Citizenship and Citizen Participation in the Administration of Justice
Citoyenneté et participation à l'administration de la justice

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Thank you very much. I am happy to be here. The last time I spoke to a group of judges was in Cambridge, England, quite a long time ago at the Institute for Advanced Legal Studies, so I am very glad to have this opportunity again. What I want to talk about today is Citizen Participation in the Judicial System and I’m going to start by talking about my own experiences because I was on the Ontario Judicial Council for about 4 or 5 years and end up where I think we need to look now in terms of some trends that are happening. Je tiens aussi à dire que je suis capable de répondre aux questions en français, mais je fais ma présentation en anglais. I got appointed to the Ontario Judicial Council in, I think it was 1991. At the time I was president of the National Action Committee on the Status of Women and the judges were not very happy about this appointment. I was appointed by the New Democratic Party (NDP) government. I think that could be the understatement of the year. They were so upset about it in fact that the Chief Justice at the time, Charles Dubin went to see the Premier. I do not flatter myself that he actually went to see the Premier especially to ask that I be unappointed, but I am sure it was on his list that he was discussing with the Premier and he was very upset about it and so were all the other judges because in fact I had been a pretty prominent critic of the judicial system. This was at the time when a lot of judges were making some very dumb remarks, not to put too fine on it. You might remember there was a period of two or three years, as so happened I was President of the National Action Committee on the Status of Women (NAC), when there were some foolish remarks.

Transcription from a speech presented by Judy Rebick, on October 13, 2001 in Halifax at the Annual Conference sponsored by the Canadian Institute for the Administration of Justice entitled “Citizenship and Citizen Participation in the Administration of Justice”.

Author of “Imagine Democracy”, journalist and broadcaster, Toronto, Ontario.
made by judges about the women’s movement I was very critical of and since I was a spokesperson of the women’s movement I was upfront about that. Anyway, the Premier did not back down about this appointment and I started to sit on the Ontario Judicial Council and we had two rolls at the time. One was to discipline judges and the other was to approve appointments of judges. The first thing I want to say is that my attitude toward the judicial system changed significantly in the course of that experience. I was very cynical about the judicial system and particularly about what I considered at the time the methodology of the roll of judges, that judges were actually fair. Because of my cynicism, I did not really believe that and the experience of being on the Ontario Judicial Council changed my mind about a lot of things, and they also changed their mind about me because I realized as President of the NAC, my role was that of an advocate, I was speaking on behalf of the women’s movement, the feminist movement. But on the Judicial Council I was in fact acting as a judge so to speak and judging judges, and that was a very different role, and the first thing that I think changed their minds was that at the time there was a committee appointing judges that had lay people on it and they were changing the face of the judiciary rather dramatically in Ontario, appointing a lot more women, a lot more people of colour and we had to approve these appointments. There was one appointment of a woman of colour in fact, who really was not qualified, to be a judge, she just did not have enough experience and I agreed with the others on the Ontario Judicial Council that she was not sufficiently qualified, and we sent back the appointment to the committee and they were astonished by this decision, that I would actually say that because my role as President of the NAC of course was to fight for more women of colour to be on the bench, but my role on the judicial council was different than that. It was to be to approve appointments, to make sure that there was good appointments of women and of people of colour of a more representative bench, but also to make sure that the people who were appointed could do the job. So that started to change things on the Judicial Council. But the big thing that changed things was a particular case. I cannot go into all the details of the case, but it was what the media called “the kissing judge.” This was a very high-profile case and this judge was accused of sexual harassment numerous times and his lawyer argued that there was a reasonable apprehension of bias in my participation in the Judicial Council and asked that I stand down. The Judicial Council asked that I stand down, that I could not be fair in judging this case. Now this was a fairly stressful moment for me because it was also during the Charlottetown Accord. You may remember that the NAC said “no” to the
Charlottetown Accord and I was chief spokesperson, so at the same time I was leading a campaign for the no vote in Charlottetown, which, as you can imagine, was fairly stressful given that everybody else was on the “yes” side. I was faced with this decision on the Judicial Council and clearly my argument to the other members of the Judicial Council was that the reason I was on the Judicial Council was because in certain parts of the community there was a reasonable apprehension of bias in the opposite direction, that is of supporting the judge and of not understanding the concerns that the community had about what the judge was accused of doing. This was a very intense debate on the Judicial Council. It was an intense debate for two reasons: one was looking at the issue itself, but also because of the political impact because clearly if I had been asked to stand down, there would have been no reason for me to continue on the Judicial Council and I would have resigned and that would have been a big public scandal, I suppose. I tell this story because the Judicial Council had to come to grips on why they needed laypeople on the Judicial Council, because of course the judge’s view was that they could be fair in judging their peers and that is true, they could be fair, but they looked at it from a particular experience, which was a common experience. I looked at it from a very different experience, and the other layperson (there were only two of us at the time, that changed later), who was a person of colour, also looked at it from a different experience. What the Judicial Council and particularly Chief Justice Dubin learned over that time—like I said, I learned that judges really were fair, really did try to be fair, but what he learned—I do not want to speak for him, but what I think he learned and others there—was that the way they looked at things was different than the way we looked at things, and the reason why it was different was that we had different experiences. We were coming from different experiences, not only with the judicial system, but also in our lives. What we brought to the table in those discussions was a different quality of justice. We brought to the table the view of the community on these events that we were judging or these accusations that we were judging, and when it comes to the perception that the community has of justice, it is a very important issue because we know that for justice to be done, justice must be perceived that it is done and particularly in terms of judges and the fairness of judges, and so this debate was a very important debate for the Council and in the end I was allowed to stay on the case. But it was a split vote, one difference. After that, Chief Justice Dubin became an advocate for the participation of laypeople on Judicial Councils, in fact he invited me, or got me invited to speak on the Canadian Judicial Council on this topic. I did not manage to persuade
them obviously because they still have not included laypeople on the Canadian Judicial Council, which I think is an error. But this experience was a very important one because it showed the impact of laypeople on the Judicial Council. First, when the Judicial Council finally made the decision about this judge, whichever way it had gone, it had a lot more credibility in the community because I was on the Judicial Council, a lot more credibility. Secondly, I was able to bring arguments to the table that other people were not bringing to the table. In fact, this case had been put off and put off and put off and it was my argument that made them deal with it and it was making them look worse and worse certainly in the medias’ eyes. But thirdly, it changed my mind about the judicial system, about judges and their role because being an advocate, being in the political sphere, you do not run into people who change their minds about things. If you can manage to get enough pressure you can force them to change their minds, but it doesn’t happen very often. You know I worked in politics for many years as an advocate, working in political parties then debating on television political issues, I do not see people change their minds very often, actually be persuaded to change their minds. But on the Judicial Council I saw that. The judges would weigh the arguments and they could be persuaded to change their minds, as Chief Justice Dubin changed his mind about the role of laypeople on the Judicial Council. This was a very profound experience for me and so the impact of that, because I had a fair bit of influence in the women’s movement in particular, was significant. Not only that I had changed my mind, but also the Chief Justice had changed his mind. Together we can now advocate for more citizens participation on Judicial Councils so that the disciplining of judges can be seen in the community as fair and not just judges protecting each other, which is often how it is seen. But there was another part of that experience that I also think was important and that was the role of citizens in the appointments process. I have to say it is interesting we are discussing citizen participation in the judicial system because I think the judicial system in some ways gives us a model for citizen participation in politics, which is what my book is about through the jury system. Here we give ordinary citizens and in effect a most important role in our judicial system by making life-and-death decisions or making decisions about incarcerations, innocent or guilty in our most serious court cases, and it is a role where experts are involved explaining the law, defending or prosecuting the case, but it is the citizens who make the decisions, not the experts who make the decisions. This is the argument in my book, that we need a political system where more and more experts are providing the information and the analysis that citizens need, but it should be citizens
more and more making the decisions in the political system, that is what I argue in my book, *Imagine Democracy*. But in a judicial system we already have that model through the jury system so it is interesting that there is a resistance for involving citizens at other levels of the judicial system where they can play just as important a role as they play in the jury system. It is something I don’t quite understand. On the citizen participation in appointments, it is my view that the citizens, the committee that was appointed originally under the David Petersen government, I think it was a creation of Ian Scott who was Attorney General at the time to have a committee of laypeople and lawyers appointing judges and opening up the system of judicial appointments so that they actually, later under the Bob Rae government, advertised for judges and took applications from people. Up until that time it had been very much a backroom process and I think at the federal level in many ways it still is. What used to happen, the people who got appointed judges were the people who had the respect of their colleagues. Now you say, what is wrong with that, they are good lawyers, they are people with integrity. Well what is wrong with that is that it reproduces the status quo so that what happens (and this is you know demonstratable in any number of ways) is that if the legal community which is consulted by the justice minister is mainly middle-class or upper middle-class, middle-aged white males, those in general, are going to be the same kinds of people that they admire in doing legal work and this is demonstrable. I have evidence of another way, which was not mentioned in the introduction. I am the publisher now of a web magazine site called rabble.ca. Now the Internet is dominated by men, but when I was working with my editor-in-chief who happens to be a woman and we were looking for people to hire, the people we happened to come up with were mostly women. Now in this case it was a positive thing because the Internet is so male-dominated. But it was interesting to me that we were not thinking about women, we were not implementing affirmative action, it is just that the people we thought about that we thought were good, who we thought were to do the best job were people like us. This is very human there is nothing sort of evil about it. It is just very human that is generally how we work. So in the old system which still exists in some of the provinces and the federal level, if it is the legal community (we are talking now almost ten years ago), the legal system that is deciding, then it is a kind of an old boys network that gets promoted as judges. Then Ian Scott changed this and then the NDP changed this to open it up even further to advertising and to changing, in fact to changing their requirements from judges, so that community participation, for example, became a qualification, became a good thing.
If you worked in a legal clinic, or you worked in communities that had frequent contact with the law, the impact of this was just astonishing. I wrote in my book that the most important change that the liberals and the NDP made in the province of Ontario was in this change: in the composition of the bench because we had way more women, way more people of colour and it was very dramatic and the reason for it was simply having laypeople in a committee that appointed judges or that recommended the appointment of judges. If we are going to have a justice system that has credibility in the community and that people have confidence in, it has to better reflect the community that it is serving. Now there are a lot of arguments against that. People think, “I can be fair, I can listen to the arguments” and all of that is true, like I said I was impressed by the fairness of the judges, but nevertheless we reflect our experience, we reflect what we have lived in our lives and if we are a male living a pretty comfortable life in a big city we reflect that in how we see the world. Being does determine consciousness and we see that in any number of ways. Right now you can see it in attitudes to this war. I know I am not supposed to talk about this, but I just want to use this in this one way. A friend of mine who is the Executive Director of the Matrie Foundation had a conference, it so happened the conference took place a few days after September 11 and Matrie Foundation works very hard on immigrant and visible minority issues. She had a fellow who is the head of Policy Developments for the Liberal Party who is a South Asian man give an analysis of what he thought this was all about and she said this was remarkable because the people of colour in the room all loved it and the white people in the room all hated it. We saw the same reaction in the States to the O.J. Simpson decision. If you are black or white, the attitude toward that decision was dramatically different. We see it in the gender gap in politics. Women’s support for war is dramatically less then men’s, but it is not just on war issues, it is on a whole series of social and economic issues: tax cuts, social service funding, a whole series of issues and where that comes from is a different lived experience. That is why it is important to have a representative judiciary. It is so that the judiciary reflects the lived experience of the community. Inevitably it will be fairer and part of the way to get that because obviously we live in a class-divided society where the legal profession, although it has improved enormously, still reflects the dominant class in society. But I know, I went to my niece’s graduation last spring at University of Toronto Law School, one of the most elite law schools and I was astonished by the majority women graduating. There was a very large, very significant percentage of people of colour graduating and so I was very impressed by the dramatic
changes made in the legal profession, but nevertheless it takes awhile for that to come up to the judiciary. I would say even if we had a completely representative judiciary from a demographic point of view, we would still have issues because those of us who live a privileged life because we make a good living, in your case you have a stable job which not too many people have these days, you actually get a salary, you are guaranteed your job for life, really, more or less, well this is a very privileged position in this society to be in. Even if you are more representative of the community demographically speaking, nevertheless from the point of view of social reality and economic reality, you are not. And so to have citizens involved so that there is a constant relationship between what the judicial system is doing and what the community thinks and feels is very important so I argue that even more strongly in the political system because at least there is the jury system which ensures that in the legal system.

The second thing I want to say about it is the younger generation. It so happens that I work in the field of the Internet now and I spend a lot of time with young people and I have to say this generation under 30 which grew up with the Internet is really very different. They accept authority much less readily, they are much more interested in their own engagement and things. For example, we were putting up this web magazine and those of us who were discussing it at first were maybe over 30 and we talked about whether we wanted news, whether we wanted debates and all the young people we talked to said the same thing, which is: “If it is not interactive we are not interested. We do not want to hear what experts have to say, we want to have a say ourselves.” Right across the country whoever we talked to said the same thing. So we created as part of our Internet magazine a thing called “babble”. Our Internet magazine is called “rabble”, and the discussion board is called “babble” and it is unbelievable. Half of the traffic on our site (we get 3.5 million hits a month) is to the discussion board and they discuss everything under the sun, mostly politics because it is a political site and the level of engagement of these—and it is mostly young people because no one else could keep up with it—is phenomenal and if they do not know something, they go off and read about it. So you know in the discussions after September 11 everyone suddenly is an expert on Islam. Well we got young people, 17-year-olds going off to the library and getting a copy of the Koran and quoting it on the site and discussing the quotes from the Koran on the site. I find this amazing, but what I noticed is that it is very much part of this generation. They want more engagement. They are not
happy to leave it to experts, they are not willing to leave it to experts and this is what our whole system our whole political system, our judicial system is based on. We elect, appoint, train experts to do things for and we keep them accountable through elections or through various means. Well I do not think it that is good enough anymore. I think we have to change that so that we are not just involved as citizens to keep our experts or our politicians or our judges accountable, but we are having more influence that in the system. I think in the political system it means making decisions. In the judicial system I think it means having more input into what happens in the judicial system. Now we have to be careful as to how that thing happens because of the fairness issue and we do not want to have votes about what happens to people who are charged with crime obviously.

I want to get onto my next point which is the issue of the groups involvement in the judicial system. Before I was talking about individuals, we were individuals in the judicial council, but we were not really representing anyone. We were chosen because we were representative, but our role was not really to represent anyone, our role was simply to bring a certain sensibility. We have a very rich experience in Canada now about the participation of groups in the judicial system and I want to particularly talk about the women’s movement which is controversial, certainly outside the judicial system, but I think we can say that, because of the Charter, women’s groups and in particularly the Women’s Legal Education and Action Fund (LEAF), has played an enormous role in helping the Supreme Court to interpret the Charter in a progressive way. I can tell you I learned this when I went to Cambridge that, in fact, Canada’s human rights law, Canada’s equality rights law is seen as the most advanced in the world by other judges, by other lawyers in the field and that our Supreme Court has interpreted the Charter in very progressive ways and continues to do so and I believe the participation of LEAF in the Superior Court has made a huge difference in that and there is a backlash to that. There is a big backlash to that which argues that group interests are special interests and it is a way of diverting the justice system, it is a way of perverting the justice system, “hijacking”. I read a column yesterday by Douglas Fisher, who is among those who think that the Charter is the source of all evil in our society and the reason they think so is because they think that feminists, “special interests groups”, have hijacked the judicial system. But in fact what I think the role that LEAF played in that process has actually given the judicial system a lot more credibility in another time and I’m talking about this new
generation, which is very inter-engagement, and participation. My generation was much more into the rights of groups who had no rights, or who were oppressed in a society and so we had a society in which women were marginalized, people of colour were marginalized, aboriginal people and so on. The judicial arena of these social movements were for the representation of these groups and I think we succeeded enormously, in a legal profession this is quite dramatic, much better than in politics for example. In the courts themselves, the interpretation of the Charter was greatly informed by women lawyers, feminist lawyers intervening often under the umbrella of LEAF. Like I say, I believe and I think that most judges believe that this has been a very positive and salutatory effect. Where I have been involved in that process was in the justice consultations where Kim Campbell—and this is a political process but it relates to the judicial process—decided to consult with women’s groups when the Supreme Court struck down the rape law and the Justice Minister had to come up with a new rape law. It was the Seaboyer decision if you remember. She decided to consult with women’s group in this process which was not just consult in a sort of pro forma that politicians often consult, but in a real way and LEAF and the other women’s groups that they consulted with were actually involved in helping to draft the legislation, the new rape law legislation, and it was a very positive process not just politically—it was probably the first time that women’s groups had anything positive to say about the Mulroney government—but also in the courts because that law has stood up overtime. The same experts in the Charter that had assisted the Supreme Court in interpreting the Charter drafted it. It has stood up and it has (well it is not perfect) been a big improvement on the old law. Again there was a lot of resistance to it, but like the involvement of marginalized groups in the judicial system or in the political system is going to create resistance. There is a reason these groups are marginalized, it is because they do not have any power so therefore the people in power often object to their involvement because they see other interests that are not their interests being pushed. But that is from a judicial point of view. That is why it is a good thing because you are hearing from groups that that you do not hear from in the media very often (this has changed with the women’s movement) but at the time that you do not hear from them in the political system very often, and this is essential to be fair, to bring fairness to the system. So I think that the role groups have played—and I would not argue for a stronger role particularly for groups actually—I think that there has been the development through the Charter of the ideas of group intervention, of third party intervention, which has been very helpful to
the courts and I think the big thing here is to resist rolling that back. Obviously the courts should hear from all kinds of third parties, not just one kind of third party. I am just saying from my point of view I think the role that LEAF has been able to play at the court level has meant that, for women and particularly for women’s groups, the workings of the court have had a lot more credibility than they would have had otherwise.

Now I want to come to the point of restorative justice because I noticed that in a lot of the panels you are looking at, this issue is going to come up. This is where community involvement is going to get trickier, which is this notion that somehow the courts should be turned over to the community. That instead of the traditional advocacy role of the courts we should have a more community-based justice system or what has been called restorative justice. In many ways I agree with this. I think that in most cases the criminal justice system is a blunt instrument, that if things can be resolved in the community, if disputes can be resolved in the community without accessing what is a very expensive, very clogged legal system, that is a good thing. But I am also troubled by it because I think we have worked very hard to develop a certain level of fairness and counter-balances in our legal system and those counter-balances are supposed to (although they do not always) assist in changing inequalities of power in the community. If I give the example of a woman who has been assaulted by her spouse, the criminal justice system is not ideal for dealing with that. In fact many women, most women will not access the criminal justice system to deal with domestic assault. But nevertheless when the criminal justice is brought into play, the power differential that exists between the women and the spouse or the person who assaulted her, changes in the court. In a restorative justice system it does not. So the idea of sentencing circles or circles to resolve domestic disputes is very problematic because the same power dynamic that creates this violent situation exists in that sentencing circle or exits in that community circle. So in women’s groups—in fact I was at a conference last weekend which talked about some of these issues—women’s groups who argued very hard for things like mandatory sentencing, and for the courts to take issues of violence against women seriously, which they did not do historically, and for the police to take issues of violence against women seriously, there has been big improvements on this, but there is also a downside to it and how to resolve that, how to find ways out of that, how to find ways out of the criminal court system where there can be fairness in resolving domestic violence disputes, I think we have not come to an understanding of how to do that. I know in that conference there was a lot of discussion
about it, but nothing really has emerged as a solution, as a better more viable solution than the existing solutions that we have which is through the criminal justice system. So I think that we have to be careful not to sort of just fall into trends like restorative justice system. Sounds great, it is a wonderful word if only it could work, if only it worked in every situation it would be great, much better than the punitive system that we have. But in situations, particularly in violent situations I think we have to really think twice about how it works and particularly in relation to the power dynamic in relationship.

The second thing I want to say about the criminal justice system and the civil system is the way in which victims experience the criminal justice system. Again there has been a lot of discussion about that, a lot of discussion about victim support, but again I think that we have a long way to go in terms of making the experience of a court case easier on victims than it is without taking away the rights of the accused, and much to the surprise of many people, feminists really do worry about the rights of the accused and to make sure there is a fair trial no matter what the person is accused of. Again, I think in your deliberations you can make some progress—I don’t know if this is going to be addressed by any of your speakers—I think again we have to be careful about not just jumping on some bandwagons here. I think there are some very difficult issues about balancing the rights of the accused against making the court experience such that more victims, particularly here of domestic assault but also sexual assault, will be willing to come forward and use the court system. Our experiences are that the main problem is not. There is a problem in the courts, but the bigger problem is at the level of the police and that is still a problem today even though there has been a lot education. I guess on that level I do not have a lot of conclusions to bring to you, but only to say that I think we have to tread quite carefully in terms of the changes we make there.

I know that one of the preoccupations of judges is the perception in the public eye of the administration of justice. I have argued already that by including more citizens in things like judicial councils and things like appointments of judges, we improve the perception especially if we have people who have some profile in the community; we improve the perception of the judicial system. But then you have to deal with the media. I know a lot of the Chief Justices who actually said to me that “it is the role of people like you to give a better perception of the judicial system in the media.” Easier said than done, because the problem with the media in this case is that the media loves conflict. They love to report on
conflict and so when the judicial system is working well, when there is a
good disposition of good cases, this is not news. But when there is a judge
who makes a stupid remark then that is news or when there is a group that
is furious at some decision that some judge made then that is news. I do
not really know how you get around this because politicians have the
same problem, advocacy groups have the same problem, I personally
would like to see a different kind of media than we have, but that is not
going to happen, certainly not in the near future. I think that you could
have good communications people and I think certainly at the level of the
Supreme Court they have been doing some very good work in explaining
the judicial system, in letting judges speak more, which I think is very
important, to talk about the judicial system, to talk more about the role
judges play, how they see their roles, how the courts work. I think all
these things are very good, but I do not think you are going to get around
the problem that the media focuses on conflicts and the media loves
scandal and problems and so inevitably however good your communica-
tions is, however much you try to educate, you are going to have these
problems. That is why I think that the more you can involve the
community in the actual process the more that these kinds of bad media
coverage is countered. And I have to say also as an advocate that the bad
media is not always a bad thing. It might make you uncomfortable, but it
does point out where there are problems and it makes it necessary to deal
with the problems. The heat makes it necessary to deal with the problems
and even though we do not like it when the media goes after somebody,
goes after us, nevertheless it does often play a useful role. I do not think
the media is the place to solve these problems and I do not think the
media is the place citizens are going to understand better the justice
system either, although there is a role there.

The last thing I want to talk about is a trend I see happening now
that does not have to do with the justice system per se but is going to have
an impact on the justice system just like the fight for women’s rights and
gay and lesbian rights had a huge impact on the justice system: it is the
move from social welfare state to social control state. Now that is a pretty
dramatic way of putting it, but I see this more and more. We see the
criminalization of the poor through things like safe street sex and use
more of welfare fraud against poor people. We see the criminalization of
decent using and we are going to see this way more now with this war on
terrorism; using the heavy hand of the criminal law against protesters for
example, who even five years before would not have been charged: they
may have been arrested and let go. Now they are going through the court
systems and this troubles me greatly. I do not agree with this. I think it is the opposite direction we should be going in if we are talking about restorative justice and community-based justice. We are talking about getting these cases out of the court system and now instead they are coming back in the court system and part of the reason for that is that we live in a very complicated world, a very difficult world and people like simple answers to difficult questions and charging someone with a crime is a simple answer. Put him in jail is a simple answer but it is not a very good answer. In most cases it is not a very good answer. It does not solve anything. It might protect the community from someone who is a violent offender (as you know better than I do this is a tiny minority of the people who are charged), but it does not really solve social problems and if we are looking at using the judicial system a bit more to involve the community, and through restorative justice to try and see if we can resolve some social problems, I am sceptical about that. But I understand the desire because more and more of these social problems are being thrown onto the courts. Myself, I do not think the solution to that is to make the courts a social service agency. I think the solution to it is to get more value to social service agencies in our society and so I am not sure what you as judges can do about that. But I raise it because I think it is a concern for the whole community in particular because you are going to get loaded with it. It is a real concern for you, and if your organizations can speak out about this, I think that it would be very important politically to say that it does not make a lot of sense to load the social problems of society into the criminal courts or even into the civil courts, and that is not going to solve the problems. This is something that is not the topic of the conference but it is related to the topic of the conference, and I think that part of the desire for community and citizen participation in the justice system is to make the justice system more responsive to the community, to make the justice system more respective in the community. But I suspect from the reading I have done, particularly around the restorative justice and community access to justice, that the other part of the impulse is because you are seeing more and more social problems in the court that should be solved in the community and not by the criminal law, and there I am not sure the right response is to have the courts to be more community focused. I think the right response is to get these things out of the courts and to have them solved in the community, not in the courts. I know a lot of your speakers coming from the States and I would say the United States is way past us in doing this. I mean when you know one out of four black males are in contact with the justice system in the United States, something is very wrong. They have the highest incarceration of
any society in the world, certainly any democratic society. Something is very wrong. What has happened in the United States which I see beginning to happen here is that a social welfare system was moved toward a social control system and we are seeing that beginning to happen here. It is something that I hope judges will speak out against in whatever way that they can because it will not work. It will criminalize more and more marginal people whether they be marginal because of income or because of race or because of youth and it will clog up the courts and create a much more dysfunctional court system. But my concern is much more that it creates a society with an underclass that begins to despair of any political change in the society and sees the state only as a punitive mechanism, not as a mechanism for social change, for positive progressive, social change.

On that note, thank you very much.
We, in the Midwest of the United States, have been very anxious for dialogue and communication with Canadian judges and court staff. We view Canada as having similar problems as the United States and we hope to learn from you.

Why are we talking about citizen or public participation in the administration of justice? This is a major topic in the United States. The chief justices of all 50 states have discussed public outreach at their meetings. They are holding national meetings on this issue, as are the American Bar Association and American Judicature Society. Many of the chief justices are elected, as I am, but many are appointed, as you are.

Even in our federal courts, which have always been somewhat more removed from the people than are the state courts, the judges are talking about public understanding and support of the courts. So why are we emphasizing this issue? Do we have a problem with public trust and confidence? My answer is—probably not at this moment. The polls indicate that the United States Supreme Court is held in very high regard, even after Bush v. Gore. Even as the country is split 50/50 on the election and 50/50 on favoring or not favoring the Supreme Court opinion, public trust and confidence in the US Supreme Court is very high. That is very good news for all of us, because the public tends to lump courts together. It doesn’t fully understand the difference between the US Supreme Court, the Wisconsin Supreme Court and the trial courts. A court is a court, and too often we are all painted the same, in a black robe. Many people think that I am Ruth Bader Ginsburg or Sandra Day O’Connor.

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In my own home state, Wisconsin, if you went out and conducted a poll, the poll would show that the judiciary is held in very high regard. In my non-random, non-scientific polls, judges in Wisconsin get about a 98% approval rate. People trust their local judiciary and their local judges. It doesn’t mean that they like all of our decisions—they don’t. It doesn’t mean that they don’t think we can improve—they think we can improve, and we can. But it means that the public has high regard for the judiciary as an institution and individual judges in the local community.

So why are we concerned? For two reasons. First, we want to maintain that kind of public trust and confidence in an era in which most Government institutions do not have the trust and confidence of the public. The public does not seem to hold the legislative and executive branches in high regard. If you are part of the Government, as judges are, you tend to soon get painted with the same brush of distrust in which the executive and legislative branches are held. This distrust of Government will travel, I think, to the judiciary.

Second, the reason I think we have to be concerned is because the emphasis in the business community is on service. You are our customer, we are serving you, and if things aren’t right, come to the complaint department and we will fix it. The American public is getting accustomed to this emphasis on customer service. The American public will expect service from courts that emphasizes consumers’ needs.

When I first came on the court in 1976, I continued my practice of making public speeches. One of my colleagues much older than myself, a long-time trial judge and a long-time appellate judge, said, “Don’t do it. It is a big mistake to let the people know that there is a human being in that black robe. It is better to wrap yourself in the black robe and let them think that you are not necessarily of flesh and blood. If you are of flesh and blood, you can make mistakes. You are only human.” That was not and is not my view. Remember the “Wizard of Oz.” The Wizard was behind the screen and when the screen was dropped, you saw a scared person back there. I don’t want to be that “scared person.” I don’t want the judiciary to be that “scared person.” I want the judiciary to be able to stand up for what it is, an independent branch of Government, not taking orders from the legislature or executive, and rendering fair and impartial justice, regardless of public opinion polls or other extraneous matters. I may not be right, I may make errors, but I am going to be as fair and impartial as I possibly can. I may make mistakes, which I hope I don’t, but the people will still have faith and confidence in me and in my role as
a judge if they understand my role and understand my commitment to impartiality.

Meeting the public is not only important for educating the public but educating ourselves. We must listen. We must listen to the public’s perspective. The people have something to offer. Lawyers hate to hear this: just because you didn’t go to law school, and just because you are not a judge, doesn’t mean you don’t know anything. A lot of people without a legal education are very smart. Sometimes we, as lawyers and judges, forget that important piece of information. The people have a lot to offer. The more narrow we become, the more isolated we become from the people we are supposed to serve, the likelihood of us missing the mark and not doing a good job increases significantly.

From my perspective, there are three aspects of public participation that we should be talking about. First, outreach; lawyers and judges talking with the people. I think we can start with very young people. Talk about our roles, explain what we do, and ask them about their perceptions and how they think we should be changing.

Second, input; getting non-lawyers into the courts, not as litigants, but to help us perform our role—get non-lawyers involved in the appointments of judges, lawyer discipline, judicial discipline, bar examinations in the United States, and volunteer organizations in the courts system. Bring them in. We need their input.

The third aspect of citizen participation, as I see it, is that we, in the judiciary, have to find ways of communicating with the executive and judicial branches on issues of mutual concern, yet maintain our independence. The judiciary is an independent branch of Government, but a branch of Government that co-operates in a variety of ways with the other two branches, because we all have the same goal: namely, working for the people of the province, the state and the country.

Public outreach and public input have risks. How many of you think that judges should be out in the community encouraging citizen participation in the administration of justice and also bringing people into the court in advisory roles to help administer the justice system? How many of you don’t? The house is divided.
The reason I ask the question is because we all know that a judge is supposed to be impartial and is supposed to conduct himself or herself to minimize the risk of conflict with judicial obligations. I am reading from the canon of judicial conduct, which governs my conduct. I am to act impartially. I should do nothing that casts reasonable doubt on my capacity to act impartially. I am not to demean the judicial office. I should do nothing to interfere with the proper performance of judicial duties.

Yet, here I am advocating that you go out and reach out to the public. What happens? The public will ask questions. Canada doesn’t have capital punishment, I assume. Neither does my state; most states do. As soon as there is a horrible crime in my state, some legislator gets on the platform and wants to enact a law adopting capital punishment. Then I run for election. Even if I am not running for election I speak about some topic that is not too controversial and then invite questions and answers. I always have questions and answers because, as I say, my job as a judge is to listen. That is what judges do: listen.

What is the first question from the audience? “What do you think about capital punishment … abortion … prison without parole?” Don’t I think that all non-resident aliens of the Mideast should be detained, preferably without trial? These are hot topics in the United States. People are going to ask these kinds of questions. I explain that I don’t make the law—I interpret it. The legislature decides on capital punishment. Does that mean I have nothing to say? No, there’s much to say. I remind them that how I feel personally about capital punishment is irrelevant. I also tell them that capital punishment will increase the cost of administering justice. The response to questions should be educational. If I could not sit impartially on a death case, I can’t be a judge. I must recuse myself from that case. In my responses, however, I should not do anything to jeopardize my sitting on a case that might come up. It is important in outreach that I explain my obligations as a judge and what I can, cannot and should not talk about. And there is great dispute about what judges can and should discuss publicly.

