists of as set out in section 27. For the purpose of the ensuing discussion, I am assuming that the concept of multiculturalism is equivalent to the concept of multicultural heritage of Canadians. It is imperative to define multiculturalism first. Attempts to define multiculturalism have usually set out a historical evolution of Canadian nationhood accompanied by what the concept means or should mean today. The 1987 House of Commons Report entitled *Multiculturalism*[30] arrives at the following essential features of multiculturalism:

- Multiculturalism is a principle applicable to all Canadians and it seeks to preserve and promote a heterogeneous society in Canada. The principle refutes the idea that all citizens should assimilate to one standard paradigm over time.
- Multiculturalism is today most fundamentally concerned with ensuring substantial equality for all Canadians regardless of what cultural groups they belong to.

If this is correct, then the interpretive rule in section 27 is a mandate for Canadian courts and governments to interpret all rights and freedoms in the *Charter*, even those focused on individual rights, in a manner that preserves cultural pluralism and substantive equality among all citizens in Canada. This, again, is a fundamental principle of distributive justice.

The most relevant and controversial conclusion from this analysis of section 27 is that there will be situations when the exercise of individual rights will, in some circumstances, have to give way to the collectivist principle of cultural pluralism, where the exercise of such rights crushes the equal access by minority groups to the most important goods in our society. This has been illustrated in the area of hate propaganda in the *R. v. Keegstra*[31] decision of the Canadian Supreme Court, where the Court, in upholding the hate propaganda provisions of the Canadian *Criminal Code*[32] ruled that the freedom to willfully disseminate hate propaganda against identifiable minority groups in our society cannot crush the rights of such minorities to equality and full citizenship in our society. The Court ruled that these rights are protected both by section 15, (the equality guarantee) and section 27 of the *Charter* in the context of balancing rights against collective interests under section 1 of the *Charter*.

A Canadian conception of distributive justice

By the above discussion, I have tried to show that distributive justice must also be at the core of any democratic federalism attempt to entrench substantive equality to protect minority rights. It is time for me to explain what, then, is the conception of distributive justice that I advocate.

Distributive justice encapsulates every aspect of all human societies because all human societies are also institutions of distribution. Different political and legal systems promote different distributions of society's most valued assets, such as power, knowledge, wealth, security of the person, health, and education. The judiciary also is an instrument of distributive justice. Different interpretations of rights, especially collective rights, lead to different distributions of power and access to public goods. The decisions of the Supreme Court in the area of linguistic and aboriginal rights most clearly demonstrate this. [33]

In human history, some societies have either expressly (*e.g.*, the former apartheid regime in South Africa) or de facto (including many so-called Western liberal democracies) allowed full and equal access to the above-mentioned societal goods only to those who conform to a singular and dominant racial, ethnic, linguistic, or cultural paradigm. This has been the root cause of much of the racial and ethnic strife that we have seen and continue to see around the world today, from the civil rights movement in the United States to the ethnic strife in the Balkans and Sri Lanka. Conceptions of distributive justice found within democratic federal systems deny that such societal distributional criteria can ever be just. Democratic federalist and pluralist conceptions of distributive justice must acknowledge that all manifestations of race, language, ethnicity, or national origin are worthy of equal concern and respect. Distributive justice in democratic federalist societies must aim at the establishment of a society where no one segment of society can claim that they have the singular and dominant racial, cultural, ethnic, or linguistic paradigm and, on that basis, have the predominant access to society's most valued goods.

It is readily acknowledged that this is one conception of distributive justice. As others have so well stated, distributive justice is one of most

hotly contested battlegrounds for different political, philosophical, and moral perspectives.[34]

It is suggested that this approach to distributive justice is also the predominant value behind the equality guarantee in section 15 of the *Canadian Charter of Rights and Freedoms* as confirmed by the jurisprudence of the Supreme Court of Canada.[35]

But the *Charter* and Canadian society also recognize the equal value of civil and political rights based on the dignity of the individual human being. Many of the civil and political rights are stated in absolute terms that seem to allow little room for abridgement. For example, section 2 of the Charter states:

> Everyone has the following fundamental freedoms:
> (a) freedom of conscience and religion;
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other means of communication;
> (c) freedom of peaceful assembly; and
> (d) freedom of association.

The jurisprudence of the Canadian Supreme Court has imposed a two-step approach to interpreting rights such as these in any litigation process. First, the complainant who is alleging that his or her rights have been infringed must establish a *prima facie* case that the government has violated the guaranteed right. No governmental justification for abridgement of the right is permitted at this stage. For example, even the curtailment by government action or legislation of the vilest forms of hate propaganda and more recently, child pornography, have been ruled a violation of section 2.[36] The Supreme Court has held that any form of communication has expressive content and government restriction of any such form of expression is a violation of section 2(b).[37]

However, despite this initial, seemingly absolutist, approach to civil and political rights, we do not place collective rights and interests of groups and society at risk of being trumped by individual rights and freedoms no matter how they are being used. Rather, we attempt to balance the categories of rights by the distributive justice principles that have been enunciated in the Supreme Court of Canada case law interpreting section 1 of the *Charter*.

The need to develop some fundamental principles of distributive justice is introduced in the first section of our *Charter*. This section states:

> The rights set out in the *Charter* are subject to reasonable limits demonstrably justified in a free and democratic society.

The section comes into operation after the plaintiff has proven that there is a *prima facie* violation of his or her rights, as described above. The burden of proof then switches to the government to show that it can justify such a violation on the basis of the criteria set out in section 1, which makes all the guaranteed rights subject to reasonable limits demonstrably justified in a free and democratic society.

I suggest that section 1 was a mandate given by the people of Canada to the judiciary, in particular the Supreme Court of Canada, to work out a framework of distributive justice within which an appropriately Canadian rights adjudication process could take place.

During the relatively brief period of the existence of the *Canadian Charter*, there have been cases where, I suggest, the Supreme Court met the challenge of creating this uniquely Canadian framework of distributive justice for rights adjudication. The landmark decision of the Canadian Supreme Court in *Ford v. Quebec (A.G.)*[38] is, I suggest, one such example. In this case, five businesses operated by English speaking Quebeckers sought a declaration that sections 58 and 69 of the Quebec *Charter* of the French Language infringed the individual right of free expression as they required exclusive use of French on exterior commercial signs. The Court held that this was too heavy an infringement of the individual right of free expression and so struck down the law. The Court even suggested a different legislative scheme that would be constitutionally acceptable. The Court suggested that requiring the predominant display of the French language, even its marked predominance, would be proportional to the legitimate goal of promoting and maintaining a French "visage linguistique" in Quebec. Ultimately, even a subsequently elected separatist government in Quebec accepted this suggestion by the Court as a just way to deal with cultural self-determination while respecting the human rights of all the province's citizens.[39]

In the rather complex interpretations of section 1, it should never be forgotten that one of the most pre-eminent jurists in Canadian history, Chief Justice Dickson, in *R. v. Oakes* focused upon the final words of section 1 as they were seen as "the ultimate standard against which a limit on a right or freedom must be shown,

despite its effect..."[40] Chief Justice Dickson argued that because Canada is a free and democratic society, the courts must be guided in interpreting section 1 by the values inherent in concepts such as: respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.[41]

There can be no better conclusion as to what are the fundamental values that must underpin democratic federal states if minority rights are to be protected within democratic federal states and to ensure the survival of such federal states. There can be no better description of the values of democratic pluralism and substantive equality based on Canadian perceptions of distributive justice than that which comprises the Canadian template for multiethnic federations around the world.

Notes

[1] See A. Stephan, "Federalism and Democracy: Beyond the U.S. Model" (1999) 10 *J. of Democracy* 4 at 19-34. For an excellent analysis of how federal structures in the Former Republic of Yugoslavia (FRY) did or did not contribute to the breakup of the FRY; see S. Malesevic, "Ethnicity and Federalism in Communist Yugoslavia and its Successor States" in Yash Ghai, ed., *Autonomy and Ethnicity, Negotiating Competing Claims in Multi-Ethnic States* (Cambridge: Cambridge University Press, 2000) at 147. The author's thesis is that regarding the value of federal arrangements for the maintenance of multiethnic societies, "A great deal depends on the historical, political and social conditions of the particular society. What is crucial is the way in which the agreement between the constituent units is reached."

[2] See B.W. Jentleson, "A Responsibility to Protect: The defining challenge for the global community" Harvard International Review, 2007 Vo. 28, No. 4, pg. 19 at pg. 19.

[3] See Tiruchelvam, *supra* note 1 at 198. The author, a friend and colleague, was a moderate Tamil scholar and jurist who paid with his life for his belief that constitutional reform in the direction of regional autonomy could resolve Sri Lanka's ethnic conflict. He was killed by a suicide bomber on July 29, 1999.

[4] The annual reports of Amnesty International and Human Rights Watch continue to condemn the gross human rights violations and lack of effective democratic institutions in both countries, see online: Amnesty International <http://www.amnesty.org>, Human Rights Watch <http://www.hrw.org>.

[5] For a discussion of equality and the accommodation of differences between minority groups and majorities, see W. Kymlicka, *Multicultural Citizenship* (Oxford: Oxford University Press, 1995) at 108-116.

[6] For further discussion of this hotly contested view, see D. Milne, "Equality or Asymmetry: Why Choose?" in R.L. Watts & D.M. Brown, eds., *Options for a New Canada* (Toronto: University of Toronto Press, 1991) at 285-307.

[7] U.K., 30 & 31 Victoria, c. 3. For a detailed discussion of the early pre and post-confederation history of Canada, see J.L. Finlay, *Pre-Confederation Canada: The Structure of Canadian History to 1867* (Toronto: Prentice-Hall, Canada, 1989); P.B. Waite, *The Life and Times of Confederaion, 1864-1867* (Toronto: University of Toronto Press, 1962); S.B. Ryerson, Unequal Union: Confederation and the Roots of Conflict in the Canadas, 1815-1873 *(Toronto: Progress Books, 1973); A.I. Silver, The French Canadian Idea of Confederation, 1864-1900* (Toronto: University of Toronto Press, 1982).

[8] For the landmark text which discusses and analyzes how the division of powers under the *Constitution Act*, 1867 allows for asymmetry, even while symmetry predominates, see G.-A. Beaudoin, *La Constitution du Canada: institutions, partage des pouvoirs, droits et libertés* (Montreal: Wilson &Lafleur, 1990).

[9] See William H. Riker, "Federalism" in F. Greenstein and N.W. Posby, eds., *Handbook of Political Science* (Boston: Addison-Wesley, 1975) Vol. 5, at 93-172.

[10] For further discussion of the equality/asymmetry arguments that took place in these constitutional rounds, see P. Monahan, *Meech Lake: The Inside Story* (Toronto: University of Toronto Press, 1991); K. McRoberts & P. Monahan, *The Charlottetown Accord, the Referendum and the Future of Canada* (Toronto: University of Toronto Press, 1993).

[11] There are a plethora of sources that advance this theme, see for example, P. A. Freund, "The Judicial Process in Civil Liberties Case" in V. Stone, ed., *Civil Liberties and Civil Rights* (Chicago: University of Illinois Press, 1975); *The Role of the Supreme Court in American Government* (Oxford: Oxford University Press, 1976); M. Kammen, *Sovereignty and Liberty* (Madison: University of Wisconsin Press, 1988).

[12] See Kymlicka, ed. *The Rights of Minority Cultures* (Oxford: Oxford University Press, 1995) for a collection of essays by some of the leading experts in the world on this theme.

[13] See *Kymlicka*, *supra* note 6 at pp. 10-130.

[14] See *A. Stephan, supra* note 1 at 53.

[15] While not a classic federal state, Spain, through its autonomous communities, demonstrates some of the features of asymmetrical federalism, see Conversi, *supra* note 1 at 122.

[16] See Riker, *supra* note 10.

[17] See the literature, *supra* note 12 for discussion on this point also.

[18] It is ironic that one of the main architects of the modern Canadian constitutional order, the late Right Hon. Pierre Trudeau, seemed to have held this perspective of collective rights, see K. McRoberts, *Misconceiving Canada: The Struggle for National Unity* (Toronto: Oxford University Press, 1997) at 60-64.

[19] See Kymlicka, *supra* note 6 at 75-106.

[20] *A Declaration of Liberal Democratic Principles Concerning Ethnocultural and National Minorities and Indigenous Peoples*, adopted by members of 38 indigenous peoples, national and ethnocultural minorities from 26 countries at the 2nd Minorities Conference of the Friedrich Naumann Foundation held at Berlin from September 13-16, 2000. Copies can be obtained from Liberales Institut der Freidrich-Naumann-Stiftung, Postfach 90 01 64, D-14437 Potsdam or online: Freidrich-Naumann-Stiftung http://www.fnst.de/libinst/publikationen/minoeng.pdf.

[21] See Kymlicka, *supra* note 6 at 75-106.

[22] For an extensive discussion of how important language is, with such "group specific" rights from a historical and international perspective, see F. de Varennes, *Language, Minorities and Human Rights* (Boston: Martinus Nijhoff Publishers, 1996).

[23] For a comparison of these two types of territorial autonomy, see M. Pares & G. Tremblay, eds., *Catalunya, Quebez: Dues Nacions, Dos Models Culturals,* (Ponencies del Primer Simposi, Barcelona, maig, 1985, Generlitat de Catalunya, 1988).

[24] *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act,* 1982, Schedule B of the *Canada Act,* 1982 (U.K.) C.11 [*Charter*]. For one of the most comprehensive analyses of the provisions of the *Charter*, see, G.-A. Beaudoin & E. Mendes eds., *The Canadian Charter of Rights and Freedoms, 3rd ed.*, (Carswell, 1996).

[25] See M. Bastarche, ed., *Les droits linguistique au Canada*, (Montreal: Yvon Blais, 1986).

[26] [2000] 1 S.C.R. 3.

[27] [1998] 2 S.C.R. 217.

[28] *Ibid. at para.* 100.

[29] *Ibid. at para*. 90.

[30] House of Commons Standing Committee report on *Multiculturalism: Building the Canadian Mosaic*, 2nd Sess. 33rd Parl., 1987 at 22-23.

[31] [1990] 3 S.C.R. 697 [*Keegstra*].

[32] R.S.C. 1985, c. C-46 [*Criminal Code*].

[33] For support on this point, see Macklem, *supra* note 32 at 21-23.

[34] See T. Campbell, *Justice* (Atlantic Highlands, New Jersey: Humanities Press International, 1988).

[35] For a discussion of the recent jurisprudence of the Court, see E.P. Mendes, "Taking Equality into the 21st Century: Establishing the Concept of Equal Human Dignity" (2000) 12 National J. of Constitutional L. 1 at 3.

[36] *Keegstra*, *supra* note 33; R. v. *Sharpe* (2001) S.C.C. 2.

[37] *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 [*Irwin Toy*].

[38] [1988] 2 S.C.R. 712.

[39] For a detailed discussion of this case, see E. P. Mendes, "Two Solitudes, Freedom of Expression and Collective Linguistic Rights in Canada: A Case Study of the Ford Decision" (1991-92) 1 National J. of Constitutional L. 283.

[40] [1986] 1 S.C.R. 103 at 136.

[41] *Ibid*.

THE *CHARTER* AS A GOVERNANCE STORY

ABSTRACT

The *Canadian Charter of Rights and Freedoms* was a chance event that derailed the drift from Big G (government) to small g (governance). The positive opinion of Canadians about the *Charter* is an uninformed opinion. In fact, the *Charter* underpinned a new fundamentalism of rights talk, and a trumping of politics by adjudication. Until judges go back to their duty of jus dicere, instead of indulging in *jus dare*, and until citizens recapture control of their polity, the malefits of the *Charter* will continue to prevail.

> "As the morality of rights displaces the morality of consent,
> the politics of coercion replaces the politics of persuasion".
>
> F.L. Morton & Rainer Knopff

The context

The last twenty-five years have witnessed major changes both in the nature and valence of the state, and in the configuration of government. Pressures generated by globalization, accelerated technological change, greater socio-ethnic diversity, heightened citizens' expectations, crises in public finances, and so forth, have generated considerable turbulence, and a requirement for the institutional order to adjust faster to ever more complex and always evolving circumstances. These pressures have eaten away at many basic assumptions upon which traditional forms of governing were built.

To simplify, one might say that the Welfare State is in the process of being replaced around the world by the Strategic State: governing has been drifting from a pattern dominated by Big G (government) towards a pattern dominated by small g (governance). This latter pattern of governance is less state-centric, more decentralized, and more polycentric and network-based than the previous regime.

The dominant features of the Big G world were a presumption that the state is more effective than other mechanisms in the pursuit of the public good, and that redistribution should proceed as a matter of right toward an objective of egalitarianism – that can be achieved only through a centralized governance that brings the loot to the center to begin with.

As for the small g world, its dominant features are a belief that the state cannot be presumed to be more effective than market or solidarity mechanisms in all circumstances, and that redistribution should proceed on the basis of needs, and be guided by a philosophy of subsidiarity that operates bottom-up, and in a decentralized fashion – allowing intervention at the higher and more distant level only if the work cannot be done at a lower and more proximate level.

The *Charter* revolution

My hypothesis is that the 1982 *Charter* has produced changes of considerable magnitude in the Canadian psycho-socio-political environment, and has considerably slowed down the drift from Big G to small g.

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It has done so by dramatically changing both the Canadian mindset and the rules of the democratic game in Canada. These impacts have not been well understood.

First, the positive opinion of Canadians about the *Charter* is not an informed opinion. It is an impressionistic and emotional attachment to a contraption that has been effectively marketed by Trudeau-style politicians as an empowerment of the citizens. As soon as the citizens are informed that two thirds of the *Charter* decisions by the Supreme Court involve the rights of those accused of crimes or of special interest groups, Canadian citizens are often astonished and much less enthralled.

This ignorance explains why more than half of polled Canadians in 2007 continue to think that the *Charter* has had a positive effect on Canada in the past, and is moving Canadian society in the right direction for the future.

In parallel, the fuzziness of the public mind on *Charter* matters has allowed interest groups to take advantage of the new instrument to advance their causes by defining their wants or their preferences as rights. Rights as a bundle of rules are claimed without any concern as to whether such claims relate to basic needs or rather to luxury privileges, without any concern for the consequences, and without asking if the population agrees to it and is ready to take on the associated burdens.

Second, such claims have been routinely supported by the courts, often for specious reasons, and have acquired thereby a sacred character and a degree of permanency that they would never have acquired through parliament. The courts have gained the upper hand in their dialogue with the legislatures and parliament.

While it has been argued that the legislatures can always use the 'notwithstanding clause' to neutralize the actions of the courts, the extraordinary degree of political correctness of the population, and their undue deference to the courts, have led to a chill both in the political class and the citizenry, even in the face of the most Kafkaesque decisions of the courts.

The political correctness that has generated such deference to the judiciary has become a new despotism.

Consequently, democratic governance has been eroded by the new fundamentalism of rights talk, and by the fact that, through the *Charter*, judicial adjudication has come to trump the democratic conversation.

The new fundamentalism of rights talk

Fundamentally, rights are social; they are a man-made system of rules granting some privileges to persons with a particular status. They define expectations when they become morally endorsed and/or embedded in law. The *Charter* has generated considerable pressure to establish and formalize rights, to give judicial status to certain rules, and to make the related rights inalienable and inextinguishable.

Like all charters of rights, the *Canadian Charter* was purported to ensure *negative freedom* (i.e., to protect citizens from their governments). But, through various means – of which judicial activism is only one – the *Canadian Charter* has morphed into a machine that produces an inflation of entitlements, with the courts using it to force government to accept new responsibilities in the name of *positive freedom* (i.e., the obligation to provide citizens with the security and support necessary to help them "develop" to their fullest extent), all in the name of shared values and egalitarianism.

The shift from a focus on negative freedom to one on positive freedom is a change of kind.

While the pursuit of negative freedom entails a reduction of oppressive rules, the focus on positive freedom leads to an increase in the *number of rules* as: (1) there seems to be no limit on the "capacities" that may presumed to be necessary for the optimal development of the individual, and (2) therefore no limit to the entitlements required to ensure that one's "capacities" are going to be allowed to be fully developed. It has also been argued that the degree of formality and permanency of the arrangements, necessary for positive freedom to be assured, is such that only legal arrangements will do.

This inflation of new rights to symbolic and real resources has re-enforced the centrality of the state, and in so doing, slowed down the drift from Big G to small g in Canada.

Although the new fundamentalism that emerged from the rights talk of the *Charter* has been denounced from the very moment when the project of a charter was discussed, to the present – from Smiley (1969) to Ignatieff (2001) – and even though it was clear that the vague Rorschachian language of charters was likely to be 'interpreted' by activist judges as legitimizing limitless entitlements, it has proved impossible to counter the ideological support for this philosophy of entitlement.

The notion of needs might have helped in establishing limits on those entitlements. David Braybrooke (1987) has shown that, to the extent that one is able to tame the notion of needs (through lists of matters of need, definition of minimal standard, the principle of precedence of needs over preferences, and a revisionary process to modify either list or standards as circumstances evolve) this notion may serve to anchor discussions about entitlements, and help to keep them within bounds. For, contrary to the notion of rights that is a conversation stopper, the notion of needs is an invitation to conversation and deliberation.

Charter as adjudication trumping politics

In the post-*Charter* years, the drifts from the rule of law to the idolatry of rights, and toward a political correctness of deference to the infallibility of the judges and commissars charged to interpret them, have not been innocent. It would appear that the quest for certainty and clarity knows no bound; the political process has been found too unreliable to be counted on in matters of governance. Better a clear bad rule than a good fuzzy one.

An elite of superbureaucrats has been called upon to interpret the laws, to define what is acceptable or not, to make decisions for the citizens, because the citizens have been declared incapable (as were their elected representatives) of doing that.

This drift toward legal formalism and administrative adjudication has grown exponentially. It is such that one can hardly go through a week in the life of the country without one commissar or another making an adjudication report that is meant to force a representative government to do something it would prefer not to do.

Such development has also tended to slow down the drift from Big G to small g, and it has often been done with the complicity of parliamentarians whose lack of courage has, at times, led them to: (1) delegate to judges and commissars some of the wicked problems they were faced with, and (2) never to challenge their diktats even when they were absurd and destructive.

This state of affair reached a bizarre climax in 2004 when the then federal Minister of Justice developed a new doctrine, in the *Ottawa Citizen*, in the midst of the electoral campaign (Cotler 2004). This new gospel stated openly what until then had remained closeted in political circles: representative democracy does not work; and the courts and commissars must be the bulwarks to protect Canadian governance.

The key matter under discussion at the time was the decision of appellate courts in British Columbia, Ontario and Quebec to strike down the legislation limiting marriage to a man and a woman.

Irwin Cotler took the view that appellate court judges were infallible, even though the majority in the House of Commons would appear not to agree with them, and had said so very clearly in open debates in recent times.

It is difficult to understand why the Minister of Justice did not even feel the need to obtain the Supreme Court's view about whether the traditional definition of marriage was indeed in violation of the *Charter* – an opinion that the Supreme Court has refused to give.

Whatever the Supreme Court's final decision might have been, what is most surprising is to see a federal Minister of Justice so obsessed with limiting the damages that the tyranny of the majority might inflict on minorities (in his own personal view), that he was willing to (1) fall into an idolatry of court-interpreted rights (as if they were sacred), (2) to pronounce the ultimate authority of the courts over parliament in a representative democracy, and (3) to suggest that Parliament should not dare to use the notwithstanding clause, and that the judiciary should be allowed complete license.

As Michael Ignatieff has rightly underlined, "we need to stop thinking of human rights as trumps and begin thinking of them as a language that creates a basis for deliberation". Rights are not a set of trump cards to bring political disputes to closure. Parliament is the place of last resort for deliberation about all governance issues in a democracy.

This ignorance explains why more than half of polled Canadians in 2007 continue to think that the Charter has had a positive effect on Canada in the past, and is moving Canadian society in the right direction for the future.

The idea that Parliament is not to be trusted, and that judges, as super-bureaucrats, are like shamans who cannot be contested is anti-democratic.

The *Charter* is a creature of Parliament

Rights have been defined by Parliament, as Michael Ignatieff reminds us. They are a "tool kit against oppression" and one should not automatically "define anything desirable as a right", because that would erode the legitimacy of core rights.

The courts are not infallible in interpreting the *Charter* either. And there is nothing sinister, in a free and democratic society, in Parliament's using the notwithstanding clause to suspend for a short period the application of a decision by the courts that does not pertain to oppression, and with which the majority of freely elected parliamentarians does not agree.

To allow minority groups to obtain everything they would prefer to have as a matter of rights, to make rights into a secular religion, and the courts into its only authorized clergy, is taking Canada back into dangerous territory. And when a minister of the Canadian government trivializes Parliament as the ultimate authority in a representative democracy, one has cause for concern.

One might be tempted to take Cotler's views as extreme and marginal, and to discount them accordingly. That would be a mistake.