*     *     *
The outreach programs that are available across the United States differ somewhat from state to state and even within a state. Many of the programs are run by an individual judge. A particular judge has a particular interest in a particular matter or a particular means of communication and just develops it. The program then moves from that small community to a region and then to the state and then via either the Internet or programs such as this, the program becomes national or international. We borrow from each other vigorously. We don’t feel that we have to “re-invent the wheel.” We take someone else’s “wheel,” slap on the name of our jurisdiction, make a few changes and then we call it our own. Some of the things that I am going to talk about may have started in our state or may have started in another state; it doesn’t make much difference.

One thing you can do, without a leader and without directions and without funds, is to go out and make speeches. You can speak at your children’s school, at your university or law school, at your service club or your neighbor’s service club. And one speech leads to another invitation unless, of course, you bombed. The best kinds of speeches are interactive. Engage your audience. I swear in members of the audience as judges. I tell them that I am going to give them a fast course in judicial decision-making. Then I give them the case of Landlord v. Tenant. The tenant has one small goldfish named Tootsie. The ordinance says if you live in an apartment house of more than three families, “NO PETS ARE ALLOWED.” You don’t have to go to law school to understand the facts or law. It is a simple law and all people should understand it. Now you are the judge, and is “Tootsie” the goldfish a pet? I explain the court structure to them, divide the audience into thirds, then I take the case to the trial court, then the first appeals court, and then to the highest appellate court. This is an important case because fish are a billion-dollar business and more people own fish than any other animal. I go through the judicial process of interpreting a law and applying it to the fact situation. We talk about statutory interpretation. We look at the dictionary; we look at legislative intent; we discuss whether to look at legislative history, etc. I ask the audience to vote whether “Tootsie” the goldfish is a pet, on the basis of the legal principles we develop. They are to vote on the basis of the law, not on whether they are a landlord or a tenant, not on whether they are Republicans, Conservatives, Democrats, liberals or judicial activists. By the time they finish, I say to them, how many of you think that “Tootsie” is a pet and should be evicted? They never all agree. This exercise is a way of telling them that decision making is difficult, that
laws are not always clear, that judges fill in the cracks. If they can’t agree whether “Tootsie” is a pet, it is understandable why judges do not necessarily agree about complex issues in securities law or tax law, or due process or equal protection, much more complicated issues. The audience leaves talking about the issues, and sometimes they call me later or send me newspaper clippings about pet cases.

Another outreach program we have developed is called “Justice on Wheels.” It takes about eight hours to drive from one corner of Wisconsin to another. The Supreme Court sits in Madison, in the southern part of the state. So we take the Supreme Court out on the road and sit in another community at a local courthouse. Wherever we visit, we do press conferences explaining how the Court works and answer questions. We meeting with citizen groups and bar members. We invite everybody into the courtroom, including school classes. We usually fill every seat in the courtroom and often have overflow crowds. We are on TV (cameras are always allowed in the trial courts and in the appellate courts in Wisconsin). This Justice on Wheels program is very effective in telling people about the Court. Justice on Wheels not only promotes understanding of the Supreme Court but also gives great support to the local judiciary, the local trial judges.

We also do something we call judicial “ride-alongs.” We invite legislators, state and local, one at a time, to sit on the trial court bench with the judges for a morning. The legislators are intrigued at the diversity of cases. Sometimes their experience even stimulates amended laws. One legislator heard a case in which a youngster wanted to change his name from his biological father’s name to his stepfather’s, but he couldn’t because the father had disappeared. The law requires the father’s approval. The legislator asked, “Who drafted that dumb law?” Well, he had. At least, he voted for it. It’s a good law, but it didn’t work for this child. The law had to be amended to take care of cases in which the father could not be reached.

We also have a Wisconsin courts web page which is widely used.

We have seminars with the media to discuss mutual problems. I do a press conference with the Madison media every two or three years and ask the reporters, “What can we do to help you cover our courts better?” They would like to sit in the conference room. I say, “No, you are not going to sit in the conference room. Now let’s be reasonable.” They wanted advance notice of when a decision was going to be handed down. They didn’t have to know what the decision would be, but they wanted to
know when it was going to be handed down so that they could get their materials in order. In effect, they would write the whole story, except the bottom line, and think of whom they would call to complete the story. So we now announce a couple of days in advance which opinions will be released. It doesn’t cost us anything, and it has been a very effective technique. We get better coverage because the reporters are not surprised. The reporters also say “don’t bunch the cases.” Instead of handing out ten in a day as before, I now spread the decisions out to so that we release them over a series of days. That helps the media write better stories and the cases get better coverage. More people read what the media writes than what I write.

I often visit newspapers when I travel around the state. They really like you to just touch base with them. They may not have any questions but they want to feel that they are “in the loop.” We tend to keep talking about the same things because the newspaper people keep changing. I don’t know about Canada but if reporters in our jurisdiction are there two years, that is a long time, and then they move on to other things. It is a continual process to educate them about how the courts work.

We have sentencing seminars with the media because sentencing is where judges have the most interaction with the media: Judges do not like the headline—“Judge Soft On Crime, Guy Only Got 250 Years.” We again try to do interactive programming. We do a vignette about a tough case. Maybe a case where you have an upstanding citizen who drives while intoxicated and kills somebody. The driver is a single mother who has three children, is a good person, and is having a crisis in the family. No doubt about it that she was drunk; no doubt about it that the driving is a crime; no doubt about it that three innocent people were killed. What is the judge going to do with the case? We have the journalists sentence the driver. We tell them what their options are. The journalists are usually much less harsh in sentencing than the judges are. The journalists learn firsthand of the difficulties that judges face. We also try to educate the judges how to sentence in terms of making a sentence more understandable to the public, more understandable to the media.

Another one of our programs is called “Court with Class.” We invite every high school in the state to come to Madison to hear oral argument. If the class agrees to come, we send the class copies of the briefs and other materials on the case ahead of time. A justice meets with the class at lunch to talk about, not the case, but the process the Court uses.
We also do a teachers’ institutes annually to help teachers teach classes on the court system. The teachers find the institute very useful because we emphasize interactive techniques to use with their students.

We have numerous other outreach programs. They are usually administered by our court public information officer. Here are some examples.

We have receptions at the courthouse. We appear on radio and TV shows. We put out self-help materials on our web site and in hard copy. We try to meet with various groups, but we are very careful that we are not partial to any particular group. For every group there is a counter group, a group that has a different view, and we deal with all of them also.

We have 5,000 volunteers across the state in a whole variety of programs. They monitor guardianships, they visit with children who have had difficulties and they see if court’s orders are being enforced. For example, if there are custody issues and a child is not supposed to visit with a particular parent except under supervision, the volunteers oversee those visits.

We try to determine whether our courts are operating well by using focus groups, exit interviews, questionnaires, polls, surveys. We are even thinking about suggestion boxes in some courthouses. The Department of Revenue has a suggestion box. It doesn’t ask if you want to pay your taxes; it asks, how were you treated in your dealings with the Department? It can be very frightening for staff and judges to find out how the public feels they were treated. In the United States, students are asked to evaluate the faculty at the end of a course. Is that common in Canada? Yes. Very frightening. Maybe out of 90 students, 5 say you are the worst professor they have ever had. Even if 85 say you range between OK and good, you don’t care about the 85 who say you are OK. You care about the 5 that say you were terrible. You grieve about it and it hurts, but it is very important to find out how we are doing. It doesn’t mean that the 5 are right; it may mean they are somewhat right.

We include non-lawyers on every court committee or task force. Indeed about one-third of the membership of every court committee is composed of lay people.
We meet in open session with legislative committees. Has that ever been tried in Canada? The first time we met with a legislative committee everybody was very nervous. Meetings have turned out fine. Everybody was very polite, regardless of how they felt about issues, and we had very good discussions on matters of mutual interest. We also just had the first ever seminar for judges, legislators, and staff about how courts interpret statutes. It was very successful and it is being copied elsewhere.

I have attempted to give you a brief overview of some of the many programs in Wisconsin. Other states have similar programs. More details about these programs are available on our website and various other websites. No one need reinvent the wheel.
Involving Citizens with Courts and Tribunals: Initiatives in Canada

Dennis Orchard*

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It’s an honour to be asked to participate in this conference and to be paired with Chief Justice Abrahamson, whose outstanding reputation precedes her. My qualifications to be here are limited to those of observer of events related to our subject—involving individual citizens with courts and tribunals.

I am a part-time consultant, not staff member, with the Canadian Judicial Council, but this relationship does afford me something of a window on courts across the country. As communications advisor to the Council for the past three years, I have been able to support a special committee devoted to public information, help carry out surveys of the communications and outreach activity of superior courts, and meet judges of the Supreme Court and Federal Court of Canada, as well as committees of superior and provincial court judges in four provinces.

I propose in the next few minutes to address our subject in three parts, which I will call “Principles”, “Practice” and “Potential”.

I. PRINCIPLES

As a matter of principle, why should judges be concerned to engage members of their communities in the business of the courts?

The Council tried to answer this question two years ago when it approved a policy framework for public communications and outreach. Let me cite some key points:

• Judges make news—some say more real news than politicians.
• In the world of the *Canadian Charter of Rights and Freedoms*, some of the decisions judges make will inevitably attract public and media commentary and controversy.

• Judges may be vulnerable to serious misunderstanding of what they do. That is a function of the complexity of the law, the adversarial court system, media coverage (good and bad) and other factors. Neither the courts nor other public bodies can rely on automatic respect or deference. Some observers go so far as to say there is a crisis in public understanding and acceptance of the justice system and judges’ role in it.

• Yet ultimately it is the public that grants legitimacy to judicial decision-makers.

• There is a growing consensus that judges have a responsibility to help the public understand what the courts do, how judges transact their business and why they function as they do.

• The Council’s paper quotes the late Justice John Sopinka as saying, “No longer can we expect the public to respect decisions in a process that is shrouded in mystery and made by people who have withdrawn from society.”

• The judiciary’s role should not be seen primarily as a means of responding to criticism. It should be much broader.

On the basis of these main points, points of principle if you like, the Council has recommended that courts get actively involved in communications and outreach initiatives. Three kinds are proposed:

• Educational initiatives at all levels of the education system.

• Public initiatives—engaging groups representative of the community.

• Reaching public audiences through the media and providing a forum for constructive discussion with the media about the reporting of justice issues.
II. PRACTICE

So what is happening “on the ground?” What are courts and judges doing off the bench to involve citizens and promote public involvement and understanding?

A survey of superior courts last year revealed that in nine jurisdictions, superior courts have set up communications or media relations committees. Six of those committees include representatives of provincial courts. Some committees that had previously been limited more or less to media relations issues were broadening their mandates embracing education and communications.

Many educational programs are taking shape. Following the creation of an umbrella committee of judges, legal educators, teachers, lawyers and provincial ministries, Ontario superior and provincial courts are collaborating with others to establish Local Liaison Committees across the province to promote courthouse and classroom visits. Judicial “lead hands” are tapping volunteers among crown attorneys, local lawyers and representatives of legal clinics and legal aid to speak about the legal system and the role of judges with high school students. More than 200 judges volunteered to participate, and a structured process was created for teachers to request a class visit to a courthouse, where students would be met by a lawyer or judge, or lawyers and judges would visit classrooms.

In Quebec, the courts, the Bar and the Justice Department are organizing open houses at regional court houses, mock courts for youths, career days in schools and information days for victims of criminal acts. Information is being provided to the general public with the cooperation of local media.

In Manitoba, judges have paid visits to high schools in every corner of the province. This past year all 100 first-year law students at the University of Manitoba participated in the “shadowing project” with 25 volunteer members of the Manitoba Court of Queen’s Bench. In groups of four, students spent two days with a judge following civil, criminal and family trials, motions, pre-trials and case conferences, bail hearings, small claims and summary conviction appeals.
In Saskatchewan, an all-courts committee is developing proposals for educational initiatives, a forum for constructive discussion with the media, and public initiatives. Strategies address media training for judges, issues of access to judicial and legal information including the Internet, cooperation with educational efforts of other groups, and a process for rapid response to inaccurate reporting.

A committee of judges from the Alberta Court of Appeal, Court of Queen’s Bench and Provincial Court is providing educational institutions with speakers from the three Courts; arranging public information initiatives aimed at explaining the role of the judiciary and courts, for example in the form of courthouse tours for students and adults; and communicating with the media in their coverage of the courts.

In Canada, the clear leader in public education and outreach programming is British Columbia, whose Law Courts Education Society has been delivering legal education programming to schools and the community for more than 20 years.

The Society is a non-profit organization working with the Ministry of Attorney General, the Ministry of Education, the Judiciary, the Canadian Bar Association, schools and communities. Board members are drawn from these organizations, from First Nations, immigrant and visible minority communities, and from schools and other educational institutions.

The Society receives core funding from the provincial Government and raises funds independently. It provides education programs for tens of thousands of students and others annually, hundreds of educational visits to the courts, curricula and programs for the primary intermediate and secondary grades in Law, Social Studies, First Nations Studies, and career and personal planning.

The Society works with virtually every Law 12 class in B.C. hundreds of Social Studies 11 classes, and over 1000 elementary schools. At courthouses across B.C. and in remote schools, regional offices of the Society deliver court orientations, speakers, mock trials, professional development workshops and community workshops. Another undertaking of regional offices are Courtlink Youth Programs for First Nations Youth, Youth at Risk and Immigrant Youth.
III. Special Programs

The list goes on: Special programs for northern First Nations communities, Special programming for the mentally challenged and the deaf community, a Court Information Program for Immigrants in five languages and Parenting After Separation workshops.

And specifically on our topic today: A Judicial Community Liaison Programs where judges can visit communities and discuss justice issues. Last year, judges participated in almost 600 school visits and public sessions across B.C. and two Judges Outreach programs with the Provincial Court Judges Equality Committee. They held meetings with Community Workers, Chinatown Community groups, Outreach, workers and services for youth and Mentally Challenged individuals. Celebrating the 300th Anniversary of the Act of Settlement, the Society worked with the Supreme Court to develop a curriculum and Judges Outreach program for Social Studies classes. Judges are involved in piloting the program in 15 schools early in 2001.

It is also B.C. where former Chief Justice Alan McEachern pioneered an “ask the judge” e-mail window to accept questions from the public, an initiative his successor has pledged to continue. Chief Justice McEachern was also the force behind the extraordinary *A Compendium of Law and Judges*, posted on the B.C. Appeal Court Website.

Our courts are recognizing the role that the Internet can play to assist litigants, the legal community, the general public and the media. Websites are maintained by the Supreme Court of Canada, Federal Court of Canada, the Court Martial Appeal Court, the Tax Court of Canada, Prince Edward Island, Quebec, Ontario, Manitoba, Saskatchewan, Alberta, British Columbia and Nunavut. Sites are in various planning stages by Newfoundland, New Brunswick and the Yukon.

Courts are carrying out a range of media activities and plan more. The Ontario Court of Appeal set up a Media Committee and made significant changes in its practices for releasing decisions. Officers of the court provided information to media on operations, procedures, scheduling and other matters prior to release of decisions, and responded to questions about specific judgments after their release. Arrangements were made to provide notice of significant judgments and to post them on the Ontario Courts Website on the day of release, accompanied by a summary. The Nova Scotia Media-Courts
Liaison Committee devised an electronic notice regime regarding publication bans using the Internet and e-mail.

IV. POTENTIAL

Finally, let me speak about the potential for further engagement of individual citizens with judges and their work.

I have given you some examples of the useful activities taking place, but I think it must be admitted that the action is fragmented, uneven and still well short of the potential and the need.

Court Websites are useful for lawyers and researchers, but to date they are awkward and limited sources of information for the general public, and not at all interactive. A start has been made, and sites can be expected to improve steadily. Most sites contain the texts of judgments, but not many judgments include easy-to-read summaries.

Chief Justices and members of their courts report that they are speaking publicly, but the audiences tend to be specialized legal groups rather than organizations representative of the broader community.

There are significant limits on the time individual judges can devote to outreach activities. Many judges are burdened by punishing workloads, particularly in the courts experiencing significant vacancies. If judges are to do more in their communities, it will require greater consensus within courts on the priority of public outreach and a collective will to reserve more judicial time for this purpose. Chief Justices must make clear they want outreach to happen, and they must identify champions within their courts to advance the agenda.

A closely-related point: to sustain outreach activities they must be well planned and organized. This requires experienced and dedicated staff support, and few courts have been able to devote resources to such support.

The Council has long recognized the key role that our news media play in portraying the work of the courts, and the contribution that can be made by court officers devoted to assisting the media and supporting communications activities. Three years ago, former Chief Justice Lamer wrote to the Attorneys General urging them to support the appointment of communications officers for their courts.
Communications roles of varying scope and importance are assigned to individual officers in a number of courts, but the role is significant only in the Supreme Court of Canada, Federal Court of Canada, and in the courts of Nova Scotia, Manitoba, Alberta and B.C. The Judicial Council takes the lead in convening meetings of these officers when possible, but their travel budgets are limited.

Another in the level of outreach activity might be termed “judicial aptitude.” Not every judge has the interest, confidence or flair for public and media engagement. The skills required are not necessarily the same ones required for judicial duties. Working with the Judicial Council, the National Judicial Institute last month convened a one-day pilot session to train judges in media interviews, public speaking and public presentations, which may translate into a continuing program open to judges across Canada.

And finally, an important factor in the promotion of judicial outreach is surely the value of partnerships, as illustrated particularly by the work being done in B.C. and Ontario. A good current example of partnership is a workshop program on the relationship between the media and the justice system which will be piloted in Prince Edward Island next month. Two of the speakers you will hear from tomorrow—Dean Jobb of the Halifax Herald and Stephen Bindman of the Department of Justice—are key players in developing the program, which involves the CIAJ, the Judicial Council, the Canadian Association of Journalists, the Canadian Bar Association and others. Another example is the video and information kit on judicial independence prepared by the CBA and the Canadian Judges Forum and available in quantity for individuals speaking publicly on the judicial system, the law and the courts.

There is not yet much evidence of collaboration between the courts and the legal education networks across Canada—surely a fertile ground for cooperation.

To sum up: the challenge of judicial outreach and public involvement is being recognized. Significant barriers exist. Some good work is being done. There is potential for a lot more.
Setting the Agenda of Courts and Tribunals Through Funding Decisions

James MacPherson*

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Justice is one of the most important subject areas in a democratic and civilized society. If you asked Canadians to close their eyes and identify areas in which they want Government to be involved, and indeed to do a good job, I suspect that their list would be health, education, social safety net, and justice.

The importance that the public attaches to justice is nothing new. It is as old as Confederation, as reflected in the Constitution Act, 1867 which assigned jurisdiction over various justice topics to both levels of Government in sections 91(27), 91(28) and 92(14).

Justice depends on access. There is a crucial role, for both Governments and the courts, in ensuring access to justice. The topic that this panel has been invited to address is Setting the Agenda of Courts and Tribunals Through Funding Decisions. Funding means, of course, money provided by Governments. So I will speak principally about Governments, funding and access, all from the perspective of a judge—six years as a trial judge and two and a half years as an appellate judge. However, I also want to speak, albeit more briefly, about the role of courts and tribunals in promoting access to justice.

I. GOVERNMENTS AND ACCESS

There is a serious problem in Canada today with respect to access to courts. The problem has two dimensions—fewer cases and more self-represented litigants.
The fact of fewer cases can be dramatically illustrated by Ontario’s recent experience with respect to civil litigation. In 1992, there were approximately 43,000 new filings of civil cases.\(^1\) By 2000, only about 20,000 new civil cases were initiated. There was, it can be seen, approximately 55 to 60 per cent decrease in civil cases in less than a decade.

Is this necessarily a bad development? Perhaps not. Courts are places of contention, court procedures are difficult, and the results of court decisions usually create absolute winners and absolute losers. In 1906, Dean Roscoe Pound wrote:

“The idea that procedure must of necessity be wholly contentious disfigures our judicial administration at every turn […] The effects of our exaggerated contentious procedures is not only to irritate parties, witnesses and jurors in particular cases, but to give to the whole community a false notion of the purpose and end of law.”

The result of concerns like this in recent years has been a rapid growth of interest in and resort to mediation, alternate dispute resolution and comprehensive legislative responses like no-fault automobile insurance. Accordingly, some of the decline in civil cases has been the result, arguably, of beneficial diversification and creativity in the administration of justice.

Moreover, Governments have taken important initiatives in several areas to encourage access. Let me mention four initiatives.

First, and probably most importantly, the *Canadian Charter of Rights and Freedoms* has transformed the work of courts and tribunals. The important values set out in the *Charter* and the overarching (that is to say constitutional) protection for those values have created a strong desire to bring rights issues before courts and tribunals.

Second, Governments have developed targeted funding programs to encourage access. For example, the federal Government has developed a court challenges program and an aboriginal issues fund which deserve to be commended.

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\(^1\) I exclude motor vehicle civil cases because legislative changes in this area on several occasions in the 1990s had a significant impact on these cases.
Third, Governments have enacted legislation to encourage access through creative means. A good example is class proceedings laws in several jurisdictions.

Fourth, in the criminal domain, I have often been impressed with the position taken by Crown counsel in criminal cases involving self-represented accused persons. In spite of serious financial constraints, they will not dispute the need for Government funding of counsel if the nature of the criminal case requires professional representation.

So, to summarize, the dramatic decline in cases is not all bad (some of those cases have simply moved to other useful fora) and Governments have often been faithful to their constitutional mandate to administer a good, even an excellent, justice system.

However, the reality today is that many people, especially low and middle income people, cannot come to court at all. The reason—no money. And many people who do come to court must represent themselves, even in, sadly, criminal cases. The reason—no money. This is wrong. It is regression, not progress.

Is there a Government role in this regression? In my view, there is. Governments have failed in the area of legal aid funding. The average Government funding for legal aid dropped about 30% in the 1990s. Applications for legal aid, many from deserving people, decreased by a corresponding amount.

Governments must always strive to strike a proper balance between the value of equality and efficiency. Canadians want equality. That is why we have medicare and a public school system. That is why, in the justice domain, access is so important. However, equality in the health, education and justice domains is expensive. Canadians also want efficiency in the delivery of basic services.

In the justice system, efficiency has won the debate with respect to legal aid funding. The results are fewer people in the court system and decreased coverage for those who try to resort to the courts. From the perspective of a judge with eight years experience at both the trial and appellate levels, both of these developments are wrong.

Can Governments solve these problems? In my view, they can, in part by focussing more strongly on different delivery systems for legal aid. The dominant, although not exclusive, Canadian model is judicare with its emphasis on private lawyers. This model promotes access and
emphasizes the value of equality—the person who obtains legal aid can choose the lawyer of his or her choice. The disadvantage of this model, however, is its high cost.

Several Canadian jurisdictions, in an attempt to strike a better balance between access and cost, have moved in the direction of community clinics and staff lawyers. In my view, this is a very good development. My experience indicates that community clinics are staffed by thoroughly competent, experienced and dedicated lawyers (the Parkdale Legal Services Clinic in Toronto is a prime example). Moreover, the fact that these clinics are community-based gives them a visibility that promotes access. Finally, there is no question that this model is less expensive than the private lawyer model.

In a comprehensive review of legal aid in Ontario, the *Ontario Legal Aid Review* (1997), Professor John McCamus recommended:

“9. The plan (OLAP) should seek to narrow the gap between full representation and no representation through provision of a much greater variety of legal services in order to assist a broader range of potential clients by invoking a wide spectrum of delivery mechanisms, including, for example, public legal education, duty counsel, supervised paralegals, staff officers, community legal clinics, judicare, and block contracting.”

I agree with this recommendation. I hope that Governments will pay heed to it as they explore ways to restore a legal aid system that has badly deteriorated throughout Canada in recent years.

II. COURTS, TRIBUNALS AND ACCESS

Canadian courts and tribunals have promoted access in many important ways. Their substantive interpretation of the *Charter* has opened the doors to many disadvantaged individuals and groups. Liberal definitions of standing and intervenor have also allowed more people to raise more issues before the courts. As well, courts will order that counsel be appointed for some litigants: see s. 684 of the *Criminal Code* and *New Brunswick (Minister of Health and Community Services) v. G. (J.),* [1999] 3 S.C.R. 46 and *Winters v. Legal Services Society,* [1999] 3 S.C.R. 160.
In spite of these good developments, courts and tribunals could do more to promote access. Let me mention three possibilities.

First, in the category of non-economic access, courts need to do better with respect to jury charges in criminal cases. In 2001, criminal jury charges are long, complicated and unclear. Some jury charges are even lasting for days, not hours! Juries must find them incomprehensible. Courts should strive to develop and deliver brief and clear model jury charges, perhaps with typed portions being distributed to the jury.

Second, courts and tribunals need to recognize that access is not just entry into the system; it is also progress through the system. In my view, the progress of many cases through the courts, both trial and appeal, and through tribunals is remarkably slow. We need to emphasize more such devices as case management, assignment of a single judge to a case, and simplified procedures. In *Blencoe v. B. C. (Human Rights Commission)*, [2000] 2 S.C.R. 307 at 384, Justice Lebel said:

“Unnecessary delay in judicial and administrative proceedings has long been an enemy of a free and fair society. At some point, it is a foe that has plagued the life of almost all courts and administrative tribunals. It’s a problem that must be brought under control if we are to maintain an effective system of justice, worthy of the confidence of Canadians.”

We need to be vigilant and creative to ensure that this description does not apply to the courts and tribunals on which we serve.

Third, courts and tribunals need to recognize that access is not just entry into the system; it is also a prompt exit from the system. I am constantly amazed at how long some judges and tribunals take to make their decisions after the hearing has concluded. The Canadian Judicial Council has a six-month guideline for judgments; it is routinely ignored. As a judge, I see decisions of courts and tribunals that were reserved for year(s), not months!

This is wrong. It is very unfair to litigants who suffer the psychological stress of waiting for a result. It is also surprising, given that judges and tribunal members must have worked to all manner of deadlines in their pre-judicial careers. Finally, it is bad for the reputation of the justice system. “Slow justice” is, in my view, an oxymoron.
Funding Public Interest Litigation: Should Judges be Funders?

Arne Peltz*
Beverly Froese

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A fair and impartial justice system is one of the hallmarks of democracy. We know and accept that justice must not only be done, it must be seen to be done. Inherent in that concept is accessibility to the courts by all citizens, regardless of their personal or financial circumstances. A justice system available to only those who can afford it loses its claim to legitimacy.

In addition, the elaborate rules and procedures associated with our increasingly complex and costly legal system have often rendered the average layperson unable to navigate these unfamiliar waters. Public interest litigation, in particular, is virtually impossible for unrepresented plaintiffs to launch, and insufficient funding for legal counsel is one of the most formidable barriers to overcome.

The sacred promise of equal access to justice in Canada is not being fulfilled. Legal aid in particular is in a state of crisis across the country. The limited purpose of this paper is to consider practical options which could ease the financial burden placed on potential public interest litigants, with a view to revitalizing the sacred promise in this sphere of the law. We argue that judges must move to the forefront and play an active role in ensuring fair hearings. Judges are the “gatekeepers” to our justice system and as such have the authority, as well as the obligation, to ensure that the courthouse door remains open.

In order to fully appreciate what it is about public interest litigation that necessitates special consideration, one must first understand its purpose and unique characteristics. What follows is a brief analysis of the evolution of public interest litigation to its current status.
I. PUBLIC INTEREST LITIGATION AND STANDING

Public interest litigation is a relatively new area of the law. Indeed one could say it is still in its infancy. It is only in the past two decades that it has become firmly entrenched in our common law.

Public interest litigation is unique in that it does not reflect the traditional structure of our adversarial system wherein two private parties seek a resolution to their dispute. Rather, it is an action commenced by a plaintiff, usually against the state, not for the protection of personal interests or compensation for the loss thereof, but for public benefit. Most often it involves challenges to the validity of either federal or provincial legislation, or government action. Frequently the relief sought is declaratory in nature, as opposed to compensatory. Its purpose is to clarify existing rights and benefits to which Canadians are entitled, or, alternatively, to provide a check on state power.

While any potential plaintiff may initially file suit, prior to the continuation of the action, standing must be granted by the court (in the absence of a direct or personal interest). Over the past 20 years the test to grant public interest standing has been refined and is now well established. Pursuant to several Supreme Court of Canada decisions, public interest standing may be granted at the discretion of the court if the following criteria have been met:

a. There is a serious issue as to the validity of the impugned legislation or action;

b. The plaintiff has a genuine interest in the particular issue;

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c. There is no other reasonable or effective means of bringing the action before the courts.

The willingness of courts to grant public interest standing to a plaintiff has changed over the years. At times the test has been strictly applied and at times it has been given a more liberal interpretation. Prior to “the Trilogy” of Thorson, McNeil and Borowski, courts were reluctant to grant public interest standing for fear that “mere busybodies” would be encouraged to commence trivial proceedings and thus consume scarce judicial resources. For instance, in Smith v. Ontario (Attorney General),\(^2\) the Supreme Court denied the plaintiff standing on the basis that he had not in fact actually violated the provisions of The Ontario Temperance Act and thus subject to prosecution. As such he had not established that he was “exceptionally prejudiced”. It was suggested that only in a “situation of oppression, by reason of drastic and arbitrary legislation” would standing even be considered, let alone granted. In the Supreme Court’s opinion, to hold otherwise would open the “floodgates” to “virtually every resident in Ontario”, leading to “grave inconvenience” and public disorder.

Fortunately this narrow doctrine was firmly rejected in Thorson when Laskin J. specifically noted that courts are “quite able to control declaratory actions, both through discretion, by directing a stay, and by imposing costs”.\(^3\) In dismissing the “floodgate” argument, he considered it “alarming” if legislative power were protected from challenge by such a restrictive approach. In his view, compliance with the Constitution was more important than strict adherence to the standing test.

A further milestone in the development of public interest litigation was Finlay. Until this point in its history, public interest standing had been limited to situations where the constitutional validity of particular legislation was in question. Finlay broadened the scope of public interest standing to including issues arising in an administrative law context. In keeping with the principles enunciated in the Trilogy, it was held that “the

\(^2\) [1924] S.C.R. 331, where the plaintiff, a resident of Toronto, challenged the provisions of The Ontario Temperance Act 6 Geo. V, c. 50, which prohibited the importation of liquor into Ontario after he unsuccessfully attempted to order whiskey and beer from a dealer in Montreal.

\(^3\) *Thorson*, supra note 1 at para. 12.
consideration of serious constitutional or other public law ... is a proper use of court resources.”

With the decision in Finlay, it appeared that public interest litigation would become a burgeoning area of the common law. However, some have said that the Supreme Court reversed its earlier position and returned to a conservative approach in Canadian Council of Churches v. Canada (Minister of Employment and Immigration). In a striking “change in attitude”, the spectre of the “mere busybody” was resurrected after it had been laid to rest only 10 years earlier in the Trilogy. It was disheartening that despite the Council’s genuine interest in refugee protection, standing was denied. The Council had a history of involvement in refugee protection issues and had participated in the past in the development of refugee policy. The Council was clearly not a “mere busybody”, yet the Supreme Court noted an individual refugee claimant could have launched this challenge instead.

Unlike in the Trilogy, the third step of the standing test was applied in a very narrow fashion and limited to situations in which “no directly affected individual might be expected to initiate litigation.” The argument put forward by the Council that it was in a better position financially and otherwise to institute the proceedings, as opposed to an individual claimant facing possible deportation, was not accepted.

The following quote illustrates the resurgence of the “floodgate” fear and the narrowing of the previously liberal principles of public interest standing:

However, I would stress that recognition of the need to grant public interest standing in some circumstances does not amount to a blanket approval to grant standing to all who wish to litigate an

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4 Finlay, supra note 1 [emphasis added].
7 Canadian Council, supra note 5 at para. 34 [emphasis added].
issue. It is essential that a balance be struck between ensuring access to the courts and preserving judicial resources. It would be disastrous if the courts were allowed to become hopelessly burdened as a result of the unnecessary proliferation of marginal or redundant suits brought by a well-meaning organization pursuing their own particular cases certain in the knowledge that their cause is all important. It would be detrimental, if not devastating, to our system of justice and unfair to private litigants.8

Just a short time later the Supreme Court reiterated these sentiments in Hy and Zel’s Inc. v. Ontario (Attorney General); Paul Magder Furs Ltd. v. Ontario (Attorney General),9 when it denied the applicants standing to challenge certain provisions of Ontario’s Retail Business Holidays Act10 which restricted holiday shopping. In the opinion of the Supreme Court, too liberal an interpretation of the standing test could lead to its abuse.11

Subsequent to Canadian Council and Hy and Zel’s, commentators, in a “dismal forecast,” predicted that the “golden age” of liberal public interest standing in Canada was coming to an end.12 The trend which emerged from these two cases was denounced and the “floodgate” argument soundly hailed as unreasonable and unrealistic, as follows:

[w]hen the “floodates” of litigation are opened to some new class of controversy [...] it is notable how rarely one can discern the flood that the dissenters feared. The plaintiff [...] must feel strongly enough about the issues in question to pay the bills [...] The idle and whimsical plaintiff, a dilettante who litigates for a

8 Ibid., at para. 35.
10 R.S.O. 1980, c. 453.
11 For a more detailed examination of this case, see P. Bowal & M. Cranwell, “Case Comment: Persona Non Grata: The Supreme Court of Canada Further Constrains Public Interest Standing” (1994) 33 Alta. L. Rev. 192.
12 Ross, supra note 6 at para. 46.
lark, is a spectre which haunts the legal literature, not the courtroom.\textsuperscript{13}

Fortunately the chill which immediately followed Canadian Council and Hy and Zel’s did not continue. The critics’ fears were assuaged. The public interest standing doctrine is now alive and flourishing in Canada, particularly in comparison to other common law jurisdictions. A wide variety of cases have reached the courts and public interest standing has been granted to individuals and organizations across Canada.\textsuperscript{14} One lingering negative effect from Council of Churches, however, is that it did encourage defendants to resist standing, which they regularly do, making cases even more difficult and expensive to conduct.

A very recent example out of the Public Interest Law Centre in Winnipeg illustrates the inroads which have been made into previously uncharted territory. In Harris v. Canada,\textsuperscript{15} standing was granted for the first time to a third party seeking to challenge a ruling made by Revenue Canada in favour of another taxpayer. Mr. Harris filed his suit based on the Auditor General’s Report released in 1996 which questioned the appropriateness of an advance tax ruling which had the effect of allowing billions of dollars to escape Canada tax-free. Mr. Harris was afforded...

\textsuperscript{13} Ibid., at para. 17, quoting K.E. Scott, “Standing in the Supreme Court – A Functional Analysis” (1973) 86 Harv. L. Rev. 645 at 673-674.

\textsuperscript{14} Recent examples include Woodworkers for Fair Forest Policy Society v. British Columbia (Ministry of Forests), [2000] B.C.J. No 2180, online: QL (BCJ), where the British Columbia Supreme Court granted standing to the applicant to challenge a decision made by the British Columbia Minister of Forests and the Chief Forester to grant a tree farm licence to the respondent, Canadian Forest Products Ltd.; Bury v. Saskatchewan Government Insurance, (1990) 75 D.L.R. (4th) 449, where the Saskatchewan Court of Appeal affirmed the standing granted to the plaintiffs to seek a declaration that the proposed disposition by Saskatchewan General Insurance of its general insurance business was ultra vires its governing legislation; Canadian AIDS Society v. Ontario, (1995) 25 O.R. (3d) 388 (Ont. Gen. Div.), where standing was granted to the applicant to challenge reporting requirements regarding a donor’s positive HIV status on the basis that it violated the Charter; Cameron v. Nova Scotia (Attorney General), (1999) 172 N.S.R. (2d) 227 (S.C.), where standing was granted to a couple who had been denied reimbursement for the cost of \textit{in vitro} fertilization from their Nova Scotia Health Care Plan to seek a declaration that such services were not insured services under provincial legislation; and Prince Edward Island Nurses Union v. Prince Edward Island (Lieutenant Governor in Council), (1995) 126 Nfld. & P.E.I.R. 345, (P.E.I.S.C.), where standing was granted to the applicants to challenge the validity of a controversial Public Sector Pay Reduction Act, S.P.E.I. 1994, c. 51.

\textsuperscript{15} [2000] 4 F.C. 37 [hereinafter Harris].
public interest standing on behalf of all Canadian taxpayers (except of course of the taxpayer who reaped the benefit of the ruling).

What is particularly significant about *Harris* is that standing was granted despite valid privacy and confidentiality issues raised by the Crown on behalf of the affected taxpayer. In the normal course, information regarding the identity and financial circumstances of all taxpayers must be kept strictly confidential so as to maintain privacy. In this case, however, the identity of the taxpayer was not the issue, but rather government accountability, or in essence the lack thereof, and whether or not preferential treatment was given to this particular taxpayer.

Regardless of the outcome, *Harris* is a case of national importance in that it has established a precedent regarding accountability for decisions made by government departments which affect not only the parties involved, but all Canadians. For instance, the loss of millions of dollars in tax revenue translates into decreased funding available for social programs or health care. Further, allegations of preferential treatment in favour of certain wealthy individuals or families erodes the legitimacy of our tax system. It is crucial that the public perceive the collection of income tax to be a fair process across the board.

*Harris* is also an example of how public interest litigation can serve as an effective method of bringing to light excessive or unlawful government action. Unfortunately, despite the progress this case and others like it have made in the development of the law, there is a danger that public interest cases are beyond the reach of most potential litigants. Without adequate funding, all the steps forward will be in vain. As one commentator noted, “liberalized standing rules address only part of the problem facing potential public interest litigants. Costs, the most formidable barrier to participation, remain a powerful disincentive.”

The expenses associated with public interest litigation include not only the actual start-up fees and those incurred during the litigation process itself, but also the very real threat of an adverse cost award at the end of the day should the plaintiff be unsuccessful. Very few plaintiffs are able to undertake such a risk personally. Unless steps are taken to rectify this dire predicament facing potential litigants, access to the justice

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system will be restricted to those with either very deep pockets or those who are able to access an alternative source of funding.

There are possible options to address deficiencies in funding and the balance of this paper explores methods available to ensure the liberal principles of public interest standing remain meaningful. Tentative steps have been taken in some areas, in particular with respect to cost awards, but the time has come for a great leap forward.

II. FUNDRAISING

The most commonly heard response to the “problem” of funding public interest litigation is that people who care about the issue in question should simply raise the necessary funds from the public at large. Thus, fundraising has offset some of the litigation costs incurred in the Harris case. This case attracted enormous media attention and public sentiment overwhelmingly favours Mr. Harris. Contributions to what is known as “Project Loophole” have been received from both individuals and corporations across Canada.

In reality, however, these donations will cover only a fraction of the actual costs. This case wound its way through various levels of the Federal Court for four years before standing was ultimately granted to Mr. Harris to proceed, and is now only at the point of trial. Countless motions and appeals have been filed and argued by both sides, each of which requires extensive preparation. The Public Interest Law Centre has finite and modest financial resources at its disposal and as a result was required to obtain the assistance of a private bar lawyer on a pro bono basis for the trial. Even with the monies raised through “Project Loophole”, the parties are still on an unequal playing field in terms of funding and resources.

The imbalance becomes even greater in cases which garner little media attention or public support. The Public Interest Law Centre has represented members of the most disadvantaged and overlooked groups in our society and fundraising in these circumstances is simply not a viable option. For example, there would be few contributors to a prisoner voting rights fund, to cite one issue which the Centre has vigorously pursued for the past 15 years.¹⁷

¹⁷ Sauve v. Canada (Chief Electoral Officer), [2000] 2 F.C. 117. The plaintiffs in this case include current and former federal penitentiary inmates and a group representing Aboriginal inmates. At issue is the validity of specific sections of the Canada
Consequently, while private funding is certainly appreciated and provides a means of participation in the litigation process by the public at large, it is not realistic to rely upon it to sustain a public interest lawsuit through to its completion.

III. TEST CASE PROGRAMS

Non-profit organizations may provide financial relief to public interest litigants in certain circumstances. The Court Challenges Program of Canada (“Court Challenges”)\(^\text{18}\) receives $2.75 million annually from the Department of Canadian Heritage with which to fund selected test cases. Its mandate is to advance and protect equality rights under federal legislation, or language rights under either federal or provincial legislation by providing financial assistance for test cases of national significance.\(^\text{19}\)

Assistance may be given to individuals who are members of a disadvantaged group or to organizations which act on their behalf. As noted above, in order to qualify the applicant must be commencing a “test case” in the sense that the matter is not already before the courts or has already been decided. Several additional factors are also considered at the time an application for funding is received, such as the impact the case may have on the individual plaintiff, how the case will advance the law in general, and the seriousness of the issue.

Should an application for funding be approved, Court Challenges provides funding to conduct initial research and, in addition, the cost of the litigation itself up to prescribed limits. This is vital to public interest cases where expert evidence, which is extremely costly, is often necessary. In 1999-2000, the acceptance rate of applications for funding was 72.3 % and the most common reasons cited in refusing an application were that the matter was not a test case or fell under provincial domain.\(^\text{20}\)

\(\text{Elections Act, S.C. 2000, c. 9, which deny voting rights in federal elections to those inmates serving sentences of more than two years. This case is currently pending before the Supreme Court of Canada and will be heard in December, 2001.}\)

\(\text{Located at 616 - 294 Portage Avenue, Winnipeg, Manitoba, R3C 0B9. Telephone: (204) 942-0022; online: Court Challenges Program of Canada http://www.ccppja.ca.}\)

\(\text{Court Challenges Program of Canada, Annual Report 1999-2000 at 7.}\)

\(\text{Ibid., at 48 and 50.}\)
In the 1999-2000 fiscal year, Court Challenges participated in a number of significant test cases and played a vital role in ensuring access to the justice system for those who might otherwise have been excluded.\textsuperscript{21}

Unfortunately, however, Court Challenges is restricted in its scope, as it is limited to funding challenges only to federal legislation under section 15 of the \textit{Charter}, or federal and provincial legislation regarding language rights. As a result, it is only a partial solution to the problem of inadequate funding.

\textbf{IV. State-Funded Counsel}

As our legal system becomes increasingly complicated, it is often difficult, if not impossible, for an unrepresented plaintiff to participate effectively. As such, those individuals or groups unable to afford legal counsel or to commence an action would be denied access to the courts despite a valid claim. In the event an unrepresented public interest litigant forged ahead nonetheless, the fairness of the proceedings would certainly be suspect, given the disparity between the parties in terms of available resources.

The necessity for trial fairness has long been recognized in the criminal law context due to the possibility of incarceration, the ultimate restriction on liberty by the state. It is accepted by the courts that in situations where an accused cannot afford legal representation, there exists the possibility that the trial will be rendered unfair.

\begin{flushleft}
\textsuperscript{21} See Corbiere \textit{v. Canada (Minister of Indian and Northern Affairs)}, [1999] 2 S.C.R. 203, where certain provisions of the \textit{Indian Act}, R.S.C. 1985, c. I-5, which prohibited Band members that reside off-reserve from participating in Band elections, were challenged. On May 20, 1999 the Supreme Court rendered its decision in favour of the non-resident Band members on the basis that the prohibition violated equality rights under s. 15 of the \textit{Charter}. See also Sauve, supra note 16. In \textit{R. v. Mills}, [1999] S.C.R. 668, the Supreme Court held upheld the provisions of Bill C-46, which set out the process to be followed by a judge regarding access by an accused to a complainant’s private records in a sexual assault case. The Supreme Court held that Bill C-46 did not violate an accused’s right to a fair trial under ss. 7 and 11(d) of the \textit{Charter} and balanced those rights against complainants’ rights to equality and privacy.
\end{flushleft}
To ensure the trial is fair in such a scenario, a remedy has been fashioned by the courts pursuant to section 24(1) of the Charter.\(^{22}\) If it can be shown by the accused that an unfair trial will result from lack of representation, the charges will be stayed unless and until defence counsel is appointed and paid for by the state. Thus, if the Crown is intent upon pursuing prosecution of the accused, it must ensure that funds are made available for this purpose.\(^ {23}\)

For an accused to benefit from this remedy, he/she must meet two requirements. Firstly, it must be shown that the accused is unable to afford counsel and has exhausted all possibilities of obtaining legal aid. Secondly, the accused must also show that the issues to be raised at trial are sufficiently complex such that lack of legal representation will result in an unfair trial.

An example of the procedure to be followed by the courts to determine whether a stay is appropriate in the circumstances can be found in the recent decision from the Manitoba Court of Appeal in *R. v. Drury*.\(^ {24}\) Both Mr. Drury and the co-accused, Mr. Hazard, had been charged with a number of serious offences and represented themselves at trial after their preliminary motion for state-funded counsel was denied. Both were convicted and each sentenced to a total of five years’ imprisonment. On appeal to the Manitoba Court of Appeal, Steel J.A. commenced her analysis of the issue by reiterating the purpose of a stay under section 24(1) of the Charter, namely to “guarantee a fair trial in serious and complex cases where the accused is impecunious and has been refused assistance by Legal Aid.”\(^ {25}\)

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22 Section 24(1) of the Charter states: “Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.”

23 These types of cases are commonly referred to as “Rowbotham Applications” after the leading case of *R. v. Rowbotham*, (1988) 41 C.C.C. (3d) 1 (Ont. C.A.) [hereinafter *Rowbotham* cited to C.C.C.].


The financial circumstances of both Messrs. Drury and Hazard were reviewed, together with details pertaining to their attempts to obtain legal counsel. In addition, evidence was presented by five senior criminal attorneys in Manitoba as to the estimated costs likely to be expended for a trial of this particular length and complexity. The Deputy Director of Legal Aid Manitoba also testified and confirmed that its current tariff was insufficient to provide adequate compensation to any defence counsel willing to step forward and represent either accused.

It this case it was ultimately determined that both accused had sufficient assets with which to retain counsel on their own. However, had that not been the case, the Court of Appeal was prepared to grant a stay.

Based on the principles gleaned from the jurisprudence in this area of the law, a valid argument can be made that a similar remedy should be made available to public interest litigants. While the threat of incarceration is not an issue in civil cases, the consequences of the state action or legislation which arise in public interest cases can be equally devastating. The impacts may reach far beyond the affected individual to the broader public interest. It is a logical step from the protection of the rights of an accused in a criminal context to the protection of the rights of all Canadians from unlawful state action.

Support for such an assertion can be found in several recent cases, two of which will be discussed in detail below.

Firstly, in R. v. Dedam,26 a stay was granted pursuant to section 24(1) of the Charter even though the accused did not face incarceration upon conviction. Mr. Dedam, a resident of Burnt Church, New Brunswick, was charged with obstructing a fishery officer, an offence under the federal Fisheries Act.27 It was his intention to raise a defence at his trial that he was entitled to fish on the basis of his aboriginal and treaty rights.

McCarroll J. undertook a typical “Rowbotham Application” approach and heard evidence from Mr. Dedam that he did not have the financial resources with which to retain counsel. Just as in the Drury case noted above, experienced lawyers testified as to the estimated costs associated with the complex defence Mr. Dedam intended to raise. As

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well, the Director of Legal Aid New Brunswick confirmed that due to the fact Mr. Dedam did not face a prison sentence, he did not meet its eligibility requirements.

What is significant about this case is that the threat of incarceration was not the determinative factor. Rather, the focus was directed toward the complexity of the proposed defence and its possible implications, not only upon Mr. Dedam, but on others in his situation. In ultimately concluding that a stay was the appropriate remedy, McCarroll J. stated:

I am satisfied on the balance of probabilities that this case involves extremely complex legal issues... [T]he possibility of a potential jail sentence is not the only indicator of seriousness... [T]he issue the charge deals with is of extreme importance, and I would go on to say it’s of national importance... Simply looking at the penalty attached to this charge does not do justice, in my opinion, to the reality of this whole situation... [T]he outcome in this case could well affect hundreds of native fishers who strongly and fervently believe in their right to fish lobster. The determination of this issue, in my opinion, is indeed serious, not just to the person charged, but to the governments of both the province and the country as well... [T]he evidence to be presented by the defence is of such a complex and time-consuming nature requiring months of preparation and organization that it would be unfair to allow this trial to proceed without the appointment of state-funded counsel...

Secondly, in New Brunswick (Minister of Health and Community Services) v. G.(J.) [J.G.], the Supreme Court extended this concept into the civil law sphere when it ruled that indigent parents have a constitutional right to state-funded counsel when facing the loss of custody of their children to the state. Their rationale for such a finding was that “[w]hen government action triggers a hearing in which interests protected by section 7 of the Canadian Charter of Rights and Freedoms are engaged, it is under an obligation to do whatever is required to ensure that the hearing be fair.” Relevant factors which were taken into

28  Dedam, supra note 26 at para. 27.
30  Ibid., at para. 2.
consideration included the interests at stake, the complexity of the proceedings and the capacities of the parents to participate meaningfully in the process.

Of paramount importance in G.(J.) is the affirmation by the Supreme Court that “security of the person”, as guaranteed by section 7 of the Charter, spans beyond physical restraint on liberty and encompasses “psychological integrity” as well. A caution was made, however, that such psychological integrity must be greater than the ordinary stresses and anxieties arising out of everyday life, but certainly does not require the individual to “rise to the level of nervous shock or psychiatric illness”.

There is no doubt that apprehension of a child by a government agency is a “gross intrusion into a private and intimate sphere” by the state. It was also recognized by the Supreme Court that an “individual’s status as a parent is often fundamental to personal identity” and acknowledged that the loss of custody of a child has a devastating impact on the parent. As a result of the consequences to both the parent and the child, it was considered crucial that a fair hearing be conducted in order to determine the best interests of that child. To that end, meaningful participation by the parent was held to be an essential factor.

The Supreme Court made it clear, however, that legal representation of the parent may not be a prerequisite for a fair hearing in all situations, but may be appropriate in circumstances where the proceedings are complex or the parent is unable to effectively participate. It was specifically mentioned that meaningful participation on the part of the parent “goes beyond mere ability to understand the case and communicate.”

In her judgment, L’Heureux-Dubé J. stated that section 7 cases should be interpreted “through the lens of ss. 15 and 28,” particularly with respect to child protection proceedings which frequently affect parents who are members of disadvantaged groups, particularly visible minorities, Aboriginal people and the disabled.

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31 Ibid., at para. 58-60.
32 Ibid., at para. 61.
33 Ibid., at para. 83.
34 Ibid., at para. 114-115.
The remedy ultimately awarded in favour of the parent in \emph{G. (J.)} was different from that of a stay granted under section 24(1), as that was obviously not an option in those particular circumstances. Instead, the Province of New Brunswick was ordered to provide state-funded counsel in accordance with either the tariff of Legal Aid New Brunswick or the tariff applicable to non-governmental lawyers hired by the Province in similar proceedings.

It is interesting to note that a variation of this remedy has been awarded by the courts in situations where the Legal Aid tariff would be insufficient to adequately compensate counsel.\footnote{Such situations are commonly referred to as “Fisher Applications”, after the case of \emph{R. v. Fisher}, [1997] S.J No 530, online: QL (SJ), wherein the Saskatchewan Court of Queen’s Bench granted Mr. Fisher’s request to have Brian Beresh appointed to represent him. Due to the unique circumstances of this case, the Court appointed Mr. Beresh to represent Mr. Fisher despite the fact that he was not resident in Saskatchewan. Further, the Court ordered an hourly rate to Mr. Beresh of $150.00, well above the Legal Aid tariff. See also \emph{R. v. L.C.W.}, (2000) 191 Sask. R. 69, wherein the Saskatchewan Court of Queen’s Bench appointed two lawyers to act on the accused’s behalf regarding an application to declare him a dangerous offender. In that case, the court ordered that counsel refer their accounts to the Registrar for taxation at the conclusion of the trial. See also \emph{R. v. Fok}, (2000) 275 A.R. 381 where the Alberta Court of Queen’s Bench granted the accused’s request to have two counsel appointed to represent him on his “Fisher Application.” The Court also ordered “reasonable” fees and disbursements to be paid by the State to the accused’s counsel. In addition, the Court suggested that an agreement be reached between the Crown and defence counsel as to a reasonable hourly rate, failing which the Court would hear further argument and decide.} For instance, in \emph{R. v. Chan},\footnote{\emph{Ibid.}, at para. 65 where the Alberta Court of Queen’s Bench awarded an hourly rate in accordance with the Test Case Funding Contribution Agreement and ordered state-funded counsel at the rates of $150.00 per hour for each senior lawyer, $100.00 per hour for each junior lawyer, and $50.00 per hour for each articling student.} the Alberta Court of Queen’s Bench ordered state-funded counsel at rates in excess of the Legal Aid tariff due to the nature of the prosecution. This was an extreme complex case wherein 35 individuals charged with offences relating to participation in a criminal organization were to be tried together. The commitment required on the part of defence counsel was enormous and as such the court recognized that an increased hourly rate than that afforded by Legal Aid was warranted.\footnote{\emph{Ibid.}, at para. 65 where the Alberta Court of Queen’s Bench awarded an hourly rate in accordance with the Test Case Funding Contribution Agreement and ordered state-funded counsel at the rates of $150.00 per hour for each senior lawyer, $100.00 per hour for each junior lawyer, and $50.00 per hour for each articling student.}

From the above, it is clear that funding for public interest litigation would be a natural extension of the reasoning applied in these cases.
Issues of national or public importance are raised and the effects of the legislation or government action often violate the psychological integrity of the affected individual and others in the same situation. It would therefore be appropriate for courts to order state-funded counsel for the same reasons they have done so in other realms of the law. As will be noted below, Legal Aid plans in Canada are unable to assist public interest litigants in any significant way, given the crisis in maintaining minimal legal representation for ordinary domestic and criminal law matters.

A recent example of the new approach we advocate is Spracklin v. Kichton, wherein the plaintiff commenced an action to challenge the definition of “spouse” in Alberta’s Matrimonial Property Act. In a progressive decision, Watson J. ordered the Attorney General of Alberta to provide state-funded counsel in relation to the plaintiff’s constitutional challenge. At paragraph 81, Watson J. set out the reasons for his ruling, as follows:

a. Ms. Spracklin is an individual person, not a corporation, association, representative or class action plaintiff;

b. She is not financially able to finance the Charter challenge;

c. She is not legally trained and as such not capable of advancing her challenge without legal representation;

d. Her Charter challenge is not frivolous nor “an experiment”;  

e. The issue raises matters of importance to Canadians and to human dignity;

f. Her claim “is not an effort to run a lottery against state resources”;

g. The issue may not get adjudicated in light of the fact that others in Ms. Spracklin’s situation are likely in a similar financial position;

h. There is no court challenges program available in Alberta;

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i. Her challenge could proceed even if she were unrepresented, however the “negative consequences of that are plain”;

j. Ms. Spracklin would be afforded reasonable representation by competent counsel, not a “Cadillac” representation.\(^{40}\)

The Court also put forward a suggested approach to be taken by the parties in order to agree on a reasonable amount of compensation for legal counsel.

As will be explored in greater detail below in the section of this paper regarding cost awards, it is important to bear in mind that the discretionary remedies noted in the above cases were established by the courts in response to the obvious and inherent power imbalance between the state and the individual. The courts often remarked on their duty and obligation to ensure the unrepresented party receives a fair trial.\(^{41}\)

V. THE STATUS OF LEGAL AID IN CANADA

Legal Aid is “synonymous with access to justice” and an integral part of our justice system.\(^{42}\) However, its current status across Canada is precarious. What is needed is a fresh approach on the part of both levels of government and a shift “away from an emphasis on dollars toward a focus on a governmental responsibility for public legal services.”\(^{43}\) Legal Aid is one the most effective means of ensuring fairness in the system, however “fairness in battle cannot be achieved if only one party is armed.”\(^{44}\)

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\(^{40}\) For a further discussion of this decision, see the August 31, 2001 issue of “Lawyers Weekly”, vol. 21, No 16 at 2.

\(^{41}\) For example, in Rowbotham, supra note 23, the Ontario Court of Appeal, at p. 46, held that “the basic premise must be that the trial judge himself will do everything to make sure an unrepresented litigant receives a fair trial.” In R. v. Lewis, [1995] Y.J. No. 116 (Terr. Ct.), online: QL (YJ), the court noted that every court has the power to control its own process and that the principles of natural justice require a judge to ensure the accused receives a fair trial. In Dedam, supra note 26, the court noted at para. 27 that “[a] trial judge’s paramount obligation is to ensure that an accused receives a fair trial ... Justice must not only be done, but must be seen to be done.”

\(^{42}\) M. Buckley, “The Legal Aid Crisis: Time for Action”, a background paper prepared for the Canadian Bar Association in June, 2000, at 6.

\(^{43}\) Ibid., at 5.

\(^{44}\) Ibid., at 7.
A graphic example of the perilous situation facing Legal Aid occurred in Manitoba in a situation strikingly similar to that of the Chan case. In a test case of the federal government’s “anti-gang” legislation, 30 alleged members of the Manitoba Warriors were to be tried together in what would have been one of the most complicated and lengthy trials in Canadian history. Most of the accused were indigent and clearly met the eligibility guidelines to obtain Legal Aid counsel due to the serious nature of the allegations. However, providing Legal Aid counsel to all eligible accused individuals in this prosecution would have bankrupted the entire program.

As a result, negotiations were undertaken between the provincial government and Legal Aid Manitoba and an agreement was ultimately reached whereby additional funds would be set aside by the government in excess of Legal Aid’s annual budget. It was also agreed that the hourly rate to be paid to legal counsel for their services would be in excess of the Legal Aid tariff to ensure they were adequately compensated.

Even in the absence of situations such as the Manitoba Warriors case, funding for Legal Aid programs across Canada is insufficient to meet the needs of those requiring legal representation. The Canadian Bar Association has been actively lobbying the federal government for a significant increase in funding to address this dire predicament. In response, the federal government has allocated an additional $20 million in “bridge financing” for criminal and immigration/refugee matters.45

Unfortunately the federal government has not responded in kind regarding civil matters, including public interest litigation. Federal Justice Minister Anne McLellan recently indicated no additional funding will be provided for civil legal aid until a two-year study has been completed.46 As a result, no relief is in sight to increasing access to the justice system for public interest litigants through Legal Aid.

45 See the August 24, 2001 issue of “Lawyers Weekly”, vol. 12, No 15, at 23.
46 Ibid.
VI. THE COURT’S DISCRETIONARY AUTHORITY TO AWARD COSTS

A promising means of funding public interest litigation can be seen on the horizon. Two cases from the past several months have opened the door to the justice system for potential public interest litigants on the basis of their valuable contribution to the public benefit, one being the Spracklin case noted above and the other to be discussed in greater detail below. Unfortunately these are only glimpses of what has yet to become an accepted legal principle and this is an issue still being considered in a somewhat piecemeal fashion. What is required is a concerted effort on the part of lawyers and judges alike to ensure that favourable cost awards in public interest cases, regardless of the outcome, become a reality.

Traditionally costs are awarded to the successful party in order to encourage settlement without hindering access to the courts. In the usual course, “party and party” costs are awarded to the successful party based on a tariff which is calculated according to each particular step undertaken in the litigation process. On rare occasions, “solicitor and client” costs may be awarded which are on a higher scale and reflect the actual costs incurred. This type of cost award is punitive in nature and for the most part occurs in situations where there has been misconduct on the part of one of the parties or the lawyers.

The historical rationale for awarding costs to compensate the successful party does not, and should not, apply to public interest litigants. Financial compensation is not the plaintiff’s goal in these cases, but rather protection against unlawful government action. Therefore, judges must turn their minds away from conventional principles and towards recognition of the unique characteristics of public interest litigation. To do so would ensure that public interest litigants are afforded access to the justice system and rewarded for their efforts, even if they are unsuccessful at the end of the day.

One of the reasons why the law of costs has stalled in this context is because courts rarely give reasons when awarding costs and this issue is often overlooked on appeal. Hence, it is an area ripe for growth and development and judges have a vital role to play in that regard. What is also clearly needed is clarification and guidance from the courts as to

47 Friedlander, supra note 15 at para. 2.
when and how a public interest exception to the customary rule of costs should be implemented.

Several commentators have suggested possible options to consider, however to date there is no general consensus on what form this exception should take. In its “Report on Standing,” the Ontario Law Reform Commission (“OLRC”) proposed that the traditional “costs follow the event” rule should be deviated from in certain situations. More particularly, it recommended the following criteria be adopted when determining if a certain case should fall within a “public interest” exception:

a. The litigation must raise issues of importance beyond the immediate interests of the parties;

b. The plaintiff must have no personal, proprietary or pecuniary interest in the outcome, or if such an interest does exist, it clearly does not justify the litigation economically;

c. The litigation does not present issues which have previously been judicially determined against the same defendant;

d. The defendant must have a clearly superior capacity to bear the costs of the proceeding.48

Should a particular case satisfy the requirements of this four-fold test, the OLRC and other supporters recommend that a “one-way” costs regime be implemented such that costs would be awarded in favour of successful public interest litigants, but not against them if they lose.49 An alternative approach to the “one-way” rule has also been suggested and


entails the adoption of the American “no-way” cost rule wherein each party bears its own costs.50

The difficulty with both of these propositions is that while they protect a public interest litigant from an adverse cost award, they do not solve the problem of the prohibitive costs of the litigation itself should the plaintiff be unsuccessful. A more appropriate solution would be to create a public interest exception whereby a modified “one-way” rule would be adopted such that the plaintiff would be awarded costs regardless of the outcome on the basis of the importance of the issues raised.51

This solution is available and at the discretion of the courts. The importance of public interest litigation is in fact already recognized and codified in federal and provincial court rules.52 Just as with the remedy created by the courts in granting a stay pursuant to section 24(1) of the Charter, judges should also recognize the necessity for trial fairness and the disparity in available resources in public interest cases.

The following case is illustrative of the court’s inherent discretion to deviate from the traditional rules of costs in an appropriate case in order to ensure issues of national importance are heard.