The activism of the courts and the willingness of judges and commissars to indulge in intellectual acrobatics in interpreting Article 15 of the *Charter* – the equality clause – (for instance), and in philosophizing about what may touch or leave untouched "dignity, feelings and self-respect" of a person can only leave one somewhat uncomfortable.

The thrusting of the language of rights into democratic conversations, and the further displacement of Parliament by judges and commissars, have imposed onto discussions about more or less (that characterize most of the democratic discourse) a sort of either-or yoke. Practical issues that ought to be discussed taking into account context and circumstances are adjudicated in the absolute and in the abstract, within an adversarial venue. This is not what we thought democracy was.

Hopes and fears

At first, many were enthusiastically favourable to the idea of the *Charter*, on the ground that the Supreme Court would exercise the same restraint in interpreting the *Charter* that it had exercised in interpreting the *Bill of Rights* of 1960.

This has proved not to be the case. The dual forces of the fundamentalism of rights and judicial activism have unleashed a major attack on representative democracy.

The saga of this successful attack has been eloquently told by Rory Leishman (2006).

In a short paper, one cannot do more than point to circumstantial evidence, but this is a cautionary tale.

Our institutional order has been transformed while the citizens slept. It has now been established that the courts have a right (when they wish) to review and strike down policies supported by the citizens' elected representatives, and to define their own rules for doing so (e.g., the Oakes' test) – in complete ignorance or blatant contradiction of earlier jurisprudence when they wish to do so – as Leishman clearly shows.

Whether this is an irreversible trend is the key question.

Let us just say that, for an observer from the mezzanine, it is difficult to see how this dérapage will be stopped (1) until judges go back to their duty of *jus dicere* instead of indulging in *jus dare*; and this will not happen until there is a change of the guard; and (2) until parliamentary democracy has been strengthened; and this will not happen until there is a change in citizen activism.

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THE CHANGING CONCEPTION OF THE RIGHT TO VOTE AND ITS IMPLICATIONS FOR THE ROLE OF THE CANADIAN SUPREME COURT

ABSTRACT

A key theme of *Charter*-era Canadian constitutional thought has been to emphasize the difference between Canadian and American conceptions of individual rights and, correspondingly, the different roles played by the respective Supreme Courts when hearing rights-based challenges to legislation. We argue that this distinction between the Canadian and American courts is inaccurate if not mythical, and that a convergence has occurred, especially concerning the manner in which the Supreme Courts of both nations regard scope and vision of the franchise.

Members of both courts now acknowledge that it is not possible to defer to the elected branches when dealing with voting rights claims because there is an inherent conflict of interest when elected officials write the rules by which they are returned to office. As a result, the Canadian Supreme Court now manifests an increasing awareness of the need to follow (or, at least, bear in mind) John Hart Ely's call for courts to police the process of representation and protect the integrity of the democratic process. This suggests that 25 years of judicial deference under the *Charter* is likely to be to be succeeded by an era of increased conflict between the judiciary and the legislature as the Supreme Court struggles to set forth a clear definition of the franchise and the notion of a meaningful political process.

A key theme of *Charter*-era Canadian constitutional thought has been to emphasize the difference between Canadian and American conceptions of individual rights and, correspondingly, the different roles played by the respective supreme courts when hearing rights-based challenges to legislation. Canadian scholars have emphasized that the Canadian constitutional vision of rights promotes the public interest over that of the individual.[1] Therefore, the Canadian courts have maintained a much more deferential stance towards parliament and the provincial legislatures than their American judicial counterparts.

We argue that this distinction between the Canadian and American courts is inaccurate if not mythical, and that a convergence has occurred, especially concerning the manner in which the Supreme Courts of both nations regard scope and vision of the franchise. Both courts have manifested a growing desire to protect the "meaningful" exercise of the franchise. While they have struggled thus far to define what, exactly, constitutes a meaningful vote, both have also drawn similar conclusions regarding the nature of infringements that decrease the integrity of the franchise.

This, in turn, has resulted in a confluence of thought concerning judicial deference. On the one hand, members of both courts acknowledge that they must respect the collective wisdom of the larger legislative bodies when it comes to balancing individual rights claims and those made on behalf of the public interest. On the other hand, both have also come to acknowledge that it is not possible to defer to the elected branches when dealing with voting rights claims because there is an inherent conflict of interest when elected officials write the rules by which they are returned to office. The incentive for legislators to erect barriers to entry into the political process and to buffer themselves from political competition is palpable in cases dealing with discriminatory ballot access laws and restrictions on campaign spending and speech.

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The Canadian Supreme Court now manifests an increasing awareness of the need to follow (or, at least, bear in mind) John Hart Ely's call for courts to police the process of representation and protect the integrity of the democratic process.[2] This same concern animated the early writings of Patrick Monahan[3], who also urged the judiciary to protect the meaningful exercise of the franchise, and is now evident in the opinions of Chief Justice Beverly McLachlin.

In this paper, we document this evolution of Canadian judicial thinking and discuss its implications for the relationship between the Supreme Court and the elected branches of the government. We suggest that this enhanced judicial concern for protecting the integrity of the democratic process ensures that Canadian courts will be less deferential towards the legislature when dealing with matters of electoral law. This, in turn, suggests that there will be an increasing tension between the judiciary and the other branches of the government as the courts constrain (or at least scrutinize) the substantive actions of the legislatures in order to protect the process by which they were elected to office.

At first, one might regard the debate in Bryan as an unremarkable dispute among judges concerning the justifiability of a legislative infringement of a right.

The contemporary setting: *R v. Bryan*[4]

The evolving tensions within the Supreme Court's vision of the franchise were clearly demonstrated in its most recent decision on electoral law, *R v. Bryan.* Splitting 5-4, the court dismissed a challenge to s.329 of the *Canada Elections Act,* which prohibits the transmission of electoral results in one riding to another before the closing of polls in the latter.

The majority, led by Justice Bastarache, deferred to the government's desire that all voters go to the polls with essentially the same type, quality and amount of information. Accordingly, the infringement on free speech imposed by the broadcast restriction was acceptable in light of the government's desire to protect the integrity of the electoral process and to maintain public confidence in the fairness of the rules by which elections are conducted. The dissents, led by Justice Abella, asserted that the government had not provided enough evidence to justify s.329's infringement on free speech.

During the 2000 parliamentary election, Paul Charles Bryan had posted election results from Atlantic Canada on a website. He thereby made them available across Canada despite the fact that polling stations were still open in the western provinces. He was fined $1,000 for violating s.329. In sustaining the fine and dismissing Bryan's challenge, the Supreme Court relied principally on its decision in *Harper v. Canada*[5], where it sustained several restrictions on campaign spending and third party advertising.

We regard *Harper* as a seminal, if not pivotal decision in the evolution of Canadian judicial thought.[6] There, for the first time in nine *Charter* decisions concerning electoral law, Justice McLachlin dissented. Her dissent was especially intriguing because the majority opinion was grounded in several opinions that she had written. We discuss the importance of McLachlin's defection from the court majority below. For now, we focus on the manner in which *Harper* informed *Bryan* and what it indicates regarding the Supreme Court's approach to electoral rights.

Writing for the majority, Justice Bastarache summarized the key points from *Harper* that bore upon *Bryan*. *Harper*, said Bastarache, contained two important principles.

> First, it establishes that courts ought to take a natural attitude of deference toward Parliament when dealing with election laws: "Given the right of Parliament to choose Canada's electoral model and the nuances inherent in implementing this model, the Court must approach the justification analysis with deference" (*Harper*, at para. 87).
>
> Second, it reaffirms that, in determining the nature and sufficiency of evidence required for the Attorney General to establish that a violation of s.2(b) is saved by s.1, the impugned provision must be viewed in its context…. This context can be best established by reference to the four factors which this Court set out in

Thomson Newspapers and Harper: (i) the nature of the harm and the inability to measure it, (ii) the vulnerability of the group protected, (iii) subjective fears and apprehension of harm, and (iv) the nature of the infringed activity.[7]

In *Bryan*, the Court concluded that the context surrounding s.329 was sufficient to justify the infringement it placed on the right to speak. Bastarache and the rest of the court majority accepted the government's justification that s.329 was designed to promote "informational equality" among voters by ensuring that voters in the western provinces went to the polls with the same information as those in the east. The broadcast of election results from east to west would enable western voters to condition their electoral choices on the basis of their knowledge of eastern election results. Insofar as eastern voters would not have access to such information (due, simply to the difference in time zones), the Attorney General argued that s.329 was designed to prevent the broadcast of electoral information that, while clearly pertinent, gave western voters an unfair advantage in casting their votes. This, in turn, informed the government's second justification for s.329. Insofar as information inequality could undermine public confidence in the electoral system, the government asserted that s.329 was necessary to preserve the public's perception of the integrity of the electoral process.

The dissents rejected the government's evidence and, accordingly, would have supported Bryan's challenge to s.329. Speaking for the dissenters, Justice Abella first acknowledged that ensuring "that electors in different parts of the country have access to the same information before they go to the polls" is a "pressing and substantial" governmental objective.[8] Nonetheless, the dissenters challenged the majority's conclusion that the publication ban was necessary to the achievement of this goal and that it resulted in a "minimal" impairment of the right to speak. The right at issue, said Abella, is "the right of the media and others to publish election results in a timely fashion and the right of all Canadians to receive it."[9] Insofar as communicating and receiving elections results is a core democratic right that is an "essential" part of the democratic process, "clear and convincing evidence is required" to justify limiting the availability of political information.[10]

According to the dissent, the government provided no conclusive evidence to demonstrate that the information imbalance had a palpable effect on the outcome of the election or that the public had indeed lost faith in the fairness of the electoral process. As well, the dissent also noted that publication bans such as s.329 were rendered increasingly moot due to advances in technology. Accordingly, Justice Abella asserted that s.329's ban on the dissemination of election results was tantamount to a ban on speech. The harm to the *Charter*, she argued, was "demonstrable." Yet, the "benefits of the ban are not."[11] S.329 therefore failed not only the rational basis test but also any test of proportionality.

Democratic rights and the changing role of the Canadian Supreme Court

At first, one might regard the debate in *Bryan* as an unremarkable dispute among judges concerning the justifiability of a legislative infringement of a right. In this respect, the case embodies the principal tension in any constitutional democracy between the right of a majority to govern and the right of an individual to use constitutionally-guaranteed rights to constrain that governing power. Accordingly, *Bryan* boils down essentially to a debate about the justifiability of a particular law's infringement on a particular right.

More important, however, is the manner in which the debate among the justices manifests the evolving conception of the court's role and the disposition of particular members to defer to claims by the legislature that it manifests or embodies the public interest. In short, the assumption underlying the claim that courts ought to defer to the legislature (stated early on in the *Charter* era by scholars such as Patrick Monahan[12]) was grounded on the a priori assumption that the legislature embodies the public interest and acts as the agent for the collective will of the polity. After a quarter century of *Charter* litigation, the Supreme Court manifests an increasing tendency to question this assumption. As a result, the court has taken a much less deferential attitude towards the Parliament and provincial legislatures.

The most intriguing aspect of this evolution is that it has been driven principally by changes in the thinking of the Chief Justice. Throughout the court's election law cases, different Justices have referred to McLachlin's opinion in *Ref. Re: Saskatchewan Electoral Boundaries*[13] (the "*Saskatchewan Reference*") as the talismanic statement of the Canadian Supreme Court's view of voting rights and the manner in which it would

defer to governmental attempts to balance the protection of individual rights with the promotion of the collective right to cast a meaningful ballot.

The meaningful ballot is a core aspect of the Canadian conception of the franchise. As Justice Bastarache noted in *Bryan*: "If Canadians lack confidence in the electoral system, they will be discouraged from participating in a meaningful way in the electoral process. More importantly, they will lack faith in their elected representatives. Confidence in the electoral process is, therefore, a pressing and substantial objective." [14]

Throughout its prior election law decisions, the Supreme Court has collectively or individually cited McLachlin's *Saskatchewan Reference* opinion as the seminal statement of how the *Charter* embodies a collective, flexible and non-individualistic vision of the franchise and the role the judiciary would play in interpreting and protecting it. In that case, McLachlin rejected the American adherence to the rigid one-person, one vote principle of electoral equality and redistribution in favor of a "less radical, more pragmatic approach" developed in England and Canada[15] that allowed Parliament and the provincial legislatures the leeway necessary to protect and promote minority representational opportunities even if it required deviating from "rep by pop" and thereby resulted in the infringement of individual voting equality.

While parity of individual voting power was an important aspect of the democratic process, McLachlin noted that other factors mattered as well:

> (…) it has the effect of detracting from the primary goal of effective representation. Factors like geography, community history, community interests and minority representation may need to be taken into account to ensure that our legislative assemblies effectively represent the diversity of our social mosaic. These are but examples of considerations which may justify departure from absolute voter parity in the pursuit of more effective representation; the list is not closed.[16]

Thus, this vision of the franchise suggested that the judiciary would defer to legislative attempts to balance individual and collective rights claims in order to promote a fairer democratic process and a collective right to cast a meaningful ballot.

The evolution of the Chief Justice's vision and the erosion of judicial deference to the legislature

The deference to the legislature manifested in McLachlin's *Saskatchewan Reference* opinion acknowledges that the larger, more diverse legislature may in fact be able to bring more wisdom to bear on the difficult task of balancing rights claims than the correspondingly smaller, more insulated judiciary.[17] Nonetheless, as her dissent in Harper indicates, the McLachlin's deference was not unconditional.

Harper v. Canada entailed a challenge to section 350(1) of the act which stated that no more than $3,000 per constituency and $150,000 nationally could be spent to promote the election or defeat of a particular candidate or candidates. Stephen Harper contended that the spending limits were too low and therefore violated the rights to speak and vote set forth in sections two and three of the *Charter*.

Asserting that "the overarching objective of the third party election advertising limits is electoral fairness,"[18] they rejected the challenge to s.350. Anticipating the tone of Abella's dissent in *Bryan*, McLachlin asserted that the government had not provided enough evidence to justify the infringement on political speech posed by the campaign spending restrictions.

> The dangers posited are wholly hypothetical. The Attorney General presented no evidence that wealthier Canadians – alone or in concert – will dominate political debate during the electoral period absent limits. It offered only the hypothetical possibility that, without limits on citizen spending, problems could arise. If, as urged by the Attorney General, wealthy Canadians are poised to hijack this country's election process, an expectation of some evidence to that effect is reasonable. Yet none was presented. This minimizes the Attorney General's assertions of necessity and lends credence to the argument that the legislation is an overreaction to a non-existent problem.[19]

McLachlin noted that the restrictions did pose a palpable threat to democracy by essentially limiting the capacity of the electorate to amass the financial resources necessary to challenge incumbents or hold them accountable.[20] Furthermore, insofar as the restrictions diminished the amount of information available to voters, they posed a

threat to the integrity and meaning of the franchise similar that posed by the broadcast restrictions that McLachlin would have struck down in *Bryan*.

Perspective

McLachlin was joined by two dissenters in *Harper* and three in *Bryan*. This suggests that McLachlin's concerns about the integrity of the democratic process and the meaning of the franchise have gained adherents. They have, at least precipitated a debate among the justices concerning the extent to which the court and justify its deference to the government when dealing with legislation that concerns the process by which the elected officials are returned to office.

We do not mean to suggest that this evolution in judicial thinking will exacerbate the tension that naturally exists between courts and legislatures. Nonetheless, insofar as Canadian constitutional development can be said to proceed as a "dialogue" among scholars, judges and legislators,[21] we maintain that the evolution of Justice McLachlin's thinking indicates that the dialogue about the scope of the franchise may become more heated to the extent that it clearly will alter the nature of the deference with which the Supreme Court regards the government.

Notes

[1] See, e.g., Weiler, Paul C. 1984. "Rights and Judges in a Democracy: A New Canadian Version." 18 U. *Mich. J. L. Reform* 51-92; McLachlin, Beverly. 2004. "Protecting Constitutional Rights: A Comparative View of the United States and Canada. Plattsburg State University, 5 April 2004. http://www.scc-csc.gc.ca/aboutcourt/judges/speeches/ComparativeView_e.asp; Glendon, Mary Ann. 1991. *Rights Talk: The Impoverishment of Political Discourse.* (New York. The Free Press), 167.

[2] Ely, John Hart. 1980. *Democracy and Distrust.* Cambridge: Harvard University press.

[3] Monahan, Patrick. *Politics and the Constitution.* Toronto: Carswell.

[4] 2007 SCC 12.

[5] [2004] 1 S.C.R. 827

[6] We discuss this at length in our forthcoming article, "Electoral Jurisprudence in the Canadian and US Supreme Courts: Evolution and Convergence," forthcoming, *McGill Law Journal.*

[7] Bryan, at paras. 9-10, citing *Harper* at para. 87. Internal citations omitted.

[8] Ibid., at para. 104, citing *Harper* at para. 132.

[9] Ibid., para. 110.

[10] Ibid.

[11] Ibid., para. 131.

[12] Monahan, supra note 2.

[13] [1991] 2 S. C. R. 158

[14] *Bryan*, para. 37, citing *Harper*, para. 103.

[15] *Saskatchewan Ref.*, 185

[16] Ibid, 184

[17] Manfredi, Christopher. 2001. *Judicial Power and the Charter, 2d ed.* Toronto: Oxford, 151-63. See also Horowitz, Donald. 1977. *The Courts and Social Policy.* Washington: Brookings Institution.

[18] *Harper*, para 91.

[19] Ibid. para 34.

[20] Ibid, para. 80-81.

[21] See, e.g., Hogg, Peter W. and Allison Bushell. "The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing After All." *Osgoode Hall Law Journal* 35: (1997) 75-124.

CONSTITUTIONAL DEFLATION AND THE REBOUND EFFECT: THE *CHARTER* AND THE ENHANCEMENT OF STATE POWER

ABSTRACT

It is commonplace that the *Charter* has limited State power in important ways. This article addresses a less recognized phenomenon – that the *Charter* has also been a vehicle for enhancing State power. According to the author, it has done so in two ways. The first is through "constitutional deflation" which occurs where courts define *Charter* rights narrowly to keep them under control. The implication for courts and legislators is that any State action not prohibited by those narrow rights is acceptable. This has had a deflationary effect on common law rights. For example, neither the principle of *mens rea*, nor even the presumption of innocence has the influence they had prior to the *Charter*. The second way in which the *Charter* has increased State rights is through the rebound effect. Fully two thirds of the successful challenges to legislation have inspired legislative responses, often with enactments that give the State more authority than it had prior to the *Charter* challenge. In an effort to keep *Charter* claims in check, even courts have recognized police powers not provided for by legislation. The author argues that the tendency of the *Charter* to increase State power should have been anticipated and should now be recognized by those who engage in *Charter* litigation.

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It is common to think of the *Charter* as "a vehicle for restraining rather than enhancing state power"[1] or to caution that "the… legal rights provisions… are not the sources of police powers."[2] While the *Charter* has indeed imposed significant limits on state authority in its first quarter-century, the truth is that in important respects the *Charter* has also enhanced state power. Indeed, the *Charter* has facilitated the expansion of the criminal law by broadening the scope of crimes, confining the moral force of the presumption of innocence, and it has inspired whole new police powers. With the benefit of hindsight this was perhaps to be expected. It is the product of two related phenomena I call "constitutional deflation" and "the rebound effect."

Constitutional deflation

"Constitutional deflation" is the process through which common law principles lose their currency or moral suasion as a result of constitutional adjudication. Where this happens, governments and courts are more inclined to compromise those principles than they were prior to the *Charter*. This phenomenon of constitutional deflation is a consequence of the complex role the *Charter* plays as a tool for achieving a just or civil society. After all, a civil society is not created simply by guaranteeing rights and freedoms. More than 250 years ago, Blackstone identified three elements that civil society requires: 1) sovereign powers, 2) individual rights, and 3) a rule of law to mediate between sovereign power and individual rights. It is, of course, the sovereign power that is relied on to define and enforce the criminal law, as the prosecution of offences is the "means by which a civilized society defends itself from within." At the other extreme, the *Charter* is the primary agent for securing those oppositional individual rights that a civil society needs. Yet, the *Charter* operates to achieve the third element of a civil society as well by mediating between individual rights and the sovereign power to prosecute. As the Supreme Court of

Canada has said in more general terms, the *Charter* is "a yardstick of reconciliation between the individual and the community and their respective rights."[4]

This "third element" role for the *Charter* makes it self-deluding to think of the *Charter* only as a rights-conferring instrument or a vehicle for restraining state power. In reality, it is impossible to make binding decisions about the balance between individual and community rights without defining the legitimate reach of state power and, in the process, giving that state power some measure of constitutional imprimatur. Where constitutional principles do not meet the majesty of common law principles or practices – and they will not because morally persuasive common law principles can be defined with far less reserve than constitutionally limiting ones – the result can be that the restraining impact of those principles is dulled. State agents and courts alike, having been told that it is constitutionally valid for the state to have authority, are emboldened and readily claim that authority, hence the phenomenon of "constitutional deflation."

The "rebound effect" occurs where Charter litigation generates new state powers or breeds practices that ultimately reduce the rights of those accused of crime.

Perhaps the most poignant example of constitutional deflation is the common law "principle of fault," the notion that to make it just to harm the accused by punishing him, he must have an "evil mind" or subjective *mens rea*. It is not enough that the accused causes harm by being clumsy or acting unreasonably. He must be "morally blameworthy." Prior to the *Charter*, this was one of the key organizing principles of criminal law.[5] While there were pre-*Charter* negligence offences, courts operating under the heavy influence of common law principle purported to look for an evil mind even for these crimes. To be sure, the reasoning was often fashioned creatively, at times paying mere lip service to *mens rea* while finding ways around it. However, the practice acted as a governor or brake on initiatives to grow the criminal law to capture irresponsible as opposed to malevolent conduct. Not so after the constitutional decisions. The brakes are now off.

Ironically, the devaluation of the principle of fault began with its own stellar victory in the *B.C. Motor Vehicle Reference case*.[6] There the Supreme Court of Canada held that absolute liability – the imposition of liability based solely on the commission of the prohibited act – contravenes the constitutional principle of moral fault for offences that carry the risk of incarceration. Inspired by the decision, defense lawyers began to challenge those criminal offences that did not appear to respect *mens rea* principles. Initially, there was success as "constructive" or "felony" murder provisions fell.[7] Even in those early decisions, though, the implications of accepting "moral fault" as a wholesale limit on Parliamentary authority caused the Court to hesitate. To keep it from running roughshod through the law, the Court imposed limits on the operation of the principle by confining it to offences that carry serious stigma and unremitting penalties, such as murder-based crimes.[8] The implication was that objective fault is appropriate in other cases. This led ultimately to an overt endorsement of the use of objective standards of criminal liability. For those offenders with anything but the lowest levels of capacity, it was declared to be appropriate for criminal liability to follow if the negligence is serious enough, amounting to a marked as opposed to simple departure from the standards a prudent person would use.[9]

Not surprisingly, downgrading the principle of fault in constitutional litigation diminished its influence. The moral suasion the principle had exercised at common law waned. We have now become acculturated to objective fault, accepting it as a principled basis for liability in manslaughter,[10] criminal negligence,[11] motor vehicle[12] and firearm offences[13] (including where a minimum penalty applies),[14] and through the creation of what are clearly offences of negligent sexual assault[15] and negligent possession of child pornography.[16] Some appellate courts have even rejected the long-standing interpretive presumption that criminal offences should be read as requiring subjective *mens rea*; in *R. v. Ludlow*[17] the B.C.C.A. accepted that a negligent failure to attend court is criminal. Why? The Court reasoned that "the authority of those earlier cases [in requiring subjective fault]

has been shaken by the trend of [constitutional] authorities in the Supreme Court of Canada."[18] Without question, as a result of constitutional litigation the common law principle of *mens rea* is not what it once was.

To a less dramatic extent the very presumption of innocence, the "one golden thread that is always to be seen" in criminal cases, has also fallen victim to constitutional deflation. The most manifest symptom of this is the proliferation of reverse onus and mandatory presumptions that put the risk of loss for failing to persuade on the accused instead of the Crown. Courts have routinely if not systematically upheld these provisions using section 1, often after summary reasoning. The cultural acceptance of reversing criminal onuses generated in *Charter* litigation has led the Court to create its own mandatory presumption "out of thin air" [19] in sexual breach of trust cases, as well as to reverse the onus on extreme intoxication[20] and automatism[21] defenses.