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50 See Friedlander, supra note 16.
51 See Finlay, supra note 1 (decision on the merits, [1993] 1 S.C.R. 1080 at 1132-1133, awarding party and party costs to Mr. Finlay throughout, despite the Crown’s success on appeal; Schachter v. Canada, [1992] 2 S.C.R. 679 at 726, awarding solicitor and client costs where the plaintiff succeeded on his Charter claim but lost on remedy, the only issue appealed by the Crown; Dagg v. Canada (Minister of Finance), [1997] 2 S.C.R. 403 at 460-461, awarding costs to the unsuccessful appellant against the government under s. 53(2) of the Access to Information Act, R.S.C. 1985, c. A-1, which expressly authorized costs in favour of the losing applicant where an important new principle is raised under the litigation; public interest tribunal practice of awarding one-way costs was approved in Bell Canada v. Consumers Association of Canada, [1986] 1 S.C.R. 190.
52 Rule 400(3)(c) of the Federal Court Rules states that a court may consider “the importance and complexity of the issues” when exercising its discretion in awarding costs. This is also reflected in Manitoba’s Court of Queen’s Bench Rule 57.01(1) where it also states that the complexity of the proceedings and the importance of the issues are relevant factors in awarding costs.
In Rogers v. Ontario (Works, Administrator for the City of Greater Sudbury), the applicant sought interim relief pending the determination of her constitutional challenge of the Regulations pursuant to which her social assistance benefits had been suspended. She was seeking costs “payable forthwith” as opposed to the usual course of awarding costs payable at the conclusion of the litigation.

Ms. Rogers had received social assistance benefits until they were terminated after she was convicted of welfare fraud. At that time Ms. Rogers was 39 years old, living alone and 22 weeks pregnant. She was under long-term treatment for various disorders and as a result of the termination of her benefits, was rendered destitute and forced to rely on food banks and charities to survive.

In finding in favour of Ms. Rogers, Epstein J. acknowledged the traditional principles regarding costs, however she also considered other cases which have recognized the importance of Charter litigation. The following quote provides the basis for her decision to award costs “payable forthwith” and also succinctly summarizes the rationale judges in future cases should follow:

I start with two realities. First, so-called ordinary citizens generate a significant amount of Charter litigation. Secondly, Charter litigation tends to be long, complicated and expensive and therefore, financially prohibitive for most people. The result of these two realities is that to the extent that Charter litigation does go forward, applicants, particularly those such as Ms. Rogers who are experiencing financial hardship, are represented by lawyers acting pro bono. Such retainers obviously involve a financial sacrifice on the part of lawyers or law firms prepared to take on such work. This is so because the lawyers are not paid for their work as the file moves through the system. They are paid, if at all,


See Canadian Newspapers v. Attorney General (Canada), (1986) 32 D.L.R. (4th) 292 (Ont. H.C.J.), where it was held “... it is desirable that bona fide challenge is not to be discouraged by the necessity for the applicant to bear the entire burden”; Re Lavigne and Ontario Public Service Employees Union (No. 2), (1987) 41 D.L.R. (4th) 86 (Ont. H.C.J.), where White J. stated “it is desirable that Charter litigation not be beyond the reach of the citizen of ordinary means.”
by the “other side” at the conclusion of the litigation. It may take years before those who accept pro bono retainers are reimbursed for their expenses and compensated for the time spent on the file. Accordingly, larger firms who can more easily “carry the file” accept more pro bono retainers. By limiting the type and number of firms who are able to assume this type of financial obligation, the public’s access to counsel who will act for them in Charter challenges is similarly limited.\textsuperscript{55}

There is a disturbing footnote to this case in that subsequent to this decision, Kimberly Rogers was discovered dead in her sweltering apartment. In her earlier decision regarding the merits of the case, Epstein J. specifically noted in what was to be an eerie forewarning:

In the unique circumstances of this case, if the applicant is exposed to the full three-month suspension of her benefits, a member of our community carrying an unborn child may well be homeless and deprived of basic sustenance. Such a situation would jeopardize the health of Ms. Rogers and the fetus thereby adversely affecting not only the mother and child but also the public—its dignity, its human rights commitments and its health care resources. For many reasons, there is overwhelming public interest in protecting a pregnant woman in our community from being destitute.\textsuperscript{56}

It is simply essential that justice be accessible for people like Kimberly Rogers. No judge should countenance a hearing in his or her court which is markedly unfair, especially when matters of broad public interest are at stake. The time has arrived for public interest litigation to be properly funded. Judges can be part of the solution. Judges should be funders.

\textsuperscript{55} Rogers, supra note 53 at para. 20.

Citizenship and Citizen Participation

Prepared by Elisabeth Eid and M.-R. Natalie Girard
And presented by Yves de Montigny*

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* Department of Justice Canada.
Thank you for that kind introduction and for inviting me to participate on this panel.

The topic I have been asked to address is “Setting the Agenda of Courts and Tribunals through Funding.” This is somewhat of a problematic title—as it implies that the Department of Justice is involved in setting the courts’ agendas—a proposition that does not sit well with the constitutional principle of judicial independence.

I have thus decided to rephrase the topic as “whether and to what extent the funding of interest group litigation has had an impact on access to the courts.” In examining this question, I will be taking a rather philosophical approach. I would like to first address the rationale for funding interest group litigation. Then I will describe the existing federal funding programs. Finally, I will examine the impact of funding on the range of perspectives heard by the courts. In so doing, I would also like to address the critique, in some academic circles, that funding of interest group litigation is undemocratic.

In my view, funding of interest group litigation is vital to giving a voice to groups that would otherwise not likely be heard before the courts. In this respect, such funding enhances public access and participation before the courts, and is thus consistent with democratic values.
I. A FEW DEFINITIONS—WHAT DO WE MEAN BY AN “INTEREST GROUP?”

The term “interest group” is often used in a narrow manner as applying for example, to lesbian and gay activists, civil libertarians and feminists,1 to the exclusion of corporate interests and the interests of social conservatives. When used in such a manner, it is suggested that only the former groups pursue interests before the courts; whereas the latter groups are not so involved.

For the purposes of this discussion, when I refer to “interest group,” I mean a collectivity of individuals who have come together out of a common interest or purpose. Such groups may include: Aboriginal people, civil libertarians, corporate interest groups, labour groups, equality-seeking groups, victims groups, social conservatives, environmentalists and economic nationalists.

I will focus much of my discussion on interest group litigation in the context of Charter challenges. I will not be addressing legal aid, but I remain open to answering any questions you may have on the subject.

II. SHOULD GOVERNMENT FUND INTEREST GROUP LITIGATION: WHY OR WHY NOT?

Certain academics assert that funding of interest group litigation is undemocratic in that it positions particular interest groups to control the courts’ agendas to the exclusion of other members of the public who may reflect majoritarian views.2 They are also concerned that government support for interest group litigation intensifies existing rights-based rhetoric thereby quelling full discussion, including dissenting views, in Parliament.3

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1 See, for example, the types of interest groups included in Morton and Knopff’s “Court Party”, infra note 2.
3 Id., at 166.
The concern behind this assertion is the view that courts themselves are undemocratic and not the place for the resolution of often complex questions posed by the Charter. For these authors, Parliament is the preferable venue for debate around social policy issues.

This is one perspective, with which one may agree or disagree. I however view the relationship between Parliament, the courts and interest groups fundamentally in a different way.

In his book, *Democracy and Distrust*, John Hart Ely posits that even in representative democracies, many elected politicians represent majoritarian interests to the disadvantage or exclusion of minority views. Given the natural propensity of politicians to seek re-election, this furthers the tendency to respond to majoritarian interests. While political theorists have argued that majorities are constantly shifting and that minority interests may seek protection through alliances with such shifting majorities, the fact is that, in the political arena, there is a significant imbalance in power, which leaves minority interests vulnerable to exclusion. The courts play an important role in mitigating against such power imbalances by ensuring that minority interests are heard in cases argued before them.

It is unquestionable that litigation and particularly Charter litigation is expensive and would not be a viable option for groups with limited financial resources. Without such funding, it is likely that only those from financially advantaged sectors of Canadian society would be able to seek protection of their interests before the courts. As my co-panelist Arne Peltz has stated elsewhere, “rights are meaningless without real and accessible remedies.”

### III. WHAT FEDERAL PROGRAMS PROVIDE FUNDING FOR INTEREST GROUP LITIGATION?

There are three main federal programs which provide funds to individuals or groups for litigation before Canadian courts: the

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5 *Id.*, at 135.
Challenges Program and two Aboriginal test case funding programs. I will
describe these in turn.

A. The Court Challenges Program

The Court Challenges Program is currently administered at arm’s
length from Government by the Court Challenges Program of Canada, a non-
governmental organization located in Winnipeg, which receives funding from
the Department of Canadian Heritage. The corporation receives $2.75 million
annually. The program remains unique in the world.

The Program was initiated in 1978 to provide funding to individuals
seeking to clarify the language provisions contained in the Constitution Act,
1867. With the passage of the Charter in 1982, the program’s mandate was
broadened to include the official language rights contained therein. The
program’s mandate was further extended in 1985 to cover challenges to
federal legislation, policies and programs under section 15 of the Charter,
which came into force in April of that year.

In February 1992, the Government abolished the program as part of
a large cost-cutting exercise. After strong protest from equality-seeking
groups, official language minority groups and individuals from Canada’s
academic and legal community, the Government announced that it would re-
instate the program in 1993. This announcement was made by a conservative
Government (Prime Minister Campbell), a fact often overlooked by critics
of the program. The program was re-established in 1994.

The program provides financial assistance for test cases of national
significance in the areas of official language minority rights and equality
rights. The maximum amount of case funding available is $50,000 for the trial
level, $35,000 for each appeal and $35,000 for each intervenor. The Equality
and Language Panels of the program review funding applications and make
decisions on the amounts to be granted. In the 1999-2000 year, the Panels
received 174 applications for funding, 131 of which were granted funding.

Some of the more well-known cases that received funding from the
program last year include: Corbiere (successful s.15 challenge to Indian Act
provisions that limit voting in band elections to those band members living
on-reserve); Mills (Charter challenge to Criminal Code provisions governing
the production of private records of sexual assault victims); Liebmann v.
Canada (successful challenge to the Department of National Defence’s policy allowing for consideration of cultural, religious or other sensitivities in determining assignments); Baker (administrative law challenge to an immigration officer’s denial of Ms. Baker’s application for landing based on humanitarian and compassionate grounds); Montfort (challenge to Ontario government’s decision to close the Montfort hospital); and Arsenault-Cameron (minority language rights challenge by French parents in PEI for French language school to be established in their community).

B. Aboriginal Test Case Funding Programs

Apart from the Court Challenges Program, Indian and Northern Affairs Canada (INAC) administers two test case funding programs. Under the “regular” Aboriginal Test Case Funding Program, individuals or entities, private or public, can receive contributions to cover the legal costs of litigating aboriginal issues of any kind, except those relating to the 1985 amendments to the Indian Act, which fall under the second program, the C-31 Test Case Funding Program. Under both programs, funding is discretionary.

The “regular” Aboriginal Test Case Funding Program has two stated objectives: first, to clarify long-standing legal issues surrounding the interpretation of the Indian Act and other legislation, treaties and constitutional instruments; second, to assist INAC in meeting its objectives of fulfilling its legal, statutory and constitutional responsibilities to Aboriginal people. In essence, if the litigation involves important, unresolved Aboriginal-related legal issues of general application to a large number of Aboriginal people, which cannot be resolved outside the courts, funding can be granted. It must be in the interest of both Aboriginal people and the federal government to have the matter resolved judicially.

Under this program and pursuant to a written contribution agreement, a recipient can receive up to $1 million. Funding is available for all stages of the litigation (except for applications for leave to appeal at the Supreme Court of Canada).

As for the second, “companion” program, it stems from the 1985 amendments to the Indian Act (Bill C-31), enacted to remove sexual discrimination from the legislation, restore rights lost in the past as a result of such discrimination and provide for Indian bands to assume control of their own membership. The C-31 Test Case Funding Program thus targets
cases dealing with issues concerning Bill C-31. The rationale underlying this program is quite simple: allow those individuals, mainly women with limited financial resources, affected by band action in the design and administration of band membership rules, to have recourse to the courts in cases of alleged discrimination. The formal terms and conditions of the C-31 Program were approved in 1988.

As with the regular program, any individual or entity, private or public, can apply to the **C-31 Test Case Funding Program**. To be eligible, however, they must satisfy somewhat stricter criteria. The litigation must involve a Bill C-31 issue that is unresolved and that involves the determination of individual rights. Cases where parties are bringing actions solely against the Crown or where the Government made a decision on the record not to opt for the position taken by the Applicant are ineligible to be funded. Similarly, intervenors are eligible only where they are arguing in support of the thrust of the Crown’s position.

The contribution payable to any one recipient for a case up to and including the Supreme Court of Canada cannot exceed $500,000. Where a band applies for funding, INAC will consider its financial position and funding may be denied if the Band is deemed to have adequate resources. Finally, all or a portion of the contribution may be repayable, should the recipient obtain any judgment or award of costs or settlement monies.

During the eighteen year period from 1983 until 2001, contributions totaling almost $18 million (i.e. $1 million per year average) have been granted to various groups through the **Aboriginal and C-31 Test Case Funding Programs**. Most of the major aboriginal law cases have received funding from the programs, including: *Guerin v. The Queen* (on the nature of the aboriginal title) and *Delgamuukw v. British Columbia* (which dealt with the content of the aboriginal title, how it is protected by s. 35(1) of the *Constitution Act, 1982*, and its evidentiary requirements); *Simon v. The

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7 Note however that this figure has been exceeded for specific interveners in the *L’Hirondelle* constitutional challenge to the amendments.

8 All numbers compiled by Indian and Northern Affairs Canada in *Test Case Funding Contributions (November 1983 to August 2001)*.


Queen,\textsuperscript{11} R. v. Sioui,\textsuperscript{12} R. v. Horseman\textsuperscript{13} and R. v. Badger\textsuperscript{14} (dealing with treaty rights, establishing their sui generis nature, as well as guidelines for interpretation and extinguishment); R. v. Sparrow,\textsuperscript{15} R. v. Gladstone\textsuperscript{16} and R. v. Van der Peel\textsuperscript{17} (dealing with “existing aboriginal rights”, their sui generis nature and purposive interpretation, establishing principles of extinguishment, and a justificatory standard under s. 35(1) of the Constitution Act, 1982 for infringement of aboriginal rights). More recent cases to have received funding include: Corbiere v. Canada (Minister of Indian and Northern Affairs)\textsuperscript{18} (s. 15 challenge to Indian Act provisions that limit voting in band elections to those band members living on-reserve); R. v. Marshall\textsuperscript{19} (where the Court found a Mi’kmaq treaty right to carry on a small scale commercial eel fishery); Lovelace v. Ontario\textsuperscript{20} (unsuccessful s. 15 challenge to program distributing proceeds from reserve-based casino to band Indians to the exclusion of non-band aboriginal communities) and the Reference re Secession of Quebec\textsuperscript{21} (where two aboriginal groups received funding to intervene in the case.\textsuperscript{22})

The federal government also provides what is known as “core” or “project” funding to a variety of interest groups. These funds are granted either to assist such groups with “core” functions such as running their organizations or for specific projects (not including litigation). Given that some organizations applying for core funding are advocacy groups, it is possible that a portion of these funds is used for litigation purposes.

\textsuperscript{11} [1985] 2 S.C.R. 387.
\textsuperscript{12} [1990] 1 S.C.R. 1025.
\textsuperscript{13} [1990] 1 S.C.R. 901.
\textsuperscript{14} [1996] 1 S.C.R. 771.
\textsuperscript{15} [1990] 1 S.C.R. 1075.
\textsuperscript{17} [1996] 2 S.C.R. 507.
\textsuperscript{18} [1999] 2 S.C.R. 203.
\textsuperscript{19} [1999] 3 S.C.R. 456.
\textsuperscript{20} [2000] 1 S.C.R. 950.
\textsuperscript{22} $80,000 for Kitigan Zibi Anishinabeg and $250,000 for the Grand Council of the Crees.
However, this is speculative and in any event, the amounts would not likely be significant.\textsuperscript{23}

\textsuperscript{23} For example, Canadian Heritage provided $6,287,560 last year to Aboriginal representative organizations as core organizational funding. Some of these groups have been involved in litigation however, unless a detailed audit is conduct on their spending, it is not known whether any federal funds were used for litigation purposes.
It is undeniable that public interest litigation is very expensive. To illustrate, consider the fact that, in just one case and only for the trial level, it costs the federal government $500,000 in legal fees and disbursements to defend the challenge to section 43 of the Criminal Code (“the spanking provision”). Federal funding of litigation is modest when one considers the cost of public interest litigation. It is evident that a large amount of legal work for such cases is done on a pro bono basis. The relatively small amount of federal funding going towards such purposes serves to dispel the view that Government is significantly involved in funding interest group litigation to the detriment of other citizen participation before the courts. However the funding that does exist, undoubtedly assists groups that would otherwise have considerable difficulty bringing their claims to court.

IV. THE IMPACT OF FUNDING ON PERSPECTIVES HEARD BY THE COURTS

How does funding of interest group litigation impact on the perspectives on issues heard by the courts? This question requires an understanding of what groups are bringing their issues before the courts, the nature of those issues and the extent to which funding plays a role in enabling such issues to be heard by the courts.

Critics of Government funding of interest group litigation suggest that such funding allows particular interest groups to advance their “leftist causes” before the courts to the exclusion of other individuals and groups thereby hindering public access to the judicial system.24 Others, such as Ian Brodie, have argued that Government funding of interest group litigation “encourages systemic appellate litigation by groups organized to wage long-term battles, rather than sporadic efforts by loosely organized communities.”25


Gregory Hein in his article “Interest Group Litigation and Canadian Democracy,” discusses the results of his examination of all Federal Court and Supreme Court of Canada published decisions from 1988 to 1998. His findings reveal that while corporations litigate for different reasons than other interest groups, they are very much present in Canadian courtrooms. He offers a different perspective on interest group litigation:

“The account advanced by conservative critics is incomplete and misleading. While warning us about ‘zealous’ activists who invite judicial activism, they never tell us that courts are filled with a broad range of interests that express a wide array of values. [...] We will see that critics on the right are correct when they argue that social activists are eager to pursue legal strategies. However their interpretation ignores the economic interests that also appreciate the benefits of litigation. Corporations exert a surprising degree of pressure by asking judges to scrutinize the work of elected officials.”

Hein emphasizes that there was interest group litigation well before the coming into force of the Charter. For example, in the 1930s, corporations came before the courts to hinder the growth of a welfare state and to advance pecuniary and proprietary claims. This trend of corporate-sponsored litigation continued after the Charter as well. During the ten year period of Hein’s study, he found that corporations brought 468 actions, significantly more than any other interest group. He also found that 38 % of the claims challenging government legislation and ministerial decisions emanated from corporations. Corporate actions included challenges to legislation governing

\[\text{(2000) 6 I.R.P.P. 2-31.}\]
\[\text{Id., at 4}\]
\[\text{Id., at 8.}\]
\[\text{Id., at 9.}\]
\[\text{Id., at 15.}\]
banking, federal elections, international trade, advertising, and environmental protection.\textsuperscript{31}
Hein emphasizes that the major current change is that “courts now hear from interests that struggled for decades to win access.” Traditional rules respecting standing and evidentiary requirements acted as solid barriers to groups wanting to advance issues of broad public interest. Judicial recognition of public interest standing and liberalization of the rules respecting intervenor status, have allowed for a much greater range of perspectives to be heard before the courts. Government funding of interest group litigation is another factor assisting interest groups in gaining access to the courts.

Hein’s study also revealed that there is a difference in why interest groups use the courts. For example, corporations tend to pursue private interests before the courts, while other groups, such as civil libertarians and equality-seeking groups, seek social policy changes that will affect a broader audience.

Compare for example, the nature of the issues put forward by corporations before the courts under the Charter with that of equality-seeking groups. Some of the more renowned Supreme Court of Canada Charter cases involving corporations include: R. v. Big M Drug Mart,33 (successful challenge to Sunday closing legislation by a retail business); Hunter v. Southam Inc.,34 (successful challenge by Southam Inc. of search and seizure provisions in the Combines Investigation Act); RWDSU v. Dolphin Delivery Ltd.35 (dealing with an injunction against secondary picketing and the application of the Charter); R. v. Edward Books and Art Ltd.,36 (unsuccessful challenge by retail businesses of partial prohibition on Sunday openings); Irwin Toy Ltd. v. Quebec (Attorney General),37 (unsuccessful challenge to consumer protection legislation prohibiting commercial advertising directed at children); R. v. Wholesale Travel Group Inc.,38 (partially successful challenge by travel agency of provisions of the

32 Id.
Competition Act respecting false or misleading advertising); RJR-MacDonald Inc. v. Canada (Attorney General),\textsuperscript{39} (successful freedom of expression challenge of legislation prohibiting tobacco advertising and promotion); Canadian Egg Marketing Agency v. Richardson,\textsuperscript{40} (unsuccessful challenge by NWT egg producer of federal-provincial scheme regulating Canadian egg marketing); and Thompson Newspapers Co. v. Canada (Attorney General),\textsuperscript{41} (successful challenge to federal elections legislation prohibiting publication of opinion survey results during last few days of election campaign).

These cases reveal that corporations pursue litigation to challenge government regulation of their business interests, whether it be through competition legislation, consumer protection legislation, health legislation or legislation governing elections. While corporations generally invoke the Charter in defence of charges laid against them as opposed to offensive challenges,\textsuperscript{42} this does not mean that they do not vigorously pursue their interests before the courts and they have often been successful. These interests appear to be private or proprietary ones, although the cases do have important precedential value for the interpretation of Charter rights. Such interests are significantly different from those of other interest groups, such as equality-seeking bodies.

A sampling of Supreme Court of Canada cases involving Charter challenges that received equality rights funding for interventions or as parties from the Court Challenges Program reveals types of issues brought forward by these groups. Some of these cases include: Schachter v. Canada,\textsuperscript{43} (successful equality rights challenge to the provisions of the Unemployment Insurance Act that provided parental benefits to natural parents but not to parents who adopted); Symes v. Canada,\textsuperscript{44} (unsuccessful challenge to Income Tax Act provisions limiting the amount that may be claimed for child

\textsuperscript{39} [1995] 3 S.C.R. 199.
\textsuperscript{40} [1998] 3 S.C.R. 157.
\textsuperscript{41} [1998] 1 S.C.R. 877.
\textsuperscript{42} The courts have generally held that corporations do not have standing to invoke the Charter as a “sword” but may do so as a “shield” in response to Government charges.
\textsuperscript{44} [1993] 4 S.C.R. 695.
care expenses); *R. v. Williams,*\(^45\) (in which the Court held that jurors may be challenged for racial bias); *R. v. Mills,*\(^46\) (Court upheld the scheme governing admissibility of complainants’ therapeutic records in sexual offence proceedings); *Corbiere v. Canada (Minister of Indian and Northern Affairs),*\(^47\) (successful equality rights challenge to provisions of the *Indian Act* which required that band members be ordinarily resident on reserve to vote in band elections); *Granovsky v. Canada (Minister of Employment and Immigration),*\(^48\) (unsuccessful equality right challenge to provisions of the *Canada Pension Plan* respecting a benefit available to persons with severe and permanent disabilities to the exclusion of those with temporary disabilities); *R. v. Darrach,*\(^49\) (Court upholds the provisions governing the admissibility of complainants past sexual history); and *R. v. Latimer,*\(^50\) (whether a mandatory minimum sentence of life imprisonment for the second degree murder of a severely disabled child constitutes cruel and unusual punishment—funds were granted to support the views of persons with disabilities).

It is noteworthy that in many of these cases, funding was granted for the purposes of intervening in the case rather than for supporting a party. This is particularly evident in the criminal law cases, where funding was granted to support an intervention conveying the perspective of racialized minorities (*Williams*), women (*Mills; Darrach*), and persons with disabilities (*Latimer*). These perspectives have likely had an influence on the Court’s decisions and one can legitimately question whether the Court would have arrived at the same conclusions in the absence of hearing from these interest groups. At a minimum, support for such interventions assists in ensuring that the Court is able to hear from a wider range of perspectives on an issue prior to arriving at a decision. A review of these cases also reveals that the interests pursued by those challenging government actions concerned the advancement of equality rights for those less advantaged or historically

\(^{45}\) [1998] 1 S.C.R. 1128 [hereinafter *Williams*].  

\(^{46}\) [1999] 3 S.C.R. 668 [hereinafter *Mills*].  

\(^{47}\) *Supra* note 18.  

\(^{48}\) [2000] 1 S.C.R. 703 [hereinafter *Granovsky*].  

\(^{49}\) [2000] 2 S.C.R. 443 [hereinafter *Darrach*].  

\(^{50}\) [2001] 1 S.C.R. 3 [hereinafter *Latimer*].
subject to stereotyping (e.g. the disabled—Granovsky; parents of adopted children—Schachter). This stands in contrast to the economic interests pursued by corporations.
At the same time, we must recognize that funding of interest group litigation is not a panacea for ensuring that all needed perspectives are brought before the courts, nor is litigation often the best way the deal with complex social policy issues. Funding of interest group litigation also raises difficult issues for Government such as determining which groups should receive funds, for what types of cases and what amounts are appropriate.

I would suspect that some perspectives are still not being heard by the courts. I note for example that in the recent challenge to provisions of the Ontario Safe Streets Act concerning aggressive panhandling only the Canadian Civil Liberties Association intervened. One might wonder whether the reasoning in the decision would have been different had the Court also heard from an anti-poverty group or an organization representing the interests of the mentally disabled.

V. THE IMPACT OF FUNDING OF INTEREST GROUP LITIGATION ON DEMOCRACY

As I stated at the outset, critics of judicial review argue that funding of particular interest groups is undemocratic in that it positions such groups to dominate courts’ agendas at the expense of other groups and members of the public. As I hope I have demonstrated, Canadian courts and tribunals hear from a diverse range of perspectives including not only those that are recipients of state funding but also corporate interests as well as groups that receive funding from private sources.

Lorne Sossin aptly questions: “Why should the involvement of these [Court Party] groups in Charter litigation pose any more of a threat to democracy than the involvement of corporate groups, or of large corporations themselves, in Charter litigation to pursue neoliberal policy agendas?” Sossin also points out that conservative groups vigorously pursue their interests before the courts. In the recent case of Harper v.

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52 Assistant Professor, Osgoode Hall Law School & Department of Political Science, York University.
53 L. Sossin, supra note 24 at para. 8.
Canada, the President of the National Citizens Coalition is challenging provisions of the Canada Elections Act that limit the amount third parties may use for election expenditures. Such limits were imposed to promote equality of opportunity in the electoral process. As Sossin points out, one may question how the interests pursued by such groups, such as removing limits on electoral spending, are seen to be enhancing democracy, particularly given that such interests would not have appeared on any legislative agenda.

It is also important to keep in mind that even amongst those so called “leftist groups,” there are diverse and often opposing interests. For example, equality-seeking groups and civil libertarians often take opposing views with respect to limits on freedom of expression to prohibit obscenity or hate speech. Thus, these interest groups should not be lumped together as necessarily sharing common interests. The situation before the courts is much more complex than critics of judicial review portray. As Sossin aptly puts it:

“The Court Party, if it includes groups which seek to use the courtroom to further a policy agenda, constitutes a big tent indeed, with gay and lesbian activists alongside tobacco executives, and LEAF shoulder to shoulder with the NCC.”

Conservative critics would argue that Government should cease providing funding to interest groups. They would like to “resurrect traditional judicial review” where the old standing and intervention rules applied and no funding was provided to groups for litigation purposes. According to Gregory Hein, “the measures that conservative critics propose have a distinct bias that Canadians should know about.”

“Resurrecting traditional judicial review would filter out certain interests and values. Returning to the old rules governing standing and intervenor status would hurt public interests unable to demonstrate

55 Supra note 53 at para. 9.
56 Id., at para. 21.
57 G. Hein, supra note 26 at page 25.
a direct stake in a dispute [...]. Freezing the meaning and scope of constitutional guarantees would leave judges unable to address new social problems that create discrimination[...]. Taken together, these obstacles would hinder interests concerned about racism, homophobia, gender inequality, environmental degradation, poverty, lives of the disabled and the plight of Aboriginal peoples. Traditional judicial review would not, however, frustrate litigants advancing conventional pecuniary claims and legal action would still be an effective strategy for interests that want to resist state intervention.”

Funding of interest group litigation also ensures that constitutional rights and freedoms are interpreted and applied in an inclusive manner, one that ensures that such rights will be accessible by all Canadians. “Seen from this perspective, the current relationship between citizens, legislators and judges is attractive because it meets a basic requirement of democracy that many Canadians embrace. Nations comprised of diverse interests should not have institutions that respond to some and ignore others.”

CONCLUSION

Some academics, such as Ian Brodie, argue that government funding of interest group litigation results in an “embedded state being at war with itself in Court.” While it is true that at times Justice litigators find themselves defending government action that is challenged by an interest group with financial support from another federal department, this is not always the case. For example, in cases such as Mills, Darrach and Latimer which I mentioned earlier, funding was granted by the Court Challenges Program to put forward views that supported the Government legislation under attack. Rather than funding resulting in Government being at war with itself in Court, I see it rather as an instrument for facilitating diverse perspectives before the Court, better-informed judgments and ultimately a

58 Id., at page 26.
59 Id.
60 I. Brodie, supra note 25 at 376.
more inclusive policy development process. That, to me is quintessentially democratic.

Thank you.
Advancing an Agenda? A Reflection on Recent Developments in Canadian Public Interest Environmental Litigation*

Chris TOLLEFSON**

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PART I: REFLECTIONS ON THE TOPIC

In recent years, citizens and citizen organizations have come to play an increasingly important role in the development of public law, both in administrative and judicial processes. A threshold question that I have been asked to address in this paper is whether it is appropriate for such groups to pursue their “agendas” through recourse to the courts and tribunals. In addressing this provocative question, I propose to focus on developments in one specific area of legal activism—public interest environmental litigation—with a view to assessing how effectively environmental organizations have advanced what might, for the present purposes, be referred to as an environmental “agenda.” But I would first like to make some preliminary observations about implicit assumptions in the topic as framed.

At the outset, it is important to be mindful of the pervasiveness of “agenda-setting” in public law. It would be a mistake to assume that only those groups that we usually associate with “public interest” or “cause” litigation are participating in the litigation process to promote an agenda. While the Women’s Legal Education and Action Fund (LEAF),1 Mothers Against Drunk Driving,2 the National Citizens Coalition (N.C.C.),3 civil

1 For a comprehensive summary of LEAF cases see online: http://www.leaf.ca (date accessed: July 30, 2002).

2 See for example Horsefield v. Ontario (Registrar of Motor Vehicles) (1999), 44 O.R. (3d) 73 (C.A.) [MADD and Criminal Lawyers Association appearing as interveners].

3 A discussion of the NCC’s continuing challenges to election spending laws is available online: http://www.morefreedom.org/new_page_1.htm (date accessed: July 30, 2002).
liberties organizations,4 aboriginal groups5 and environmental interests6 all engage in litigation to pursue their respective agendas, so too do business corporations, professional and trade associations and labour unions.7

Sometimes these groups litigate with a view to restraining government action; other times, they intervene to defend the exercise of governmental power. Almost invariably, however, I would contend that their participation in the litigation process is motivated or defined by a particular vision of social and political ordering. In other words, not only are they seeking vindication of their rights on the merits as is typical in private litigation, they are also mindful of and aspire to advance broader principles, interests and values.

This said, clearly the precision with which such groups define their agenda will differ. For some groups, their agenda will be relatively inchoate and generic. For instance, business interests are typically motivated to litigate public law issues by an aversion to government action and regulation that affects the cost of doing business.

For other groups, the agenda they are seeking to advance is much more specific and indeed may be legally prescribed in their organizational objects and purposes. Such is the case with LEAF, the National Citizen’s Coalition, civil liberties and environmental groups. However, even these groups seek to invoke legal rights and remedies in distinct ways. LEAF, for instance, pursues a highly focused litigation strategy that relies almost exclusively on the equality provisions of the Charter. In contrast, public interest environmental litigants—due, in part, to the absence of a specifically applicable Charter protection—tend to rely on a more diverse range of legal theories and seek recourse in a wider range of legal fora.

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4 See for example Little Sisters Book and Art Emporium v. Canada (Minister of Justice), [2000] 2 S.C.R. 1120 [the BCCLA, the bookstore and its two owners appellants; appearing as interveners the Canadian AIDS Society, the Canadian Civil Liberties Association, the Canadian Conference of the Arts, EGALE Canada Inc., Equality Now, PEN Canada, and LEAF].
5 Illustrations abound: see, for example, Council of the Haida Nation v. B.C. (Minister of Forests), [2002] B.C.J. 378 (C.A.), online: QL (BCJ).
6 See illustrations discussed in Part II below.
This leads into a final threshold issue: is it appropriate for litigants to bring their political or social values into the courtroom? The evolution of more liberal standing and intervention rules suggests that courts and tribunals are recognizing—especially in the constitutional arena—the need to be mindful of the social and political context and implications of the decisions they are being increasingly asked to make. Indeed, where laws are being challenged under the Charter, section one makes these mandatory considerations. In my view, judicial and administrative resolution of public law questions should be addressed in an analogous contextual and purposive manner. Such an approach not only advances important access to justice objectives, it also bolsters the protection of public rights (particularly those put at risk in the environmental context) and offers the promise of enhancing the quality of administrative and judicial decision making.\(^8\)

If we accept that public law disputes arise and are litigated for a cluster of reasons that often involve a desire on the part of the litigants to advance an agenda, should this be a cause for concern? One way to respond to this question is to pose another question: what is the alternative? If we decided that agenda-advancing groups should be discouraged from seeking recourse to courts or tribunals, how would we translate this value judgment into practice, particularly given our presumably shared desire to ensure that courts and tribunals remain fora that are accessible and open to a diverse range of interests and perspectives? Undoubtedly there is a concern that courts and tribunals retain control of their dockets with a view to ensure that scarce judicial and administrative resources are allocated wisely. Presumably, however, these bodies already possess means to effectively police these concerns through standing requirements and summary dismissal procedures.

Moreover, surely part of the raison d’être of courts and tribunals in a liberal democracy is to consider and resolve public law disputes in a manner consistent with the rule of law and the principles of due process. Indeed, a measure of how effectively courts and tribunals are discharging this essential function is the legitimacy and respect they are able to command within society at large. The flourishing state of public interest

litigation speaks well to how effectively courts and tribunals are fulfilling this key role. Thus, I assert that the challenge of democratizing access to justice for public interest litigants and public interest issues within judicial and administrative processes is one that courts and tribunals should welcome, as daunting a task as that might at times appears.

Insofar as a goal of this paper is to reflect on the success or failure with which groups have engaged judicial and administrative processes to advance their agenda, I propose to devote Part II to an examination of legal developments in public interest environmental litigation, perhaps the fastest growing area of public interest litigation in this country. In Part III, I conclude with some observations on what lessons flow from this review in terms of the current state, and future prospects of public interest litigation in Canada.

PART II: PUBLIC INTEREST ENVIRONMENTAL LITIGATION: THE RECENT RECORD

There is little doubt that, during the 1990s, tribunals and especially courts, were called upon with increasing frequency to assess arguments and adjudicate claims made by environmental groups. There are many reasons for this phenomenon. In part, this trend reflected an evolution of social values. In 1987, upon publication of Our Common Future (a report of the World Commission on Environment and Development also known as the “Brundtland Commission Report”) “environmental protection” topped the list of Canadians concerns, a position it had not occupied since the mid-1970s, and one that it was to retain for much of the 1990s. The 1990s were also a decade that saw unprecedented growth in support for, and membership in, various environmental organizations.9

Enhanced engagement by environmental interests in administrative and judicial processes was also a product of opportunity and capacity. At the federal and provincial levels, new legislation was enacted that imposed legally binding responsibilities on private and public bodies to protect the environment. Under these new laws, and pursuant to public interest standing principles, citizens and citizen groups were effectively

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invited into the judicial arena. To assist them in accepting up this invitation, the capacity of the public interest environmental bar expanded, most notably with the establishment of the Sierra Legal Defence Fund in 1991, Canada’s first national, full-service, pro bono public interest environmental law firm.

In this part, my goal is to provide an overview of some of the legal landmarks and issues that emerged during the past decade. Given space limitations, I have chosen to limit this discussion to cases that have arisen in the judicial review context. In choosing this focus, it should be recognized that many important principles and cases were also argued before administrative tribunals, and that several landmark decisions during this period also emerged out of private prosecutions pursued against polluters by citizens and citizen organizations.10

This said, I will discuss first, in what follows the impact of public interest environmental litigants as interveners in the Supreme Court of Canada. I will then discuss the evolving caselaw with respect to three issues of particular concern to public interest environmental litigants: standing, the availability of interlocutory injunctive relief and costs.

A. Interventions in the Supreme Court of Canada

During the 1990s, the Supreme Court of Canada (S.C.C.) came to recognize environmental protection as a “fundamental value of Canadian society” and through its evolving jurisprudence played a leadership role in demonstrating how this value can be better realized within our federal

10 A noteworthy illustration of successful public interest involvement in the tribunal context was a lengthy and complicated proceeding before the Ontario Environmental Appeal Board prompted by an application by Petrocan seeking permission to increase sulphur dioxide emissions at one of its refineries. In the result, the company and the SLDF (acting for a group of public interest litigants) agreed to a settlement under which Petrocan committed to significantly reducing its proposed emissions and contributing a quarter of a million dollars to an airshed research trust fund: see Bart v. Ontario (Ministry of Environment). [1997] O.E.A.B. No. 9 (Ont. C.A.), online: QL (OEAB). Public interest environmental interests have also secured a number of helpful administrative rulings in the context of freedom of information claims: see, for example, Order P-1557, Institution: Ministry of the Environment, [1998] O.I.P.C. No. 92; (Ontario Information and Privacy Commissioner) online: QL (OIPC); and Order PO-1909, Institution: Ministry of the Environment, [2001] O.I.P.C. No. 109 (Ontario Information and Privacy Commissioner) online: QL (OIPC). [Note, the styles of cause in these cases are routinely anonymized by the tribunal, but in both of these cases the filer - SLDF - has waived anonymity].
model. Its continuing commitment to this goal has recently been affirmed in Spraytech v. Hudson.\(^\text{11}\)

In all of the environmental law cases decided by the Court since the early 1990s, environmental groups were given intervener status, and, while it is difficult to discern with certainty the extent to which their submissions influenced judicial decision-making, there is strong evidence that the Court found their participation helpful and their submissions persuasive.

The Court’s first environmental case of the 1990s was Friends of Oldman River v. Canada (Minister of Transport).\(^\text{12}\) Handed down in 1992, the decision was a conclusive, eight-to-one victory for the plaintiff. The case was brought by the Friends of Oldman River, a small Alberta-based environmental group that was opposed to a large dam being constructed on the Oldman River by the Alberta Government. Under federal law, the Alberta Government required a federal licence under the Navigable Waters Protection Act. Although the project had significant environmental effects, the federal Minister of Transport issued the licence without conducting an environmental assessment (EA) as required by a federal Environmental Assessment and Review Process Guidelines Order (EARP Guidelines). The Minister later rejected repeated requests that he undertakes an EA on the ground because EARP Guidelines were not mandatory and because the project was a matter of provincial concern.

In the Supreme Court of Canada the key issues were whether the EARP Guidelines were mandatory and, if so, whether they were constitutional. On the constitutionality issue, six provinces and a territory intervened to support Alberta’s position that the Guidelines violated the division of powers. In its first visit to the S.C.C., the Sierra Legal Defence Fund was granted intervener status, and made submissions in support of the mandatory and constitutional nature of the Guidelines.

“The protection of the environment has become one of the major challenges of our time”: with these now-famous words La Forest J. began his reasons for the Court. In short order, he dispatched the argument that the Guidelines were not legally binding and moved on to the broader division of powers question. In framing this question, he articulated a


compelling theoretical and practical justification for dual federal-provincial jurisdiction over the “environment” as a constitutional subject matter. Drawing on his own earlier observation (then in dissent in R. v. Crown Zellerbach\textsuperscript{13}) that the environment is a “diffuse” subject, abstruse and difficult to reconcile within the existing division of powers, he held that the federal and provincial jurisdictions over environmental assessment should be seen as necessary adjuncts to their respective heads of legislative power. Seen in this light, he held the Guidelines were \textit{intra vires}, in the result awarding solicitor and client costs to the Friends throughout.

Two years later, public interest environmental interveners again appeared in the Supreme Court in a case concerning federal licencing requirements relating to Hydro-Québec’s proposed Great Whale hydroelectric project. A key issue in the case was whether the National Energy Board (NEB) could require Hydro-Québec to comply with ongoing environmental assessment conditions as a clause to being granted of an electrical power export licence. The NEB was of the view that it could, but the Quebec Court of Appeal disagreed. Relying heavily on the constitutional analysis set out by the Court in the \textit{Oldman River} case, Iacobucci J. for the S.C.C. held that the Court of Appeal had adopted an “unduly narrow interpretation” of the Board’s jurisdiction and restored by NEB’s original order.\textsuperscript{14}

Likely the most sweeping victory for environmental protection during the last decade occurred in 1997. This case again involved Hydro-Québec, this time as a defendant in a prosecution for dumping PCBs into a river contrary to the \textit{Canadian Environmental Protection Act}.\textsuperscript{15} Hydro-Québec, supported by the Attorney General of Quebec, claimed that the federal order which rendered this dumping illegal violated the division of powers. Given the far-reaching implications of the case for federal regulation of toxic substances, the Court allowed the Sierra Legal Defence Fund and the Canadian Environmental Law Association to intervene on behalf of a variety of public interest environmental groups.

\textsuperscript{13} \cite{R.v.CrownZellerbach}
\textsuperscript{14} See \textit{Quebec (A.G.) v. Canada (Nat. Energy Board)}, \cite{QuebecAGvCanadaEnergyBoard}
\textsuperscript{15} See \textit{R. v. Hydro-Québec}, \cite{RvHydroQuebec}
Carefully scrutinizing the complex legislative regime and the voluminous scientific evidence tendered, La Forest J. rendered a decision that unequivocally affirmed federal jurisdiction to use the criminal law power for the purpose not only of protecting human health, but also a “clean environment.” In his words, the latter was “a wholly legitimate public objective in the exercise of the criminal law power. Humanity’s interest in the environment surely extends beyond its own life and health.” In reaching this landmark conclusion, he relied heavily on arguments made by interveners with respect to the imperative that governments be empowered to fulfill its international obligations in respect of the environment.

That the Supreme Court remains committed to path it blazed in the 1990s is clear from its most recent decision in the area of environmental law rendered in June of 2001. In this case, two Quebec-based landscaping companies challenged a bylaw enacted by the Town of Hudson that prohibited the use of pesticides for non-essential (that is to say aesthetic) purposes. The petitioners contended that the bylaw was inoperative in that it conflicted with the provincial pesticides legislation. Sierra Legal Defence Fund was granted leave to intervene on behalf of the Federation of Canadian Municipalities and two environmental groups, while the Canadian Environmental Law Association intervened for close to a dozen environmental and health organizations.

In upholding the bylaw, writing for the Court, L’Heureux-Dubé J. stated that the “context of this appeal includes the realization that our common future, that of every Canadian community, depends on a healthy environment.” Two elements of L’Heureux-Dubé J.’s analysis are particularly noteworthy in terms of breaking new ground in the judicial consideration of environmental protection. The first was her explicit approval of the principle of “subsidiarity”: the notion that “law-making and implementation are often best achieved at a level of government that is not only effective, but also closest to the needs of the citizens affected, and thus most responsive to their needs, to local distinctiveness, and to population diversity.” In support of this principle, which has become a key credo of environmentalists worldwide, she cited La Forest J. in Hydro-Québec and the Brundtland Commission Report.

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16 114957 Canada Ltée (Spraytech, Société d’arrosage) v. Hudson (Town), supra note 12.
The other pioneering aspect of the Court’s decision, that drew heavily on the submissions made by the environmental and health group interveners, was L’Heureux-Dubé J.’s invocation of international law as a contextual consideration militating in favour of upholding the bylaw. In this regard, she emphasized the relevance of the precautionary principle, the notion that “where there are threats of serious or irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.” In her view, it was noteworthy that Canada had advocated the precautionary principle in international fora, and that various commentators and courts in other jurisdictions have concluded that the principle has become a norm of customary international law.

B. Public Interest Standing

The 1990s were also a period during which environmental and other public interest groups were able to take advantage of broadened standing principles governing challenges to administrative action. The door was opened to challenges of this type by the Supreme Court’s 1986 decision in Finlay v. Canada (Minister of Finance).\textsuperscript{17} Prior to this decision, public interest standing was restricted to cases challenging the validity of legislation: see the S.C.C. trilogy of Thorson, McNeil and Borowski.\textsuperscript{18} In Finlay, the post-Charter decision of the Court on public interest standing, Le Dain J., speaking for the Court, expanded public interest standing to embrace the proceedings commenced to review the validity of administrative action. Under the test expounded in Finlay, public interest standing in such proceedings can be granted if the applicant establishes that: (1) the litigation raises a serious or justiciable issue; (2) they have a genuine interest in the outcome of subject-matter of the litigation; and (3) there were no other persons more directly affected who might reasonably be expected to litigate the issues being advanced.

\textsuperscript{17} [1986] 2 S.C.R. 607 [hereinafter Finlay].

Following the Finlay decision, lower courts began to grant standing much more readily to public interest litigants, particularly where such groups were able to demonstrate a longstanding involvement in issues relating to the subject matter of the proposed litigation. In 1992, however, the Supreme Court revisited Finlay and sounded a cautionary note. In Canadian Council of Churches,19 the Court emphasized that Finlay was not a “blanket approval to grant standing to all who wish to litigate an issue” underscoring the need to “preserve judicial resources” put at risk by the “unnecessary proliferation of marginal or redundant suits.”

In the wake of this admonition, a few courts have interpreted the “genuine interest” arm of the Finlay test to import a requirement that the applicant demonstrate “a direct and personal interest” in the litigation; a requirement they have construed to exclude environmental groups and concerned citizens whose interest in the subject-matter of the suit is civic as opposed to proprietary.20 For the most part, however, courts—while mindful of concerns about judicial economy—have continued to regard a “history of responsible involvement” around the issue at stake in the litigation to satisfy the “genuine interest” requirement.21

Two relatively recent public interest cases deserve particular mention. One of the most important cases in this area in the federal courts was rendered in the context of a challenge by the Sierra Club of Canada to a federal refusal to undertake an environmental assessment with respect to the sale of two CANDU nuclear reactors to China. The intervener, Atomic Energy of Canada, challenged the petitioner’s standing. It argued that section 18.1(1) of the Federal Court Act which permits “anyone directly affected by the matter in respect of which relief is sought” excludes, by inference, the potential for a litigant who is not “directly affected” to rely on common law public interest standing under the Finlay test. Evans J. rejected this argument on several grounds.22 He noted, first of all, previous Federal Court cases in which groups were granted public interest standing under the same provision of the Federal Court Act without

21 See Algonquin Wildlands v. Ontario (Minister of Natural Resources) (1996), 21 C.E.L.R. (N.S.) 102 (Ont.C. (Gen.Div.)).
22 See Sierra Club of Canada v. Canada (Minister of Finance), [1999] 2 F.C. 211.
demonstrating they were “directly affected.” Moreover, it was undesirable, in his view, for Federal courts to be governed by public interest standing rules different from those that apply in other Canadian courts. In his view, the Finlay test should therefore be applied where public interest litigants seek standing in proceedings governed by the Act.

An area of lingering uncertainty with respect to public interest standing concerns its applicability to challenges arising out of administrative inaction as opposed to action. Relying on Finlay, public interest litigants sought standing to commence mandamus proceedings to compel the Provincial Crown to require a local government to obtain environmental approvals in connection with the damming of a local river for water supply purposes. The British Columbia Supreme Court considered this to be an unjustifiable extension of the Finlay principle.23 Relying on the House of Lords’ decision in Gouriet v. Union of Postal Workers,24 McCauley J. held that standing under Finlay was not available “where the public authority responsible for the enforcement of the statute decides in good faith not to place the issue before the court.”

C. Injunctive Relief

A common stumbling block faced by environmental and conservation organizations that have sought recourse to the courts to protect natural areas from development has been their inability to obtain interlocutory injunctive relief. Even where courts have acknowledged that their legal claims have significant merit, judicial application of the prevailing test with respect to the availability of injunctions under RJR-MacDonald Inc. v. Canada (Attorney General)25 has frequently led to a denial of interim relief sought. RJR-MacDonald established a threefold test: (1) is there a serious issue to be tried? (2) Would the applicants suffer irreparable harm if the injunction were refused? And (3) does the balance of convenience between the parties to the application justify the relief sought? In addition, courts have traditionally deemed it necessary for the applicant to undertake to indemnify the respondent for damages in the event that the claim is ultimately dismissed.

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The two primary difficulties environmental groups have encountered in securing interlocutory relief have related to this undertaking requirement, and judicial interpretation of the “irreparable harm” arm of the test under RJR-MacDonald. Many, if not most such groups lack the financial resources to make an undertaking as to damages. As such, it seems appropriate that courts employ the undertaking requirement flexibly to ensure that the right to a remedy is not dictated solely by economic considerations. This is especially so insofar as one of the traditional reasons for imposing the undertaking requirement is to ensure that an applicant who secures interim relief is not unjustly enriched at the expense of the party against whom the relief has been granted, a rationale that seemingly has little application in the context of public interest litigation.

American courts have been alive to this concern and have been generally unwilling “to close the courthouse door in public interest litigation by imposing burdensome security requirement(s).” As such the usual practice in the United States has been to require public interest litigants seeking injunctive relief to post a nominal bond.

Recent Canadian authority suggests that our courts are beginning to re-evaluate the appropriateness of invariably imposing an undertaking requirement on public interest litigants. For example in Friends of Stanley Park et al. v. Vancouver Parks and Recreation Board, Davies J. observed that:

“If an applicant who applies for injunctive relief in a matter concerning serious public interests is able to establish a serious question to be tried, and that the balance of convenience, including the public interest, favours the granting of injunctive relief, such relief should not generally, at the interlocutory stage, be rendered ineffectual by reason of the fact that the applicant may not have the financial wherewithal to provide a viable undertaking as to damages.”

Davies J. went to state that had the applicant succeeded in meeting the test to obtain an interim injunction, he would have issued the injunction without an undertaking as to damages. The decision in this case appears to accord with emerging authority.  

The other barrier faced by public interest environmental litigants in securing interim injunctive relief has been the judicial treatment of the second arm of the *RJR-MacDonald* test: the requirement that the applicant demonstrate that they will suffer irreparable harm if relief is not granted. In private litigation, this inquiry has traditionally focused on the risk to the applicant of physical injury or economic loss. Where the applicant has been granted standing as a public interest litigant this risk is, by definition, absent; instead, in such cases, it has been argued that the relevant “irreparable harm” is harm to the environment.

The meaning of “irreparable harm” has been considered in a variety of cases that have sought to challenge the legality of proposed logging on public lands, often in old growth areas. In several cases, despite evidence that it can take hundreds of years for trees to reach mature (old growth) status, courts have concluded that the logging of old growth does not constitute irreparable harm.  

In *Wilderness Society v. Banff*, the Court concluded that “irreparable harm” would not result from clear-cut logging of three hundred year old trees in Banff National Park, despite expert evidence that logging would have precisely this effect.

Recent cases have been more responsive to the argument that natural resource extraction, in particular clear-cut logging, can constitute “irreparable harm.” Indeed, the Supreme Court’s decision in *RJR-MacDonald*, rendered in 1994, tends to support this view. There the Court relied on a case where logging was enjoined on an island claimed by First Nations to illustrate the meaning of irreparable harm. In its words, “’irreparable’ refers to the nature of the harm, not its magnitude:

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examples include where a permanent loss of natural resources will be the result when a challenged activity is not enjoined.\textsuperscript{31}

Over time, American courts have come to conclude that harm to the environment will almost always be “irreparable.” In the words of the United States Supreme Court:

“Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e. irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favour the issuance of an injunction to protect the environment.”\textsuperscript{32}

Three recent decisions involving interim applications to enjoin logging activities in or near parklands suggest that Canadian courts may be coming to a similar realization. In 1998, Monnin J.A. (in chambers) upheld an interim injunction prohibiting construction of a road through a provincial park noting that “damages will not compensate for a destroyed forest,” and observing that failure to grant the relief sought would “trigger a non-reversible process.”\textsuperscript{33} In a similar vein, Lamek J. concluded that “absent an injunction, the clearing of the road will proceed and the trees will be gone, if not forever, at least for decades.”\textsuperscript{34} Most recently, the Federal Court Trial Division held that because the proposed logging would result in the loss of trees that “could not be replaced in a person’s lifetime” this meant that nature of the harm “could not be quantified in monetary terms.”\textsuperscript{35}

\begin{footnotesize}
\begin{enumerate}
\item \textit{Amoco Production Co. v. Village of Gambell, Alaska} (1987), 107 S.Ct. 1396 at 1404.
\item \textit{Algonquin Wildlands League v. Northern Bruce Peninsula, supra} note 30.
\item \textit{Friends of Point Pleasant Park v. Canada} (2000), 38 C.E.L.R. (N.S.) 45.
\end{enumerate}
\end{footnotesize}
D. Costs

Like the law governing interlocutory injunctive relief, the law governing the awarding of costs is one that has evolved over time primarily in response to cases that have arisen in the context of private litigation. Since different considerations and values come into play where the claim is brought under the auspices of public interest standing, it has been argued that in the area of costs, as in the realm of injunctive relief, courts must turn their minds to how, and to what extent, traditional principles and assumptions need to revisited.

In most Canadian provinces and territories, the law of costs is primarily governed by the common law under which the ordinary rule is that costs will ordinarily “follow the event,” and be awarded at the conclusion of the proceeding. One of the most interesting current issues in public interest litigation, and in litigation in which the public interest is implicated, is the extent to which this presumption is being questioned.

Increasingly, in such proceedings, courts are being called upon to award costs to public interest litigants even where they do not prevail on the merits. A recent illustration is a decision of McKeown J. in an unsuccessful constitutional challenge brought during the course of the APEC Inquiry. On dismissing the claim, he held that the public interest plaintiffs should nonetheless be entitled to their costs in recognition that “the testing of the constitutional principles involved in this matter is clearly in the public interest, since they are at the heart of our constitutional democracy.”36 The approach adopted by McKeown J. has also found favour in the Ontario Court of Appeal37 and in the Supreme Court of Canada.38

There is also emerging caselaw recognizing the right of public interest litigants, and litigants in cases presenting important issues of public policy, to be granted an interim award of costs to enable them to retain counsel in complex litigation that pits them against Government. A litigant in Alberta has recently received such an award to support her challenge to a new definition of “spouse” under provincial legislation as being contrary to the Charter’s equality provisions.\(^{39}\) In making this interim award, Watson J. noted, *inter alia* that her claim was not frivolous, that she was not legally trained and could not afford counsel, and that such an award would help ensure that the matter was properly litigated. Courts in B.C. are also increasingly being asked to recognize the need for, and public benefit of, making interim costs awards in cases involving impecunious parties and important legal issues.\(^{40}\)

In the realm of public interest environmental law, however, the most commonly litigated costs issue has been that unsuccessful public interest litigants should be exposed to adverse costs liability. There appear to be a growing judicial recognition that the traditional rationales underpinning the usual rule that costs follow the event apply with less force, if they apply at all, to public interest litigation. Three rationales are said to justify to the usual rule: that costs should be levied against the party which the court has found to be “at fault” in the litigation; that costs should be imposed as a form of punishment for inappropriate litigation tactics or to deter others from similar conduct; and that costs should be awarded as the spoils of victory to compensate the victor for the expenses it has incurred as a result of the actions of the unsuccessful litigant.\(^{41}\)


\(^{40}\) See *Minister of Forests (B.C.) v. Okanagan Band*, [2001] B.C.J. No. 2279 (C.A.), online: QL (BCJ). In this case, the Crown commenced legal action against the Band to enjoin it from harvesting timber on Crown lands. The Band defended the action by claiming it had an aboriginal right to the timber in question. When the Crown succeeded in having the matter converted to a trial, the Band applied to have its trial costs borne by the Crown. In a recent ruling the Court of Appeal has ordered the Crown to pay the Band its taxable costs in advance in recognition, *inter alia*, of the “public interest” at stake in the case. In a subsequent case, Vickers J. has ordered the federal and provincial Crowns to pay a Band its legal fees and disbursements in advance of the trial of its aboriginal title claim: see *Nemaiah Valley Indian Band v. Riverside Forest Products* [2001] B.C.J. No. 2484 (S.C.), online: QL (BCJ).

\(^{41}\) For further discussion of the rationales governing the allocation of costs and their applicability to public interest litigation see C. Tollefson, “When the Public Interest
The first two rationales of these are rarely applicable to public interest litigation. Generally, therefore, awarding costs against unsuccessful public interest litigants, courts have relied on the last of these three rationales: what I have termed the “spoils-based compensation” rationale.

Public interest litigants point out, however, that there are a variety of reasons why courts should refrain from making adverse costs awards against public interest litigants. The first is an “access to justice” rationale. As I have noted elsewhere in relation to public interest environmental litigation:

“Adverse costs awards are one of the most significant barriers to realizing the promise of access to justice held out by liberalized rules of standing. Financing complex and protracted public interest litigation against government or private interests, of the type that is particularly prevalent in the environmental context, is an enormous challenge for any public interest litigant. When the prospect of being liable for the defendant’s legal costs is factored into the equation, all but the best-financed (or, possibly, judgment-proof) litigants will be deterred from proceeding except in those rare instances where a successful outcome is a virtual certainty.”

Another compelling rationale for courts to be reluctant to award costs against public interest litigants are the public benefits often associated with such litigation regardless of the outcome. The “public benefit” rationale recognizes the social utility of resolving important and often novel legal questions, holding Government to account under the rule of law and encouraging disputes to be resolved within the law. On this last point, the words of Curtis J. of the B.C. Supreme Court are apt:

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Ibid., at 318-319.
“Disputes involving environmental issues, such as this one, are all too liable to provoke confrontations outside the law. In my opinion, it would not be conducive to the proper and legal resolution of this case which is one of significant public interest, to penalize the petitioners who have acted responsibly by attempting to resolve the issues according to the law, through awarding costs against them.”

This passage was recently cited with approval by Kirby J. of the High Court of Australia in a decision that upheld a trial court ruling not to award costs against a public interest environmental litigant.

As the law of costs in Canada is primarily non-statutory (with the notable exception of federally, where it is dealt with in some detail in the Federal Court Rules as I will discuss), public interest litigants have pressed for judicial recognition of a common law “public interest costs exception.” This proposed exception would insulate a public interest litigant from adverse costs awards where a court is satisfied that the litigation concerns an issue of public importance, that resolution of the issue will yield a public benefit, and that the litigant has acted in a responsible manner sensitive to concerns about judicial economy.

To date, courts have been reluctant to establish a stand-alone public interest costs exception. They have, however, frequently exercised their discretion to excuse unsuccessful public interest litigants from costs liability. In so doing, they have typically invoked the access to justice and public benefit rationales.

A particularly good illustration of the application of these dual rationales in the context of public interest environmental litigation is a decision of Paris J. where he declined to award costs against an unsuccessful public interest litigant on the grounds that its suit “raised serious legal issues of unquestionable public interest,” that financial

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45 See Sierra Club of Western Canada v. B.C. (A.G.), supra note 44; Friends of Oak Hammock Marsh Inc. v. Ducks Unlimited (Canada) (1991), 84 D.L.R. (4th) 371 at 381 (Man. Q.B.) [“the applicants’ perception of potential danger to the public interest was sufficiently well-founded that I order no costs payable to or by any of the parties”]; and Reese v. Alberta, [1993] 1.W.W.R. 450 at 456 (Q.B.) [a “close case” in which the applicants “performed a public service”].
consequences of such an award would be “significant,” and that it had “at all times acted responsibly and within the law, in particular by attempting to vindicate its position through the courts.”\[46\]

For a similar analysis arising in the context of a constitutional challenge, where the court noted that the appellants “were not motivated by personal gain” and that this was a case which justified “citizens taking legal action which is of vital interest to a large segment of the population.”\[47\]

As noted earlier, the rules governing costs in Federal Court proceedings differ from those prevailing in most other Canadian jurisdictions due to the fact that in the late 1990s the Federal Court Rules were amended to codify judicial discretion with respect to the costs determination and allocation.\[48\] In determining and allocating costs, the Rules now provide that courts shall consider a variety of factors including: the result of the proceeding, the importance and complexity of the issues, whether the public interest in having the proceeding litigated justifies a particular award of costs, and any conduct of a party that tended to shorten or unnecessarily lengthen the duration of the proceeding.

Rule 400 departs from its predecessor—Rule 1408—that provided that there should be no award as to costs unless there were “special reasons” to do so. Under the former Rule, public interest environmental litigants had enjoyed mixed success in arguing that they should be exempted from adverse costs awards, where such awards were sought by private sector developers. In one case, where such an award was made, the trial judge emphasized that the developer “was not a public agency with a general responsibility to participate in judicial review for the clarification of the laws. Instead it was obliged to participate to protect its very financial interests.”\[49\] On similar facts, developers have also been denied their costs.\[50\] In this case, Cullen J. observed that while

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47 Hogan et al. at para.180, supra.
48 Federal Court Rules, r. 400 [SOR/98-106].
“environmental advocacy” groups were not “entitled to special treatment,” neither the petitioner’s vigourous pursuit of its cause, nor the fact that the developer may have incurred “real financial hardship” justified an award of costs in the event.

To date, the jurisprudence under Rule 400 is relatively limited. In one of the few reported cases, the Federal Court of Appeal recently imposed costs against an unsuccessful public interest environmental litigant where it concluded that the appellant had failed to proceed in an expeditious manner and that it had not raised any “truly novel arguments.” The Court also observed that although it did not doubt the genuineness of the appellant’s belief that it was acting in the “public interest,” it was “pertinent to note that all of the governments of the municipalities surrounding [the proposed development] supported the findings of the environmental assessment upon which the Minister based her decision.”

PART III: CONCLUDING OBSERVATIONS

The success or failure of public interest environmental litigation, like public interest litigation generally, cannot be fully or adequately assessed on the basis of win/loss score-sheet. This is because such litigation is not just about prevailing in court but also involves other goals. These goals may include drawing judicial, legislative and public attention to pressing social or environmental problems, playing a watchdog role with respect to governmental action or inaction, and promoting access to justice by providing legal representation to clients in need.

To this extent, it is clear that public interest litigation necessarily entails seeking to advance an agenda. As I have argued earlier, however, “agenda advancement” is by no means unique to public interest litigants but rather is one that pervades litigation involving public law issues.

In this concluding Part, I will try to provide an assessment that takes account of the broader impact of what environmental groups have achieved, and failed to achieve, through litigation since over the last decade or so.

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In terms of enhancing access to justice and providing legal services to needy clients, I argue that great strides have been made. This is due, in large measure, to an increasing willingness on the part of courts and tribunals to recognize the value of hearing from new interests where those interests are prepared and able to play a constructive and responsible role in the litigation process. Moreover, the capacity of the legal profession to provide able representation to ensure that these interests can, in fact, play this role has been greatly enhanced by the continuing efforts of well established public interest environmental law firms such as West Coast Environmental Law\textsuperscript{52} CELA and the Canadian Environmental Defence Fund and by the expanding role played by the Sierra Legal Defence Fund.