Meanwhile, the scope of operation of the presumption of innocence has been confined as a result of *Charter* litigation. In *R. v. Pearson*[22], the accused sought to rely on the presumption of innocence to challenge a provision that put the onus on him to show why he should be released pending his trial. The Court upheld the provision and in doing so made overt what had previously been left unspoken – that the presumption of innocence has a different, less intense meaning where the issue before a criminal court "does not involve determinations of guilt," even where individuals are being deprived of their liberty. This enabled the Ontario Court of Appeal to uphold a criminal restraining order provision[23] that imposes what amounts to probationary terms on individuals who have created no offence, provided there are reasonable grounds to fear that they will commit a child sexual offence in the future.[24]

Without question, these constitutional outcomes have made putting the onus on the accused more culturally acceptable in the criminal context than was once the case. Post-*Charter* we have seen a cavalcade of measures that do everything from reversing the onus in bail release cases on all drug traffickers[25] and on those charged with criminal organization offences[26], terrorism offences[27] or designated *Security of Information Act offences*,[28] to reversing the onus on the public interest defense available to persons permanently bound to secrecy who leak protected information.[29] We have also seen a dramatic growth in resorting to criminal restraining order provisions available if there are reasonable grounds to fear that individuals *will* commit the offences we most fear, including personal injury offences,[30] sexual offences against children,[31] computer solicitation offences with children,[32] organized crimes offences[33] and terrorism offences.[34] Meanwhile, reversing the onus has become a favoured strategy for law and order reform proposals. Proposed Bill C-27 will reverse the onus for bail release for those charged with firearm offences.[35] Bill C-35 proposes to reverse the onus in dangerous offender proceedings,[36] and if passed, Bill C-25 will reverse the onus in money-laundering cases.[37] The legal culture that has encouraged these initiatives was *Charter* born. During Parliamentary Debates, for example, the Honourable Peter Milliken defended the government's initiative to reverse the onus in dangerous offender proceedings by chiding an opposition member that "He is fully aware that reverse onus provisions in the code have already been challenged and upheld as constitutionally strong."[38]

The rebound effect

The "rebound effect" occurs where *Charter* litigation generates new state powers or breeds practices that ultimately reduce the rights of those accused of crime.

The dialogue rebound

The most notorious rebound effect of *Charter* litigation is "dialogue," where, in an effort to confine or even abridge the effect of *Charter* "victories," legislative reform occurs. In 1997, Hogg and Bushnell discovered that in more than two-thirds of the 66 *Charter* cases where statutes were struck down, rebound legislation occurred.[39] In the criminal law context dialogue, legislation does not simply operate to replace *Charter*-defective provisions with less intrusive ones. It has often meant the creation of new or expanded police powers or the creation of statutory provisions that can frustrate tactics the accused might otherwise have used in responding to state allegations. Unreasonable search challenges, for example, have led to[40] the creation of whole new warrant powers, including DNA warrants;[41] body impression warrants;[42] warrants to place tracking devices on vehicles;[43] general warrants to use investigative devices, techniques or procedures;[44] warrants to enter dwelling houses to affect arrests,[45] and powers of warrant less searches available in exigent circumstances[46] The successful constitutional challenge

to the "rape shield" provisions in *R. v. Seaboyer* led to legislation that extended rape shield protection to prior sexual experiences between the complainant and the accused,[47] and the decision in *R. v. O'Connor*[48] giving the accused access to third party records was followed by legislation that makes it so complex and prohibitively expensive to try to get records in sexual offence cases that it will often be pointless or impractical.[49] *Charter* litigation striking down a seldom-used power to deny bail to persons charged with crime[50] inspired the development of a statutory provision that has proven effective in achieving the pretrial detention, even of those persons who are likely to attend court and avoid re-offending pending their trials; detention is justified based solely on public perception.[51] *Charter* litigation[52] has also inspired extreme intoxication legislation that accepts the hitherto discreditable proposition that individuals can be criminalized for their involuntary actions. [53]

Judicial rebound

A less notorious but more problematic form of rebound effect occurs where courts, attempting to achieve a balance, find ways to affirm previously non-existent or controversial police powers. The most striking example is investigative detention. Even though the common law did not permit detention short of arrest,[54] *Charter* challenges to police stops led the Supreme Court of Canada to recognize in *R. v. Mann*[55] that the police have the authority to detain individuals for a "brief duration" if there are "reasonable grounds to suspect in all of the circumstances that such an individual is connected to a particular recent and ongoing crime, and that such a detention is necessary."[56] And in *R. v. Godoy*[57], it was the judiciary that gave the police the power to enter homes in response to emergency calls.

Most often the rebound effect is achieved not by the creation of new common law police powers, but rather through creative construction that reads unstated authority into legislation. It was judges in *Charter* litigation, for example, that identified the power of police to enter homes to install listening devices,[58] or to detain suspected customs violators in drug-loo facilities,[59] or to question drivers detained about their sobriety and request that they perform sobriety tests, all without providing a right to counsel.[60]

Judge-made *Charter* balancing holdings provoked by constitutional claims can impede the interests of the accused even where police powers are not being claimed. The judicially created right to compel production of private third party records in *R. v. O'Connor* [61] inspired the precedent for giving victims previously unheard of standing rights in criminal trials and rights of appeal,[62] and inspired judicial recognition of privacy rights in therapeutic and personal records that the common law had previously denied.

Conclusion

While it is widely said that the *Charter* is not intended to be a source for promoting state prosecutorial interests or police powers, "constitutional devaluation" and the "rebound effect" ensure that this will often be the outcome of asserting *Charter* claims. This is a phenomenon that requires recognition if we are to have a full appreciation of the role the *Charter* plays and of the broader implications of undertaking constitutional challenges.

While the *Charter's* role in enhancing state powers may have been the greatest surprise in the first quarter century of *Charter* litigation, in truth it should have surprised none of us. "Constitutional devaluation" is a natural but regrettable corollary of asserting mandatory limits on state power using an instrument that functions by moderating individual rights claims through the identification of permissible limits. Nor should dialogue rebound have come as a surprise. It, too, is natural, and so long as legislators respond to constitutional decisions by passing laws that respect indicated *Charter* limits, it is not in the least regrettable; if constitutional litigation reveals or creates important gaps in the law contrary to the broader public interest, those gaps should be filled to the extent the *Charter* tolerates.[63] In contrast, the "judicial rebound" effect that occurs where judges take it upon themselves to achieve balance by creating state powers either from whole cloth or using creative construction is far more controversial. It has long been considered unseemly for judges, responsible for enforcing constitutional limits, to create state powers,[64] and it has been demonstrated powerfully that judges are not particularly good at performing what is in truth a legislative function.[65] More importantly, there is no need for this kind of balancing. One thing that has been demonstrated during the first quarter century of the *Charter* era is that where *Charter* litigation leaves important competing state interests unattended to, legislators will respond, so courts should not have to. It is unavoidable that the Charter will enhance state powers. It is entirely avoidable that judges do the enhancing.

Notes

[1] Don Stuart, *Charter Justice in Canadian Criminal Law* (4th ed.), (Carswell: Toronto, 2005) at 140.

[2] James Stribolpolous, "In Search of Dialogue: The Supreme Court, Police Powers and the *Charter*" (2005), 31 Queen's Law Journal 1 at 17.

[3] Stuart James Whitely, *Criminal Justice and the Constitution* (Carswell: Toronto, 1989) at 29.

[4] *L.S.U.C. v Skapinke*r [1984] 1 S.C.R. 357 at 366-67.

[5] See *R. v City of Sault Ste. Marie* [1978] 2 S.C.R. 1299.

[6] *Reference re Section 94(2) Motor Vehicles Act* (B.C.) (1986), 48 C.R. (3d) 289 (S.C.C.).

[7] *R. v. Vaillencourt* (1987), 69 C.R. (3d) 289 (S.C.C.); *R. v. Martineau* (1990), 79 C.R. (3d) 129 (S.C.C.); *R. v. Logan* [1990] 2 S.C.R. 731.

[8] *R. v. DeSousa* [1992] 2 S.C.R. 944.

[9] *R v Hundal* [1993] 1 S.C.R. 867; *R. v. Creighton* [1993] 3 S.C.R. 3; *R. v. Finlay* [1993] 3 S.C.R. 103.

[10] *R. v. Creighton* [1993] 3 S.C.R. 3.

[11] *R. v Creighton* [1993] 3 S.C.R. 3 accepts objective fault for criminal negligence causing death.

[12] *R. vHundal* [1993] 1 S.C.R. 867 accepts objective fault for dangerous driving.

[13] *R. v. Finlay* [1993] 3 S.C.R. 103.

[14] In *R. v. Morrisey* (2000), 36 C.R. (5th) 85 (S.C.C.) the Court accepted the constitutional validity of a 4 year minimum sentence for criminal negligence causing death with a firearm for negligent conduct.

[15] Section 273.2(b). The provision was upheld in the face of constitutional challenge in *R. v. Darrach* (1998), 122 C.C.C. (3d) 225 (Ont. C.A.), aff'd on other grounds [2000] 2 S.C.R. 443.

[16] Section 163.1(5).

[17] *R. v. Ludlow* [1999] B.C.J. No. 1359 (B.C.C.A.), followed *R. v. Custance*]2005] M.J. No. 30 (Man C.A.).

[18] *R. v. Ludlow* [1999] B.C.J. No. 1359 at para 34 (B.C.C.A.); And see *R. v. Smillie* [1998] B.C.J. No. 2082 (B.C.C.A.).

[19] Don Stuart, *Charter Justice in Canadian Criminal Law* (4th ed.), (Carswell, Toronto, 2005) at 397, referring to *R. v. Audet* (1996), 48 C.R. (3d) 1 (S.C.C.).

[20] *R. v. Daviault* (1994) 33 C.R. (4th) 165 (S.C.C.), now codified in s.33.1 of the *Criminal Code of Canada* R.S.C. 1985, C-46.

[21] *R. v. Stone* (1999), 24 C.R. (5th) 1 (S.C.C.).

[22] *R. v. Pearson* [1992] 2 S.C.R. 665 at 685.

[23] *Criminal Code of Canada*, R.S.C. 1985, c. C-46 at s.810.1.

[24] *R. v. Budreo* (2000), 32 C.R. (5th) 127 at 138 (Ont. C.A.).

[25] *Criminal Code of Canada*, R.S.C. 1985, c. C-46 at s.515(6)(d).

[26] *Criminal Code of Canada*, R.S.C. 1985, c. C-46 at s.515(6)(a)(ii).

[27] Criminal Code of Canada, R.S.C. 1985, c. C-46 at s.515(6)(a)(iii).

[28] *Anti-Terrorism Act,* S.C. 2001, c.41, s.19(4), Criminal Code of Canada, R.S.C. 1985, c. C-46 at s.515(6)(a)(iv) and (v).

[29] *Anti-Terrorism Act*, S.C. 2001, c.41, s. 15(1).

[30] *Criminal Code of Canada*, R.S.C. 1985, c. C-46 at s.810.2.

[31] *Criminal Code of Canada*, R.S.C. 1985, c. C-46 at s.810.1.

[32] *Criminal Code of Canada*, R.S.C. 1985, c. C-46 at s.810.01(a).

[33] *Criminal Code of Canada*, R.S.C. 1985, c. C-46 at s.810.01(a).

[34] *Criminal Code of Canada*, R.S.C. 1985, c. C-46 at s.810.01.

[35] Bill C-27 (First Session, Thirty-ninth Parliament 55 Elizabeth II, 2006).

[36] Bill C-35 (First Session, Thirty-ninth Parliament 55 Elizabeth II, 2006).

[37] Bill C-25 (First Session, Thirty-ninth Parliament 55 Elizabeth II, 2006).

[38] The Hon. Peter Milliken, House of Commons Debates, Official Report (Hansard) Thursday, Nov. 29, 2006 at 1629 referencing Bill C-27 during the second reading debate.

[39] Peter. W. Hogg, "Discovering Dialogue" 3 at 3, citing Peter Hogg and Allison Bushnell, "The *Charter* Dialogue between Courts and Legislatures" (1997, 35 Osgode Hall L.J. 75.

[40] I am indebted to James Stribolpolous, "In Search of Dialogue: The Supreme Court, Police Powers and the *Charter*" (2005), 31 Queen's Law Journal 1 at 66, fn. 13 for having so conveniently catalogued these changes.

[41] *An Act to Amend the Criminal Code and the Young Offender's Act (forensic DNA analysis)* S.C. 1995, c. 27, s1, in response to R. v. Borden [1994] 3 S.C.R. 145.

[42] *DNA Identification Act*, S.C. 1998, s.37, in response to *R. v.Stillman* [1997] 1 S.C.R. 607.

[43] *An Act to Amend the Criminal Code, the Crown Proceedings Act and the Radiocommunications Act,* S.C. 1993, c.40, s.18, in response to *R. v. Wise* [1992] 1 S.C.R. 527.

[44] *An Act to Amend the Criminal Code, the Crown Proceedings Act and the Radiocommunications Act*, S.C. 1993, c.40, s.15, in response to *R .v. Duarte* [1990] 1 S.C.R. 30 and *R. v Wong* [1990] 3 S.C.R. 36.

[45] *An Act to Amend the Criminal Code and the Interpretation Act (powers to arrest and enter dwellings)*, S.C. 1997, c.39, s.2 in response to *R. v. Feeney* [1997] 2 S.C.R. 13.

[46] *Criminal Law Improvement Act*, S.C. 1997, c.18, in response to R. v. Silviera [1995] 2 S.C.R. 297.

[47] *Criminal Code of Canada*, R.S.C. 1985, c. C-46, s.276.

[48] *R. v. O'Connor* (1995), 44 C.R. (4th) 1 (S.C.C.).

[49] *Criminal Code of Canada*, R.S.C. 1985, c. C-46, s.278.1.

[50] *R. v. Morales* (1992), 17 C.R. (4th) 74 (S.C.C.).

[51] *Criminal Code of Canada,* R.S.C. 1985, c. C-46, s.515(10)(b).

[52] *R. v. Daviault* (1994) 33 C.R. (4th) 165 (S.C.C.).

[53] *Criminal Code of Canada*, R.S.C. 1985, c. C-46, s.33.1. The constitutionality of this legislation remains controversial.

[54] See *R v Dedman* [1995] 2 S.C.R. 2 at 10-13, and Don Stuart, *Charter Justice in Canadian Criminal Law* (4th ed.), (Carswell: Toronto, 2005) at 308.

[55] (2004), 21 C.R. (6th) 1 (S.C.C.).

[56] (2004), 21 C.R. (6th) 1 at para 45 (S.C.C.).

[57] [1999] 1 S.C.R. 311.

[58] *R. v Lyons* [1984] 2 S.C.R. 633, and *Reference re Judicature Act* (Alberta) [1984] 2 S.C.R. 697.

[59] *R. v. Monney* [1999] 1 S.C.R. 652.

[60] *R. v. Orbanski* (2005), 29 C.R. (6th) 205 (S.C.C.).

[61] (1995), 103 C.C.C. (3d) 1 (S.C.C.)

[62] *L.L.A. v A.B. (sub nom. L.L.A. v Beharriell)* (1995), 103 C.C.C. (3d) 92 (S.C.C.).

[63] This kind of directory dialogue is appropriate. The kind of diplomatic dialogue evident in *R. v. Mills* (1999) 28 C.R. (5th) 207 (S.C.C.) and *R. v. Hall* (2002) 4 C.R. (6th) 197 (S.C.C.) and the *Daviault* legislation where Parliament rejects constitutional limits proclaimed by courts in the hope that the Court will retreat is not. It is detrimental to the constitutional message. For similar views see Don Stuart, *Charter Justice in Canadian Criminal Law* (Toronto: Carswell, 2005) at 7-13; Stephen Coughlan, Annotation to *Suave*, 5 C.R.(6th) at 209; Jamie Cameron, "Dialogue and Hierarchy in Charter Interpretation: A Comment on *R. v. Mills*" (2001) 38 Alta. L. Rev. 1051; and Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001) at 278-281.

[64] See, for example, R.J. Delisle, "Judicial Creation of Police Powers" (1993), 20 C.R. (4th) 29.

[65] See James Stribopolous, "In Search of Dialogue: The Supreme Court, Police Powers and the Charter" (2005), 31 Queen's L. J. 1.

25 ANS DE LA *CHARTE* : UNE EXPRESSION DE L'IDENTITÉ CANADIENNE

RÉSUMÉ

Durant ce quart de siècle, s'inspirant d'une conversation sur la langue qui a vu le jour avec la Commission royale d'enquête sur le bilinguisme et le biculturalisme, la *Charte* a déclenché une série d'événements qui ont enclenché un processus de rétablissement des droits linguistiques, modifié le comportement des gouvernements et créé une nouvelle dynamique pour les minorités linguistiques au Canada. L'inclusion des droits linguistiques dans la *Charte*, la *Loi sur les langues officielles* et sa modification subséquente est la reconnaissance de la valeur intrinsèque des communautés française et anglaise qui ont aidé à forger l'identité du Canada. Le français et l'anglais sont des langues canadiennes qui appartiennent à tous les Canadiens ; la *Charte* a accéléré le processus visant à faire de cette prétention une réalité.

Durant ce quart de siècle, la *Charte* a suscité une conversation nationale entre les tribunaux, les gouvernements et les communautés de langue officielle qui a fait évoluer l'interprétation des droits linguistiques. En fait, j'oserais même affirmer que, au cours des ans, plutôt que les universités canadiennes ou les élus lors de débats au Parlement, c'est la Cour suprême du Canada qui a formulé, dans ses arrêts, certaines des plus éloquentes déclarations sur l'importance de la langue comme élément de l'identité personnelle et collective. En 1990, la Cour suprême statuait ce qui suit : « [u]ne langue est plus qu'un simple moyen de communication ; elle fait partie intégrante de l'identité et de la culture du peuple qui la parle » et « [c]'est le moyen par lequel les individus se comprennent eux-mêmes et comprennent le milieu dans lequel ils vivent ».[1]

Cette décision et d'autres reflètent la conversation engagée au Canada sur la langue, auquel ont pris part des personnalités aussi différentes qu'André Laurendeau, Marshall McLuhan et Camille Laurin. Par exemple, André Laurendeau, coauteur des fameuses « pages bleues » du rapport final de la Commission royale d'enquête sur le bilinguisme et le biculturalisme, a décrit l'importance cruciale de la langue comme étant au cœur de la vie intellectuelle et émotive de toute personne.[2] Cette conversation ne date pas de la ratification de la *Charte* en 1982. C'est le Parlement qui, au début des années 1960, a commencé à réagir aux disparités évidentes, sur les plans politique, économique et social, entre le Canada français et le Canada anglais.

La Commission royale d'enquête sur le bilinguisme et le biculturalisme, créée par Lester Pearson en 1963, a indiqué aux Canadiens et aux Canadiennes, en 1965, que le Canada traversait alors une des plus grandes crises de son histoire.[3] La Commission royale d'enquête a examiné le paradoxe du bilinguisme officiel : un paradoxe encore largement mal compris. Une politique de langues officielles ne vise pas à exiger que tous apprennent deux langues – quoique, à l'évidence, si personne n'est bilingue, la politique restera lettre morte. Une politique de langues officielles a deux objectifs fondamentaux : protéger les personnes unilingues et protéger les communautés de la langue de la minorité. Quatre millions de Canadiens et de Canadiennes d'expression française au Canada sont unilingues, et une des principales raisons d'être de la *Loi sur les langues officielles* est de veiller à ce qu'ils et elles reçoivent du gouvernement fédéral le même niveau de service que les vingt millions de Canadiens et Canadiennes d'expression anglaise unilingues. Un million de

GRAHAM FRASER Le 17 octobre 2006, après une carrière comme journaliste qui a débuté en 1968, Graham Fraser est devenu le sixième Commissaire aux langues officielles. Auteur du livre Le Parti Québécois (1984), son livre le plus récent est : *Sorry, I don't speak French : Ou pourquoi quarante ans de politiques linguistiques au Canada n'ont rien réglé..ou presque* (2006).

Canadiens et de Canadiennes d'expression française vivent également dans des communautés minoritaires dans l'ensemble du Canada, et près d'un million de Canadiens et de Canadiennes d'expression anglaise vivent dans des communautés minoritaires au Québec. Ces communautés méritent non seulement de survivre, mais également de prospérer.

Avec l'arrivée d'immigrants de toutes les parties du monde et la société multiculturelle d'aujourd'hui, les identités collectives sont vraisemblablement moins fortement fondées qu'auparavant sur la langue et la religion. En effet, ce qui les caractérise aujourd'hui, ce sont les multiples affiliations.[4]

En fait, un des changements les plus dramatiques dans les relations entre les anglophones et les francophones au Canada est que les deux groupes linguistiques accueillent de nouveaux arrivants. Dans nombre de cas, ces nouveaux arrivants deviennent plus rapidement conscients que de nombreux Canadiens et de nombreuses Canadiennes de naissance de l'importance de la dualité linguistique pour l'identité du Canada. De fait, s'il devenait nécessaire de démontrer que la diversité culturelle et la dualité linguistique sont complémentaires, et non contradictoires, nos deux dernières gouverneures générales en seraient la preuve. Michaëlle Jean et Adrianne Clarkson étaient toutes deux de jeunes filles lorsqu'elles sont arrivées au Canada, l'une d'Haïti et l'autre de Hong Kong; toutes deux ont adhéré à une communauté linguistique; toutes deux ont décidé de vraiment prendre part à la conversation canadienne, et toutes deux allaient devenir non seulement compétentes, mais également éloquentes dans les deux langues officielles.

Comment définir alors les communautés de langue officielle? Comment est-ce que le sens d'appartenance à une communauté se crée et s'organise? Comment évaluons-nous l'épanouissement d'une communauté? Ces questions ont pris de plus en plus d'importance non seulement dans le contexte sociologique, mais également dans le contexte juridique. La notion même de l'épanouissement d'une communauté est enchâssée dans le cadre judiciaire canadien puisqu'elle a trait au principe de l'égalité du français et de l'anglais garanti par l'article 16 de la *Charte*.[5] En novembre 2005, presque tous les partis politiques se sont prononcés en faveur d'une modification de la *Loi sur les langues officielles*[6] visant à ce que le gouvernement fédéral ait l'obligation, en vertu de la loi, de prendre des « mesures positives » visant à favoriser et à soutenir l'épanouissement des communautés minoritaires linguistiques françaises et anglaises au Canada, ainsi qu'à promouvoir la complète reconnaissance et l'usage complet du français et de l'anglais dans la société canadienne.[7]

Dans le contexte des langues officielles, le terme « communauté » renvoie traditionnellement à une région géographique où vivent les communautés de langue officielle : un quartier, une ville, une cité ou une région. Les communautés de langue officielle ont toujours constitué de telles communautés. Elles ont occupé le territoire, érigé des villes et des cités, construit des églises et fondé des entreprises. Dans cette optique, le terme renvoie essentiellement au résultat de l'occupation du territoire qui suscite tant l'interaction entre les individus que le sens d'appartenance.[8]

Une définition plus moderne du terme nous porte à penser en termes de réseaux d'institutions, d'organismes ou d'individus associés soit avec l'une, soit avec l'autre communauté de langue officielle. Il se peut qu'un groupe d'individus partageant le même intérêt – en l'occurrence, leur culture et leur langue – soient appelés une communauté. Dans un tel cas, le territoire revêt moins d'importance. Une communauté implique plutôt un lien de solidarité actif parmi un groupe dispersé géographiquement. Bon nombre de telles communautés sont connues comme possédant une identité collective : par exemple, la communauté d'expression anglaise au Québec, la communauté acadienne dans les provinces atlantiques, la communauté franco-manitobaine ou la communauté canadienne-française.[9]

Dans une perspective plus large mais non moins importante, le Québec forme sans aucun doute une minorité au sein du pays et le Parlement fédéral n'a pas hésité récemment à déclarer que les Québécoises et les Québécois forment une nation.[10] Qu'elle soit nettement circonscrite sur un territoire particulier ou que, ayant des assises moins définies, elle réside dans une mouvance de réseaux relationnels, une communauté n'est jamais seule; la communauté fait partie d'un plus grand tout – un État, une société ou une nation – au sein duquel elle voisine d'autres communautés, majoritaires ou minoritaires.[11]

Dans le contexte des langues officielles, la vitalité, tout comme la communauté, est une notion qui peut avoir plusieurs significations. La vitalité peut être examinée d'une perspective individuelle ou collective. Sur le plan individuel, la

langue peut être considérée comme une facette de la vitalité puisqu'elle est, par-dessus tout, une habileté. La langue est une connaissance qui peut être utilisée pour exprimer des valeurs, des symboles et des expériences et qui, en tant que telle, fait partie de l'identité propre d'un individu. Sur le plan collectif, la vitalité linguistique a trait à l'utilisation de la langue dans le temps et l'espace ainsi qu'aux nombreuses fonctions qu'elle remplit dans divers domaines de la société tels la culture, la religion, l'instruction, l'administration, les médias et le droit. De ce point de vue, la vitalité linguistique est une caractéristique de la communauté dans son ensemble.[12]

Comme les zones écologiques, qui sont délimitées selon leurs besoins en eau, en ensoleillement, en chaleur ou en refroidissement, pour survivre, les communautés linguistiques ont besoin de certains éléments tels l'instruction, les soins de santé et les ressources économiques et culturelles. Bon nombre de ces éléments ont été améliorés au cours des quarante dernières années dans le cadre de la conversation nationale sur la langue. Bien qu'il faille encore combler certaines lacunes et qu'il nous reste beaucoup à faire pour veiller à ce que les diverses composantes de la politique linguistique fonctionnent de façon plus cohérente, de solides composantes sont en place pour que la politique linguistique puisse donner des résultats concrets.