By enhancing the ability of citizens to ensure governments follow through on legal commitments they have made to protect the environment, I also argue that these public interest environmental law firms have played an increasingly effective role throughout the 1990s. That such groups were willing and able to play such a role is particularly fortuitous due to the fact that throughout this decade governments everywhere were cutting back on environmental protection and enforcement budgets. Thus not only did public interest litigation help to draw attention to practices and proposals that put the environment at risk, it also had the effect of drawing attention to the environmental costs associated with government austerity measures.

But it is with respect to informing judicial and legislative attitudes on questions of environmental protection and sustainable resource management that public interest environmental litigation has had its most empirically measurable effect. Legal historians will, I believe, regard the last decade or so as a watershed period in Supreme Court of Canada jurisprudence on environmental issues. During this period, the Court sought with vigour and creativity to develop legal principles that would optimize protection of the environment while recognizing the need to achieve balance and autonomy within our federal structure and to ensure that federal, provincial and local Governments are given room and

\textsuperscript{52} For most of the 1990s, the West Coast Environmental Law Association has administered an innovative program that allows needy litigants to secure funding for counsel in relation to public interest cases, the bulk of which are heard by the B.C. Environmental Appeal Board. This program, known as the Environmental Dispute Resolution Fund (EDRF) is fully funded by the Law Foundation of British Columbia.
incentives to tackle this task. In developing this jurisprudence it broke new ground by recognizing the global context within which the challenge of environmental protection must be approached, and the utility of emerging principles of international environmental law and policy. In more concrete terms, the Supreme Court’s decision in Oldman River clearly influenced the subsequent decision of the federal Government to enact Canada’s first federal environmental assessment law and similar laws that have since been enacted in various provinces. In a similar way, it can be speculated with some degree of confidence that recent amendments aimed at strengthening the Canadian Environmental Protection Act would not have been pursued but for the decision of the Court in R. v. Hydro-Québec.

Whether these developments would have occurred but for the involvement of public interest environmental interveners is impossible to say. What is clear, however, is that their presence made these outcomes more likely.

Turning to developments in trial courts across the country, we have seen a significant change in the judicial attitude towards the participation of public interest environmental groups in the litigation process. While in large measure this is attributable to the expansion of public interest standing brought about by the Supreme Court in Finlay, it is also, I submit, a testament to the careful and responsible way environmental groups have undertaken litigation in the post-Finlay era. As a result, the concerns about the prospect of well meaning groups with unmeritorious cases flooding court dockets, expressed in Canadian Council of Churches and elsewhere, has simply not materialized.

I also argue that important progress has been made towards recognizing the complex interplay between citizen participation and rules governing the availability of interlocutory relief and the allocation of costs. On the basis of recent caselaw, there is reason to be optimistic that courts will exercise their discretion in these areas in ways that seek to promote rather than to discourage participation in judicial processes by responsible public interest advocates.

There can be little doubt that the enhanced role that citizens and citizens groups are playing in judicial and administrative settings challenges us to reflect not only on the implications of this phenomenon in terms of the rules and procedures that have traditionally governed these fora, but also on broader questions of democratic governance. The citizen participation phenomenon is not one that courts and tribunals should
resist, nor have they done so. On the contrary, they have, I submit, made significant strides towards accommodating public interest advocates in processes and under rules that were developed for different purposes in different times. The progress courts and tribunals have made on this front suggests that they are keenly aware of the multitude of public benefits that flow from citizen engagement in judicial and administrative processes. Their continuing commitment to democratizing access to justice is, and will remain, a key measure and determinant of the health of our democracy.
La réconciliation du citoyen avec le système contradictoire

Arlène GAUDREAULT*

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Des progrès importants ont été accomplis aux cours des deux dernières décennies afin d’humaniser le système de justice, de protéger les victimes, particulièrement celles qui sont vulnérables, et pour favoriser la dénonciation de gestes de violence qui, auparavant, n’étaient pas portés à l’attention de la police et des autorités judiciaires. Même si nous sommes dotés de conventions internationales telles que la Déclaration de principes fondamentaux de justice relatifs aux victimes de la criminalité et aux victimes d’abus de pouvoir ratifiée par l’Organisation des Nations Unies (1985) et que plusieurs pays, dont le Canada, aient adopté des législations visant à reconnaître les droits des victimes à un meilleur traitement dans le système de justice, il n’en reste pas moins que trop souvent encore, l’expérience des victimes et des témoins devant les tribunaux est vécue comme une revictimisation.

Mon propos n’est pas de cibler les lacunes du système actuel mais d’aborder plutôt le thème de cette conférence sous l’angle de la justice réparatrice. Ce modèle est-il susceptible de redonner une place aux victimes? S’agit-il d’une justice davantage orientée vers la reconnaissance de leurs besoins? Est-elle une avenue intéressante pour l’ensemble des victimes et à quelles conditions?

Je vais d’abord rappeler brièvement quelques-unes des raisons qui sont le plus souvent évoquées pour faire valoir l’intérêt de ce modèle. Cependant, ma réflexion va surtout porter sur les difficultés et les écueils que peut présenter la justice réparatrice dans la perspective des victimes et des organismes qui leur viennent en aide.
I. POURQUOI OPTER POUR LA JUSTICE RÉPARATRICE?

En comparaison avec le modèle de justice traditionnel, la justice réparatrice se veut une approche plus positive et constructive pour restaurer les liens entre la personne qui a subi le préjudice du délit, celle qui l’a causé et la communauté dans son ensemble. Elle peut avoir un impact positif sur le délinquant en le confrontant à ses responsabilités et en lui offrant l’occasion de réparer les torts causés envers les victimes. Elle vise à accorder une plus grande place aux victimes, à répondre à leurs besoins d’information sur les raisons et les circonstances du délit, à leur permettre d’être entendues et d’obtenir un dédommagement, matériel ou symbolique. La justice réparatrice mise sur des sentiments nobles comme le pardon et la réconciliation plutôt que sur la vengeance et le désir de punir. Elle vise à diminuer l’humiliation, la dégradation et la stigmatisation rattachés au modèle de justice rétributive.

II. UN CONCEPT QUI MANQUE DE CLARTE

Il existe une confusion au plan de la terminologie et une absence de cohérence au plan de la philosophie ou des fondements théoriques des pratiques réparatrices. Justice relationnelle, réparatrice, transformatrice ou réformatrice : on recourt à une terminologie différente et à une pléthore de descripteurs pour englober ces pratiques.

Toutes sortes d’initiatives ou de programmes se réclament maintenant de la justice réparatrice : médiation directe ou indirecte, cercles de conférences, conférences familiales, cercles de guérisons ou de détermination de la peine, alternatives à l’incarcération. Dans une certaine mesure, la justice réparatrice est un concept « fourre-tout ». Lode


Walgrave³, ardent promoteur de cette approche, convient que la « prolifération hétéroclite », le « mélange de bonne intentions » et la « croissance sauvage de programmes » dans ce domaine, menacent la valeur et le potentiel de l’approche réparatrice.

Dans la plupart des pays, elle est souvent utilisée et préconisée dans des affaires mettant en cause des jeunes délinquants et elle cible des délits de faible gravité. Elle consiste souvent à éviter aux auteurs d’infractions l’entrée dans le circuit pénal ou à arriver, le cas échéant, à une sanction moins lourde. Elle a une optique de déjudiciarisation et elle mise sur une philosophie basée sur l’intervention minimale auprès des délinquants.

La justice réparatrice, comme d’autres programmes de mesures alternatives, est devenue une autre façon d’étendre le contrôle judiciaire et social dans des domaines qui ne sont pas normalement de la compétence judiciaire et ce, bien souvent, au détriment des groupes défavorisés. Ces effets pervers expliquent que ces nouvelles approches ne se sont pas avérées être de véritables alternatives à la prison comme on l’avait souhaité⁴.

III. LA RECHERCHE EVALUATIVE ET LES APPROCHES DE JUSTICE RÉPARATRICE

Les évaluations de ces programmes souffrent de nombreux problèmes au plan méthodologique : absence de groupe contrôle, faiblesses des méthodes statistiques, échantillons restreints, mesure des effets à court terme⁵. Certaines études ne précisent pas le type de victimisation, les caractéristiques des participants (jeunes ou adultes, délits contre les biens ou de violence, la nature de leurs liens) ou, pis encore, le nombre de répondants à l’étude. La disparité des programmes au plan des objectifs, des clientèles, de l’implantation des modèles (dans le cadre pénal ou non,

³ L. WALGRAVE, loc. cit., note 2.
programmes à la Cour ou administrés par d’autres agences pénales) ne permettent pas de tirer des explications de cause à effet. Il est donc difficile de généraliser les données actuelles.\(^6\)

\[\text{IV. LA CLIENTELE-CIBLE DE CES PROGRAMMES}\]

Le bilan des recherches évaluatives sur les initiatives de justice réparatrice met en lumière que ces programmes s’adressent à une minorité de cas en regard de l’ensemble du volume de la criminalité. Ils visent davantage les délits contre les biens et, dans un nombre disproportionné, des jeunes qui en sont à leurs premiers délits.\(^7\) Jusqu’à présent, les expériences dans ce domaine ont été prudentes et elles se sont concentrées sur des cas sans risque.

Même si on met de l’avant que les modèles de justice réparatrice peuvent s’appliquer aussi dans les cas de crimes violents, peu de programmes rejoignent cette catégorie de victimes. De plus, les recherches sur lesquelles on s’appuie sont souvent anecdotiques et reposent sur des échantillons restreints ou des études de cas. Certaines problématiques telles que la violence conjugale et l’agression sexuelle sont peu documentées.

La recherche ne permet pas d’établir clairement que ces programmes réduisent le taux de récidive ou l’accroissent. Plusieurs chercheurs admettent qu’on ne peut pas dire grand chose sur la récidive parce qu’on ne dispose pas de données substantielles sur le sujet.\(^8\)

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La réconciliation du citoyen avec le système contradictoire

V. VERTUS ET LIMITES DE LA MEDIATION

La plupart des études montrent que les victimes qui ont collaboré à des expériences de médiation sont généralement satisfaites. Les victimes qui y ont participé décrivent le processus comme étant équitable et, dans l’ensemble, une telle expérience semble avoir contribué à diminuer la peur du crime, à augmenter les chances que le délinquant dédommage les torts causés. Victimes et délinquants ont le sentiment que cela leur donne l’occasion de prendre en mains leurs problèmes et de les régler d’une façon plus constructive.

Néanmoins, le développement des modèles de médiation à travers l’Europe et en Amérique du Nord en est encore aux phases initiales\(^9\). La médiation directe est rare même si on en parle beaucoup.

Un pourcentage significatif de victimes (de 30 % à 50 %) ne veulent pas rencontrer ou parler au délinquant. Perte de temps, peur ou colère, besoin de tourner la page : ces raisons sont le plus souvent évoquées pour expliquer leur refus. La nature et les circonstances du délit, certaines caractéristiques liées au délinquant (jeunes ou adultes, premières offenses ou non), la possibilité ou non d’obtenir un dédommagement : ces facteurs sont également pris en compte dans leurs décisions.

Les réticences ne sont pas seulement du côté des victimes mais elles proviennent également des intervenants sur le terrain. La médiation exige une longue préparation et elle est coûteuse en terme de ressources et de temps qu’on doit y consacrer. De plus, certains intervenants ne sont pas à l’aise avec le fait de devoir composer avec les réactions des victimes\(^10\). Dans nombre de cas, il semble donc plus facile ou profitable d’impliquer indirectement les victimes.

VI. LA SATISFACTION DES VICTIMES

Malgré le haut taux de satisfaction des victimes qu’indiquent les recherches, particulièrement celles qui ont porté sur la médiation, nous devons rester prudents et ne pas exagérer les bénéfices qu’elles en retirent. À l’heure actuelle, il n’y a pas d’étude systématique permettant de dire dans quelle mesure la justice réparatrice répond efficacement aux besoins des victimes, contribue à leur processus de guérison, réduit la vulnérabilité par rapport à une victimisation future et diminue le sentiment de marginalité que ressentent souvent les victimes\(^\text{11}\). Il n’y a pas d’évidence que les victimes sont plus satisfaites des programmes de justice réparatrice que du modèle de justice traditionnel (Smith 1988)\(^\text{12}\). Plusieurs études révèlent qu’une proportion significative de victimes se disent moins satisfaites que les délinquants lorsqu’on les interroge sur leur expérience.

Les modèles actuels apparaissent prometteurs en théorie mais des recherches plus rigoureuses et à plus long terme – à la fois qualitatives et quantitatives – s’imposent pour mieux cerner le potentiel et les limites que représente ce domaine en émergence. Il importe également de cibler les meilleures pratiques, de recueillir des données sur de grands groupes et sur les effets à long terme.

VII. QUELQUES INTERROGATIONS SUR LE DEDOMMAGEMENT ET SUR LA REPARATION DES TORTS CAUSES

Il est difficile de savoir dans quelle mesure les victimes qui ont collaboré à des initiatives de justice réparatrice, notamment la médiation, obtiennent un dédommagement qui corresponde aux pertes encourues. On en sait peu également sur les problèmes liés à l’exécution de ces mesures. Ces aspects ne sont pratiquement pas documentés dans les recherches alors qu’il s’agit d’enjeux majeurs lorsqu’on fait la promotion de la justice réparatrice.


Par ailleurs, les victimes doivent-elles se contenter d’excuses ou d’un dédommagement symbolique qui, plus souvent qu’autrement, consiste en l’exécution de travaux au bénéfice de la communauté ou de tiers? Est-ce suffisant? L’implication du délinquant dans des démarches visant l’amélioration de ses aptitudes est-il réparateur pour la victime? S’agit-il plutôt, comme le souligne Walgrave\textsuperscript{13}, de mesures de traitements alternatifs visant à réadapter le délinquant? La réparation des préjudices causés aux victimes ne s’efface-t-elle pas au profit de l’action qu’on entend exercer sur le délinquant?

Il convient de souligner que le besoin de réparation ne s’exprime pas seulement en terme de dédommagement matériel. Plusieurs victimes souhaitent aussi que la peine soit proportionnelle aux torts causés, qu’elle reconnaîsse l’impact du crime, qu’elle assure leur protection et envoie un message de dissuasion et de réprobation sociale. Ces préoccupations semblent souvent reléguées à l’arrière-plan dans le discours de la justice réparatrice.

\textbf{VIII. UNE JUSTICE DAVANTAGE ORIENTEE VERS LES VICTIMES?}

L’évaluation d’un certain nombre de projets donne des résultats pour le moins équivoques. Dans certains programmes, les victimes n’ont pas été systématiquement consultées; d’autres ont subi des pressions pour prendre part à la médiation. On ne prend pas toujours le temps de leur prodiguer l’information, de les préparer psychologiquement, d’aménager des conditions qui facilitent leur participation\textsuperscript{14}.

Dans les projets axés sur la déjudiciarisation, les besoins des victimes sont souvent subordonnés à ceux des délinquants\textsuperscript{15}. Les initiatives de justice réparatrice sont, la plupart du temps, sous l’autorité de services voués à la réinsertion des délinquants (probation, programmes de mesures de rechange pour les jeunes ou les adultes). Les cas sont

\textsuperscript{13} L. WALGRAVE, \textit{loc. cit.}, note 2.


choisis en fonction des caractéristiques des délinquants et de leurs besoins sans qu’on se préoccupe suffisamment des intérêts des victimes. Elles sont alors confinées à un rôle de facilitateur ou d’intermédiaire et servent de prétexte pour faire une intervention éducative à l’endroit des délinquants. Il faut également se demander si les intervenants qui travaillent dans ces programmes ont la formation voulue et s’ils sont capables d’agir avec neutralité et dans le respect de toutes les parties.

Certaines façons de faire dénotent un manque d’intérêt à leur endroit et elles peuvent contribuer à la victimisation secondaire. Lorsque le délinquant exprime de faux remords et s’implique surtout pour éviter des sanctions plus lourdes, lorsqu’on crée de fausses attentes sur un dédommagement possible de la part du délinquant et surtout lorsque celles-ci ne sont pas respectées, les victimes en retirent le sentiment que les délinquants sont les premiers gagnants.

IX. S’ENGAGER DANS CE MODELE AVEC PRUDENCE

Certains types de domination psychologique et physique d’une personne sur une autre excluent que les parties puissent avoir des rapports volontaires et libres entre elles. Lorsque la sécurité des personnes est compromise, elle exige des approches qui assurent un contrôle de la non-récidive et un encadrement clinique qui garantisse le respect des intérêts de chacune des parties en cause (Centre jeunesse de Québec, 2001). Nous avons besoin de plus de données sur bon nombre de questions qui suscitent de vives inquiétudes dans le réseau d’aide aux victimes :

- Dans quel cas doit-on envisager les options liées à la justice réparatrice et, plus particulièrement, les mesures médiatrices?
- Sont-elles souhaitables dans le cas des personnes qui ont subi de multiples victimisations ou dont le parcours est marqué par des violences chroniques et répétées?
- Sont-elles adaptées à celles qui sont dans un rapport de force inégal à cause de leur âge, de leur statut, de leur histoire personnelle?
- Sont-elles indiquées dans les cas de violence conjugale, de maltraitance et d’agression sexuelle envers les enfants?
- Sont-elles appropriées lorsque le délit porte atteinte à l’intégrité physique, psychique ou sexuelle des victimes?
À quelle étape du processus doit-on envisager la justice réparatrice?

Dans certains cas – on peut penser par exemple aux mesures de rechange – il faut « mettre en marche » le processus de responsabilisation le plus rapidement possible si l’on veut que la mesure réparatrice soit significative et éviter d’allonger les délais. L’efficacité de cette mesure peut dépendre de la rapidité avec laquelle on intervient auprès du contrevenant.

Or, cet impératif n’est pas toujours compatible avec les besoins de la victime. Le processus de rétablissement, le temps pour se remettre de l’impact d’un crime peuvent varier considérablement selon les personnes et les contextes de victimisation. Même dans les crimes contre les biens, comme l’ont démontré les sondages de victimisation et de nombreuses études, les victimes passent à travers des étapes de plus ou moins grande désorganisation. On les sollicite à un moment qui est peut-être propice pour le contrevenant mais pas nécessairement pour elles. Comment une victime qui n’a pas eu le temps de surmonter les difficultés peut-elle réellement accepter librement et de façon éclairée une procédure de médiation? Est-ce une négociation loyale?

Dans quels cas est-il pertinent de favoriser une rencontre entre la victime et l’auteur du délit au stade de l’exécution de la peine et de la remise en liberté? Quels bénéfices peuvent en retirer la victime et le délinquant? Quelles sont les conditions à mettre en place pour qu’un tel processus soit efficace pour les parties en cause? Comment le dédommagement, matériel ou symbolique, est-il possible ou réaliste à cette étape?

X. LE DESIR DES VICTIMES DE RENCONTRER LEUR AGRESSEUR

Les victimes ne sont pas toutes désireuses de rétablir ou d’établir des liens avec l’auteur du crime. L’idée même peut heurter plusieurs d’entre elles. Il semble que les victimes de crimes contre les biens soient plus intéressées que les victimes de crime contre la personne à rencontrer leur agresseur\(^\text{16}\). Celles qui ont été davantage perturbées par les conséquences du crime et qui connaissent leur agresseur seraient plus

consentantes à s’impliquer. Pour plusieurs victimes, la médiation indirecte semble une meilleure avenue. Ce processus serait moins confrontant tout en donnant l’occasion de recevoir un dédommagement. En fait, les données actuelles sont disparates et il est difficile de dire ce que les victimes souhaitent vraiment.

XI. RECONCILIER LES VICTIMES ET LES AGRESSEURS : UN RÊVE POSSIBLE?

Réconcilier suppose qu’on soit capable de reconstruire des liens. L’incapacité d’aller vers l’autre, d’entendre, de dire, peut venir tout autant de l’agresseur que de la victime.

1. Dans la perspective des victimes

Les réponses à la violence, à la victimisation diffèrent beaucoup selon les personnes, la gravité du geste posé, l’aide qui leur est apportée. Plusieurs victimes ne retrouveront jamais leur qualité de vie, leur sérénité, leur sécurité, leur confiance en autrui... ou en leurs proches. Certains crimes entraînent une profonde rupture de liens, des brisures importantes dans les rapports au sein de la famille, de l’entourage. On ne doit pas imposer des solutions toutes faites.

La réconciliation avec l’agresseur, l’acceptation des gestes qu’il a posés sont impossibles ou impensables pour bon nombre de victimes. Certaines blessures, psychologiques ou physiques, certaines pertes ou dommages ne pourront jamais être véritablement réparés ou compensés. L’idée même de réparation et de réconciliation peut heurter bon nombre de victimes parce « l’irréparable » est au cœur de ce qu’elles vivent et de ce qu’elles ressentent.

Plusieurs victimes vont choisir un processus de guérison et des voies qui les amènent à s’éloigner de l’agresseur. Toute proximité ou contact avec ce dernier peut être perçu comme contaminant ou peut provoquer de nouvelles blessures. Elles vont chercher à se protéger

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18 D. MIERS, op. cit., note 6.
d’autres formes d’agression et de blessures en refusant, par exemple, de suivre le processus judiciaire ou le traitement médiatique de leur affaire.
Reconnaître « l’irréparable », notre impuissance et les limites de nos interventions est un message que nous devrions envoyer plus souvent aux victimes pour exprimer notre sympathie. Accepter que des victimes veuillent poursuivre leur route, le plus sereinement possible et laisser l’autre poursuivre la sienne.

2. Dans la perspective des contrevenants

Dans la panoplie des mesures réparatrices, la médiation est décrite comme étant particulièrement utile pour faire émerger et renforcer chez le délinquant des émotions positives telles que l’empathie et la compassion. La rencontre entre la victime et le délinquant serait la meilleure façon de contrecarrer le processus mental de désensibilisation dans lequel il se réfugie pour éviter de se sentir coupable. Mis en face de la victime, il lui est alors impossible de nier son existence; il ne peut plus longtemps la dépersonnaliser, la traiter en objet. Parce que les parties en viennent à adopter une vision plus réaliste et moins stéréotypée l’un de l’autre, la réconciliation devient alors possible.

Le modèle de la justice réparatrice semble évacuer un peu facilement le fait que de nombreux délinquants puissent utiliser la justice réparatrice à toutes sortes de fins : échapper à des sanctions punitives, se montrer sous un meilleur jour, atténuer leurs fautes, manipuler... Lorsqu’on a affaire à des délinquants narcissiques et antisociaux, cette rencontre présumément réparatrice avec la victime est contre-indiquée.

Cet objectif de réconciliation n’est pas réaliste ni pour toutes les victimes ni pour tous les délinquants. Les tenants de la justice réparatrice devraient davantage le reconnaître.

CONCLUSION

La justice réparatrice est-elle suffisamment bien articulée pour justifier les références continues au fait qu’elle est un nouveau paradigme? Il convient sans doute de prendre une plus grande distance...
critique face aux initiatives actuelles et admettre que ce n’est pas une panacée.20

Jusqu’à présent, le modèle de justice réparatrice n’a pas réorienté fondamentalement les visées du système de justice pénale. La diversité des pratiques, les tensions entre les politiques orientées vers les victimes et vers les délinquants, le manque de consensus sur les fondements théoriques et sur son impact en terme de changement alimentent le débat actuel sur les finalités et la valeur de ce modèle.

On peut entretenir des doutes quant à la capacité ou au potentiel de la justice réparatrice d’être un courant de pensée capable de prendre un grand nombre de cas dans et à l’extérieur du système de justice. Il est difficile de concevoir que ce modèle puisse être très répandu rapidement et appliqué dans toutes sortes de situations. Il n’est pas le remède souverain à tous les maux.

Il faut lutter contre les idées simplistes. La justice réparatrice est un des outils dans la résolution des problèmes, une des options de la justice, une des façons de l’exercer. Le système de justice traditionnel peut aussi jouer un rôle réparateur. Ce serait le déresponsabiliser trop facilement! C’est un aspect que les tenants de la justice réparatrice ont balayé très facilement du revers de la main.

Il est important de ne pas se précipiter dans cette option et de prendre le temps de bien encadrer la philosophie qui la sous-tend et les pratiques qu’elle génère. Il est plus approprié de décrire la justice réparatrice dans le système de justice plutôt que de s’engager dans un discours euphorique sur les nouveaux paradigmes.

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Citizen Participation in Canadian Criminal Justice: The Emergence of “Inclusionary Adversarial” and “Restorative” Models

Bruce P. Archibald**

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I would like to thank my colleagues Archie Kaiser, Jennifer Llewellyn and Ronalda Murphy for helpful comments on the first draft of this paper. My stubbornness on some controversial issues will be evident to them, and of course, remaining errors are my responsibility alone.

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Changes in how citizens relate to criminal justice are in the air. Perennial demands to “get tough on crime” continue. But as a society, we are “getting smart about getting tough”.\(^1\) As the new *Youth Criminal Justice Act*\(^2\) and the relatively recent amendments to the sentencing provisions of the *Criminal Code*\(^3\) attest, Canada is at the forefront of international developments which acknowledge the importance of integrating restorative and more traditional paradigms of criminal justice.\(^4\) Moreover, the character of traditional criminal justice is changing.\(^5\) All of these initiatives are rooted in varying degrees of citizen alienation from what traditionally has happened in our criminal justice system. Individual citizens and identifiable communities are demanding greater participation in the administration of criminal justice.\(^6\) Courts, legislators and criminal justice policy makers are

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1. This is to steal the title of the Saskatchewan restorative justice programme: “Getting Smart about Getting Tough”: Saskatchewan’s Restorative Justice Initiative, Department of Justice of Saskatchewan, 1997.


responding to these demands with measures, sometimes *ad hoc* and sometimes more coordinated, to increase the capacities of those affected by criminal harms, and their procedural aftermath, to participate meaningfully in effective societal responses to these wrongs. Meanwhile there is ferment in the scholarly literature about concepts of citizenship and theories of democracy. This paper is intended to sketch a map of these changes and reflect on the various new trails that are being blazed over what might otherwise be thought to be somewhat familiar territory.

What is the cartographic structure of the paper? One must start by placing the detailed area map of criminal justice on the broad marine chart of the constitutional and political coastlines which channel the sometimes turbulent waters of egalitarian and participatory values around Canada’s post-modern democracy. Secondly, it is critical, when coming on shore, to reflect on the outlines of the traditional “exclusionary and hierarchical” criminal justice landscape which we seem to be leaving for more verdant environs. Thirdly, we shall focus on the redeveloped territory of formal criminal justice: that which, for a want of a more elegant label, I am describing as an egalitarian and inclusionary adversarial model. Fourthly, we examine a skeletal relief map of the restorative justice processes which are emerging as alternative routes or supportive by-ways to channel criminal justice traffic to both novel and well-known criminal justice destinations. Finally, it is important to reflect on the public security features of the journey, to ensure that in our criminal justice policy travels we maintain a safe balance between individual citizens’ goals and principles of fundamental justice which protect our over-all societal interests.

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8. The mapping analogy in legal and social science literature is becoming more attractive as the underbrush of ideological conflict makes the traditional terrain more difficult to discern: see W. Twining, *Globalization and Legal Theory* (London: Butterworths, 2000).
One definitional caveat is in order at the outset. While this paper is informed by recent debates over the nature of citizenship in multicultural democracies, and is oriented to issues of inclusion, it does not directly engage with the theoretical literature on citizenship per se. This is because our criminal law has for some considerable time largely ignored the question of citizenship as a threshold for defining substantive and procedural rights. While citizenship may be relevant to the status of judges or jurors, crimes and their defences generally apply to all those found on Canadian territory and the legal rights provisions of the Charter apply to everyone, regardless of citizenship. Thus, this paper is about rights of participation in the criminal justice process available to all persons affected by that system regardless of formal citizenship. From time to time the word “citizen” may thus be used in this broad sense to include all members of the community, both transient and permanent, who may have such rights of participation.

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9 Supra note 7.


11 Being a Canadian citizen or British subject was formerly and indirectly a qualification for being a judge in most Canadian jurisdictions by virtue of the fact that one had to be a barrister or advocate to become a judge and such status was required in order to be a lawyer. However, since the finding in Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 21 [hereinafter Andrews] that a citizenship qualification for lawyers is contrary to the equality protectionsof the Charter, the derivative citizenship requirement for judges is no longer operative and such statuses as the Supreme Court Act, the Federal Court Act R.S.C. 1985, c. F-7 and the Nova Scotia Provincial Court Judges Act R.S.N.S. 1989, c. 238, have not been amended to re-instate a citizenship requirement, even though it would seem to be justifiable under the Andrews reasoning.

12 Citizenship may be a qualification for jury service in Canada (see the Juries Act, R.S.N.S. 1989, c. 242, s. 4, as amended), although there is an argument that this might be contrary to the reasoning in Andrews, ibid.

13 On the “territorial principle” as the primary basis for jurisdiction in Canadian criminal law, as opposed to the “nationality principle” or the “protective principle”, see Law Reform Commission of Canada, Working Paper # 37: Extraterritorial Jurisdiction (Ottawa: Ministry of Supply and Services, 1984).


15 Charter sections 7, 8, 9, 10 and 12 explicitly apply to “everyone”, while the procedural protections of section 11 apply to “any person charged with an offence.” The extent of the application of the Charter to non-citizens has been most controversially litigated in the immigration and refugee context: see Suresh v. Canada (Minister of Citizenship and Immigration), 2002 SCC 1.
For certain purposes, however, precise and formal rights of citizenship are relevant to the subject, and this will be noted where appropriate.