En fait, un des changements les plus dramatiques dans les relations entre les anglophones et les francophones au Canada est que les deux groupes linguistiques accueillent de nouveaux arrivants.

Il y a quarante ans, la Commission B.B. a tenté d'adopter une approche davantage systémique ou intégrée dans le domaine de la langue en proposant la création de districts bilingues[13], ce qui aurait exigé, dans certaines régions, la participation des trois paliers d'administration publique. Cette approche a été rejetée pour de nombreuses raisons, entre autres politique, car le gouvernement fédéral ne peut tout simplement pas dire aux provinces et aux municipalités quoi faire. Mais fondamentalement, le Canada a opté pour les droits individuels des citoyens où qu'ils soient, sous réserve de la disposition d'assujettissement à la justification par le nombre, contenue dans la *Charte*.[14]

Quoique formulés comme des droits individuels, depuis l'avènement de la *Charte*, les droits linguistiques ont pris une dimension collective. Le droit à l'instruction dans la langue de la minorité, qui est garanti par l'article 23 de la *Charte*, et étoffé dans les décisions que les tribunaux ont rendues après l'adoption de la *Charte*, fait en sorte que les écoles d'expression française soient administrées par des conseils scolaires d'expression française.[15] La modification constitutionnelle de 1993[16] visant à inclure l'article 16.1 évoque l'égalité de la communauté linguistique anglaise et de la communauté linguistique française au Nouveau-Brunswick, et non les langues qu'elles parlent.[17] En 2001, la Cour d'appel de l'Ontario s'est appuyée sur le principe constitutionnel non écrit de la protection de la minorité pour reconnaître le rôle essentiel et vital pour l'avancement et le bien-être de la communauté franco-ontarienne que jouait l'hôpital Montfort en tant qu'institution linguistique et culturelle importante en plus d'être un établissement d'enseignement important.[18] Cette évolution démontre que, pour que les droits linguistiques atteignent leur objectif, les communautés linguistiques du Canada doivent être en mesure de participer au processus de prise des décisions gouvernementales, dans la mesure où ces décisions gouvernementales ont des incidences sur leur épanouissement économique, social et culturel.

Les politiques linguistiques canadiennes sont fondées non seulement sur les droits, mais également sur les valeurs. L'inclusion des droits linguistiques dans la *Charte*, la *Loi sur les langues officielles* et ses diverses modifications est la reconnaissance de la valeur intrinsèque des communautés françaises et anglaises qui ont aidé à forger l'identité du Canada.

Le fait qu'en vertu des lois canadiennes le gouvernement fédéral ait maintenant l'obligation d'adopter des mesures positives pour favoriser l'épanouissement des communautés minoritaires françaises et anglaises au Canada constitue une autre démonstration de cette valeur.[19] Cette exigence requiert un leadership et implique davantage qu'une simple consultation ; elle commande une collaboration et une conversation véritable visant à définir ce que peuvent être les

mesures positives. Cette réalité implique également que ces communautés ont des responsabilités réciproques. Les communautés de langue officielle doivent prendre l'initiative et établir un certain degré de contrôle sur le processus de prise de décisions. En ce sens, l'épanouissement de la communauté peut être défini comme la capacité des communautés de langue officielle de prendre leur destinée en mains en transformant et en exploitant les ressources sociales et culturelles au bénéfice de la communauté, grâce à un leadership fort et dynamique.[20]

Un rôle substantiel incombe également à d'autres acteurs dans la société. Le gouvernement fédéral n'est pas le seul à avoir cette responsabilité. Le paragraphe 16(3) de la *Charte*[21] et le principe constitutionnel de la protection de la minorité[22] démontrent le rôle essentiel des gouvernements provinciaux et territoriaux dans la promotion de l'égalité de statut et de l'usage du français et de l'anglais. Des institutions, telles les universités, ont également un rôle important à jouer. Les universités, par exemple, doivent reconnaître que le français et l'anglais sont des langues canadiennes et fournir aux étudiants la possibilité de maintenir leur connaissance de l'autre langue officielle ou d'apprendre l'autre langue officielle, que ce soit en classe ou dans le cadre d'emplois d'été ou de programmes d'échange. Les programmes de formation professionnelle devraient faire valoir l'importance capitale de la maîtrise des langues officielles au Canada. Or, même les cours d'administration publique qui préparent, du moins en théorie, les étudiants à des carrières dans les plus hautes sphères de la fonction publique, négligent les compétences linguistiques. Certaines écoles de droit canadiennes ont le mérite de reconnaître l'importance du bijuridisme canadien et de se pencher sur les interactions cruciales entre la common law et le Code civil, notamment en ce qui touche la Charte. Leur enseignement tient compte du fait que tous les projets de loi fédéraux sont rédigés dans les deux langues. Malheureusement, les avocats n'apprennent trop souvent qu'une moitié des lois : la moitié française ou la moitié anglaise. Dans certaines écoles de journalisme, on fait parfois allusion au bien-fondé de connaître les deux langues officielles, mais un grand nombre, voire la majorité, des diplômés en journalisme canadiens sont incapables d'analyser les discours que les politiciens francophones adressent à leurs électeurs.

Après 25 ans, la dualité linguistique devient de plus en plus un élément clé de l'identité que le Canada projette de lui-même. Des sondages d'opinion[23] démontrent que l'appui accordé au bilinguisme atteint des niveaux sans précédent et illustrent clairement le point suivant: 7 Canadiens/Canadiennes sur 10 déclarent être personnellement en faveur du bilinguisme dans le pays dans son ensemble ainsi que dans leur province. Chez les jeunes âgés de 18 à 34 ans, c'est-à-dire ceux qui sont nés ou qui ont grandi depuis l'avènement de la *Charte*, le niveau d'appui atteint un niveau aussi élevé que 80 pour cent. Lorsqu'on leur a demandé si le fait de vivre dans un pays avec deux langues officielles était l'une des caractéristiques qui définit réellement ce que cela signifie être Canadien, une majorité écrasante des personnes interrogées ont répondu oui.

À l'évidence, la *Charte* a aidé à forger l'identité canadienne moderne, et la jeunesse d'aujourd'hui a intégré les valeurs de la *Charte* dans la façon dont elle se voit elle-même et dont elle voit son pays et le monde qui l'entoure.

S'inspirant d'une conversation sur la langue qui a vu le jour avec la Commission royale d'enquête sur le bilinguisme et le biculturalisme, la *Charte* a, depuis 1982, déclenché une série d'événements qui ont enclenché un processus de rétablissement des droits linguistiques, modifié le comportement des gouvernements et créé une nouvelle dynamique pour les minorités linguistiques au Canada. Le français et l'anglais sont des langues canadiennes qui appartiennent à tous les Canadiens; la *Charte* a accéléré le processus visant à faire de cette prétention une réalité.

M. Fraser voudrait reconnaître la contribution de M. Kevin Shaar, conseiller juridique à la direction générale des affaires juridiques au Commissariat aux langues officielles, pour la recherche effectuée pour cet article.

Notes

1 *Mahé c. Alberta,* [1990] 1 R.C.S. 342, page 362.

2 Graham Fraser, *Sorry, I don't speak French : Ou pourquoi quarante ans de politiques linguistiques au Canada n'ont rien réglé... ou presque, trad.* par Serge Paquin, Québec, Éditions du Boréal, 2007, à la p. 104.

3 Canada, *Rapport préliminaire de la Commission royale d'enquête sur le bilinguisme et le biculturalisme,* Ottawa, Imprimeur de la Reine, 1965, à la p. 5.

4 Canada, Commissariat aux langues officielles, *Rapport annuel :* 2005-2006, 2006, à la p. 45.

[5] 16(1) Le français et l'anglais sont les langues officielles du Canada; ils ont un statut et des droits et privilèges égaux quant à leur usage dans les institutions du Parlement et du gouvernement du Canada.

[6] P.L. S-3, *Loi modifiant la Loi sur les langues officielles (promotion du français et de l'anglais)*, sanction royale reçue le 24 novembre 2005.

[7] Voir, *Loi sur les langues officielles,* L.R.C. 1985, (4e supp.), c. 31, Partie VII.

[8] Marc L. Johnson et Paule Doucet, *Une vue plus claire: évaluer la vitalité des communautés de langue officielle en situation minoritaire,* Canada, Commissariat aux langues officielles, 2006, aux pp 7-8.

[9] *Ibid*., à la p. 12.

[10] Le 28 novembre 2006, la Chambre des communes a voté en faveur d'une motion introduite par le premier ministre, le Très honorable Steven Harper, par une marge de 266 à 16. Cette motion propose: « Que cette Chambre reconnaisse que les Québécoises et les Québécois forment une nation au sein d'un Canada uni. »

[11] *Supra* note 8, à la p. 16.

[12] *Supra* note 8, aux pp. 17-18.

[13] Procès verbaux, 1 et 2 septembre 1966, Commission royale d'enquête sur le bilinguisme et le biculturalisme, Ottawa. De façon générale, voir l'ouvrage de Daniel Bourgeois, *The Canadian Bilingual Districts: From Cornerstone to Tombstone,* publié par McGill-Queen's University Press, Montréal, 2006.

[14] Voir le paragraphe 23(3) de la *Charte*. Voir aussi l'alinéa 20(1)a) de la *Charte*, où le critère de « demande importante » s'applique.

[15] Michael D. Behiels, *La francophonie canadienne : renouveau constitutionnel et gouvernance scolaire*, Ottawa, Les Presses de l'Université d'Ottawa, 2005.

[16] L'amendement constitutionnel de 1993 (Nouveau Brunswick).

[17] 16.1(1) La communauté linguistique française et la communauté linguistique anglaise du Nouveau-Brunswick ont un statut et des droits et privilèges égaux, notamment le droit à des institutions d'enseignement distinctes et aux institutions culturelles distinctes nécessaires à leur protection et à leur promotion.

[18] *Lalonde v. Ontario (Commission de restructuration des services de santé)*, 56 O.R. (3d) 577.

[19] *Supra* note 7.

[20] Comme suggéré par Marc Johnson durant la conférence intitulée *Des mesures positives, des engagements gouvernementaux et des principes : Une étude de la portée juridique de la partie VII de la Loi sur les langues officielles,* le 28 mars 2007.

[21] 16(3) La présente charte ne limite pas le pouvoir du Parlement et des législatures de favoriser la progression vers l'égalité de statut ou d'usage du français et de l'anglais.

[22] *Supra*, note 18.

[23] Centre de recherche Décima, *L'évolution de l'opinion publique au sujet des langues officielles au Canada*, Ottawa, Commissariat aux langues officielles, juillet 2006 et, CROP, *Les Canadiens et le bilinguisme,* présenté à la Société Radio-Canada, décembre 2006.

25 YEARS UNDER THE *CHARTER*: AN EXPRESSION OF CANADA'S IDENTITY

ABSTRACT

In the 25 years of its existence, building on a conversation that began with the Royal Commission on Bilingualism and Biculturalism, the *Charter* has set off a chain of events that have started the process of restoring language rights, changing the behaviour of governments, and creating a new dynamic for linguistic minorities in Canada. The inclusion of language rights in the *Charter*, the *Official Languages Act* and its subsequent amendment are recognition of the intrinsic value of the English and French communities that have helped shaped Canada's identity. English and French are Canadian languages that belong to all Canadians; the *Charter* has accelerated a process to make this claim a reality.

In the 25 years of its existence, the *Charter* has fostered a national conversation between the courts, governments and official language communities, which has enabled the interpretation of linguistic rights to evolve. In fact, it could be argued that over the years, some of the most eloquent statements about the importance of language as an element of personal and collective identity have emerged, not from Canada's universities or from debates in Parliament, but from Supreme Court decisions. "Language is more than a mere means of communication, it is part and parcel of the identity and culture of the people speaking it," the Court wrote in 1990, "It is the means by which individuals understand themselves and the world around them."[1]

In those words, and in other decisions, one can hear the echoes of the Canadian conversation on language that has included voices as various as those of André Laurendeau, Marshall McLuhan and Camille Laurin. For example, André Laurendeau, co-author of the famous "pages bleues" of the final report of the B&B Commission, described the critical importance of language as being at the core of the intellectual and emotional life of every personality.[2] This conversation did not start with the ratification of the *Charter* in 1982. Parliament, early in the 1960s, began to respond to the obvious disparities, political, economic and social, between English-speaking and French-speaking Canada.

In 1963, Lester Pearson appointed the Royal Commission on Bilingualism and Biculturalism, which told Canadians in 1965 that Canada was passing through the greatest crisis in its history.[3] The Royal Commission addressed the paradox of official bilingualism: a paradox that is still widely misunderstood. An Official language policy does not exist to require everyone to learn two languages – although obviously, if no-one is bilingual, the policy cannot succeed. An official language policy exists for two fundamental reasons: to protect the unilingual, and to protect minority language communities. There are four million unilingual French-speaking Canadians in Canada, and one of the key reasons for the Official Language Act to exist is to ensure that they get the same level of services from the federal government as the twenty million unilingual English-speaking Canadians. There are also a million French-speaking Canadians who live in minority communities across Canada, and almost a million English-speaking Canadians living in minority communities in Quebec. Those communities deserve not only to survive, but to thrive.

With the arrival of immigrants from all around the world and today's multicultural society, collective identities are less likely than before to be strongly based on

GRAHAM FRASER

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language and religion; they are now marked by multiple affiliations.[4]

In fact, one of the most dramatic changes in the relationship between English and French in Canada is that both language groups are welcoming newcomers. Those newcomers, in many cases, are quicker to realize the importance of linguistic duality to Canada's identity than many native-born Canadians. Indeed, the proof, if proof was needed, of the fact that cultural diversity and linguistic duality are complementary and not contradictory lies in our last two Governors-General. Both Michaëlle Jean and Adrianne Clarkson came to Canada as young girls, one from Haiti and the other from Hong Kong; both joined one language community; both decided to truly participate in the Canadian conversation, they would become not only competent but eloquent in both official languages.

How then do we define official language communities? How does a sense of belonging to a community establish or organise itself? How do we assess community vitality? These questions have become increasingly important, not just in the sociological context, but in the legal context. The very concept of community vitality is embedded within the Canadian judicial framework as it pertains to the principle of the equality of French and English, guaranteed in section 16 of the *Charter*.[5] In November 2005, nearly all parties voted to amend the Official Languages Act[6] so that the federal government would be required, in a legally binding fashion, to take "positive measures" to enhance the vitality of the English and French linguistic minority communities in Canada and support and assist their development; and to foster the full recognition and use of both English and French in Canadian society.[7]

Within the context of official languages, community traditionally refers to a geographical area where official language communities live: a neighbourhood, town, city or region. Historically, official language communities have constituted such communities. They settled the land, established towns and cities, and built churches and businesses. From this point of view, the term essentially refers to the product of settlement, which fosters both interaction between individuals and a sense of belonging.[8]

Under a more modern definition, the inclination is to think in terms of networks of institutions, organisations or individuals associated with either one of the official language communities. A group of individuals with a shared interest – in this instance, their culture and language – may be called a community. Here, territory is less important. Instead, community implies an active tie of solidarity in a geographically dispersed group. Many such communities are commonly known as having a collective identity: for example, the Quebec English-speaking community, the Atlantic Acadian community, the Franco-Manitoban community, or the French-Canadian community.[9]

From a larger perspective, but not less important, there is no doubt that Quebec forms a minority within the country, and recently, Parliament did not hesitate to declare that the Québécois form a nation.[10] A community, whether neatly circumscribed on a specific territory or floating in networks of relationships, is never alone; it forms part of a larger whole – a state, a society or nation – within which it is neighbour to other communities, both majority and minority.[11]

Like community, vitality is a concept that can take on several meanings in the context of official languages. It can be considered from either an individual or a collective point of view. At the individual level, language can be seen as a facet of vitality since, above all, it is a skill. Language is knowledge that can be used to represent values, symbols and experiences, and that as such makes up part of one's individual identity. At the collective level, linguistic vitality deals with the use of language across time and space, and the numerous functions it fulfills in various areas of society such as culture, religion, education, administration, media and the law. From this point of view, linguistic vitality is a characteristic of the community as a whole.[12]

Like ecological zones, which are defined by their requirements for water, sunlight, heat or cold, language communities need a certain number of elements in order to be sustained, such as education, health care, and cultural and economic resources. Over the last forty years, as part of the ongoing national conversation about language, many of those elements have been developed. Solid pieces have been built for a language policy that works, although there are still gaps that need to be addressed and we have a ways to go in ensuring that the various components function in a more coherent fashion.

Forty years ago, the B&B Commission tried to encompass a more systemic or integrated approach to language with the proposal of bilingual districts,[13] which would have required participation in certain areas of all three levels of

government. This approach was rejected for many reasons, one being purely political, the Federal Government cannot simply make the rules for provinces and municipalities, but more fundamentally, Canada has chosen a path toward individual rights, independent from where citizens are, with the caveat of where numbers warrant included in the *Charter*.[14]

Though formulated as individual rights, what has occurred since the advent of the *Charter* is that these rights have taken on a collective dimension. The right to learn, which became enshrined in the *Charter* as section 23, was fleshed out by subsequent court decisions, ensuring that French-language schools are run by French-language school boards.[15] The constitutional amendment of 1993,[16] to include section 16.1, refers to the equality of the English linguistic community and the French linguistic community in New Brunswick, as opposed to the languages they speak.[17] In 2001, the Ontario Court of Appeal, citing the unwritten constitutional principal of minority protection, recognized the essential role played by the Montfort Hospital as an important linguistic, cultural and educational institution that is vital to the development and well being of the Franco-Ontarian community.[18] What this evolution demonstrates is that in order for language rights to achieve their objective, Canada's linguistic communities must be able to participate in the government decisional process to the extent that its decisions affect their economic, social, and cultural vitality.

Canadian language policies are rights-based, but they are also value-based. The inclusion of language rights in the *Charter*, the Official Languages Act and its subsequent amendment are recognition of the intrinsic value of the English and French communities that have helped shaped Canada's identity.

Another demonstration of this value is the fact that Canadian law now requires the federal government to take positive measures to enhance the vitality of the English and French minority communities in Canada.[19] This requires leadership and implies something more than mere consultation. It implies collaboration, a veritable conversation to define what positive measures can be. It also implies reciprocal responsibilities on the part of those communities. Official language communities must take the initiative and establish a certain degree of control over the decision making process. In this sense, community vitality can be defined as the ability for official language communities to empower themselves through economic, social and cultural resources that are transformed and exploited for the benefit of the community, thanks to strong and dynamic leadership.[20]

Forty years ago, the B&B Commission tried to encompass a more systemic or integrated approach to language with the proposal of bilingual districts, which would have required participation in certain areas of all three levels of government.

Other actors in society must also play a substantial role. This responsibility is not limited to the federal government. Subsection 16(3) of the *Charter*[21] and the constitutional principle of minority protection[22] demonstrate the essential role that provincial and territorial governments have in advancing the equality of status and use of English and French. Institutions, such as universities, also have an important role to play. Universities, for example, have to recognise that French and English are Canadian languages, and provide opportunities for students to maintain or acquire the other official language, whether in the classroom, in summer jobs or exchange programs. Professional programs should recognize the critical importance of language mastery in Canada. Yet, astonishingly, even public administration programs, which are at least notionally preparing students for careers that should lead to the highest levels of the public service, pay little attention to language requirements. Some law schools, to their credit, have recognised the importance of Canada's bijural legal system and the critical interaction between the Common Law tradition and the *Civil Code*, most notably in the *Charter*, and have recognized that every federal law is drafted in both official languages. But too often, lawyers learn only half the law: the English half or the French half. Journalism schools sometimes pay lip service to the importance of understanding both official languages, but many, if not most graduates from Canadian journalism schools are unable to cover French-speaking politicians speaking to their constituents.

After 25 years, linguistic duality is increasingly becoming a key element in the identity that Canada projects of itself. This is clearly reflected in opinion surveys[23] which show unprecedented levels of support for bilingualism: 7 out of 10 Canadians say they are personally in favour of bilingualism for the country as a whole as well as for their own province. For youth aged from 18 to 34, those born or raised in the *Charter*-era, the level of support increases to as much as 80 percent. When asked if living in a country with two official languages is one of the things that really defines what it means to be Canadian, and overwhelming majority of those surveyed agreed.

Evidently, the *Charter* has helped shape the modern Canadian identity, and the youth of today have integrated its values into the way they see themselves, their country, and the world around them.

Since 1982, building on a conversation on language that began with the Royal Commission on Bilingualism and Biculturalism, the *Charter* has set off a chain of events that have started a process of restoring language rights, changing the behaviour of governments, and creating a new dynamic for linguistic minorities in Canada. English and French are Canadian languages that belong to all Canadians; the *Charter* has accelerated a process to make this claim a reality.

Mr. Fraser would like to recognize the contribution of Mr. Kevin Shaar, Legal Counsel in the Legal Affairs Branch at the Office of the Commissioner of Official Languages in researching this paper.

Notes

[1] *Mahé v. Alberta,* [1990] 1 S.C.R. 342, at page 362.

[2] Graham Fraser, *Sorry I Don't Speak French: Confronting the Canadian Crisis That Won't Go Away* (Toronto: McClelland & Stewart, 2006), p. 81.

[3] *A Preliminary Report of the Royal Commission on Bilingualism and Biculturalism* (Ottawa: Queen's Printer, 1965) at p. 13.

[4] *Annual Report 2005-2006* (Canada: Office of the Commissioner of Official Languages, 2006), p. 44.

[5] 16(1): English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.

[6] Bill S-3, *An Act to Amend the Official Languages Act (Promotion of English and French)*, received Royal Assent on November 24, 2005.

[7] See, *Official Languages Act,* R.S.C. 1985, c. 31 (4th Sup.), Part VII.

[8] Marc L. Johnson & Paule Doucet, *A Sharper View: Evaluating the Vitality of Official Language Minority Communities* (Canada: Office of the Commissioner of Official Languages, 2006), pp. 7-8

[9] *Ibid*, pp 11-12

[10] On November 28, 2006, the House of Commons voted in favor of the motion introduced by Prime minister, Right Honorable Steven Harper by a margin of 266 to 16. The motion reads: "That this House recognizes that the Québécois form a nation within a united Canada."

[11] *Supra*, note 8, at p. 15.

[12] *Supra*, note 8, at pp. 16-17.

[13] Minutes of 1-2 September, 1966, Royal Commission on Bilingualism and Biculturalism, Ottawa. See generally, Daniel Bourgeois, *The Canadian Bilingual Districts: from Cornerstone to Tombstone* (Montreal: McGill-Queen's University Press, 2006).

[14] See subsection 23(3) of the *Charter*. Also see paragraph 20(1a) of the Charter, where the criterion of "significant demand" applies.

[15] See Michael D. Behiels, *Canada's Francophone Minority Communities: Constitutional Renewal and the Winning of School Governance* (Montreal: McGill-Queen's University Press, 2005).

[16] Constitution Amendment, 1993 (*New Brunswick Act*).

[17] 16.1(1): The English linguistic community and the French linguistic community in New Brunswick have equality of status and equal rights and privileges, including the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of those communities.

[18] *Lalonde v. Ontario (Commission de restructuration des services de santé)*, 56 O.R. (3d) 505

[19] *Supra*, note 7.

[20] As suggested by Marc Johnson during the conference entitled *Positive Measures, Policy Commitments and Principles: An exploration of the legal scope of Part VII of the Official Languages Act,* March 28, 2007.

[21] 16(3): Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.

[22] *Supra*, note 18.

[23] Decima Research Limited, *The Evolution of Public Opinion on Official Languages in Canada* (Ottawa: Office of the Commissioner of Official Languages, July 2006) and CROP, *Les Canadiens et le bilinguisme* (Présenté à la Société Radio-Canada, décembre 2006).

LANGUAGE LAWS AND THE *CHARTER*

ABSTRACT

In the 25 years of its existence, building on a conversation that began with the Royal Commission on Bilingualism and Biculturalism, the *Charter* has set off a chain of events that have started the process of restoring language rights, changing the behaviour of governments, and creating a new dynamic for linguistic minorities in Canada. The inclusion of language rights in the *Charter*, the *Official Languages Act* and its subsequent amendment are recognition of the intrinsic value of the English and French communities that have helped shaped Canada's identity. English and French are Canadian languages that belong to all Canadians; the *Charter* has accelerated a process to make this claim a reality.