I. **EGALITARIAN AND PARTICIPATORY VALUES IN POST-MODERN CANADIAN DEMOCRACY**

In the post-modern world, the legitimacy of the rationalist vision of state-centred law is under siege. The “sacred canopy” of divinely inspired natural law has long been rent asunder, and conflicting relativistic claims about the nature of law and society invade our consciousness. In these circumstances, constitutional values and institutions assume ever greater importance in the symbolic and practical maintenance of a democratic social order. This is nowhere more true than in Canada. Since 1982, the advent of the *Charter* has propelled Canadian legal and political discourse into realms which previously might have been thought purely theoretical. The Supreme Court of Canada in its *Charter* jurisprudence is melding democratic constitutional theory with practical problems in ways which are both familiar and innovative. This is particularly true in the area of criminal litigation where recent cases demonstrate that basic notions of personal autonomy, equality and relationship among citizens are informing the

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Court’s decision-making in such areas as substantive criminal law,22 criminal procedure,23 evidence24 and sentencing.25 Such developments are in accordance with much recent theory about substantive26 and procedural law.27 Moreover, they create interest and controversy in the popular press. However, these jurisprudential approaches are somewhat at odds with certain traditional perspectives on criminal litigation centred simply in notions of individual responsibility, due process and the maintenance of order and crime control.28

These jurisprudential developments are not occurring in a political vacuum. Many of these political pressures go back decades. Pierre Trudeau was not only the prime mover behind the Charter; he had earlier championed the slogan “participatory democracy”. However, the democratic liberal centre did not happen upon the new ideology of participatory democracy by accident.29 There were pressures from the “new left” in the 1960s and 1970s for more democratic and consultative structures in universities, the


29 T.E. Cook & P. M. Morgan, Participatory Democracy (San Francisco: Canfield Press, 1971) is a representative example of the currency of the debate at the time.
workplace and elsewhere. During this period, liberal human rights concerns were on the agenda at the provincial and federal levels, with the aim of expanding citizen access to a whole range of private and public services on an egalitarian footing. The Law Reform Commission of Canada began a wholesale review of Canadian criminal law and procedure under federal government auspices. But the face of criminal law and procedure in Canada really began to change with the combined and sometimes interlinked impacts of the feminist and victims’ rights movements of the 1970s and 1980s. The 1990s has seen pressure for greater citizen access and fairness of treatment for visible minority and aboriginal communities in Canada. The interesting aspect of these political developments, also reflected to some measure through changes in citizen access to the criminal justice system, has been the shift away from simply thinking in terms of individual citizens’ rights to a concomitant emphasis on the rights and participatory capacities of various groups of citizens who identify themselves as communities or persons with common interests. An attempt will be made to portray all of

36 On the theoretical aspects of this debate, see the sources referred to, supra note 7.
these influences on the evolving map of citizen access to criminal justice in Canada. But before doing this it may be helpful to examine related developments in the field of political/legal theory.
Theories of democracy are changing to adequately comprehend this complex new political reality in its various manifestations. Jurgen Habermas boldly attempts to bridge the gap between the normative, moral discourse of political philosophy and the empirical discourse of the social sciences in a theory of democracy based on the principles of communicative action. In fact Habermas differentiates three dimensions of the “self-understanding of modernity” which he argues cannot be collapsed: cognitive, evaluative and normative validity. He writes in the wake of the “linguistic turn” and claims that communicative reason, on which political communities are built, is possible because of “the linguistic medium through which interactions are woven together and forms of life are structured.” In what is perhaps an optimistic universalist premise, Habermas asserts:

In seeking to reach understanding, natural language users must assume, among other things, that the participants pursue their illocutionary goals without reservations, that they tie their agreement to the inter-subjective recognition of criticizable validity claims, and that they are ready to take on the obligations resulting from consensus and relevant for further interaction.

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38 The description and analysis in the following paragraphs is based on and more fully explored in my recent paper “Democracy and Restorative Justice: Comparative Reflections on Criminal Prosecutions, the Rule of Law and Reflexive Law” delivered at the Fifth International Conference of the International Network for Research on Restorative Justice, Leuven, Belgium, September 16-19, 2001.

39 Facts and Norms, supra note 19 and M. Deflem, Habermas, Modernity and Law (Thousand Oaks: Sage Publications, 1996). The abridged version of his theory here is intended only to whet the appetite of the reader to pursue it in more detail.

40 Facts and Norms, ibid., p. xli.

41 Ibid., p. 3.

42 Ibid., p. 4. In fact, Habermas goes further and makes the following claim at p. 311-312:

“In all language and in every language community, such concepts as truth, rationality, justification and consensus, even if interpreted differently and applied according to different criteria, play the same grammatical role. At any rate this is true for modern societies that, with positive law, secularized politics and a principled morality, have made the shift to a post-conventional level of justification and expect their own members to take a reflexive attitude toward their own respective cultural traditions.”
In other words, earnest communication is intended to have, and has, real meaning to participants in such conversations. He also recognizes that communication for strategic purposes in the short-term may not be characterized by the degree of integrity described above as characteristic of communicative rationality. That is, people may lie for sleazy, short-term purposes, and expect for a time to get away with it. Communicative interaction creates the basis for potential social solidarity despite the diversity of pluralistic secular societies which have lost their “sacred canopy” of common religious beliefs and which are characterized by complex differentiation of function among politics, law, education and social welfare subsystems. However, his claim is that law, as a form of communication, is a critical category of social mediation between facts and norms. He sees modern societies as integrated “not only socially through values, norms and mutual understanding, but also systemically through markets [including labour relations systems] and the administrative use of power”. Law is linked to all three of these mechanisms of social integration. Indeed as a central communicative medium, law (both private and public) is the coercive glue which can serve to hold key aspects of society together when less formalized mechanisms prove inadequate to the task.

For Habermas, constitutional democracy rests on a “discourse principle” which becomes translated into a “democracy principle”. The discourse principle, a matter of morality and law, holds that “valid action norms are only those to which all possibly affected persons could agree as participants in rational discourses”. The democracy principle is that only those statutes may claim legitimacy that can meet with the assent of all citizens in a discourse process of legislation that in turn has been legally constituted. The democracy principle thus implies a system of recognized rights and a constitutional/procedural organization. Habermas concludes that these basic rights are equality, citizenship or community membership,

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43 For a discussion of the relevance of broader forms of public communication (including greeting, rhetoric and narrative) to democratic theory, see Young, supra note 7.
44 Ibid., Chapter 1, passim.
mechanisms for enforcement of individual rights, capacity for autonomous participation in politics, and a minimum standard of living.\(^{48}\) In Habermas’ conception of popular sovereignty, political power derives from the communicative power of citizens. However, in complex societies this must be exercised through legitimated procedures rooted in the rule of law for legislatures, courts and administrative bodies. Thus for Habermas, deliberative politics involves a procedural concept of democracy based on the empirical/normative substructure of the communicative theory of action underlying broad cultural forms (the “life-world”).\(^{49}\)

Critical to the Habermasian understanding of deliberative democracy is the necessary co-existence of formal and informal public spheres—state and civil society. The free development of opinion in pluralistic societies occurs in a wild, undisciplined and unrestricted informal public sphere, which becomes procedurally transmogrified into democratic opinion and democratic will formation in the political/legislative institutions of the formal public sphere.\(^{50}\) However, Habermas finds the traditional liberal and modern welfare-state paradigms of democratic theory to be inadequate. Consider the following from Habermas’ *Between Facts and Norms*:\(^{51}\)

> [...] both paradigms share the productivist image of capital industrial society. In the liberal view, the private pursuit of personal interests is what allows capitalist society to satisfy the expectations of social justice, whereas in the social welfare view, this is precisely what shatters the expectation of justice. Both views are fixated on how a legally protected negative status functions in a given social context.

\(^{48}\) *Ibid.*, p. 121 ff. These are similar to Amartya Sens’ basic capacities for the exercise of freedom, see his *Development as Freedom* (Oxford: Oxford University Press, 1999).

\(^{49}\) *Ibid.*, p. 287. This notion of “life-world” is significant for Habermas’ empiricist universalism. The “life-world” is the practical reality of day-to-day interaction among individuals as family members, consumers and citizens, etc., conducted on the assumption that simple communication has inter-subjective meaning and that mutual understanding based on everyday language is possible. Out of this pragmatic communicative action emerges a possibly crude but generalized culture, and the potential basis for the informal, and ultimately formal, public spheres.


\(^{51}\) *Supra* note 19.
[...] After the formal guarantee of private autonomy has proven insufficient, and after social intervention through law also threatens the very private autonomy it means to restore, the only solution consists in thematizing the connections between forms of communication that simultaneously guarantee private and public autonomy in the very conditions from which they emerge.

But in the post-modern deliberative democracy, the thematized connections between private and public spheres become reciprocal, self-reflective and mutually regenerative or “reflexive”.52 In the decentralizing and, at least partially, privatizing democracies of the present world, the “supervisory” or “regulatory state” emerges. As Habermas says: “The supervisory state looks to non-hierarchicial bargaining for an attunement among sociofunctional systems...”53, and to reflexive law through relational programmes which “induce and enable systems causing dangers to steer themselves in new safer directions.”54 In other words, the post-modern supervisory state tends to rely on consultation and participation by affected individuals, corporate/social entities and communities as the means to supplement the older “democratic will-formation” mechanisms of legislation and top-down regulation in the liberal and/or social welfare state. This is a procedural theory of democracy whereby legitimacy of those wielding authority is based upon their exercise of power in accordance with constitutionally appropriate and democratically approved procedural norms involving both broad electoral politics and functionally specific participation by affected segments of society or interest groups.

53 Facts and Norms, p. 344.
54 Ibid.
There are also aspects of the fragmented culture of post-modern
democracy which have a pervasive impact on criminal justice policy. Hans
Boutellier\textsuperscript{55} convincingly argues, following Richard Rorty,\textsuperscript{56} that morality has become “victimaled” and that the only substantial question having
general cogency in this context is “Are you suffering?” The only broad moral
consensus in relation to criminal law is a negative one: we cannot tolerate
cruelty, inhumane treatment, humiliation and exclusion. He observes that the
“...moral significance of a criminal offence mainly manifests itself in the
popular emotions evoked by it and in the court room reaction [to it].”\textsuperscript{57}
However, criminological analysis tends to focus on keeping criminality under
control or on the socio-political analysis of the genesis of criminality. In
neither case is there a sufficient appreciation of the moral and emotive
dimensions of crime. The modern professionalized and technocratic criminal
justice system, as opposed to the pre-modern one, has fallen into the first
category of downplaying the emotive aspects of crime. Professional criminal
justice bureaucrats do their jobs according to law, regardless (and sometimes
in spite) of their emotional reactions to offence, offender or victim. Meanwhile the media play up the emotional side, and the politicians respond. It is difficult to get the sceptical, post-modern citizen to swear
allegiance to the established order as represented by the criminal justice
system and its agents, while it is far easier to mobilize support around a
perceived victim. Politically acknowledged victimhood can and has
consequences for criminal justice policy. Boutellier concludes it is therefore
not surprising that in post-modern democracies there has been a shift away
from the dichotomized state/offender concept of the criminal process toward
formal procedures that include victims in a three-cornered process. Nor,
might one add, should it be surprising to see the development of informal
restorative process which responds to victims, offenders and communities
in localized and reflexive ways in accordance with the notions of the supervisory state posited by Habermas.


\textsuperscript{57} Boutellier, \textit{supra} note 55, p. 2.
The implications of deliberative democracy and reflexive law for post-modern criminal justice will be more fully explored below. Given the evolution of complex democracies toward reflexive procedures, it should be no surprise, however, that increased victim participation and community involvement in criminal justice process have appeared on the agenda. But there has been a deeper shift in recent years in the manner in which criminal justice matters are conceptualized, that corresponds to cognate developments in the realm of political/constitutional theory in post-modern democracies. Autonomy, equality and relationship, in a context of community and diversity, are arguably now the key principles for analysis of criminal justice issues. As noted above, this holds true in relation to the justifications for and content of criminal sanctions, the general principles of substantive criminal liability and the evolution of criminal procedure. Moreover, the application of these three principles of autonomy, equality and relationship has both individual and collective dimensions.

II. THE CRITIQUE OF THE HIERARCHICAL AND EXCLUSIONARY ADVERSARIAL CRIMINAL PROCESS

In the classic conception of the criminal trial, the state prosecutes the individual for causing harm in breach of a pre-existing criminal law rule. The aim of the process is to punish the culprit and deter others. The agents of the state, the police and prosecutors, have a public duty to engage in this exercise on behalf of society as a whole in within the scope of their respective spheres of recognized discretion. This retributive model has its roots in the Judeo-Christian religious tradition and many of its substantive and procedural implications had been worked out by medieval theologians.

58 The democratic principle of legality, embodied in the Canadian abolition of common law crimes and the requirement that all crimes be defined in statues, is found in Criminal Code, s. 9, and has been found in that section or its analogues since 1955—well before the advent of sections 7 and 11(g) of the Charter.


“As the common law left its early Christian roots, its development was never fully excised from Christian belief. The grand names of English law were at the same grand churchmen. Sir Edward Coke (d.1634) or Sir Matthew Hale (d.1676), for example, were equally at home in writing about theology and philosophy.”

Moreover, this moralizing, punitive orientation was espoused by Sir James Fitzjames Stephen, author of the English draft code after which our Criminal Code was modelled, when he opined it was “right to hate criminals”.

It was in this context that many of the formative doctrines of our criminal law developed. Principles of individual criminal responsibility and notions of justification and excuse evolved in an era when the punishments imposed by the criminal process were exceedingly harsh. The counterweight to this substantive harshness, however, was the emergence of due process protections. Indeed, the political struggles of the late eighteenth century in England, America and France gave rise to rights declarations which were in substantial part intended to correct the procedural abuses of old regimes in their use of the criminal law as a weapon of self-protection.

The procedural protections of the Canadian Charter of Rights and Freedom, particularly those found in sections 7 through 14 dealing with “legal rights” are in this tradition. Indeed, the Charter can be seen as having brought Canadian criminal law out of the middle ages and fully into the eighteenth century near the end of the twentieth.

In this pre-modern retributive model of criminal justice, the intimate opportunities for citizen participation were present by virtue of the relative simplicity and restricted scale of most communities in a predominantly rural and agrarian Canadian society. Citizen arrest powers have existed at common law for generations and these were incorporated into the Canadian

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Criminal Code from the outset. Charges might be laid by local constables, municipal and provincial police forces or the Royal Canadian Mounted Police (RCMP), but the private prosecution provided the opportunity for the individual citizen to bring the matter forward. The Attorney General of a province would often prosecute cases in person, no doubt giving all citizens involved a sense of closeness to governmental authority, for better or ill. Though Supreme Court judges might travel on circuit, most magistrates or justices of the peace dealing with ordinary crimes would be well-known members of the local community, and most of these judicial officials were citizens who were not legally trained. Trials were by and large swift, and often the indigent accused were processed without benefit of defence counsel. Subjects owning property could sit as members of a jury, and feel proud to have done their duty on behalf of Her (or His) Majesty for the community. In the pre-confederation colonial period, punishments such as sitting in the stocks, confinement in the “bridewell” (lock-up) or hanging would be carried out within the sight of any curious on-looker in the locality. However, the terrors of the system might be mitigated by royal prerogative of mercy, capricious though its exercise might be. Thus, the pre-modern criminal law of Canada can, on one level, be presented as providing ample opportunity for citizen participation. On the other hand, of course, this early system of criminal “justice” was highly exclusionary. Women, the poor, aboriginals and persons of colour were excluded as controlling participants in the process, and relegated to the status of witnesses or accused persons.

65 B. Archibald, “The Law of Arrest” in V. Del Buono, ed., Criminal Procedure in Canada (Toronto: Butterworths, 1982). This provision is now found in Criminal Code, s. 494.
66 P. Burns, “Private Prosecutions in Canada: The Law and a Proposal for Change” (1975) 21 McGill L.J. 269. This power still exists, of course, by virtue of Criminal Code, s. 504.
70 Phillips, supra note 68.
Moreover, for victims the process brought them virtually nothing other than possible moral satisfaction. Compensation or restitution was deemed to be a matter of civil law, and even fines went not to the coffers of the Crown for the benefit of the community, but rather into the pocket of the magistrate!\textsuperscript{72}

The mid-nineteenth and early twentieth centuries brought a shift in the focus of the criminal justice system. Successive waves of reformist activism led to rejection of the punitive ideology, at least among moral entrepreneurs toiling in the wasteland of criminal justice.\textsuperscript{73} Religion\textsuperscript{74} and then burgeoning social science\textsuperscript{75} intervened to reorient the criminal justice system toward forward-looking utilitarian goals: general and specific deterrence, rehabilitation and treatment, and incapacitation of the dangerous, where necessary. Retribution came to be associated not with basic notions of justice, but rather with crude, barbarous and unjustifiable sentiments of revenge.\textsuperscript{76} The notions of punishment and retribution were even excised from the modern lexicon of sentencing rhetoric in some Canadian jurisdictions.\textsuperscript{77} While Canadian federal penitentiaries had become a fixture in our justice system since the late nineteenth century, the promises of the rehabilitative ideal overshadowed retribution in official pronouncements on criminal law.\textsuperscript{78} Provincial probation services and the federal correctional service grew, and the National Parole Board was created to modernize the “ticket of leave”

\textsuperscript{72} Kimball, \textit{supra} note 69.


\textsuperscript{74} Protestant denominations had a huge impact on theories of punishment and prison architecture in the nineteenth century: see M. Ignatief, \textit{A Just Measure of Pain: The Penitentiary in the Industrial Revolution - 1750-1858} (New York: Pantheon Books, 1978).


\textsuperscript{77} In Nova Scotia, the leading case of sentencing \textit{R. v. Grady}, (1975) 10 N.S.R. (2d) 90 (N.S.S.C.(A.D.)) held that the purpose of sentencing was the protection of the public, and that this purpose was to be attained by deterrence or rehabilitation or a combination of both. Retribution or punishment were no longer invoked.

\textsuperscript{78} \textit{Report of the Royal Commission to Investigate the Penal System of Canada} (Ottawa: Queen’s Printer, 1938) [The Archambault Report].
This professionalization of the penal system was paralleled by a similar phenomenon in the courts. Provincial and federal prosecution systems were put on a modern footing, and provinces largely did away with lay magistrates and justices of the peace as provincial courts became the judicial workhorses of the criminal justice system. This apparent confidence in the professional capacities of the welfare state to manage criminal justice was accompanied by a reduction in citizen participation in the criminal trial. The “speedy trials” provisions were introduced into the Criminal Code which enlarged the absolute jurisdiction of magistrates or provincial court judges to try indictable offences, and thus reduced the range of offences for which jury trials were available. Grand juries were also done away with as an archaic and clumsy screening device no longer required in an era of professionalized prosecution. Of course, citizens thereby lost the opportunity to make periodic, if irregular, forays into the well-being of the justice system as grand jurors with their amateur, but perhaps satisfying, recommendations for administrative reform.

In this shift to the modern rehabilitative ideal, the focus of criminal justice continued to be very much on the accused. The paradigm of the criminal trial as struggle between the state and the individual was still paramount. Models of “crime control” versus “due process” were contrasted with one another, and in the 1970s the side of the angels was represented by the civil libertarians. Accused persons were often viewed as the exploited victims of the criminal justice system, although publicly

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79 The latter being the result of the Report of a Committee Appointed to Inquire into the Principles and Procedures followed in the Remission Service of the Department of Justice of Canada (Ottawa: Queen’s Printer, 1956) [The Fautoux Report].
81 See for example D. Drinkwater, Ontario Provincial Offences Procedure (Toronto: Carswell, 1980).
82 Now found listed in Criminal Code, s. 553: indictable offences within the “absolute jurisdiction” of the then magistrate, or now provincial court judge.
83 Nova Scotia was the last of the provinces to do this in 1985: R. E Salhany, Canadian Criminal Procedure 5th ed. (Aurora: Canada Law Book, 1989) at 182.
85 Ibid.
funded legal aid was available to some indigent accused persons in most Canadian jurisdictions by the 1970s. This concern, moreover, was reinforced by pre-Charter judicial rulings which approved the admissibility of illegally obtained evidence, encouraged police misconduct and arguably brought the administration of justice into disrepute. The legal rights and remedial aspects of the Charter of Rights and Freedoms were born out of this climate and were a welcome righting of the balance in favour of due process in Canada. However, the adversarial criminal trial at the advent of the Charter era was an exclusionary and hierarchical affair by today’s standards. While the 1970s had brought victim’s compensation legislation to virtually all Canadian jurisdictions, this did not alter the status of the victim in criminal trials. Restitution provisions of the Criminal Code were hedged about with practical constraints and rarely used. Victims, called complainants, were relegated to the status of mere witnesses and often treated as a simple means to an end in the professionalized combat of the criminal trial. Victims seeking compensation for the harms caused by criminal conduct had to pursue separate civil (tort and delict) or administrative remedies. Sexual assault victims were further victimized in criminal trials by rules of evidence which invited broad cross-examination and much irrelevant evidence on reputation and prior sexual conduct, often turning rape trials into unfair trials of the complainant.

The conclusion must be that until the 1980s, the Canadian criminal trial, whether in the ancient retributive guise or its modern rehabilitative incarnation, was an exclusionary and hierarchical exercise. Opportunities for citizen participation, other than through professional representation, were limited and apparently shrinking. Offenders might now be more regularly represented by defence counsel, but victims were often not pleased by the

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88 R. v. Wray, [1971] S.C.R. 272 was the root of the problem, and can be contrasted with the post-Charter exclusionary rule (section 24(2)) as exemplified by R. v. Burlingham, [1995] 2 S.C.R. 206: both involved finding the murder weapon as a result of improper police conduct.
92 C. Boyle, Sexual Assault (Toronto: Carswell, 1984).
manner in which they were treated by Crowns. Effective remedies for aggrieved citizens cast in the roles of either offender or victim were often not to be had. Jury trials had become a symbolic, if important, rarity. Criminal sanctions, increasingly believed to be ineffective by a sceptical public, were now administered behind closed doors by professionals whose capacities were being questioned by offenders, victims and the public alike. At the appellate level, the parties were essentially deemed to be the state and the accused, and the recognition of other persons with interest in the outcome as intervenors was undertaken with great reluctance. With the benefit of hindsight, change at that point of modernity seems to have been inevitable.

III. CITIZEN ACCESS: EGALITARIAN AND INCLUSIONARY ADVERSARIAL CRIMINAL JUSTICE

In the last twenty years, there have been significant modifications to the standard adversarial criminal process which render it far more egalitarian and inclusive. Citizens, in varying roles, now have a greater capacity than ever to have an impact on the outcome of a criminal trial in order that their interests can be reflected or protected. These new forms of citizen access run from the commission of the offence to the release of offenders, and not all are without controversy. However, they are consistent with certain post-modern trends in political/legal thinking.

While not involving legally enforceable citizen rights of access to criminal justice, it is helpful to put post-modern policing practices in context. Public dissatisfaction with distant and hierarchical policing (largely involving police from central headquarters seeming isolated in their squad cars), has led to the widespread introduction of “community policing”. Neighbourhood

95 This is particularly true for victims of crime, in relation to whom there have been recent amendments to the Criminal Code: An Act to amend the Criminal Code (victims of Crime), S.C. 1999, c. 25, arising from the Report of the Parliamentary Committee on Justice and Human Rights, Victims’ Rights: A Voice not a Veto. On this topic in general see J. Barrett, Balancing Charter Interests: Victims’ Rights and Third Party Remedies, looseleaf (Toronto: Carswell, 2001).
police stations and more accessible police officers on foot (or on their bicycles) create forms of citizen access which should not be disparaged in complex urban environments, particularly when combined with such participatory programmes as neighbourhood watch and crime-stoppers. Of course, knowledgeable victims or members of the public dissatisfied with the police resolution of an investigation, may lay criminal charges themselves.\(^97\) Moreover, many current directives on the exercise of police discretion require these agencies to take into account the victims’ wishes when determining whether charges should go forward.\(^98\) If charges are laid, police, court houses, provincial departments of justice and community organizations often have victim support services to provide information and assist victims who may appear as witnesses in criminal cases. The general impact on citizen access to criminal justice of such policies should not be underestimated.

The exercise of prosecutorial discretion is critical for citizen access to criminal justice. The private prosecution still exists, if very much subject to the Crown’s right to stay the proceedings.\(^99\) Prosecution policy may leave the prosecution of some minor offences to private complainants,\(^100\) while enforcing the prosecution of other crimes not withstanding the apparent desire of the victim not to go forward to trial.\(^101\) The interests of the citizenry at large are in principle reflected in the primary policy that prosecutions are to be pursued only where two criteria are met: 1) there must be evidence on all elements of the offence sufficient to give rise to a

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\(^97\) There are, of course, offences for which the permission of the Attorney General or a prosecutor may be required: see Barrett, supra note 95 at 2-20 and 2-21.

\(^98\) This a topic canvassed by the Report of the Ontario Attorney General’s Advisory Committee, Charge Screening, Disclosure and Resolution Discussions (Toronto: Queen’s Printer, 1993) [the Martin Committee] and consistent with the preambles to “victims’ bills of rights” which exist in all provinces.

\(^99\) Criminal Code, s. 579 and 795.

\(^100\) Notably, common assault. For example, the Nova Scotia Public Prosecution Service does not prosecute cases of common assault under Criminal Code, section 266(b) other than in exceptional cases: see Nova Scotia Public Prosecution Service, Crown Attorney’s Manual, looseleaf (Policy/Protocol Tab. 17), dated June 19, 1985 (updated September 1, 2000).

reasonable likelihood of conviction; and 2) the prosecution must be in the public interest as evaluated by a number of factors structuring this discretion.\textsuperscript{102} At the pre-trial stage, the traditional model of the criminal trial attempted to balance the public and the accused person’s interests, while subsuming the interests of the victim under those of the public. Thus, the Crown’s duty of pre-trial disclosure to the defence\textsuperscript{103} or the right of the accused to release on bail\textsuperscript{104} could traditionally be discussed in the light of the classic opposition between accused and public rights, with little attention to the particular status of victims as such. Shifting this balance required legislative intervention. The amendment to the Criminal Code requiring judges to take into account victims’ views at bail hearings may be relatively uncontroversial.\textsuperscript{105} However, sexual assault victims’ rights to privacy of personal records, in the face of accused’s rights to disclosure, involved a controversial balancing act which was finally stabilized by the Supreme Court’s recognition of the legitimacy of Parliament’s legislating on the position of its dissenting judges from a previous case.\textsuperscript{106} Prosecution services across the country are recognizing this enhanced status of the victims of crime in protocols which mandate consultation with victims prior to making key prosecutorial decisions, such as those arising during plea bargaining and sentencing.\textsuperscript{107} In terms of harmonizing individual citizens’ goals with the adversarial structure of the legal system, the accused as a citizen has seen his interests balanced against those of victims who were previously more

\textsuperscript{102} Virtually all prosecution services in Canada now have written guidelines which render this traditional common law principle explicit: see for example, Department of Justice, Federal Prosecution Service Deskbook looseleaf (Ottawa: Government of Canada, 2000), Chapter 15; or Nova Scotia Public Prosecution Service, Crown Attorney’s Manual, supra note 100 “Directive of the Director of Public Prosecutions”, undated.


\textsuperscript{105} Criminal Code, s. 518(1)(d.2).


\textsuperscript{107} For example, Nova Scotia Public Prosecution Service, Crown Attorney’s Manual, supra, “Spousal/Partner Violence Policy”, supra note 101; or Federal Prosecution Service Deskbook, Chapter 20, “Plea and Sentence Discussions and Issue Resolution”, where under the heading “Openness and Fairness” one reads: “Crown counsel should, where reasonably possible, solicit and weigh the views of those involved in the Crown’s case—in particular, the victim and the investigating agency. However, after consultation, the final responsibility for assessing the appropriateness of a plea agreement rests with Crown counsel.”
subordinated participants in pre-trial adversarial process. In this exercise, moreover, the role of the prosecutor as sole guarantor of the public interest is now subject to the supervisory jurisdiction of the courts under the Charter.\textsuperscript{108}

The institutional structure of the criminal trial and related sentencing hearings have also changed in the last 20 years to reflect a capacity of courts to balance a wider range of diverse citizens goals. The composition of the court has arguably been democratized. Qualifications of counsel cannot be restricted in ways which are discriminatory.\textsuperscript{109} While judges and jurors are normally limited to persons of Canadian citizenship,\textsuperscript{110} the opportunity for jury service has been broadened by recently improved support for potential jurors with disabilities.\textsuperscript{111} Moreover, the Charter and interpretive case law have ensured that non-native speakers and the deaf have translation services to facilitate effective participation in the criminal trial.\textsuperscript{112} The accused’s participation in the trial has arguably been rendered more effective by the Charter’s beefing up the scope of the pre-trial right to counsel,\textsuperscript{113} although the support for paid counsel at trial has not advanced substantially.\textsuperscript{114}

The traditional procedural and evidentiary rules applicable during the criminal trial assume that the state and the accused are the primary parties, with certain constraints being imposed upon the state in order to ensure fairness in the light of its superior power and resources. The Crown normally

\textsuperscript{108} Although the courts are enjoined not to exercise this supervisory jurisdiction over the exercise of prosecutorial discretion unless there is “conspicuous evidence of improper motives or bad faith or of an act so wrong that it violates the conscience of the community, such that it would be genuinely unfair and indecent to proceed” \textit{R. v. Power}, [1994] 1 S.C.R. 601.

\textsuperscript{109} \textit{Andrews, supra} note 11.

\textsuperscript{110} For example, the Nova Scotia \textit{Juries Act}, subject to what was noted in notes 11 and 12.

\textsuperscript{111} \textit{Criminal Code}, ss. 627 and 631(4).


bears the burden of proving the case beyond a reasonable doubt, and the even-handed principle that all relevant evidence is admissible is sometimes skewed in favour of rules which exclude evidence which may operate to the disadvantage of the accused. But here too the situation of the victim is being enhanced, particularly in relation to cases of sexual assault. The rule requiring corroboration of a sexual assault complainant’s testimony has been abrogated, as has the rule based on the assumption that a woman sexually assaulted will immediately complain to others, failing which negative inferences may be drawn against her. In addition, the rape shield provisions of the Criminal Code preventing unnecessary evidence as to the complainant’s prior sexual activity have been held to be constitutional. These changes are all designed to rectify inappropriate reliance on damaging stereotypes, and encourage the reporting and prosecution of sexual assault. In a similar vein, relatively new Criminal Code provisions authorize exclusion of public from the courtroom, allow the presence of support persons, regulate cross-examination of the complainant by certain persons, and allow bans on publication of information revealing the identity of the complainant. The impact on citizen participation of these latter provisions, however, is ambiguous: while they encourage victim reporting and more rigorous prosecution, they restrict public participation and knowledge about the evidence and its impact on the proceeding. Moreover,


116 Examples of such exclusionary rules favouring the accused would include those relating to hearsay, to character and similar conduct, as well as the newly recognized judicial discretion to exclude evidence where prejudice may outweigh probative value: see generally, J. Sopinka, S. N. Lederman & A. W. Bryant, The Law of Evidence in Canada (Toronto: Butterworths, 1999); and D. Paciocco & L. Steusser, The Law of Evidence, 2nd ed. (Toronto: Irwin, 1999).

117 Criminal Code, s. 274. It must be said, however, that the full expectations of the proponents of this legislation may not have been met if one considers recent caselaw: see R. v. S., (1997) 116 C.C.C. (3d) 435 (Ont.C.A.); R. v. Stymiest, (1993) 79 C.C.C. (3d) 408 (B.C.C.A.); or R. v. Saulnier, (1989) 48 C.C.C. (3d) 301 (N.S.C.A.).


120 Criminal Code, s. 486.
while the victim’s role is made easier, she still maintains the status of witness rather than party.

It is perhaps in relation to the sentencing hearing that greatest expansion of citizen/victim participation has been mandated. In respect of the purposes of sentencing, the range of issues has been broadened with the concomitant likelihood that more persons will be heard at this crucial point in the proceedings (it must be remembered that most criminal prosecutions end in guilty pleas, such that the sentencing hearing is the only significant aspect for those involved). *Criminal Code* section 718 makes clear that retribution *per se* is not a purpose of the criminal sanction, although it must be the underlying limiting principle for the proportionality provisions in section 718.1. However, section 718 also makes clear that victim compensation and offender acknowledgement of harm done to the community are purposes that take their full place with denunciation, deterrence, incapacitation and rehabilitation. With such greater victim and community-related purposes, one can anticipate a broadening of citizen participation in the sentencing process. But the most significant development for expanding citizen input has been the introduction of victim impact statements. While such statements must be prepared in writing, they can be read by the victim at the sentencing hearing, providing a dramatic opportunity for important citizen participation creating what one court has described as “parity of identity” for victim and accused in the criminal process. One might also mention in this context jury recommendations on eligibility for parole in murder sentencing, which though of significant symbolic importance for citizen participation in substantive outcomes, are

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121 *Criminal Code*, s. 718 states that the fundamental purpose of sentencing is to contribute, along with other crime prevention measures, to the maintenance of a “just, peaceful and safe society” through sanctions which have one or more of the following objectives: denunciation, deterrence, incapacitation, rehabilitation, reparation of harm and promotion of a sense of responsibility among offenders. This despite the views of the Supreme Court in *R. v. C. (M.A.)*, [1996] 1 S.C.R. 500, which purported to recognize retribution as a formal purpose of the criminal sanction.