The heyday of the *Charter* was the 1980s and the 1990s, when Canadian courts applied it to many disparate areas of law. Since approximately 2000, the *Charter* has been under siege by conservatives who have portrayed it as undemocratic and protective of vested interests and lobbies.[1]

While the attacks on the *Charter* appear unfair in that it would be very difficult to demonstrate that Canada is a tyranny of "judges", it is true that the *Charter* is not and should not be an instrument of daily administration.[2] Rather, it is an exceptional remedy particularly suitable for righting injustice toward individuals. It is far less effective in imposing social measures or in performing social engineering.[3] Courts do not have the means, the army of researchers, or the know-how needed to govern. They do, however, constitute an excellent bulwark against abuse of power and the *Charter* is particularly useful in this respect.

The history of the language provisions in the *Charter* and of the application of other parts of the *Charter* to language matters provides an excellent illustration of where the *Charter* can help and where it usually does not.

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The *Charter*

The provisions of the *Charter* were intended to apply in the same way to Quebec and to the rest of Canada. The one exception was s.23 1(a), which remained unproclaimed in Quebec, as recognition of the particularly precarious position of French in North America. Not only have the specific language provisions been invoked by litigants, but also freedom of expression and equality.[4] In addition, a number of special laws were adopted by the federal government, guaranteeing various services and especially trials in both official languages. Those laws acquired "quasi-constitutional status"[5] and were given a generous, "purposive interpretation". In *R. v. Beaulac*[6], Bastarache J. said at p. 791-93:

> Language rights must in all cases be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada; see *Reference re Public Schools Act (Man)*, supra at p. 850. To the extent that *Société des Acadiens du Nouveau-Brunswick*, supra, at pp. 579-80, stands for a restrictive interpretation of language rights is to be rejected. The fear that a liberal interpretation of language rights will make provinces less willing to become involved in the geographical extension of those rights is inconsistent with the requirement that language rights be interpreted as a fundamental tool for the preservation and protection of

> official language communities where they do apply. It is also useful to re-affirm here that language rights are a particular kind of right, distinct from the principles of fundamental justice. They have a different purpose and a different origin. I will return to this point later.

This principle was reiterated by the Supreme Court in *Arsenault-Cameron v. P.E.I.*[7]

In Solski[8], the court said at par. 21:

> En raison du caractère national de l'art. 23, la Cour a interprété les droits qu'il confère de façon uniforme pour toutes les provinces : Quebec *Association of Protestant School Boards; Mahe; renvoi relatif à la Loi sur les écoles publiques (Man.); Arsenault-Cameron; Doucet-Boudreau;*

Yet, despite this uniformity, slightly and appropriately tilted in favour of protecting the French language, the *Charter* and the related laws have been totally successful in protecting the rights to use English in Quebec. Their success with respect to French in the rest of the country[9] is far more mitigated.

In today's Quebec, English schools continue to flourish[10], and English theatre and cinema are highly successful, attracting the interest of many francophones as well as anglophones. The irritants of *Bill 101* have been corrected through litigation, while the law itself remains as an essential and virtually universally accepted guarantee for the survival of French. The tensions and volatility of the 1970s and 1980s have all but disappeared.[11]

In the rest of the country, some improvements with respect to French schools have occurred[12]; laws now have a French version in several provinces, and a trial in French is easier to obtain. It is nevertheless true that the status of French in the Anglophone provinces has in no way caught up to that of English in Quebec and remains a threatened language. There is little of the cultural and academic vibrancy of English in Quebec[13] and, while the law has generally been interpreted as generously as in Quebec[14], the results are not as impressive.

The reason for this is not found in the good faith or bad faith of anyone but rather in the nature of the challenges faced by English in Quebec as compared to those faced by French in the rest of the country.

The problems of French and English

In Quebec, English had long been the dominant language. Universities, hospitals and schools in English had been established before the days of massive government financing which would have favoured French.

After 1960, the Quiet Revolution adopted francization as one of its goals. As a social goal, this was perfectly legitimate. However, on various occasions, individual rights to expression and to employment to the use of English or to education in English were infringed. These problems were ideally suited to solution through the use of the *Charter* and rules of natural justice and fairness.

The issue of free expression was settled by *R. v. Ford*.[15] That of municipal law and English services was largely solved by *Alliance for English Communities v. A.G. Quebec.*[16]

The generous attitude of the Courts toward English-speaking employees was clear from *Ville de Lachine v. A.G. Quebec*[17], as well as *Chiasson v. A.G. Quebec*.[18]

The education issue was probably the most controversial and it was not solved entirely by the courts, but by the promulgation of the Charter which, in s.23 replaced the "Quebec clause". The courts gave a "purposive" and broad interpretation of 23(2) despite strong resistance from Quebec.

In *Mak v. Minister of Education*[19], 500-05-008960-823, Deschênes C.J.Q. applied section 23 to all education lawfully obtained in Quebec, even if it did not qualify under *Bill 101*, and the Supreme Court upheld this as one of the cases in the umbrella known as *Quebec Association of Protestant School Boards*.[20]

The purposive interpretation of the education provision continued in *Colin v. Commission d'Appel*[21] and *Smith v. Marois.*[22] Although the Quebec Court of Appeal moved back from this position in *A.G. Que. v. Solski*[23], it was reversed by the Supreme Court in *Solski*[24]. In *Fedida v. La Ministre de l'Éducation*[25], Quebec's Tribunal Administratif also applied the "generous interpretation" doctrine. In short, the challenges were largely successful.

It must be remembered that all of the Quebec cases dealt with the right of an individual set of parents to education their children in English. The English school system was clearly in existence and this was not in issue, only the application to the families which sued for the right.[26] Therefore, success before the Courts was usually an entirely effective remedy.

In English Canada the individual had a right, so long as "numbers permitted" and the school existed. The litigation therefore dealt with more collective areas of control and finances. While the jurisprudence was positive,[27] it was obviously not possible for courts to make up for centuries of neglect and discouragement. The judicial cases improved the school situation[28] somewhat by providing for administration by the minority. However, most of the problems which existed in 1982 are still with us. Outside Ottawa and Moncton, French is not generally visible and remains in peril.

We can thus see that litigation and especially *Charter* litigation is effective in dealing with individual claims to freedom and rights; it is much more problematic when it comes to distributing goods and services between groups and lobbies.[29]

Almost from the start, many Quebec authorities believed that language rights were collective in nature.[30] In *Quebec Association of School Boards*, the government raised this issue in the Superior Court before Deschênes J.,[31] who opted for an "individual" right and the Supreme Court implicitly agreed.[32] The matter was again considered by Mme Justice Duval-Hessler in *Colin*[33] supra when she concluded at p. 1489-90:

> Il faut donc, pour déterminer l'admissibilité à l'enseignement en anglais au Québec, s'attarder uniquement à la question de savoir si la personne concernée satisfait aux conditions imposées par les dispositions pertinentes, et non à la question de savoir à quelle communauté linguistique cette personne se rattache de plus près par ses origines, d'autant plus que la loi est tout à fait muette sur les critères qui feraient en sorte qu'on puisse déterminer qu'une personne appartient réellement à tel groupe plutôt qu'à tel autre.

The one case which appeared to favour the collective solution and which negated all of the other jurisprudence was *Société des Acadiens du Nouveau-Brunswick v. Association of Parents for Fairness in Education.*[34] That case appeared to draw a distinction between "real" Acadians and other parents who desired a French education for their children. Moreover, it made language rights less fundamental, more a product of political compromise than other rights. This case was an anomaly and was fortunately disapproved in *Beaulac*.[35] However, its lure was such that the Quebec Court of Appeal attempted to rehabilitate it in *Solski*[36], only to be reversed again by the Supreme Court[37] which concluded on the collective individual question at par. 22 and 23:

> Devant notre Cour, on a proposé diverses façons d'interpréter l'art. 23. Des parties qui avaient des perceptions différentes de la réalité actuelle ont analysé la nature et la portée mêmes des droits à l'enseignement dans la langue de la minorité. Pour le procureur général du Québec, l'art. 23 est une disposition régissant l'application de droits collectifs; pour l'appelante, cet article concerne des droits individuels que les personnes admissibles peuvent exercer partout au Canada.
>
> Comme c'est souvent le cas, ni l'une ni l'autre des interprétations n'est totalement dénuée de fondement (C. Ryan, "L'impact de la Charte canadienne des droits et libertés sur les droits linguistiques au Québec", Numéro spécial de la *Revue du Barreau* en marge du vingtième anniversaire de l'adoption de la *Charte canadienne des droits et libertés,* mars 2003, 543, p. 551). L'article 23 vise clairement à protéger et à préserver, partout au Canada, les deux langues officielles et les cultures qui s'y rattachent; son application touche forcément l'avenir des communautés linguistiques minoritaires. Les droits garantis par l'art. 23 sont, dans ce sens, des droits collectifs, ce que reflètent d'ailleurs les conditions assortissant leur exercice (Doucet-Boudreau, par. 28). Leur application dépend du nombre d'élèves admissibles (*Mahe*, p. 366-367; Renvoi relatif à la Loi sur les écoles publiques (Man), p. 850; *Arsenault-Cameron*, par. 32). Néanmoins, bien

The education issue was probably the most controversial and it was not solved entirely by the courts, but by the promulgation of the Charter which, in s.23 replaced the "Quebec clause".

> qu'ils présupposent l'existence d'une communauté linguistique susceptible d'en bénéficier, ces droits ne se définissent pas avant tout comme des droits collectifs. Un examen attentif de la formulation de l'art. 23 révèle qu'il s'agit de droits individuels en faveur de personnes appartenant à des catégories particulières de titulaires de droits.

With this matter settled, we can now understand the relative success of litigation in Quebec and the very mixed result elsewhere.

The lesson can be applied to other areas of law. Efforts to advance the cause of a collectivity called "women" or "homosexuals" or "visible minorities" will succeed only if accompanied by sufficient funds to change social structures.[38] On the other hand, our courts are very well equipped to end legal barriers and to sanction affronts to individual dignity and equality of members of all these groups.[39]

The future and language law

The impossibility of enforcing equality of French litigation should not make us despair. French can be promoted through legislation and through the providing of adequate funding for education, health care and culture in French. When French institutions in the rest of Canada approach the status of the bilingual institutions of Quebec, true equality will not be far behind.[40]

It is important not to insist that the French language is the particular property or characteristic of a minority; rather it is an essential quality of Canada and a source of cultural enrichment for all Canadians. In Quebec, it is now widely recognized that English culture belongs to everyone and there is a strong francophone presence at English cultural events.

If we are to preserve French, it is crucial that funds be spent on teaching French to all, not only those identifying themselves as francophones. While English Canada will never become totally bilingual, a partial bilingualism will certainly bode well for the fate of French institutions in difficult times. Moreover, in days of considerable and completely desirable prevalence of mixed marriage[41], the preservation of French at home will depend on the partial francization of the English or allophone party. All of this however, is not, for the most part, a matter for the courts, but for the legislator with the ministers of finance of all the provinces and of the federal government as major players.

The future of Quebec's language law

Although most of Quebec's initial language problems have been solved, the present situation may soon become unsustainable. With the present law, which excludes many persons of English background from English schools and which gives an increasing number of francophones that right, through mixed marriage or through sojourns outside Quebec, *Bill 101* will in several decades appear a little absurd. The right to English will be the equivalent of a winning lottery ticket rather than a true measure of personal identity.

The solution to this may well[42] be the creation of a third system, open to everyone regardless of background and functioning, mostly in French, but to a considerable degree[43] also in English. This will be consistent with the fact that anglophones and francophones are no longer divided from each other and that both groups have a stake in each of the languages. However, a predominance of French is necessary in the North American context, to make certain that it remains the principal common language of Quebec. An attempt to return to complete bilingualism or freedom of choice is simply unthinkable and there exists no significant support for it.

Notes

1 This has not prevented conservatives from trying to use it for their ends: *Lavigne v. Ontario Public Service Employees Union,* [1991] 2 S.C.R. 211 *Harper v. Canada (A.G.),* [2004] SCC 33, *Chaouilli v. Quebec (A.G.)*, [2005] SCC 35. Except in the *Chaouilli* case, they have been unsuccessful and this writer doubts the soundness of *Chaouilli*. A recent case, *Health Services and Support Facilities Subsection Bargaining Association v. British Columbia*, 2007 SCC 27 shows that the *Charter* may yet have considerable vigor.

2 See Grey, Julius H., "Equality Rights Versus the Right to Marriage – Toward the Path of Canadian Compromise", in *Policy Options Politiques*, October 2003, Vol. 24, No. 09.

3 Hence the weakness of *Chaouilli*, supra.

4 *Ford v. A.G. Que*., [1988] 2 S.C.R. 712. Also, *the Universal Declaration of Human Rights* was invoked against Quebec's *Bill* 178, which invoked the notwithstanding clause to get around *Ford*.

5 A.G. *Canada v. Viola* (1990) [1991] 1 F.C. 373; *Air Canada v. Thibodeau,* [2007] C.A.F.

6 *R. v. Beaulac,* [1999] 1 S.C.R. 768.

7 *Archambault-Cameron v. P.E.I.,* [2000] 3 S.C.R.; See also *Solski v. Quebec,* 2005 SCC 14.

8 *Solski*, supra.

9 With the possible exception of portions of New Brunswick.

[10] Despite some closures for demographic reasons. See the discussion in *Solski*, supra.

[11] See Grey report to Larose Commission, 2001.

[12] *R. v. Mahe.*

[13] Although several excellent universities have been built.

[14] *Mahe* supra, *Beaulac*, supra, *Hospitals*, supra.

[15] *Ford*, supra.

[16] *Alliance for English Communities v. A.G. Quebec,* (1990) R.J.Q. 2622.

[17] *Ville de Lachine v. A.G. Quebec,* [1989] R.J.Q. 17.

[18] *Chiasson v. A.G. Quebec,* (2000) R.J.Q. 1836.

[19] *Mahe v. Minister of Education,* S.C. 500-05-008960-823.

[20] *A.G. Que. v. Quebec Association of Protestant School Boards,* (1984) 2 S.C.R. 66.

[21] *Colin v. Commission d'Appel,* (1995) R.J.Q. 1478.

[22] *Smith v. Marois,* (1998) R.J.Q. 161, applying the child's best interest. See also *Baker v. Canada,* (1999) 2 S.C.R. 817, and *Costandi v. Commission d'appel,* 500-05-013160-955.

[23] *A.G. Quebec v. Solski,* 500-09-010454-007.

[24] *Solski*, supra.

[25] *Fedida v. La Ministre de l'Éducation,* TALF 50007 (63-0002).

[26] Quebec in fact goes beyond the *Charter* in guaranteeing the right to eligible Quebecers even in areas when "members do not permit".

[27] *Mahe, supra, Arsenault-Comeau,* supra.

[28] As well, courts saved the French hospital near Ottawa. *Lalonde v. Ontario,* 2001 CanLII 211 64.

[29] For instance, U.S. law has been almost totally successful in removing vestiges of segregation such as separate facilities but much less effective in eliminating the social and economic problems faced by African Americans. In Canada, this distinction is clear in *Newfoundland Treasury Board v. NAPE,* (2004) 3 S.C.R. 381.

[30] See Carignan, *De les nature du droit collectif et du son application en matière scolaire au Québec,* (1984) 18 R.J.Q. 91-91.

[31] *QAPSB v. A.G. Quebec,* (1982) C.S. 673.

[32] *A.G. Quebec v. QAPSB*, supra.

[33] *Colin*, supra.

[34] *Société des Acadiens de Nouveau Brunswick v. Association of Parents for Fairness in Education,* (1986) 1 S.C.R. 549.

[35] *Beaulac*, supra.

[36] *Solski*, C.A. supra.

[37] *Solski*, SCC supra.

[38] For instance by creating day-cares and reducing poverty. See, however, *Health Services and Support Facilities Subsection Bargaining Association,* supra.

[39] E.g. by enforcing equal pay for equal work.

[40] For all practical purposes, equality has been achieved for individuals in Quebec, although complaints, at times legitimate, are heard from both sides.

[41] No society can succeed in the long run if there are barriers to marriage of an ethnic or religious type. See Grey, Julius H. "En Pays d'Immigration: Postions sur le multiculturalisme, le métissage et l'interculturalisme", in *Un Chez-Soi : Chez les Autres,* Perla Serfaty-Garzon (ed.) Montréal, Bayard Canada et Paris, Bayard Éditions, 2006.

[42] See Grey, Presentation to Larose Commission.

[43] Perhaps 20-25%; what is proposed is, at least at first, a high school system only.

ABORIGINAL IDENTITY AND THE *CHARTER* OF *RIGHTS AND FREEDOMS*

ABSTRACT

The author examines the *Charter* and the Aboriginal rights clauses in the Constitution Act 1982, and considers their influence on Aboriginal identity. Following some comments on the substantive meaning and significance of these provisions, the author suggests some of their implications, not only for group and personal identity and rights, but also for the making of Aboriginal policy and the politics of Aboriginal representation.

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The *Charter*, which constitutes Part I of the *Constitution Act 1982* (the *Act of* 1982) has provisions, notably s.15, the equality and affirmative action provision, that include Aboriginal people within their reach. Perhaps more important, in Part II, the *Act of 1982* also recognizes and affirms the aboriginal and treaty rights of the "aboriginal peoples of Canada", which are described as including 'the Indian, Inuit and Metis peoples." In this brief essay, I comment on the influence that these provisions have had on the identity of Aboriginal peoples, and on the public perception that seems to have been created about the identity of Aboriginal people and about their rights in Canada. In order to do so, I must also venture some explanation and opinion about what are undoubtedly very complex aspects of the law of the constitution of Canada.

The constitutional category made up of the Aboriginal persons caught by s.15, the equality and affirmative action provision of the *Charter*, is quite distinct from the constitutional category of those who are entitled to aboriginal and treaty rights in Part II. The resulting distinction in the identity of those who fall within each category is not generally well understood. This ambiguity is exacerbated by various definitions of Aboriginal people found in special purpose legislation, such as the *Indian Act*, and a sentencing provision in the *Criminal Code* of Canada.

Added to the mix is the complexity of the concept of Aboriginal rights, which are group rights and which tend to get confused with concepts of individual rights. This widespread ambiguity and complexity tends to foster some incoherent public debates about Aboriginal policy. It also influences decisions that Aboriginal people and groups themselves make about their identity. Social scientists inform us that the extent to which the state and its institutions can influence the identity of a people is an indicator of the people's political weakness and vulnerability.

Let us first address the distinction between the identity of those caught by the *Charter* provisions and the identity of those who belong to groups that have Aboriginal rights guaranteed in Part II. Section 15 of the *Charter* permits affirmative action in respect to persons and groups made up of historically disadvantaged persons. Aboriginal persons, whether or not they belong to a rights-bearing community, are included within the objects of s.15 and one or other of the enumerated categories of disadvantaged persons or groups. To illustrate, a person with personal antecedents that include one or more Aboriginal ancestors in the family tree, and who now resides in a large city, may not identify as an Aboriginal person, and have no personal relationship with any historic Aboriginal community. Let us assume also that the hypothetical person physically resembles what Canadians view as a stereotypical Aboriginal person and is vulnerable as such to racism and disadvantage

in securing employment or rental accommodation. Such a person may not, without more, be entitled to enjoy any aboriginal or treaty rights, but would likely be included in one of the enumerated grounds in s.15, which include, *inter alia,* 'race, national or ethnic origin', and 'colour'. Furthermore, the hypothetical person might be viewed by the courts as falling within the meaning of the sentencing provision in the *Criminal Code* which makes reference to Aboriginal offenders. The courts construe legislation by examining the statutory objectives at issue, and a person who falls within the objects of a statute does not necessarily fall within the objects and meaning of another statute.

Let us turn now to examine the identity of those who fall within the aboriginal rights clause in Part II, which is s.35. S.35 recognizes two kinds of rights: aboriginal rights and treaty rights. These rights are vested in groups. They are collective rights that can only be enjoyed by members of a constitutionally recognized Aboriginal group. According to the present state of jurisprudence on the matter, individual persons do not seem to have aboriginal rights. As members or citizens of Aboriginal rights-bearing groups, a person may be entitled to act in the enjoyment of the benefits provided by the group right, or be bound by the duties or responsibilities that are integral to the group's right. Whether or not an Aboriginal person belongs to a s.35 'people' is a vexed question that the courts have only begun to pronounce upon. In the meantime, ambiguity reigns and the federal government, which has constitutional responsibility to respect aboriginal and treaty rights and to make them effective, nevertheless has little political incentive to extend its limited recognition of Aboriginal people upon which it has historically based its policies.

A closer look at the text of s.35 is needed to suggest some of the difficulties and ambiguities that attend its judicial interpretation and the way that Aboriginal people and the public understand its meaning in relation to Aboriginal identity. S 35 refers to three categories of Aboriginal peoples: the Indian, Metis and Inuit peoples. The term 'Indian' already appeared in section 91(24) of the *Constitution Act 1867*, which grants Parliament the exclusive power to make laws about 'Indians and lands reserved for the Indians". The Supreme Court of Canada (the SCC) had decided in 1939 that Indians include Inuit people for the constitutional purposes of that provision. The question whether the Metis are also 'Indians' within the meaning of section 91(24) had been resolved affirmatively by the Charlottetown Accord, at least as far as the western Metis are concerned, but the SCC has not positively and directly decided the issue. This leaves a gap of constitutional ambiguity that complicates the role of federal and provincial governments, troubles the making of Aboriginal policy, and adds to the frustration of Aboriginal organizations representing those who do not fall within the policy or statutory categories upon which the federal government bases its policy and spending.

The guarantee of aboriginal and treaty rights and their constitutional immunization from governmental infringement has created widespread expectations and assumptions among Aboriginal people. Access to the enjoyment of these rights has been seen as a desirable resource and consequently an object to be sought. But the meaning and substance of these rights is hardly defined yet. The First Ministers Conferences on Aboriginal Constitutional Reform of the 1980s failed to specify their nature and scope, and judicial interpretation has been by its nature and method slow and piecemeal, and inadequate for developing a clear and coherent policy framework. In the result no one is quite sure what it is that is worth fighting for, or fighting over.

The more certain expectations are based upon the continuation of federal policies that recognize the common law rights of the Inuit people and the 'Indian' or First Nations people who come within the terms of the *Indian Act.* Most federal spending and policy is aimed at these groups, including treaty negotiations and a range of programs administered by the department of Indian affairs. Largely on the outside looking in are the other, non-recognized Aboriginal people who have been excluded from traditional policy. These include the 'Metis' people as well as many 'Indians' who fall outside the ambit of the definition that the government unilaterally imposed upon First Nations people in its 19th century *Indian Act*, and who are on that account known as 'non-status Indians.' The members of these two groups constitute roughly as many as the 'status Indians' or First Nations, for a total of over a million persons or less than 3% of the Canadian population, according to self-identification in federal censuses.

Given that the term 'Indian' has historically been used as a generic term to refer to Aboriginal people, one might have expected that most Aboriginal individuals and groups would identify

as Indians, unless they belonged to the Inuit people of the northern regions, whose identity is not contested. Many such individuals historically identified as 'non-status Indians'. Interestingly, it appears that a shift has occurred in favour of identifying with the third group in s.35, the unique Metis people, unless one qualifies for registration as an 'Indian' under the amended federal Act. Census statistics show that this group has increased significantly in size since the 1980s, far beyond what can be accounted for by births within the statistical group of persons that self-identified in past censuses.

A closer look at Metis constitutional identity is warranted. The Metis people of Manitoba had obtained express constitutional recognition in section 31 of the *Manitoba Act 1870*, which is still part of the Constitution of Canada. S.31 recognized the aboriginal title of the Metis and provided for a land settlement scheme. The Metis in fact did not end up as landowners in the province and it has been argued that the purported implementation of this provision was not constitutionally valid. According to the rule of interpretation that all the terms of the Constitution of Canada must be read together to discern their meaning, the term 'Metis' in s.35 must be construed in light of s.31 of the *Manitoba Act 1870.* This approach, however, is not evident in the two cases that have so far been decided by the Supreme Court of Canada. In these cases the SCC has not shied away from deciding on the identity of individuals who claimed rights based upon their belonging to an Aboriginal people. In doing so, the Court has not undertaken to decide the meaning of 'the Aboriginal peoples of Canada', but it has purported to establish some tests to identify proper claimants. Both cases involved claims to 'Metis' identity. Arguably, this task is better left to the Metis people and its legitimate representatives. It does not seem right for appointed judges to decide the very identity of distinct political societies that have struggled to assert and defend rights that have ultimately acquired Constitutional recognition and protection. Perhaps a better option is for the Court to adopt a more mature doctrine of 'political questions' that are beyond the authority and power of the courts to decide because peace and justice are more likely to result from decisions made by others. The *Act of 1982* has drawn us closer to the American constitutional model and notably the courts there have developed a mature political questions doctrine, albeit not in the context of federal Indian law.

What seems clear is that Canada needs more experience and good faith to reach a just and workable balance between the roles of the various branches of government, and the way in which each branch shall relate with the Aboriginal peoples for various purposes. The Royal Commission on Aboriginal Peoples recommended negotiations and treaty agreements to establish just relations between Aboriginal peoples or 'nations' who have rights, and the rest of Canadian society. A significant part of these recommendations deal with the vexed question of identifying the Aboriginal peoples which have constitutional rights, but governments have not acted upon these proposals.

The guarantee of aboriginal and treaty rights and their constitutional immunization from governmental infringement has created widespread expectations and assumptions among Aboriginal people.

The *Act of 1982* has also affected Aboriginal individuals at the personal and family level. Some who formerly identified as 'Metis' found themselves entitled to join the ranks of the recognized 'status Indians' in the *Indian Act* on account of a 1985 amendment to that Act that was enacted in response to the perceived requirements of the *Charter*'s equality rights provision. The story of those 'Bill C-31' people has been recounted many times, but it deserves to be recalled whenever the issue of *Charter* influence on Aboriginal identity is in issue. In these stories can be found not only personal accounts about identity and the way it is influenced by governments and the law, but also complex accounts of constitutional law issues that still pose challenges. An example is the constitutional validity of the *Indian Act,* which no longer allows a registered Indian person to opt out and resume a Metis identity or other identity, whether Aboriginal or not.

The *Act of 1982* has affected the identity of Aboriginal persons and groups in various ways which seem difficult to characterize in a positive light. However, the Aboriginal rights provisions

undoubtedly have quite appropriately enhanced the status of Aboriginal people and rights in Canada, and made the country a world leader in the recognition of the rights of indigenous peoples. The complex relationship between the *Charter* provisions and the external Aboriginal rights provisions in the *Act of 1982* is bound to remain a continuing challenge and source of contested accounts into the foreseeable future.

SOME CONTEMPORARY RELIGIOUS ISSUES IN CANADA

ABSTRACT

This article explores some contemporary issues related to religion and human rights in modern society. The essay follows a survey of similar issues related to religion and multiculturalism that were canvassed in the Spring 2006 edition of this publication. The present essay focuses on some recent cases under section 2(a) of the *Canadian Charter of Rights and Freedoms* – the freedom of religion clause, the interplay between religion and science and the recent projections by Statistics Canada as to the religious demographics in Canada in 2017. These issues were first discussed at a national conference marking the 25th anniversary of the *Charter* in April 2007.

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In the Spring 2006 issue of *Canadian Diversity*, this author examined some of the contemporary issues facing Canadians in relation to religion, multiculturalism and human rights in Canada. These issues included the use of religious law, such as the *sharia*, in resolving matrimonial disputes, recent cases under sections 2(a) and 27 of the *Canadian Charter of Rights and Freedoms* (freedom of religion and multiculturalism, respectively), the use of cultural defenses in certain criminal matters, the notion of reasonable accommodation in dealing with the sensitivities of religious minorities and the so-called L'Herouxville backlash against the notion and practical application of reasonable accommodation. Since then, the Association for Canadian Studies sponsored a major national conference in Ottawa on the occasion of the 25th Anniversary of the coming into force of the *Canadian Charter of Rights and Freedoms.* This article will examine some of the issues raised at that conference as they relate to freedom of religion in Canada as well as some other religiously based issues now occupying the public arena.

On April 8, 1966, the cover story of *Time Magazine* asked the then shocking question, "Is God Dead?" and, by so doing, made waves that lasted for decades. On April 20, 2007, *Maclean's Magazine* revisited the issue with an equally controversial cover story entitled "Is God Poison?" asserting that "[a] growing movement blames religion for all the world's ills, from the war on terror to AIDS in Africa to child abuse". Similarly, Thomas McFaul, writing in an article entitled "Religion and the Future Global Civilization" in the September-October 2006 edition of *The Futurist,* maintained that "[g]lobalization is intensifying religious conflicts. What will happen in the years ahead?" Clearly, the role and influence of religion in today's world has, in fact, not waned, but rather, has gathered strength and influence and, in reality, dominates many facets of modern life

In October of 2006, the John Humphrey Centre for Peace and Human Rights sponsored a major conference on the topic of "Building World Peace: The Role of Religions and Human Rights". That conference focused on two central themes. One theme related to the power or at least the potential of organized religion to serve as a unifying force in building world peace. This would be achieved through the central message that permeates most religious ideology as expressed by the classic Golden Rule. As enunciated by the great Jewish sage, Hillel, this ideal states that [w]hat is hateful to you, do not do to your fellow man". This 'ethic of reciprocity' is common to the three Abrahamic religions, Judaism, Christianity and Islam, as well as most other major religions.

The October 2006 conference also dealt with another prevailing theme common to modern religions, namely, the unfortunate widespread hate, violence and indeed, killing in the name of God. This phenomenon, which can be observed daily throughout the world, is the negative, dysfunctional, but nonetheless realistic, influence of religion, both historically and in modern times. It is this dichotomy, the competing positive and negative influences of religion, that poses the greatest challenge.

In many societies, religion, culture and politics are highly interwoven and often they are essentially one and the same. Even in those societies in which there is a notional and even theoretical separation of state and religion, there is often a highly interrelated relationship between the two. For example, in recent years, evangelical Christianity has played a major role in the political agenda in modern western industrial democracies. It is a fact that, in spite of the speculation and articles written about the death of God, religion remains a vital force in defining the landscape of modern society and contemporary political debate.

The role of religion in Canada, notionally a secular society, is best illustrated by reference to some recent cases under section 2(a), freedom of religion, of the *Canadian Charter of Rights and Freedoms.* The influence of religion is underscored by an examination of the effect of religious dogma on the teaching and advancement of modern science. This article will also consider the 2017 projections of Statistics Canada as to future religious demographics.

We do not really know whether these minority religious assertions will become acceptable over the long run in a society that, on one hand, respects religious minorities, but on the other hand, is essentially secular in nature.

Recent section 2(a) cases

In the case of R*esidents for Sustainable Development in Guelph v. 6 &7 Developments Ltd.,* (2006), 133 C.R.R. (2d) 205, the Ontario Municipal Board rendered a decision concerning the zoning of land (permitting the construction of a Wal-Mart store) that neighbours two cemeteries (one public and the other Catholic) as well as a Jesuit spiritual retreat. The Board had denied an assertion that the commercial development was an infringement upon the freedom of religion of those using the spiritual retreat. The Ontario Superior Court of Justice (Divisional Court) upheld the Board's decision and leave to appeal to the Ontario Court of Appeal was subsequently denied. Essentially, the Board and the Court held that either there was no infringement on freedom of religion; that is, the development did not constitute an interference with the religious practice of the users of the retreat, or if there was an infringement, it was trivial and insubstantial in nature. The details of this dispute are also discussed in *Hulet v. Guelph,* [2006] O.J. No. 1488, SS, but the *Hulet* decision was decided primarily on the procedural issue of standing or locus standi.

In Canada and particularly in Quebec, there has been considerable controversy recently about the rights afforded to minority religions and the notion of 'reasonable accommodation' as applied to these minorities. Not surprisingly, over the past 25 years, since the advent of the *Canadian Charter of Rights and Freedoms*, many religious concerns have been argued in our courts. For example, freedom of religion assertions have been brought by members of the Jewish faith (see the *Adler*[1], *C.C.L.A*[2] and *Zylberberg*[3] cases), Sikhs (see the *Multani*[4] case), members of the Jehovah's Witnesses (*see the B. (R.)*[5] case), evangelical Christians (*see Pastor Jones*[6] and *Trinity Western University*[7] cases), Jesuits (see the *Sustainable Developments* case, mentioned above) and Hutterites (see the *Hutterite Brethren* case, discussed below). In view of recent disclosures concerning polygamy and the departure from provincial education curricula in their communities, a freedom of religion assertion by a breakaway Mormon sect in Bountiful, B.C. (the Canadian Branch of the Fundamentalist Church of Jesus Christ of Latter Day Saints) will likely result in a judicial determination.[8]

The most recent case relates to members of the Hutterite community and is somewhat reminiscent of an earlier case. As a tenet of their faith, the Hutterites believe in rural communal living. In the late 1960s and the early 1970s, the Hutterites objected to provincial legislation restricting the

amount of communal landholding in Alberta. The *Communal Property Act* was specifically directed at Hutterites and Doukhabors, although, since there were no Doukhabors in Alberta at that time, it was essentially aimed at Hutterites. The case, *Walter v. Alberta*[9], was a challenge to the constitutional validity of the *Community Property Act*. It was appealed to the Supreme Court of Canada where the court decided in favour of the Alberta government. Of course, there was no constitutionally-entrenched *Charter of Rights and Freedoms* protecting religious minorities at the time. In any event, the offending act was subsequently repealed.

Another issue affecting mostly Hutterites has now emerged and involves a challenge to a recent Alberta regulation requiring photographs on Alberta driver's licenses. Photographs became an integral part of the Alberta driver's license in 1974, although there was provision for an allowable exemption. In 2003, the exemption provision was removed and photographs became mandatory for all. The photo identification on drivers' licenses was meant to assist law enforcement officials in the prevention and investigation of fraud and identity theft, as well as to assist in the promotion of national security. This requirement offends members of the Hutterite faith who believe that being photographed is contrary to the second of the Ten Commandments prohibiting the making "for yourself an idol, or any likeness...". In the case styled, *Hutterite Brethren of Wilson County... v. Alberta*[10], both the Alberta Court of Queen's Bench and the Alberta Court of Appeal (the province's highest court) held that the photograph requirement was a violation of the Hutterites' freedom of religion under section 2(a) of the *Canadian Charter of Rights and Freedoms.* Moreover, the regulation could not be saved under section 1 of the Charter as a "reasonable limit" in a "free and democratic society". As a result, the removal of the mandatory photographic requirement was held to be of no force and effect. It is likely that this case will be appealed further to the Supreme Court of Canada. This matter also bears some similarity to a recent controversy concerning the wearing of a hijab by Muslim women while voting in the 2007 provincial election in Quebec.

In confronting laws and government practices that threaten the rights of religious minorities, the prevailing reaction is that society must take steps to reasonably accommodate the needs and sensitivities of those minorities. Given the recent reaction to the notion of reasonable accommodation[11] in general, and to the *Hutterite Brethren* case in particularly, it may be that we are seeing the emergence of a backlash to some of these minority religious assertions. This is particularly important to Chassidic Jews in Quebec, for example, who have been somewhat assertive in the past two years in arguing for minority religious rights.

We do not really know whether these minority religious assertions will become acceptable over the long run in a society that, on one hand, respects religious minorities, but on the other hand, is essentially secular in nature. Religious minorities are winning the day now and reasonable accommodation has become the acceptable norm.

But will this continue to prevail? The Alberta Court of Appeal decision in the *Hutterite Brethren* case attracted considerable national attention in the media, including critical editorial reaction. This decision had a strong dissenting opinion at the Court of Appeal level. And, as the *Globe and Mail* subsequently asserted in an editorial: "... it's a balancing act. If the majority [of the judges of that Court] had been willing to give more weight to Alberta's obligation to the public to protect driver's licenses from abuse, the Hutterite Brethren, not the system safeguarding those licenses, would have had to make the greater accommodation". At this point, one can only speculate as to whether Canadian society will actively continue to support the accommodation of minority religious rights.

Science and religion

Over the years, the confluence of science and religion has given rise to a number of issues, including, for example, the related matters of stem cell research and human cloning. This has occurred both in Canada and, more dramatically, in the United States, particularly in relation to government funding of research projects. In fact, each time the U.S. Congress enacts new stem cell legislation aimed at relaxing funding prohibitions, it is vetoed by the President.

Much has been written on the topic of science and religion. In their article entitled "The Regulation of Science and the *Charter of Rights*: Would a Ban on Non-reproductive Human Cloning Unjustifiably Violate Freedom of Expression"[12], authors Barbara Billingsly and Timothy Caulfield argue that the ban on non-reproductive human cloning as contained in Bill C-13 is a violation of section 2(b), freedom of expression, of the *Canadian Charter*. They argue that the legislative purpose underlying the ban was overly broad and,

as such, could not be justified under section 1 of the *Charter*. In another article , authors[13] Jocelyn Downie, Jennifer Llewellyn and Françoise Baylis, also argue that, with respect to the ban on non-reproductive human cloning, scientific experimentation does not constitute an expressive act as contemplated in the test set out in the *Irwin Toy* case. But, even if it does constitute expressive conduct under section 2(b) of the *Charter*, it can be demonstrably justified under section 1 of the *Charter*.[14]

These 'cutting edge' issues are relatively new matters. However, despite the advances of modern science, one striking theme that continues to emerge is the revisitation of the somewhat older issue of evolution versus creationism. This issue has been revitalized in recent years, particularly in the United States, under the rubric of so-called 'intelligent design'.

Intelligent design is a re-branding of the notion of creationism and is no more than a pretense for denying evolutionary science. Intelligent design argues that the world, in its creation and through all of its changes and transformations over the millennia, was pre-ordained and guided by a monotheistic creator and that the developments over time cannot be traced to pure scientific theory. There is no allowance for random changes or the process of natural selection that often occur in nature. In subscribing to the notion that creation was effected solely through an act of a transcendent intelligent agent, intelligent design rejects the knowledge of evolution that we have gleaned from scientific investigation and discovery.

This issue of creationism has come to the fore with much public attention in both Canada and the United States as a result of the opening of two creationism museums. In the United States, proponents of creationism established a substantial $27-million (US) Creation Museum in Petersburg, Kentucky. According to a major article in the *Financial Post,* June 2, 2007, the Creation Museum "features a 'walk through history' based on the '7 Cs of History'". One of these 7 Cs is creation.

Canada has a similar institution. In Big Valley, Alberta, creationism proponent Harry Nibourg opened the Big Valley Creation Science Museum on June 5, 2007. Among its various assertions, the Museum attempts to refute evolutionary science and displays many illustrations supporting creationism. In fact, the Museum suggests that people walked on this planet at the same time as dinosaurs roamed the earth.[15] Both the American and Canadian museums focus on the century-old debate of Darwinism versus creationism and revitalize what many would have thought to be a now somewhat dated argument, long discredited by science.

The year 2005 marked the 80th anniversary of the so-called 'Monkey Trial', the now classic case of *Tennessee v. John Scopes.* In that American case, Scopes was charged with violating a Tennessee statute prohibiting the teaching of the theory of evolution in the state's schools.

More recently, a similar battle took place in a court in Harrisburg, Pennsylvania. Some parents challenged an October 2004 Dover Area School District resolution compelling teachers to read to their classes a statement in respect of the notion of 'intelligent design' prior to engaging in any instruction concerning evolution. One member of the school board argued that creationism should prevail in the schools since the United States "was founded on Christianity and our students should be taught as such".

The debate is often focused on whether discussions about creationism versus evolution belong in religion classes, or as part of the science curriculum in publicly funded schools. Arguably, to make the debate an integral part of a formal science curriculum would bring the advances of science into disrepute and would elevate a particular religious ideology to state-sanctioned teaching. To do so is neither a religious nor a scientific statement. It is simply politics.

On one hand, it is somewhat disturbing that after all these years and after all of the advances of evolutionary science, we are still engaged in a debate on the merits of evolutionary theory versus creationism. On the other hand, given the modern re-emergence of fundamentalist Christian thinking and its attendant political manifestations in North America, it is not surprising that the issue is again front and centre.

Much has been written in support of both sides of this issue. However, readers wishing to engage in this debate, particularly with respect to its political fallout, should refer to the well-documented, academically sound treatise, *Creationism's Trojan Hours: The Wedge of Intelligent Design* by Barbara Forrest and Paul R. Gross. The authors' main point is the political nature of the controversy – the debate about intelligent design is yet another example of the far-reaching influence of religion in modern politics and policy-making. However, unlike many eastern nations, in the U.S.

context, this flies in the face of the constitutional separation of church and state. For many, it is particularly disturbing when faith trumps proven science at the expense of a realistic, scientific understanding of the human condition today.

The whole modern debate underscores the dominance of faith-based politics in the contemporary landscape of North American (and particularly U.S.) public affairs. The interface of politics and religion continues to influence the making of policy. Even today, there remains a certain societal intolerance to the fact that one of the U.S. presidential candidates is a Mormon (Mitt Romney) in the same way that in 1960 there was a reaction to the fact that one of the candidates for president was a Roman Catholic (John Kennedy). Recently, also part of the 2008 U.S. presidential campaign, CNN broadcast a candidates' forum entitled "Faith, Values and Politics" held at George Washington University on June 4, 2007.

When arguing the *Scopes* trial, it is doubtful that lawyers Clarence Darrow and William Jennings Bryan would have imagined that, almost a century later, the debate over evolution would still attract the prominent attention that it does.

Canada's religious demography in 2017

The final issue to be addressed in this survey is the Statistics Canada population projections for the year 2017 as they relate to Canada's religious demographics. These projections are neither particularly dramatic nor startling, nor are they really surprising. They do, however, point to three predictable conclusions. First, the number of persons in certain religious minorities will increase substantially. This is essentially a result of immigration patterns already begun and projected into the future. For example, there will be an increasingly greater number of Muslims, Sikhs. Hindus and Buddhists in the year 2017. Secondly, for some religious minorities, there will be a decline in their relative numbers. For example, since there are very few Jewish immigrants to Canada, the proportion of those in Canada's Jewish minority will decline compared to other religious minorities. Thirdly, also because of immigration patterns already in place and likely to continue into the future , those in the Christian majority in Canada will still constitute a significant number but will do so in an increasingly smaller proportion when compared to the entire Canadian population. And, most of the foregoing will largely occur in the large urban centres throughout Canada.

What then is the significance of these population projections? First, there will likely be an increase by emboldened minorities of minority religious assertions in the courts, again most likely under the freedom of religion and perhaps the equality clauses in the *Canadian Charter of Rights and Freedoms.* In an attempt to avoid excessive litigation, this will likely lead to a prophylactic response in the nature of greater instances of reasonable accommodation or some other similar mechanism to adjust societal norms to the sensitivities, needs and requisites of religious minorities. At the same time, there might be a further backlash or response by the majority to these various assertions of minority religious concerns. This backlash, similar to the recent Herouxville phenomenon, will likely emerge from time to time as a result of frustration, perhaps some intolerance or simply a sense of fatigue experienced by the majority. Responses to new technological advances, akin to the current issues of stem cell research and cloning, as well as a return to some of the older issues such as creationism, will continue to see the light of day as a result of impassioned assertions by some members of the evangelical sector of the Christian majority.

Many of the foregoing issues have largely occurred contemporaneously with the quarter century anniversary of the *Canadian Charter of Rights and Freedoms.* When we mark subsequent anniversaries of the *Charter*, we will likely see that God is not dead, as *Time* magazine speculated some forty years ago, but rather, God is alive and well and will continue to occupy a central role in Canadian life.

References

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2 *C.C.L.A. v. Ontario Minister of Education (Elgin County),* [1990] D.L.R. (4th) 1.

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4 *Multani v. Commission scolaire Marguerite-Bourgeoys,* [2006] 1 S.C.R. 256.

5 *B.(.R) v. Children's Aid Society of Metropolitan Toronto,* [1995] 1 S.C.R. 315.

6 *R. v. Jones,* [1986] 2 S.C.R. 284.

7 *Trinity Western University v. College of Teachers,* [2001] 1 S.C.R. 772.

8 See the Globe & Mail and National Post, June 7, 2007.

[9] *Walter v. Attorney General of Alberta, [1969] S.C.R. 383.*

[10] *Hutterite Brethren of Wilson Colony [2007] A.J. No. 518.*

[11] See Gerald Gall, "Religion and Multiculturalism", *Canadian Diversity/Diversité Canadienne,* vol 5:2 Spring 2006 Printemps, p. 69.

[12] (2004), 29 Queen's L.J. 647.

[13] "A Constitutional Defence of the Federal Ban on Human Cloning for Research Purposes", (2005), 31 Queen's L.J. 353.

[14] See also Colin Rasmussen, "Canada's *Assisted Human Reproduction Act:* Is It Scientific Censorship, or a Reasoned Approach to the Regulation of Rapidly Emerging Reproductive Technologies?", (2004), 67 Sask. L.Rev. 97. In this article, the author explores the *Assisted Human Reproduction Act* and its ban on human cloning for reproductive or therapeutic purposes and its attendant restriction of research utilizing human reproductive materials. In his analysis, the author concludes that the *Act* is overly broad and, as a result, it unreasonably impairs the capacity of Canadian scientists to conduct work in areas such as cutting-edge stem cell research. For an examination of proposals for law reform in this area, see Duff Waring and Trudo Lemmens, "Integrating Values in Risk Analysis of Biomedical Research: The Case for Regulatory and Law Reform", (2004), 54 U.T.L.J. 249. In the area of patentability of higher life forms, see, the Supreme Court of Canada decision in *Harvard College v. Canada (Commissioner of Patents),* [2002] 4 S.C.R. 45. Finally, see Abdallah Daar and Lorraine Sheremeta, "The Science of Stem Cells: Some Implications for Law and Policy", (2002) Health L. Rev. 11.1.

[15] See *The Globe & Mail,* June 6, 2007.

RELIGION IN CANADA IN 2017: ARE WE PREPARED?[1]

ABSTRACT

What major changes have occurred in religion in Canada since 1991, and what might the religious landscape look like in 2017? This article addresses these questions and reflects on whether Canadian society is prepared for the changes that are already well underway in religion in Canada.

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Countless news stories have made it practically a cliché to say that religions in Canada have undergone dramatic transformations over the past two decades. In this article, I provide readers with a brief glimpse behind what many perceive to be common knowledge. I also offer some reflections on whether or not Canadian society is prepared for recent changes and on 2017 demographic projections regarding religious diversity.[2]

First, let us consider very briefly a statistical snapshot of the changes between the 1991 and 2001 census surveys (Statistics Canada only collects information about religion every ten years). Between 1991 and 2001, the percentage of Canadians identifying themselves as Christians dropped from 81.8% to 76.6%.[3] The mainline Protestant denominations experienced the most significant declines (Anglicans (-7%), United Church (-8%), Presbyterians (-35%), Lutherans (-5%)),[4] with Protestants as a whole declining from 35% to 29%. At the same time, the percentage of Canadians who describe themselves as Roman Catholics (43%) has declined slightly, although their actual numbers have increased. Finally, many conservative evangelical Protestant denominations are growing rapidly, though in some cases (Pentecostals (-15%), Salvation Army (-22%), and Mennonites (-8%)) there have been notable declines.

Another untold story here is what one might call the "de-Europeanization of Canadian Christianity." Increasing Christian immigration from non-European sources is radically transforming many and perhaps most mainline denominations. For example, major denominations, such as the Roman Catholic and United Churches, are relying increasingly on non-European ethnic minority Christian newcomers to provide their churches with members, funding, and energy.

Two other issues that attracted a great deal of media attention following the release of the 2001 census figures were the massive increases in the number and percentage of Canadians who indicate that they have "no religion" (a category that increased by 43% since 1991, with 16% or nearly five million Canadians describing themselves this way in 2001); and the consistent and significant increases in the major non-Christian religious groups.

Between 1991 and 2001, the number of Canadians identifying themselves as Muslims increased by 129%; the number of Hindus by 89%; the number of Buddhists by 84%; the number of Sikhs by 89%; and the number of Jews by 4%. Although the actual percentage of Canadians who belonged to the non-Christian traditions in 2001 is still modest at 6% of the overall population in 2001 and 3.8% in 1991, almost all of the dramatic increases within these religious communities (with the exception of the increases among Jews) result from immigration; since immigration and refugee policies will likely continue to favour the source countries from which these non-

Christians originate, we can anticipate a continuous growth in both the absolute and relative significance of these communities in the years to come.

The 2017 projections reflect this growth: they estimate that by 2017, the percentage of non-Christians in Canada will be roughly 10%. However, one always needs to be cautious about using traditional survey methods to assess and measure religious beliefs, behaviour, or identity. For example, this study naturally (and necessarily) assumes the retention of religious practice, ideology, and identities over time, so that a person who is born into a Hindu family today is included in the 2017 projections as a Hindu. But, scholars in this area know that the way young people describe themselves changes constantly. In contemporary Canadian conditions in which the dominant culture they are integrating is characterized by a mixture of ersatz spirituality, diffused Christianity, and secularism, this rearticulation of their family's religious heritage will probably change what these adherents mean when they claim to belong to a tradition. This dynamic process of renegotiation ought therefore to change the way outsiders interpret such claims.

While religious communities are growing, we should not assume that someone born into a Sikh family in the 1990s will necessarily think of herself as a Sikh in 2017. In fact, she may join the ranks of the "religious nones," or may marry a Hindu or a Christian and opt to follow the religious path of her husband's family. Conversely, she may identify more strongly with Sikhism than her parents and grandparents. This may be a function of being asked so often to provide explanations for her religious convictions, food choices, clothing choices, and social activities. For that matter, her "orthodoxification" might be the result of racial or religious discrimination in Canada,[5] or of her growing identification with the transnational Sikh movement for an independent homeland.

The tendency for second generation children to modify their inherited or ascribed religious identities is not a new phenomenon, and it is not unique to minority communities. Nevertheless, we need to understand the 2017 projections in light of this process.

We are at a crossroads with respect to the expression of religion in North America. On the whole, youth of virtually all religious traditions are less loyal to these traditions and especially to the institutional expressions of these traditions (churches, mosques, temples, gurdwaras, etc.) than their age cohorts have probably been for many centuries if not millennia. The theories we have used to predict the future of religion are challenged by the way religions and religious people in Canada and abroad seem to be behaving and thinking in the past decade or two. What is happening is something far more interesting than merely waxing or waning. The 2017 projections are useful and likely accurate, although patient ethnographic research and real-life interactions will be necessary for us to determine the emerging meanings of religious identification.

Now, we might ask ourselves whether or not contemporary Canadian society is prepared for the projected 2017 religious landscape. In order to reflect on this question, I would like to deal very briefly with three issues: Canadian law, policy discourse, and public discourse. [6]

Those of us relatively new to legal discourse would do well to consider the written decisions in cases such as *Trinity Western University v. British Columbia College of Teachers (2001), Multani v. Commission scolaire Marguerite Bourgeoys* (2006), *R. v. Big M Drug Mart* (1985), and *Adler v. Ontario* (1996).[7] Whatever one might think of a particular decision or of the broader social and legal context out of which it emerges, one can witness within the highest courts fairly sophisticated and generally progressive analyses of and responses to the intersection of religion and public policy (Berger 2002).[8] The *Charter* and other laws and public policies (notably, the *Multiculturalism Act*), may free – or compel – the higher courts to be more responsive to changes in the Canadian religious landscape than they would be if they had to abide by the more rigid secularism that exists in other liberal democracies. Perhaps, in other words, the major juridical decision makers (at least those in English-speaking Canada operating out of the tradition of British common law) have been nudging Canadian society toward a groundbreaking pluralism in which religiously-based truth and value claims can be taken seriously, even though people who advance such claims must ultimately play by the liberal rules of justice, fairness, and the dignity of all Canadians advanced by the Charter and other pivotal Canadian documents (Berger 2002).

While legal discourse would seem to justify some optimism about Canadian society's ability to respond meaningfully to the changing Canadian religious landscape, public and policy discourses reflect quite a different situation.[9]

Let us first consider the problems associated

with the way of speaking and writing about religion that one finds among some (note: not all) policy makers and others in the elite levels of society. Space does not permit an adequate description of these tendencies (cf. Biles and Ibrahim 2005), but I would suggest that in policy discourse, one finds two related problems.

First, some policy makers in Canada and abroad still embrace a version of the "secularization hypothesis" which affirmed as a universal truth the theory that as individuals and liberal democracies matured, religion would recede from the public sphere, either eventually to vanish altogether or to survive (and perhaps even thrive) in the private lives of individuals. Now that many studies have established that, while religion has changed, it is still very much with us. Most social scientists see this grand theory for the exercise in late enlightenment-era projection and wishful thinking that it was (Swatos 1999; Casanova 1994). Nonetheless, this simple form of the secularization hypothesis is still quite prominent among many members of the social elite who occupy positions of power within the political and policy making arenas.

Second, it is common for participants in policy discourse to frame the religious phenomena to which they are responding in terms of a binary essentialism in which all religions are essentially oriented toward love, peace, kindness, and egalitarianism, so that all violent religious phenomena are by definition not actually religious but are essentially political, economic, or pathological in origin and motivation. Although this "naïve" essentialism vastly underestimates the internal heterogeneity of religion throughout history and around the world, it does produce the positive consequence of safeguarding members of (usually) minority groups.

Of course, there is a more pernicious form of essentialism, in which all religions are perceived to be essentially vehicles for misogyny, cruelty, greed, social control and warfare; in this dark alternative to the naïve approach, all acts of altruism, kindness, creativity and human solidarity one sees in religion are treated as illusions oriented toward duping outsiders and insiders.

As an indication of the extent to which the spirit that motivates the Charter and the Multiculturalism policy has permeated elite policy discourse, the overwhelming majority of Canada's federal, provincial and municipal politicians and policy makers appear to eschew this latter kind of essentialism.[10]

While we might be relieved that our policy makers have not adopted a cynical or pessimistic approach to religious phenomena, it would be wiser by far to reject *all* kinds of essentialism, and to accept instead that religions are like all other human phenomena in that they are constituted by people, ideas, movements, discourses, texts and expressions that are violent, peaceful, misogynistic, egalitarian, progressive, conservative, ugly and beautiful. It is certainly challenging to develop policies that speak to phenomena that are so inherently diverse, but policies geared to a strictly sunny version of a given religion (or religion as such) will fail to help us to respond to the internally consistent and yet utterly opposed expressions of the same religion we find jostling for attention and dominance in the contemporary world (Lincoln 2002; cf. Bramadat 2005).

Although the above two problems are quite evident in Canadian policy discourse, there are some real causes of optimism. Space does not permit a full discussion, so a list will have to suffice: Citizenship and Immigration Canada and the Department of Canadian Heritage have over the past several years become more interested in funding research and promoting discussions explicitly about religion in Canada and elsewhere; the Metropolis Project has played an extraordinarily important role in encouraging the inclusion of religious issues and religious voices in the research and networking that occur under its aegis; the Department of National Defence has attempted to make its chaplaincy services more inclusive; at the provincial and local levels one sees a similar (though not always consistent) openness among policy makers to taking religious diversity seriously.

It is when one considers public discourse that one encounters some of the most difficult challenges. It is in this discursive arena – an arena, unlike public policy discourse, ungoverned by human rights norms, the *Charter*, elite codes of manners, and the threat of public exposure – that one sometimes comes face to face with extremely discriminatory views. Perhaps what Lois Sweet calls "religious illiteracy" (1997) is not the sole cause of these anti-multicultural attitudes, but I would suspect it is chief among them. Sweet argues that for a variety of reasons, we as a society have decided it is not worthwhile – and even those who think it is worthwhile would still argue that it is not prudent – to teach students about religion. Consequently, we have a general public that knows precious little about a force that now plays a major role shaping Canadian and international society. Since the most

obvious response to ignorance is education, I would argue that Canadian society (i.e., not simply provincial education systems) needs rather urgently to find ways to fill a large intellectual gap that has developed over decades. This will be neither simple nor inexpensive, but if we are serious about engaging the religious ideas, individuals and ideologies that are certain to become even more prominent between today and 2017, we need to equip ourselves accordingly.

In conclusion, I have suggested that post-*Charter* higher court rulings and rationales should lead us to feel optimistic about our capacity to respond to the religious landscape we will likely see in 2017. Policy discourses about religion show significant signs of progressive development, but are often challenged by the lingering effects of secularization and naïve essentialism. The most serious problem is evident in public discourse, where widespread ignorance about religion bedevils efforts to engage complex phenomena constructively.

The relatively flexible and multicultural "Canadian diversity model" is not only a pillar of many Canadians' self-understanding; it is also a major feature of our generally positive international profile. It is probably not too great an exaggeration to say that our success at responding creatively to the challenges posed by religious diversity will in large part determine both the national and international future of this ambitious and unusual model.

Notes

[1] Based on a presentation at the "Canadian Rights and Freedoms: 25 Years Under the *Charter*" Conference in Ottawa, organized by the Association for Canadian Studies. I would like to thank Dr. Jack Jedwab for inviting me to participate in this conference.

[2] See: "2001 Census Analysis Series: Religion in Canada," produced by Statistics Canada. Available at: http://www12.statcan.ca/english/census01/Products/Analytic/companion/rel/pdf/96F0030XIE2001015.pdf , and "Population Projections of Visible Minority Groups, Canada, Provinces and Regions, 2001-2017," produced by Statistics Canada and Canadian Heritage. Available at: http://www.statcan.ca/english/freepub/91-541-XIE/91-541-XIE2005001.pdf

[3] For the sake of brevity, subsequent percentages will be rounded to the nearest whole number.

[4] However, as the contributors to *Christianity and Ethnicity* in Canada (Bramadat and Seljak, forthcoming), indicate, in many cases, these figures underestimate the actual losses (and thus crises) in these churches.

[5] Unfortunately, very little scholarly work has been conducted on the types and levels of religious discrimination in Canada. The *Ethnic Diversity Survey* (2003) included some questions related to these issues. See Seljak (2007) and Bramadat (forthcoming) for discussion of the problems with the existing data on specifically religious forms of discrimination.

[6] Although I am interested in the post-*Charter* legal context in Canada, I am by no means an expert in this field. Readers interested in pursuing this issue should consider the writings of Lori Beaman, Benjamin Berger, and M.H. Ogilvie.

[7] All available at: http://scc.lexum.umontreal.ca/en/

[8] However, see Beaman (2004 and 2005) for a critique of some exclusionary tactics in higher court decisions.

[9] Public discourse on religion is especially disheartening, and it is perhaps by comparison that legal discourse appears to be so progressive.

[10] As evidence of this, consider what has happened in the recent past when a community leader (such as David Ahenakew) made anti-Semitic remarks.

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RELIGIOUS DIVERSITY, RIGHTS AND REASONABLE ACCOMMODATIONS RESOLUTION

ABSTRACT

The paper addresses the possible outcomes of a continued dramatic increase of Muslims in Canada. How do we resolve the issues of settlement, adaptation and accommodations crucial on the part of both immigrants and Canada? Not all questions have easy answers, but issues such as the tensions between religious or cultural rights and other rights such as the equality of women must be openly discussed. The *Charter* provides a broad framework of rights and freedom, but because it does not clearly define if any one right has priority over others, the tensions continue.

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In preparation of the 150th anniversary of the Canadian federation, the Department of Canadian Heritage commissioned a study on possible population change by 2017.

The projections state that the total population will not increase dramatically, but the composition of the population will change. Of the 33-36 million, 20% will be visible minority people (6.3 million), with half being either South Asian or Chinese.

In terms of religion, about 10% of the total population will be non Christians. Almost 5% of the total population will be Muslims (1.5 million) from all parts of the world, and most will live in urban centers. This means that there will be greater discrepancy of ethnic origins between those who live in urban areas and those who live in rural or small towns.

There is less hostility towards other religions such as Hinduism or Buddhism and a lot more against Islam and Muslims. Whatever the growth factor, there will be more Muslims in Canada and this immediately raises fears for the future of Canada. Sadly, I think too many people see Muslims as the fifth column within the country, because our motives and our religion are so suspect.

Both the *Charter* and the *Multiculturalism Act* address the topic of religious diversity, under cultural heritage.

As Canadians, we acknowledge that the *Charter* provides the framework for our values and most of us do proudly acknowledge our multicultural society. By the way, I would like to add that we pay little heed to the values of our aboriginal peoples, and these are seldom incorporated into what we call "Canadian values."

The *Charter's* Section 27 states the importance of the "preservation and enhancement of the multicultural heritage of Canadians", and this formed the basis of the *Multiculturalism Act* of 1988. The *Act* (3a) states that "multiculturalism reflects the cultural and racial diversity of Canadian society and acknowledges the freedom of all members of Canadian society to preserve, enhance and share their cultural heritage."

The *Charter* is clear that rights and freedoms must be within "reasonable limits," and some are interpreting this to mean "reasonable accommodation" of the demands of newer immigrants to preserve their cultural heritage, including their

religious freedom. Tensions arise when one group sees their demands as consistent with the *Charter* and the *Multiculturalism Act*, while other groups see these as pushing the reasonable limits.

Religious diversity is not practiced in a vacuum and has to be seen within the context of other rights outlined in both the *Charter* and the *Multiculturalism Act.* A number of legitimate questions are being raised regarding adaptation, participation and integration. These include how diversity, including religious diversity, should be reasonably accommodated. It is true that "older" Canadians are feeling a great sense of anxiety and loss when differing values and practices are integrated into Canada.

Questions which must be addressed include:

How does diversity function within the unity of Canada? How do we ensure a sense of belonging and loyalty to Canada? Should we be concerned about the development of religious or ethnic enclaves? Does diversity lead to a fragmentation of our society?

Does religious diversity mean that each group should be identified only by one characteristic, which is religion?

Should recognition of all the religions in Canada include implementation of all beliefs and practices of that particular religion, including changes to our laws? For example, does this mean that the State should fund public schools based on different religions, or laws prescribed by each religion should be practiced in our legal system?

What changes will occur and how will these affect the nature of our society? Will the demands of each religious group compete and conflict, or can there be some common ground as to how this diversity will be implemented?

How should the conflict between majority and minority rights be resolved?

The questionable assumption regarding religious and cultural diversity is that there is a single community comprised of all Christians, all Jews, all Sikhs or all Muslims. However, no religious community is monolithic, homogenous, or holds dear the same values, nor demands the same rights. In reality, there are vast differences within the same faith communities and greater similarity between those of any religion who are more literal and traditional in their interpretations, whether they are Muslims, Jews or Christians. Muslims, like Christians, come from all parts of the world. Despite extreme pressure from countries like Saudi Arabia for Islam to be one single community of believers, there is no one Islam, because it is influenced by our cultures and histories. This is the wonderful diversity within Muslims.

So we must be cautious not to generalize any one religious or cultural group's desires and ability to adapt. We must somehow assess if there is openness and flexibility to embrace new learning and active tolerance to live with others, or whether people transplant all their old ways of life to their new country. Some people not only want all their old ways, but add other practices which had little meaning for them back home.

We do not have to wait a decade to deal with the changes, as many have happened and others are in process. For example, when the issue of the Sikh turban for an RCMP officer arose, for many this signaled the end of Canadian-ness, and yet now this does not seem to be of great concern. Though Muslim women wearing the hijab, head covering, still face prejudice, I think there is a general feeling of live and let live. However, the more recent issue of the niqab, face covering, is creating a lot of anger and discomfort. Is this pushing the limits of reasonable accommodation?

I have recently returned from an incredible journey to Syria, Lebanon, Jordan and Italy, where there is high interest in the experiences of Canadian Muslims and in the application of Multiculturalism.

The dilemma of religious diversity reminds me of an ad in Lebanon. Because of the history of Lebanon, the state treads carefully between the various religious sects. This is demonstrated in the fact that each sect – Christian, Muslims or Druze – has its own specific family laws and each law is practiced in different courts. The system is called "confessional" and each citizen must declare her confession and those laws then apply to her. There are 18-19 confessional legal systems.

The Lebanese ad shows a British person in front of a map of Britain and he says, "I am British" then a map of France comes up and the person standing in front of that map, says, "I am French." When a map of Lebanon comes up, the man in front says, "I am Maronite, or Druze, or Shia", instead of simply "Lebanese".

Let us make sure that this is not allowed to happen to us in Canada!

Within the discussion of religious diversity, one must discuss the role of religions in matters of the state and in our public arena. On the surface,

it seems that there is no place, in the public domain, for religion in Canada. The values of the Enlightenment (18th century), such as reason, science, liberalism and democracy provide much of the underpinning of our state. However, religion is still present, because our head of state, the Queen, is Defender of the Faith, and the *Charter's* preamble is that "Canada is founded on the principles that recognize the supremacy of God and the rule of law."

For some Christians, their acceptance of the separation of state and religion is based on Christ's saying "Render unto Caesar the things which are Caesar's, and to God the things that are God's" (Matthew). However, we know that there have been and continue to be some Christians who want their religion to be the driving force in both the public and private arenas.

To me it seems that debating secularism versus religion is a false dichotomy, because they are neither rigid categories nor mutually exclusive. What is more significant is the question of the role any religion should have in state legislature, public policy and in the laws of the land.

I think that a secular state at its best recognizes the religion of its citizens, but is a state without a religion. It gives no preferential treatment to any one religion and provides protection for freedom of religion, and freedom from the state's imposition of any religion. The state develops laws based on human rights, not on those founded on sacred texts, which are often immutable and not subject to change.

As a believing woman, this gives me great comfort, as I am free to practice my faith, under the protection of laws and with no interference from the state or from any dominant/majority religion. I also hope that the state will protect me if there is conflict between my belonging to a specific religious or cultural group, and my rights as an individual. This does not contradict or conflict with my or anyone else's human need for spiritual meaning of life, for the here and now, or for the hereafter.

The issue of majority and minority group rights is dealt with by Professor Will Kymlicka, one of the foremost thinkers on multiculturalism. He argues that host states have the responsibility to assist in minority group's integration and ensure that their rights are incorporated, in order to give them a feeling of belonging. He acknowledges that some minority groups may have practices which are illiberal but insists that illiberal practices of the group will not be tolerated by society at large, especially in view of our *Charter*. Is this actually true? As Professor Susan Olkin argues, the rights of the individual who belongs to the group are at times subsumed under the group's rights, even if this means her rights are jeopardized. The state must protect the rights of the individual versus the rights of a minority group, whether cultural or religious. This balancing is not easy for some women, whose strong social need to belong to a group and the interdependency of their relationships sometimes takes precedence over their own individual rights.

Does religious diversity mean that each group should be identified only by one characteristic, which is religion?

Public discussion on diversity, pluralism, the application of the principles of the *Charter* and resolution of "reasonable accommodations" is very timely. But please, let us not phrase the discussion in racist or pre-conceived notions, nor focus on one religious, ethnic or racial group.

Premier Jean Charest opened a Commission in Quebec, with eminent philosopher Charles Taylor as the chair. Quebec and Charles Taylor are strong advocates for the recognition and protection of Quebec as a nation/community with its own distinct culture and language. Taylor has recently won the prestigious Templeton Prize for his work on religion and spirituality. It will be very interesting to see what will be recommended to address the needs of other ethnic or religious groups, while continuing to protect the Western based French Canadian distinctive culture. Taylor speaks of the "identity fright" of the French Canadians and of newer immigrants who also fear the erosion of their identity and the growing sense of alienation in a new land.

As a minority person, as a woman and as a Canadian Muslim, I obviously want religious diversity, because I benefit from it. I want the

elimination of injustices, racism and prejudice. However, I also acknowledge that there has to be an accommodation which is reasonable and based on the good of all, and which muse be negotiated amongst us, with respectful criteria for assessing the demands.

I know that focus is now on Muslims who are seen as different because of religion and culture. Many of the issues reported in the media related to religious diversity have to do with Muslims and Islam, whether it is women's dress or demands for gender segregation or rooms for prayers.

It is currently very difficult to be Muslim. It is exhausting to continuously defend the practices of all Muslims, all over the world, as if we are all a homogenous part humankind. This is not so. There are many of us who believe that the values articulated in the *Charter* are the same as those espoused in the Quran – the equality of all people, social justice and compassion. We disagree with some of our co-religionists, who claim that the conflict of values is such that we must self segregate or demand rights which sharply identify us as Muslims. My deep spiritual life requires protection of my rights. However, others' rights are as important as mine.

It is unfair that prejudice, racism and stereotyping should define Muslims and our religion, and make life so difficult that we are turned away from loyalty to or participation in our country.

Some recent examples could be reviewed as test cases for religious diversity:

1. The right of a Sikh boy to wear his kirpan to school, although knives of any kind were banned from schools.
2. The request of a Jewish Hassidic boys' school that the neighbouring YWCA block the windows of their gym where women were exercising, as this was distracting for the young men.
3. A soccer referee telling an 11 year old girl wearing the hijabi (Muslim head covering) that she could not play at a competition.
4. A Supreme Court decision allowing a Jewish family to build a sukkah (temporary shelter for a few weeks a year) on an apartment balcony.
5. Some Muslim women are now appearing in public wearing the niqab (full face covering). Is this acceptable, if we think that women should be free to choose how to dress?
6. The demands for publicly funded religious schools, based on the fact that Canada already funds Catholic schools.
7. The advocating of "family values" by some Christians, which implies no freedom of choice for women regarding abortion, no rights for homosexuals, no birth control, family planning or divorce.

Perhaps each case has to be assessed on its own merit, but it may be wiser to develop a set of principles and criteria on which to assess what is reasonable accommodation within the limits of our shared common values. Some argue that the *Charter* already defines the framework, and that the courts are the likely place for decisions. However, the courts have not been consistent.

An example of an ill conceived notion of religious diversity is that of the judge who stated that the severity of the sexual abuse of a daughter by her Muslim father was lessened by the fact that he sexually abused the girl anally to preserve her virginity. The judge concluded that as virginity is a value amongst Muslims, the father's sentence should be less severe. This is the worst kind of case of differential treatment, prejudice and cultural relativism.

IDENTITY, COMMUNITY AND THE *CHARTER*

ABSTRACT

The author explores the ideas and histories that shape a nation's formation and notes that, in the case of Canada, our central project of establishing terms of relationship between the communities that comprise Canada has had to accommodate two other statecraft goals – the need to engender a national identity and national solidarity and the recognition of human rights. While we have a long history with the first accommodation, we are still confounded by the challenge of marrying group recognition and empowerment with personal liberties.

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Universal conceptions of constitutionalism – or any other element of political organization – are suspect. After all, both the effective promotion of human well-being and political solidarity depend on the recognition of cultural differences and the most revered constitutional principles enjoy only relative worth. Nevertheless, some propositions about statecraft have general application and can guide development of a normative understanding of good states. For instance, we can suggest that what normally lies behind a state's choice of instruments, institutions and structures is the search for national security, national stability and efficacy. In turn, we might be inclined to agree that the basic condition for political stability – and, consequently, for security and efficacy – is justice between the people of a nation and between the communities within a nation. These conditions depend on having effective state instruments for protecting personal freedom and for recognizing communities, particularly minority communities.

But we may have already become situated. Some might argue that state solidarity does not depend on a just accommodation of communities, but simply on just treatment of individuals. Others will argue that state protection of personal autonomy cannot be allowed to compromise national solidarity and that it is in maintaining this solidarity that individuals find their greatest security and, ultimately, secure their best interests. In fact, however, few nations are formed through sensible calculation of how to balance these competing notions of a just and stable state as much as they are formed through fierce emotion – fierce emotion over what interests the state must promote and protect. Historically, this emotion is less derived from ideas of economic flourishing and personal liberty than it is from imperatives of community survival. In nation-building the compelling force is most often to sustain, under the most promising conditions possible, continuation of the nation's communities, both its ethnocultural communities and its diverse historical communities. We misunderstand a nation's constitutional arrangements when we see them as presuppositionless and as arising inevitably.

Nations and institutions result from the joining together of existing communities with specific needs – the thirteen colonies of the United States, the three churches of the United Church of Canada, or the dispersed colonial settlements of British North America that formed Canada. In the Canadian record, we have many

clear instances of inter-community negotiation over the terms of national formation and national expansion.[1] Here is one instance of this search for terms of union. In the summer of 1899, federal Treaty Commissioners Laird, Ross and McKenna met with three First Nations – Wood Cree, Beaver and Chipewyans – to make what became Treaty 8, an agreement designed, amongst other things, to acquire land for Canada on which settlement by Europeans could take place. There seem to have been two inevitable outcomes to these discussions – there would be colonial settlement on First Nations' territory and Canadian criminal law would apply to First Nations people. They were told by the Commissioners that "… the law was designed for the protection of all and must be respected by all the inhabitants of the country, irrespective of colour or origin; and [First Nations people] are required to live at peace with white men …".[2] But, the First Nations were not without their demands. The Commissioners reported:

> There was expressed at every point the fear that the making of the treaty would be followed by the curtailment of the hunting and fishing privileges and many were impressed with the notion that the treaty would lead to taxation and enforced military service. They seemed desirous of securing educational advantages for their children, but stipulated that in the matter of schools there should be no interference with their religious beliefs.[3]

Uninterrupted continuation of cultural and economic practices, exemption from onerous state obligations, obtaining social transfers and services and maintaining religious integrity comprise a completely logical list on which to construct intercultural accommodation. The Commissioners gave unqualified agreement to all of these conditions, proof that long before a developed theory of intra-state group rights wise people understood that a nation and its constitution, rather than being prior to, and constitutive of, community, are built on relationships formed between communities.[4]

With respect to communities, and their inevitable reflection in constitutional arrangements, we need to note that they can also be geographic or historic, and contingent on fate. But history and geography are also shapers of destiny and of the sense of belonging and our constitution in its use of non-ethnic federalism is here, too, creating through group accommodation the conditions that will sustain order.

Constitutions, of course, are also about nations and individuals. In order to understand how the elements of individual, community and nation are resolved into a coherent and stable regime, we need to look more closely at two statecraft mechanisms by which we have promoted group recognition and group empowerment in the broader context of individual rights and national interests. These are the devices of federalism and rights.

First, with respect to federalism, we know that a political society will only be sustained if there is on-going loyalty to it, if there is some degree of common identity and some level of common and mutual empathy. A nation's peoples must have enough of a common sense of national purpose to wage wars, or comply with public regulation and taxation and to support transfers and public goods. For that reason we need not only a national state but an idea of nation and confidence in that nation's capacity to meet the needs experienced by the people of the nation. One might say that, in the historically specific discourse that buttresses the communitarian foundation of the state, there must also be reflected the idea of a national community.

While a fully centralized state is most effective in engendering common political identity and in building common political projects, the fact that stronger political identities are most likely to be attached to communities within the state – provinces and ethnocultural groups – means that in the longer run stability and capacity will be eroded through insistent centralization. Of course, one can be both a good Canadian and a committed Buddhist or a staunch Saskatchewanian, but when one's group-based identity is increasingly constructed around the sense that the group that one belongs to is consistently ignored, or is unfairly treated, and if this sense leads to demands for political self-determination in order to avoid unfairness and to sustain cultural integrity, there is reasonable concern that the elements of common national purpose will grow too thin to sustain projects of national governance – or, ultimately, the nation itself. Federalism attempts to forestall both exploitation of minorities and diminished commitment to the nation through creating – and legitimating – two political identi-

ties, each one of which, it is hoped, will be able to attract commitment and loyalty. While the national identity will tend to be a functional commitment – having important needs effectively met by the nation – a strong emotional national attachment can also grow. Consider, for instance, the recent 90th anniversary of the battle at Vimy Ridge.

Three advantages flow from constructing political societies from existing cultural communities. First, it leads to governments which enjoy a heightened sense of legitimacy and to which a stronger loyalty is attached. This is important from the perspective of sustaining support for the governmental business of providing public goods. A political society which attracts low political solidarity produces insecure governments and, hence, weak governance. Second, constitutional recognition and empowerment of minority communities is likely to produce less deep hostility to national political bodies and to the policies and settlements that those bodies arrive at. They are not seen as destructive or oppressive of the social elements that define people or bind them together. Third, if our constitutional organization contains political authority for constituent communities, national majorities are, at least to some extent, prevented from tyrannizing national minorities. The structure of federalism, then, serves to produce strong governments, develop national solidarity and political stability and forestall oppression.

The other standard device of liberal state constitutionalism – protecting individual and group rights – is also designed to produce stability through adopting the attitude of reduced political ambition. Identifying rights and entrenching them (to a greater or lesser degree) reflects the sense that it is foolhardy and destabilizing to build national identity through a comprehensive conception of social goals. While we can certainly form a common commitment to some state goals, such as meeting national emergencies or, even, perhaps, promoting a national culture, our deepest national commitments are procedural – choosing governors through elections, preserving constitutional relationships through the rule of law and protecting liberties, due process and equality and recognizing self-determination for minority communities through rights. In the absence of a specific conception of what is right, or good, for all people, we create positive conditions for personal and group entitlement and capacity and we set limits on what the state can pursue as the general good.

But, this straightforward claim for personal autonomy becomes more complicated in describing our basic commitments in the context of the relationship between individuals and the groups to which they belong and tender allegiance. After all, it is not just the national good that must fall to the idea of autonomy, it is the broader idea of collective determinations of what is good. Generally, within political societies, like Canada's, that are built on commitments to pluralism, we have not been able to come to a clear understanding of the extent to which we should recognize the self-governing capacity of minority communities and, consistent with that recognition, how we should extend protection from oppressive community practices to members of those communities.[5] Both communities and individuals have compelling identity related interests. Individuals can be caught between, on the one hand, finding purpose, becoming empowered and knowing their value through group membership and, on the other hand, realizing through critical intelligence and an understanding of their personal needs that community norms and expectations will inflict harm. In liberal democracies, we guarantee a domain of self-determination and we promise equal respect and dignity because we know the injury of being controlled with respect to deep personal interests. Yet we ground exercises of autonomy on the capacity that is formed through complex understandings of social identity. The *Charter of Rights* reflects this difficult interaction. As Professor Mohammed Qadeer has written, "… it was the enactment of the *Charter of Rights and Freedoms* in 1982 that gave muscle to the multiculturalism policy of 1971."[6] Prime Minister Trudeau in his Patriation Day address to Canadians said, "For if individuals and minorities do not feel protected against the

The rights of the Charter of Rights are frequently based on membership and the idea that personal empowerment arises in membership.

possibility of the tyranny of the majority, if French-speaking Canadians or Native peoples or new Canadians do not feel they will be treated with justice, it is useless to ask them to open their hearts and minds to their fellow Canadians."[7]

The rights of the *Charter of Rights* are frequently based on membership and the idea that personal empowerment arises in membership. Rights are often designed to protect people through recognition of the communities they belong to. Freedom of religion, association and assembly are manifestations of the link between community and personal effectiveness. Freedom of expression is, at heart, the freedom to find a community of common interests. Equality is a claim that in Canada is based on membership in a group or class. The *Charter* gives recognition to multiculturalism, sectarian education rights, Aboriginal rights, minority language rights and official language rights.

As a matter of developed statecraft, however, we have come to a place of deep challenge. We can certainly celebrate our multiculturalism – our respect for minority ethnocultural groups – and we know that this largely successful experiment in pluralism, this "act of defiance against the history of mankind"[8] as Prime Minister Trudeau described it, can produce both the tremendous dividends of interculturalism and the deeper bases for political solidarity. But, beyond the respect for cultural difference and the rhetoric of peaceable relations and mutual respect, lie hard barriers to group recognition. For example, for the First Nations of Treaty 8, there was no room for indigenous structures for preserving social order. And, nearly a century ago, in Saskatchewan, there was no will to accept the communal land ownership by Doukhoubors even though, in a fine moment of cultural accommodation, that had been the very promise that Canada had made to them. Recently, in Ontario, even though religious arbitration over the effects of family dissolution is an inevitable and widespread practice and has been recognized for years, it was decided that such religious and cultural frameworks could no longer be tolerated in the province's administration of family law.

But it would be wrong to condemn equally all of these limits to the acceptance of pluralism. In our different reactions to these narratives, we learn that pluralism, as a state policy, must have limits and that there are interests that we must attend to when we accept that minority communities need to be recognized and accommodated. These limits are based on fundamental human interests, particularly the interests of not being exploited or enslaved or oppressed through damaging adherence to the precepts of exclusion: sexism, racism, homophobia, arbitrariness and punishment for free inquiry. The recognition that we give to communities is an aspect of our best purposes and our best history, but we are compelled to explore its limits when that recognition places at risk the rule of law, or due process, or our precepts of citizenship or our sense of what political values Canada stands for. In this exploration, we are aided by the articulation twenty-five years ago of principles of regard for both liberty and identity. Our constitution and the history that lies behind it affirm our clear acceptance of community based social ordering but they do so in the context of granting to everyone equal respect and the essential political conditions for personal dignity.

NOTES

[1] There is a not unreasonable interpretive tendency to see nation-building as attempted ideological resolution. See, eg., Ajzenstat, J. and Smith, P. (Eds.). (1995). Canada's origins: Liberal, Tory or Republican? Ottawa: Carleton University Press. But, cf, LaSelva, S. (1996). *The moral foundations of Canadian federalism: Paradoxes, achievements and tragedies of nationhood.* Montreal & Kingston: McGill-Queen's University Press in which Canadian constitutional development is explained in terms f the moral dimension of inter-group accommodation.

[2] Commissioners' Report to the Superintendent General of Indian Affairs, September 22, 1899, reproduced in *Canada v. Benoit,* 2003 FCA 236 at para.7.

[3] *Ibid.*

[4] Of course, the more familiar Canadian story of intersocietal agreement over governance structures relates to Confederation. See, eg., the interview with Réal Bélanger, the well-known Laval University historian, in Gougeon, G. (1994). *A history of Quebec nationalism.* Toronto: Lorimer. Like the history of relations with the people of Treaty 8, this post-Confederation history is marked by the willingness of the larger group to forget the centrality of intersocietal accommodation in actually living out the relationship that had been created.

[5] See Eisenberg, A. (2005). Identity and Liberal politics: The problem of minorities within minorities. In A. Eisenberg & J. Spinner-Halev, *Minorities within minorities: Equality, rights and diversity* (pp. 249). Cambridge: Cambridge University Press.

[6] Qadeer, M. (2007, February). The *Charter* and multiculturalism, Policy Options, 28(2), 89 at 90.

[7] As reproduced in Gruending, D. (Ed.). (2004). *Great Canadian speeches.* Toronto: Fitzhenry & Whiteside.

[8] *Ibid*, 214.

THE *CHARTER*: FOUR CRITICISMS

ABSTRACT

Four criticisms of the *Charter* are advanced: (i) that the decision to express its values in terms of rights saps those values' ability to motivate people to uphold them; (ii) that rights talk encourages adversarial responses to conflict, making genuinely reconciliatory approaches to conflict resolution difficult if not impossible; (iii) that the *Charter* contributes to the fragmentation of the country; and (iv) that the *Charter's* failure to recognize the Québécois nation alienates that nation's members from Canada.

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I should begin by declaring that I have no quarrel with the values contained in the *Canadian Charter of Rights and Freedoms* (1982). On the contrary, the *Charter*'s affirmation of the respect for the individual, along with its expressed concern for the special status of our aboriginal peoples, for our multicultural heritage, for the equality of the sexes, and so on – all these strike me as eminently laudable. Evidently, my objection lies elsewhere: it is with the decision to express these values in the language of rights. For I believe that the *Charter*, by encouraging rights talk both within and without the courtroom, has done great damage to Canadian politics. This is because such talk not only, ironically enough, undermines the very values it would affirm but it also makes it harder to meet the challenge of diversity, the challenge of making sometimes very different people feel at home in the same country.

I begin with a puzzle. In having ratified the UN *Universal Declaration of Human Rights*, Canada asserts, among other things, that everyone has a right to an adequate standard of living.[1] This is a right, however, that is notably absent from our *Charter*. Yet despite this, the Canadian state redistributes *over ten times* more wealth to the Canadian poor then it does to impoverished foreigners.[2] How could that be? The highest law in the land does not recognize the right of Canadians to an adequate standard of living; such a right is recognized when it comes to all of the world's poor; and yet the former are provided with more aid than the latter.

This suggests that what motivates Canadian public policy vis-à-vis our poor is something other than their ability, simply by virtue of being human, to make certain rights-claims. I believe that what that thing is something much less abstract than rights, namely, the sense that we Canadians are members of a particular political community. I care about the Vancouverites who I have never and shall never meet, that is, not because they bear certain rights, but because I see them as fellow citizens, and this in an Aristotelian sense, namely, that we share a kind of friendship.[3]

This conception of citizenship must be distinguished from one based on the idea that we Canadians affirm a theory of justice, as with the vision of a Just Society that inspired former Prime Minister Pierre Elliot Trudeau to put the *Charter* in our Constitution.[4] Because theories, unlike friendships, are abstract rather than particular. Indeed, that is one reason why it should come as no surprise that the rights contained in the *Charter* are comparable to those found in the constitutions of many other countries, not to mention the UN *Declaration*. One even wonders whether the *Charter* ought to be identified with a specific country at all as opposed

to being seen as a fundamentally cosmopolitan document; for after all, it itself declares that its rights are the possession of not only Canadian citizens, but of "everyone," "any person," "anyone," "every individual" and "any member of the public."

By contrast, the common good at the heart of the Canadian political community is something wholly particular, wholly practical and historical. Aristotle famously stipulated that no *polis* could be so large that citizens could not hear a clarion's call inviting them to participate in the discussions of the *agora*. My claim is that, thanks to advances in media and telecommunications, we Canadians have been hearing that call for some time.

It is precisely because we have done so that our political community has had a certain power to motivate us to feel obligated to each other. Let me explain. An abstraction is something separate from context, isolated from all of the things that exist together within a context. As John Locke once put it: "Words become general by being made the signs of general ideas: and ideas become general, by separating from them the circumstances of time and place, and any other ideas that may determine them to this or that particular existence."[5] Yet the more abstract something is, the less we – or at least those of us who are not natural scientists – tend to find it of interest or concern. Think of the question "How's things?" It expresses our interest in someone because it refers to the things that are of concern to them in the context of their lives.[6] Indeed those things are parts of the more or less integrated whole that constitutes their identity, the story of who they are.[7] When we ask "How's things?" then, we are essentially asking to hear a story; and a story, given that it presents things together in a context, is the opposite of an abstraction. This is significant for ethics and politics because, when those things are *values* and they are articulated abstractly, then this makes them less of a concern, undermining their very ability to motivate us to uphold them. We are all familiar with the military's use of abstract euphemisms as a way of distancing us from the horrors of war: 'collateral damage' for the deaths of civilians; 'incontinent ordnances' for wayward bombs; 'traumatic amputation' for the blowing off of arms and legs. These are effective because abstraction desensitizes, which is but another way of saying that it disempowers the values involved. I haven't the space to argue this point further here, however, so I'll have to make do with pointing out that ancient rhetoricians used to refer to vivid, detailed description as *enargeia*, and this is precisely the kind of thing I mean to invoke when I write of the *power* of a value to motivate us.

Now what are rights if not abstract principles, isolable concepts capable of being presented in bulleted schedules or lists? Of course the *Charter* is just such a list, one that fails to integrate its values, to make for some kind of narrative of the whole. Indeed the rights it affirms are not even prioritized; we are not told, for example, that the democratic rights adumbrated in Articles 3-5 are meant to carry more weight then the mobility right of Article 6. The most notable guidance offered as regards to how the *Charter's* rights are to be applied as a whole is, ironically enough, Article 1's declaration that they may be compromised ("subject to reasonable limits"), as long as this is justifiable in the name of that equally abstract formulation "a free and democratic society." Lacking any sort of Canada Clause, the *Charter* thus presents its values in an inherently uninteresting, disempowering way.[8]

Not that we are ever uninterested in asserting our own rights, of course, or those behind the causes to which we subscribe. These we advance, and often strenuously so, within *adversarial* contexts, in which we hope to have our favoured rights imposed upon those unwilling to respect them in the way we would like. The problem with taking an adversarial stance, however, is that it does violence to the common good. So where my first critique of the *Charter* above is based upon the disempowering effects of the abstract language of rights, this one has to do with that language's inherently adversarial nature.

In the United States, as the legal philosopher Mary Ann Glendon has complained, rights tend to be invoked in a way that encourages disputing parties to advance absolute, all-or-nothing positions, rendering their advocates incapable of compromise.[9] And when people are locked in a battle of this sort, of course, there is little room for the notion of a common good. In Canada, our rights talk is still adversarial, although somewhat less so. For we *negotiate* our rights, balancing them against each other in a way that recognises that hard choices have to be made.[10] We do so because we are aware that when rights clash none can be, a priori, awarded an overriding status. So while the parties here are still adversaries – for one gains only when, and as much as, the other loses – at least they do not aim for total victory. Instead, each hopes to put enough pressure on the other to

encourage them to make certain concessions, the goal being to reach a reasonable accommodation.

Yet, negotiation, we must recognize, is distinct from *conversation*. Those who respond to a conflict with conversation still oppose each other, but not in an adversarial way.[11] For their goal is not accommodation but the achievement of a shared understanding. This is a much more ambitious ideal, since where an accommodation is, as the word suggests, but a temporary domicile, understandings are things we can truly feel at home with. But understandings cannot come from balancing demands against each other. On the contrary, each party must try to convince the other of the best way to *integrate* or *reconcile* the values involved. This means that each must hear the other out with the intent of learning something.

If this is to happen, however, they must avoid articulating their positions in terms of rights. Instead, they need to go into the richest possible detail about how their interpretations of the matter constitute the best way of fulfilling the common good. Conflicting over the justice of abortion? Those who would converse will invoke neither the right of a woman to control her body nor the right to life of a foetus, for they know that such talk constitutes but an aggressive way of asserting their independence, their separation from each other and hence from the common good. ("Why should I be allowed to have an abortion? Because it's *my* right!" "Why should you not be allowed to have an abortion? Because the foetus, an *independent* being, has a right to life!" And so on.) The hostility associated with invoking such rights also ensures that neither will be able to feel secure enough to listen to the other with an open mind, which is precisely what conversation requires. Instead of asserting rights, then, those disagreeing need, for example, to open up a Bible and begin exploring it together, alongside the best feminist texts. Of course as these examples show, conversation, while markedly less aggressive than negotiation, is also far more difficult, not to mention fragile. But at least the potential payoff is directly proportional to the difficulty: the realising, rather than compromising, of the common good.[12]

Such realising can produce laws that are far more durable than any arising from some struggle over rights. The many rights being trampled in the United States today, causalities of the so-called war on terror, come as no surprise. For those of us who have taken the lesson of Weimar to heart know that neither constitutional documents (and the U.S. Bill of Rights, we recall, does not even have a notwithstanding clause!), nor institutional checks and balances can preserve our values in trying times. Other than heroism, only our political culture, as powered by the hearts of our fellow citizens, can do that.

Not that we are ever uninterested in asserting our own rights, of course, or those behind the causes to which we subscribe.

My third criticism of the *Charter* follows from the second. It is that, in encouraging Canadians to defend their positions as adversaries rather than merely opponents, the *Charter* contributes to the fragmentation of the country.[13] This happens in two ways. The first is 'pluralist multicultural': by affirming the rights of women and minorities such as the aboriginals, the disabled, and ethnic communities, the *Charter* encourages division, rather than integration, between them. The problem, to be clear, is not with their constitutional recognition *per se*; it is with the choice to do so in the language of rights. The second path to fragmentation is 'individualist multicultural', the version of multiculturalism that Trudeau endorsed: it promotes an even finer fragmentation in that articulating the respect for individuals in terms of rights encourages their separation from each other, making it more difficult for them to share goods in common and hence be members of communities.

As an alternative, I offer a 'patriotic multiculturalism'. It calls on citizens to put their common good first, and this means responding to conflict with conversation before turning to negotiation. While I accept that negotiation, and the rights talk that facilitates it, does have its place, the question is whether, thanks to the *Charter*, it has taken up too much. My answer is that it has.

I want to close by mentioning one final criticism of the *Charter*: its failure to recognize the

presence within Canada of the nation of francophone Quebecers. The recent Harper motion to this effect has certainly constituted a step in the right direction, but this is a journey that we can never hope to complete until the *Québécois* are recognized within the Constitution. In failing to do that, the *Charter* has thus served to alienate them from the country. Yet we English Canadians continue to be bewildered, as well as to pose that utterly misguided question "What does Quebec want?" For it is not the political community of Quebec that needs recognition, the community of all Quebec citizens, but, again, the national community of the *Québécois*. Perhaps one day, when we manage to wean ourselves off of our addiction to rights talk, we shall become able to listen to them with an open mind and learn how they, and indeed the many other Canadians like them, can be made to feel truly at home in the country. But for that, of course, we will first need to get rid of the *Charter*.

NOTES

[1] Article 25 of the *Declaration* states that "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."

[2] In 2004, for example, it spent $1,241 million on foreign aid and $13,413 million on domestic social assistance. See Statistics Canada at http://www.statcan.ca.

[3] See Aristotle. (1985). *Nichomachean ethics.* (T. Irwin, Trans.). Indianapolis: Hackett.

[4] See, for example, Trudeau. (1992). The values of a just society. (P. Claxton, Trans.). In T. S. Axworthy and Trudeau (Eds.), *Towards a just society: The Trudeau years.* Markham, ON: Penguin.

[5] Locke. (1979). *An essay concerning human understanding* (P. H. Nidditch, Ed.). Oxford: Oxford University Press, 1979), bk. 3, ch. 3, sect. 6.

[6] For more on this notion of "things," see Heidegger, "The Thing," in *Poetry, Language*, *Thought*, trans. Albert Hofstadter (New York: Harper & Row, 1971).

[7] On the connection between narrative and identity, see, for example, Alisdair MacIntyre, *After Virtue: A Study in Moral Theory* (Notre Dame: University of Notre Dame Press, 1984, 2nd edn.), ch. 15; Charles Taylor, *Sources of the Self: The Making of the Modern Identity* (Cambridge, MA: Harvard University Press, 1989), pp. 47-52; and Paul Ricoeur, *Oneself as Another,* trans. Kathleen Blamey (Chicago: University of Chicago Press, 1994), chs. 5-6.

[8] For more on the disempowering effects of rights talk, see my "The Ironic Tragedy of Human Rights," in *Patriotic Elaborations: Essays in Practical Philosophy* (forthcoming), sect. I.

[9] See Glendon, Rights Talk: *The Impoverishment of Political Discourse* (New York: Macmillan, 1991).

[10] See, for example, Paul Sniderman, Joseph F. Fletcher, Peter Russell, and Philip E. Tetlock, *The Clash of Rights: Liberty, Equality, and Legitimacy in Pluralist Democracy* (New Haven: Yale University Press, 1996).

[11] On this distinction, see my "Opponents vs. Adversaries in Plato's Phaedo," *History of Philosophy Quarterly* 22, no. 2 (April 2005): 109-27.

[12] For more on this critique of rights talk, see my *From Pluralist to Patriotic Politics: Putting Practice First* (Oxford and New York: Oxford University Press, 2000), ch. 7.

[13] I first advanced this particular criticism in my *Shall We Dance? A Patriotic Politics for Canada* (Montreal and Kingston: McGill-Queen's University Press, 2003), pp. 86-91.

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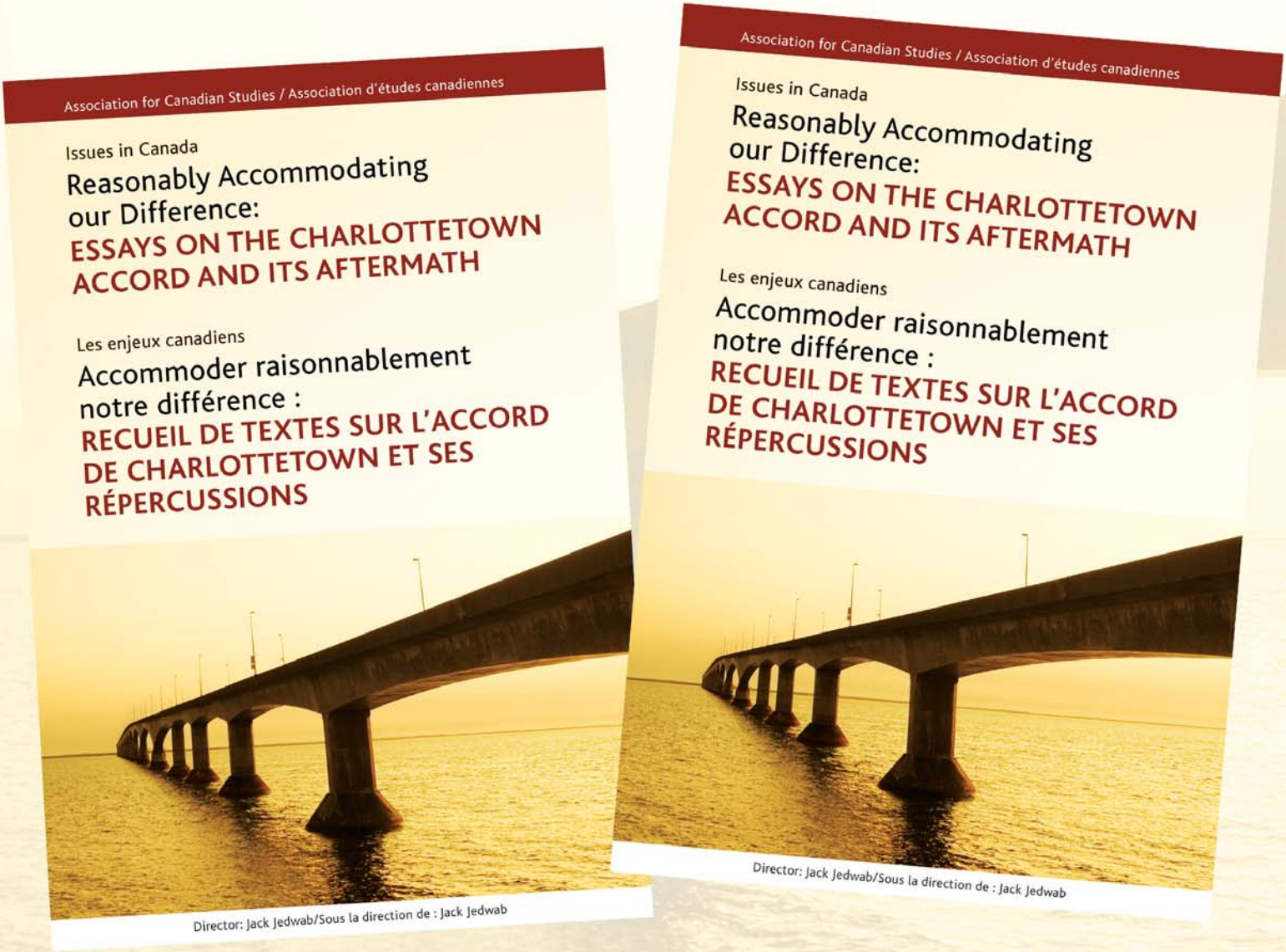

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