122 *Criminal Code*, s. 718.1 states a fundamental limiting principle in sentencing: “A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.” Section 718.2 sets out corollary principles of aggravation and mitigation, parity, totality, and restraint (in two guises).

123 *Criminal Code*, ss. 722 to 722.2.


125 *Criminal Code*, s. 745.2.
of lesser quantitative impact than the victim impact statement which is available for all offences. Nevertheless, this victim involvement in the sentencing process is rare in common law jurisdictions as opposed to, say France, where juries regularly vote on sentence in relation to a broad range of serious crimes.\textsuperscript{126}and where victims can obtain compensation through a civil action piggy-backed onto the criminal proceeding.\textsuperscript{127}

Finally, of course, there is the issue of citizen involvement in the criminal case after trial. Most prominent in this category are the various forms of victim involvement in matters of parole. Since 1992, victims have been entitled to information concerning offenders serving sentences in institutions, may submit victim impact statements for the consideration of the Parole Board, and may be granted the opportunity to attend Parole Board hearings.\textsuperscript{128} More recently, victims have been granted the possibility of participating in special jury hearings under the so-called “faint hope clause” of the \textit{Criminal Code},\textsuperscript{129} whereby offenders serving life sentences for murder may apply for early release on parole. In an analogous legislative development, victims may also participate in proceedings of Review Boards dealing with accused persons found not criminally responsible by reason of mental disorder.\textsuperscript{130}

An equally important category of citizen participation in the criminal process in the post-trial period is the possibility for affected persons, including victims and interest groups, to be granted the status of intervenor in appellate proceedings.\textsuperscript{131} Sometimes this occurs in the context of reference

\textsuperscript{126} C. Elliott & C. Vernon, \textit{The French Legal System} (Harlow: Longman, 2000).


\textsuperscript{128} \textit{Corrections and Conditional Release Act}, S.C. 1992, c. 20, ss. 26, 101, 140 and 142. \textit{An Act to amend the Criminal Code (sentencing) and other Acts in consequence thereof.}

\textsuperscript{129} \textit{Criminal Code}, s. 745.63 pursuant to S.C. 1995, c. 22 and \textit{An Act to amend the Criminal Code (victims of crime)}, supra note 95.

\textsuperscript{130} \textit{Criminal Code}, ss. 672.5, 672.54 and 672.541 following from S.C. 1999, c. 25.

\textsuperscript{131} See Gregory Hein, “Interest Group Litigation and Canadian Democracy” in P. Howe & P.H. Russell, eds., \textit{Judicial Power and Canadian Democracy} (Montreal: McGill-Queen’s University Press, 2001), where intervenors are identified under the headings “aboriginal peoples, civil libertarians, corporative interests, labour interests, professionals, social conservatives, victims, Charter Canadians and new left activists.”
cases. However, a striking feature of Canadian criminal law litigation over the last twenty years has been the extent to which intervenor status has been granted to various public and private organizations with an interest in the outcome of “ordinary” criminal cases. Some of these organizations have had governmental support for the express purpose of engaging in test case litigation with enhanced public policy input. This sort of activity has, of course, been particularly marked at the appellate level, with the Supreme Court of Canada in the lead. While other western democracies have encouraged such an approach to some degree, the Canadian courts do seem particularly enthusiastic in this regard. Surely, this must be viewed as a significant example of the manner in which the Canadian adversarial system of criminal justice promotes citizen participation.

The conclusion to be drawn in relation to the foregoing observations is surely that citizen participation in the criminal trial over the past twenty years has advanced exponentially, at least at the level of principle. An empirical investigation would be valuable in order to confirm or disprove at the level of practice these inferences from the formal legal changes wrought by Parliament and the courts. Nevertheless, the nature of the hierarchical and exclusionary criminal trial has been so altered that it may now be proper to speak of an egalitarian and inclusionary criminal trial in Canada. However, from the point of view of the community and from the style of formal justice even in the eyes of the direct participants, the formal criminal trial still limits the nature of citizen participation and its outcomes. Many individuals affected by criminal harms have no status in the adversarial process, and community interests are often represented by prosecutors and judges only

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132 See for example, Reference re: Firearms Act (Canada), [2000] 1 S.C.R. 783, where intervenors included seven attorneys general, the Federation of Saskatchewan Indians, the Coalition of Responsible Firearms Owners and Sportsmen, the Law-Abiding Unregistered Firearms Association, the Shooting Federation of Canada, the Association pour la santé publique de Québec inc., the Alberta Council of Women’s Shelters, the Fondation des victimes du 6 décembre contre la violence, the Canadian Association for Adolescent Health, the Canadian Pediatric Society, the Coalition for Gun Control, the Canadian Association of Police Chiefs and three major municipalities; see also Elliot, supra.

133 The Government of Canada’s “Court Challenges Programme”, funded by the Department of Heritage, is important in this regard.
in the most abstract sense. The evolving restorative justice model described below responds to many of these concerns.

IV. RESTORATIVE JUSTICE: ALTERNATIVE PARTICIPATION OF VICTIMS, OFFENDERS AND COMMUNITIES

Restorative justice can best be defined as the restoration of relationships and deliberative resolution of issues arising from criminal harms through a process involving victim, offender and representatives of an appropriate community.134 This normally occurs either (1) as a matter of diverting from formal prosecution an offender who has taken responsibility for the harmful conduct,135 or (2) by invoking restorative justice process as an adjunct to or replacement for sentencing, where an offender has pleaded guilty to an offence.136 Restorative techniques can also be used at the correctional or parole levels in the post-sentencing context.137 While the foregoing definition of restorative justice is broad enough to encompass

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134 Defining restorative justice is a controversial undertaking. A definition of restorative process presently under consideration in U.N. circles reads: “...any process in which the victim, the offender and/or any other individuals or community members affected by a crime actively participate together in the resolution of matters arising from the crime, often with the help of a fair and impartial third party, Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters, supra note 4. For discussion of the critical focus on transforming relationships, see J. Llewellyn & R. Howse, “Institutions for Restorative Justice: The South African Truth and Reconciliation Commission”, (1999) 49 U.T.L.J. 355; the literature on restorative justice is burgeoning. For a useful if somewhat dated bibliography, see P. McCold, Restorative Justice: An Annotated Bibliography (Monsey: Criminal Justice Press, 1997).


137 This will be explored below in relation to the Nova Scotia Restorative Justice Programme, infra notes 177 to 192 and accompanying text.
mediation and other techniques, it is primarily intended to capture the essence of recent breakthroughs in restorative processes variously called family group conferencing, community conferencing, community justice forums, and circle decision-making. Regardless of the label used, these restorative methods bring together victim, offender and significant other community players to discuss appropriate responses to the criminal behaviour. Such processes shall be referred to in this paper as restorative conferencing.

Restorative conferencing is a significant advance over what has been called “dyadic victim-offender mediation”. A trained facilitator gathers together the victim and her supporters (family and/or friends), the offender and his supporters (family and/or friends), and members of the community, where possible known and respected by both victim and offender. Often, the justice system is represented by a police officer who

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138 For a good short overview, see P. McCold, “Primary Restorative Justice Practices” in Morris & Maxwell, supra note 136.


140 This rather neutral designation is gaining in currency.

141 This is the name preferred by the Royal Canadian Mounted Police.

142 See sources cited, supra note 136.

143 J. Braithwaite, “Restorative Justice and a Better Future” (1996) 76 Dal. Rev. 7. This is not to say that victim-offender mediation (VOM) is not a cost-effective technique which has a significant place in the range of restorative options. See M. Bakker, “Repairing the Breach and Reconciling the Discordant: Mediation in the Criminal Justice System” (1994) 72 N.C. L. Rev.1479; and see the vast VOM literature, McCold, supra note 134.

144 There is a frequent issue as to whether victims should have a veto over the holding of a conference or whether it is appropriate to invite a “surrogate victim” when the personal victim of the offence is unavailable: see discussion, infra, concerning the Nova Scotia Restorative Justice Programme, infra notes 177 to 192 and accompanying text.

145 Care is obviously required in choosing offender supporters to prevent intimidation or “re-victimization” of victims in the process, or in preventing, through careful facilitation, a general sense on the part of victims that the process has been unhelpful: see H. Strang, “Justice for Victims of Young Offenders: The Centrality of Emotional Harm and Restoration” in Morris & Maxwell, supra note 133.

146 In heavily populated areas, where victim and offender may not know one another, choice of such persons may be difficult, but may have the potential for creating social bridges and building community where urban anonymity normally prevails: see J. Braithwaite, “Restorative Justice: Assessing Optimistic and Pessimistic Accounts” in M. Tonry, ed.,
is familiar with the facts of the incident. Experience shows that the psychological “group dynamic” which occurs in a conference can be very different than a simple mediation session. Victims and their supporters are able graphically to bring home to offenders the impact that the harmful behaviour has had on their lives. Offenders frequently offer heartfelt apologies which go well beyond the ritualized guilty plea of court process or the exculpatory claims of defence counsel in sentencing hearings. Supporters and community participants can make contributions that move offenders and victims from initial entrenched perceptions. Offenders can acknowledge the wrongfulness of their behaviour, while not being stigmatized as social outcasts. Victims not only obtain reparation, but can often find psychological and emotional closure, while alleviating fears of further victimization. Interestingly, victims, who in the restorative conference see offenders not as faceless monsters but rather fellow human beings with


147 Empirical studies suggest that some single parents of offenders who have been discipline problems particularly appreciate the support that the police presence can bring: see D. Clairmont, _The Nova Scotia Restorative Justice Initiative: Year One Evaluation Report_ (Bedford: Pilot Research, 2001) at 63-78 (available from the Nova Scotia Department of Justice).

148 For a useful description of a conferences, see Braithwaite, _supra_ note 143.


150 This is not to denigrate the role of defence counsel in a formal sentencing hearing, but merely to note that the focus there is to convince the sentencing judge of the client’s position, not to respond in an effective and affective manner to the victim.

151 Research on restorative justice shows that one of the most prevalent myths of criminal justice is that most victims seek revenge upon their victims: see M. Estrada-Hollenbeck, “Forgiving in the Face of Injustice: Victims’ and Perpetrators’ Perspectives” in B. Galoway & J. Hudson, _Restorative Justice: International Perspectives_ (Monsey: Criminal Justice Press, 1996).

152 John Braithwaite’s theory of “re-integrative shaming rather than alienating stigmatization” in his _Crime, Shame and Re-Integration_ (Cambridge: Cambridge University Press, 1989), while not uncontroversial and often misunderstood, has been most influential in Canada and Britain with respect to police initiatives on restorative justice. The central idea is to condemn the harmful behaviour while reaffirming the offender’s connections to the community and positive potential as a valued member of his family and society: see G. Masters, “The Importance of Shame to Restorative Justice” in L. Walgrave, ed., _Restorative Justice for Juveniles: Potentialities, Risks and Problems_ (Leuven: Leuven University Press, 1998).
problems of their own, often suggest positive rehabilitative or reparative measures to assist offenders and reduce reoffending.\textsuperscript{153} The open discussions, unconstrained by formal rules of evidence as in a sentencing hearing, frequently identify the causes of the offending behaviour and the existence of family or community resources capable of contributing to lasting solutions which can be missed by courts.\textsuperscript{154} The emotional temperature typically rises with many participants sharing tears during the discussions which seem to cement consensus outcomes. Healing is a word commonly used to describe the results of restorative conferencing, and in the best of circumstances it is healing for victims, offenders and the community as well.\textsuperscript{155}

While the foregoing discussion has emphasized the merits of restorative conferencing, restorative justice practitioners stress that it is important not to put restorative justice in a procedural straight jacket.\textsuperscript{156} There is no single path to restorative results, and reliance on the creative capacity of community members to suggest practical solutions to offending is widely accepted. Thus, restorative justice, however defined, tends to embrace multiple aims: reparation to the victim; rehabilitation of the offender\textsuperscript{157} and his reintegration into the community; the imposition of consequences for the offender which can be seen as punitive or retributive;\textsuperscript{158}

\begin{itemize}
  \item \textsuperscript{154} While good counsel will have prepared well for sentencing, and the court will usually have a pre-sentence report of greater or lesser value, restorative conferences present more flexibility in this regard.
  \item \textsuperscript{155} Van Ness, Stuart, Kurki, & Braithwaite, \textit{supra}.
  \item \textsuperscript{156} McCold, \textit{supra} note 138.
  \item \textsuperscript{157} While restorative conferences may have therapeutic aspects (see S. Retzinger & T. Sheff, “Strategy for Community Conferences: Emotions and Social Bonds” in B. Galaway & J. Hudson, \textit{supra} note 151; and T. Scheff, “Community Conferences: Shame and Anger in Therapeutic Jurisprudence” (1998) \textit{67 Rev. Jur.U.P.R} 95), the rehabilitative consequences usually take the form of an agreement by the offender to seek the assistance of relevant treatment facilities within the community.
  \item \textsuperscript{158} Among some restorative justice advocates, the imposition of punishment is anathema: see for example J. Braithwaite & P. Pettit, \textit{Not Just Deserts: A Republican Theory of Justice} (Oxford: Clarendon Press, 1990) or L. Walgrave, “On Restoration and Punishment: Favourable Similarities and Fortunate Differences” in Morris & Maxwell, \textit{supra} note 136. For others, the punitive aspect of restorative consequences is to be accepted, if not welcomed as appropriate, and an important element of the credibility of restorative justice for victims and in the community: see K. Daly, “Revisiting the Relationship between Retributive and Restorative Justice” in H. Strang & J.
the deterrence of other potential offenders who see that restorative outcomes are not necessarily “soft on crime”; and community development or transformation where the restorative conference discussions identify a generalized community problem and seek to implement solutions which go beyond the confines of the particular offender’s case. In attempting to achieve these aims, a multiplicity of procedures are deemed to be legitimate: screening or diversion of the least serious incidents through police warnings or cautions (sometimes with conditions attached); accountability sessions with offenders, their family members and community members in the absence of victims; victim-offender mediation sessions where full-blown restorative conferencing may be thought unnecessary or too resource-rich in the circumstances; or restorative conferencing as described above


Some restorative justice programmes identify community development as an explicit goal: see the Nova Scotia Restorative Justice Programme, infra notes 177 at 192 and accompanying text and South African Peace Committees in the Community Peace Programme of the Western Cape Province (personal conversations with Clifford Shearing and John Cartwright of the Community Peace Programme in Cape Town during the month of January, 2001). It is important to note that the principals in the Community Peace Programme are reluctant to adopt the mantle of “restorative justice”. They might be more comfortable with “transformative justice”, but would really prefer not to be labelled at all. On the potential significance of this latter label, see R. Morris, Stories of Transformative Justice (Toronto: Canadian Scholar’s Press, 2000).

Cautioning and warnings have been recently restructured and formalized in the United Kingdom: see J. Dignan, “The Crime and Disorder Act and Prospects for Restorative Justice” [1999] Crim L. Rev. 48, and have been introduced in Canada (Nova Scotia and Alberta).

Some Maori communities in New Zealand have adopted this approach: G. Maxwell & A. Morris, “Restorative Justice Re-Offending” in Strang & Braithwaite, supra note 158; as have some Nova Scotia agencies: see Clairmont, supra note 147, even in the face of criticism that conferences without victim participation are less than truly restorative. This approach may even be preferred in some Asian contexts where confrontation of victim and offender groups can result in a culturally unacceptable mutual “loss of face”: see Prescribed Procedures for Family Conferencing, Juvenile Court, Singapore, February 2001.

This contrasts with some jurisdictions where there is a systemic preference for mediation: see E. Weitekamp, “Mediation in Europe: Paradoxes, Problems and Promises” in Morris & Maxwell, supra note 136.
conducted at the instance of police, prosecutors, judges or correctional officials or community activists.\textsuperscript{164} The agreed outcomes of restorative conferencing are limited only by the circumstances and imaginations of the participants, but typically include: apologies from offenders; reparation to victims; community service; offender participation in treatment or rehabilitation programmes; or offenders, families and community participants engaging in interactive solutions which may be oriented to a single offender, a single victim or the community at large.\textsuperscript{165} Compliance with agreed upon outcomes in restorative conferencing seems generally high, which may be linked to surveillance of performance by family members and community observers rather than overworked probation officials.\textsuperscript{166} Participant satisfaction with restorative justice process is markedly positive, which may be linked to both participant opportunities to “have their say” during the proceedings,\textsuperscript{167} and to the knowledge that privacy and confidentiality may be protected to a greater degree than in public court proceedings.\textsuperscript{168} While restorative process may be subject to the constraints imposed by a broad legal framework,\textsuperscript{169} it is generally not subject to a narrow application of doctrines of proportionality and parity that one finds in sentencing jurisprudence. Thus, it is to be expected that restorative justice methods may give rise to considerable diversity in outcomes, depending upon the circumstances of the offender and community, and the responses of participants in the restorative discussions.\textsuperscript{170}

\textsuperscript{164} The allocation of responsibilities for restorative justice initiatives is a major theme for the Nova Scotia Programme, which purports to be comprehensive in scope.

\textsuperscript{165} See Van Ness & Heetderks Strong, supra note 153.


\textsuperscript{167} This observation has almost reached the level of a universal generalization in the restorative justice literature: see Kurki, supra note 135 as well as McCold, supra note 138, and Clairmont, supra note 147.

\textsuperscript{168} Nova Scotian restorative justice programme participants mentioned this with some frequency: see Clairmont, supra note 147.

\textsuperscript{169} This framework, of course, is critical and is found in the Criminal Code, s. 717 and the Young Offenders Act, R.S.C. 1985, c. Y-1, s. 4.

\textsuperscript{170} This “lack of certainty and predictability” is at the root of some serious theoretical critiques of restorative justice: see S. Levrant, F. Cullen, B. Fulton & J. Wozniak, “Reconsidering Restorative Justice: The Corruption of Benevolence Revisited?” (1999)
Restorative justice is a ubiquitous phenomenon. For those steeped in the retributive “law and order” perceptions of crime novels and Hollywood movies, or even for those trained as criminal justice professionals, the pervasiveness of restorative justice may come as something of a surprise. John Braithwaite, one of the world’s foremost scholars in the field, makes the extraordinarily strong empirical claim that all societies contain institutions of restorative justice. Certain writers maintain that state-centred retributive justice is the historical aberration and that restorative justice is more “natural” or certainly less socially dysfunctional. What is clear is that pressure for restorative justice alternatives or complements to mainstream justice institutions are emerging worldwide. Some of these pressures come from aboriginal communities in societies that have been characterized by the imposition of state-centred retributive justice by colonialist powers. Some have their origins in moral or religious opposition to some of the more egregiously dysfunctional aspects of mainstream criminal justice. Other such pressures are coming from institutional tensions inherent in modern criminal justice systems whether their roots are in the European civil law tradition or in the various legal cultures which originate from the common law of England.


Braithwaite, supra note 143. It appears that no one has yet demonstrated that he is incorrect. For similar claims, see E. Weitekamp, “The History of Restorative Justice” in G. Bazemore & L. Walgrave, eds., Restorative Juvenile Justice: Repairing the Harm of Youth Crime (Monsey: Criminal Justice Press, 1999).


This is certainly the case in Africa, Australia, New Zealand and North America.


Council of Europe, Committee of Ministers, Recommendation R(99)19: Mediation in Penal Matters.

An example of a comprehensive restorative justice programme bearing these reflexive law characteristics is that of the Canadian province of Nova Scotia.\textsuperscript{177} The overall aim of the Nova Scotia program of restorative justice is more effective crime prevention than that provided by a system which relies largely on fines, probation, community sentences or incarceration.\textsuperscript{178} The two “primary goals” of the restorative justice initiative are to reduce recidivism and increase victim satisfaction.\textsuperscript{179} The first is to be achieved by emphasis on a family group conferencing or community justice forum models which have been shown to be effective in focusing on the underlying causes of criminal behavior and on “constructive reintegration of the offender into the community.” The second primary goal is said to flow from evidence that in such models, victims have an opportunity to discuss the impact of the offence and gain greater satisfaction from participation in the elaboration of restorative measures for reparation of harm. The “secondary goals” of the Nova Scotia program are to strengthen communities by providing support for organizations and groups which have an interest in justice issues, and to increase public confidence in the justice system through greater participation by offenders, victims, their respective families and community residents in solution of problems which have resulted in criminal behavior.\textsuperscript{180} Achievement of all these goals is initially conceived to be through mobilization of police resources and through alternative measures


\textit{Restorative Justice: A Programme for Nova Scotia} (Halifax: Nova Scotia Department of Justice, 1998) [hereafter \textit{Nova Scotia Programme}]. This document was adopted in a “Programme Authorization” signed by Nova Scotia Attorney General Robert Harrison, June 15, 1999 and published in the Royal Gazette of the Province on August 11, 1999, and effective as an authorization under section 717 of the \textit{Criminal Code} and section 4 of the \textit{Young Offenders Act}, supra note 169, as guidelines to prosecutors under section 6(a) of the \textit{Public Prosecutions Act} S.N.S. 1990, c. 21, and as an authorization constituting police officers as agents of the Attorney General for the purposes of the programme under the \textit{Criminal Code} and the \textit{Young Offenders Act}. It also authorizes those involved with the programme to elaborate protocols for implementation which are not inconsistent with the programme authorization.


\textit{Nova Scotia Programme}, supra note 177 at 5.

\textit{Ibid.}, at 5.
societies previously established under the *Young Offenders Act*. The idea is to promote local community initiatives rather than to rely solely on centralized professional and bureaucratic resources as is the case with the current approach to criminal justice.

The framework for the Nova Scotia program consists of *four entry points* given access to a *continuum of options* which relate to *four levels of offences*. These are to be established in formal guidelines which set out minimum *procedural requirements* and describe the kinds of *discretionary factors* which will be relevant for making the system work. Each of these structural aspects of the program will be described briefly.

The Nova Scotia program may be unique in that it envisions use of restorative justice principles, models and techniques at four distinct *entry points* in the current criminal justice process.\(^1\) In this respect, it is both comprehensive and integrative. The first entry point is at the pre-charge stage, where police may use or refer offenders to restorative justice options in relation to a wide range of provincial and lesser *Criminal Code* offences. The second entry point is at the post-charge and pre-conviction stage, where appropriate cases are to be referred to restorative justice processes rather than proceed to trial. The third entry point is at the post-conviction stage, where judges are encouraged to resort to community restorative justice processes to enhance sentencing decisions or possibly to conduct sentencing circles themselves in open court. The fourth and final entry point is at the post-sentence stage, where correctional officials and victims’ services staff are authorized to employ restorative justice techniques where restoration, healing and closure for the victim and offender may be thought critical. The description of these entry points is surely sufficient to demonstrate that restorative justice in Nova Scotia is conceived of far more broadly than simply an adjunct to sentencing, as might be thought in a quick reading of section 717 of the *Criminal Code* which establishes the legislative framework for such “alternative measures.” However, as the year one evaluation of the Programme demonstrates, implementation has been easier at the police entry point than at the others. An equivalent to the marathon runner’s “wall” seems to have been encountered with prosecutorial, judicial and correctional professionals who have been resistant in the initial “run” at the problem.\(^2\)

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\(^1\) *Ibid.*, at 8.

\(^2\) Clairmont, *supra* note 147 at 118-120.
The *continuum of options* in the Nova Scotia program includes what can be conceptualized as simple “diversion” alternatives and true “restorative justice” models.\(^{183}\) As an exercise of police discretion, informal warnings have long been used to divert less serious cases from the courts. This traditional approach is now to be enhanced by a system for “formal cautions” or written letters to offenders and/or their parents from supervising police officers. Records are kept of such formal cautions, to be taken into account in the exercise of police or prosecutorial discretion in the event of further offences on the part of the offender involved. Victims may be consulted by police prior to the use of this cautioning mechanism, but the approach does not envisage the invocation of full restorative justice principles and process. Adult and youth diversion programs for out of court dispute resolution have been available in Nova Scotia for some time in relation to restricted categories of offences and offenders. These programs are to continue, although the mediation techniques used and the frequent absence of victims from the process (in what are called “offender accountability sessions”) have meant that they have been primarily instruments of “diversion” in the light of the principle of “restraint” in the use of criminal law. These accountability sessions have not had a strict focus on restoration of relationships with victims, offenders and the community. Thus the cautions and accountability sessions, while operating under the rubric of the programme, are best conceived as “diversion” rather than true “restorative justice.”

Under the label “restorative justice models”, the Nova Scotia program places a number of processes believed to target “offender accountability, victim healing, offender reintegration and repairing the harm caused by the victim.” The victim-offender conference” run by a trained facilitator enables discussion, expression of feelings and negotiation of a resolution acceptable to victim and offender. It is listed under the “true restorative justice” heading, even though some commentators are sceptical of the restorative potential of “dyadic victim-offender reconciliation” which may not place either victim or offender in a process which involves “significant others” and “community representatives” who can have useful input in the discussion and an important stake in the outcome.\(^{184}\) Given these concerns, the program was

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\(^{183}\) *Ibid.*, at 8-12.

initially intended to concentrate on the mechanism of the “family group conference” (which in RCMP literature is called a “community justice forum”). Based on principles articulated by John Braithwaite and in use in Australia and New Zealand, the process emphasizes denouncing or shaming the wrongful conduct while affirming and supporting the offender in effort to ensure reintegration into the community. While involving offenders and victims (though victims are not to have a veto), the restorative conference is premised on the notion that success may depend on involvement as well of family members and community people who are significant in the lives of offenders and victims. They may be affected by both the problematic behavior and the nature and implementation of solutions sought. Thus, in principle, restorative conferencing is central to the Nova Scotia restorative justice program. It is intended for use at all four entry points, and in relation to some relatively serious offences. It was used prior to the promulgation of the programme by RCMP in the province and in the facilitative or coordinating hands of authorized community agencies is seen as the most important referral option for police, Crown attorneys, correctional officials and judges, who might prefer input from such a gathering to conducting a sentencing circle. However, the first year evaluation report indicates that some of the community agencies are encountering difficulties in making the transition from offender oriented “accountability sessions” to true restorative conferencing which balances victim and offender interests and incorporates meaningful community participation.

Another central aspect of the Nova Scotia program is the four level classification of offences for the exercise of restorative justice discretion by the various players in the criminal justice system and in the supportive communities involved. The simplest way to describe this classification

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185 The Clairmont evaluation, supra note 147, indicates that in the initial phases the programme has in fact relied heavily on offender “accountability sessions” rather that full conferences with victims in attendance.


188 Clairmont, supra note 147 at 29-31.
scheme is to reproduce the “Table of Included and Excluded Offences” from the document itself.\footnote{\textit{Nova Scotia Programme, supra} note 177 at 16. It should be noted that soon after the Programme was introduced, a directive was issued to put a moratorium on the use of restorative justice in relation to sexual assault, which continues to be governed by the Minister of Justice’s Directive and the D.P.P.’s Protocol on “Spousal/Partner Violence Policy” referred to above in notes 101 and 102.}

\begin{tabular}{|l|l|}
\hline
\textbf{Included and Excluded Offences} & \\
\textbf{LEVEL 1 OFFENCES} & \\
These are the only offences for which a formal caution is an option & • Provincial Statute offences \\
& • Minor property offences \\
& • Disorderly conduct offences \textit{(i.e.} loitering, vagrancy) \\
& • Assaults nor resulting in bodily harm \\
& • Mischief \\
\hline
\textbf{LEVEL 2 OFFENCES} & \\
These offences can be referred at all four entry points & • This is the largest group of offences. They constitute all \textit{Criminal Code} offences that are not Level 3 or Level 4 offences \\
\hline
\textbf{LEVEL 3 OFFENCES} & \\
These offences can be referred only at the court (post-conviction/pre-sentence) and corrections (post-sentence) entry points. & • Fraud and theft-related offences over $20,000 \\
& • Robbery \\
& • Sexual offences (proceeded with as a summary offence) \\
& • Aggravated assault \\
& • Kidnapping, abduction and confinement \\
& • Criminal negligence/dangerous driving causing death \\
& • Manslaughter \\
& • Spousal/Partner Violence offences \\
& • Impaired driving and related offences \\
\hline
\textbf{LEVEL 4 OFFENCES} & \\
These offences can be referred only at the corrections (post-sentence) entry point. & • Sexual offences (indictment) \\
& • Murder \\
\hline
\end{tabular}

The final aspects of the structure of the program which needs to be presented are the formal minimal requirements and the discretionary factors which condition its invocation in particular cases. The \textit{formal minimal requirements} are those considerations set out in section 717 of the \textit{Criminal Code} and section 4 of the \textit{Young Offenders Act}. These of course, include protection of society, reference to offenders needs, and victim’s interests;
offender consent to the process; right to counsel; acceptance of responsibility for the offence by the offender; sufficiency of the evidence; privilege against the use of admissions made in the process, etc. The discretionary factors are similar to those found in Crown attorney guidelines concerning the decision to terminate proceedings in the public interest or those found in various alternative measures schemes presently in use across the country, though with a heavy emphasis on victim concerns.\(^{190}\)

The point of this long description of an operating restorative justice programme is to demonstrate the complex fashion in which restorative justice can enable citizens to achieve goals in relation to criminal justice which are in considerable measure unattainable in the context of even the egalitarian and inclusionary incarnation of the adversarial criminal justice system. It is an example of constitutional democracy based on a theory of communicative action as described above in Part II. The programme reconciles broad substantive and procedural criminal justice norms (fashioned by the federal Parliament) with administrative processes (established by the exercise of governmental discretion at the provincial level) which are implemented through ongoing consultation and citizen participation (through local

\(^{190}\) Nova Scotia Programme, supra note 177 at 14, where the list reads:

1. the cooperation of the offender;
2. the willingness of the victim to participate in the process;
3. the desire and need on the part of the community to achieve a restorative result;
4. the motive behind the commission of the offence;
5. the seriousness of the offence and the level of participation of the offender in the offence, including the level of planning and deliberation prior to the offence;
6. the relationship of the victim and offender prior to the incident, and the possible continued relationship between them in the future;
7. the offender’s apparent ability to learn from a restorative experience, and follow through with an agreement;
8. the potential for an agreement that would be meaningful to the victim (i.e., restitution, actual repairs);
9. the harm done to the victim;
10. whether the offender has been referred to a similar program in recent years;
11. whether any government or prosecutorial policy conflicts with a restorative justice referral; and
12. such other reasonable factors about the offence, offender, victim and community which may be deemed to be exceptional and worthy of consideration.
Moreover, empirical evidence suggests that on four main axes of comparative evaluation, restorative justice outperforms the adversarial paradigm. Both victims and offenders express higher levels of satisfaction with restorative process than with adversarial trials. Offender compliance rates with restorative outcomes are higher than with their adversarially achieved counterparts. Where restorative justice outcomes supplant sentencing dispositions, rather than widening the net in the direction of simple cautions or official inaction, the costs of criminal justice appear to be reduced significantly. Finally, there is emerging evidence that restorative conferencing reduces recidivism rates more than standard sentencing where other variables are held constant.

V. POST-MODERN CITIZENS’ GOALS AND FUNDAMENTAL JUSTICE: MAINTAINING THE BALANCE

Unguarded restorative justice talk may sometimes create the impression that restorative justice ought entirely to replace the criminal justice system as we know it. Such thinking is misplaced utopianism and potentially dangerous. It is necessary and indeed right that central elements of the formal criminal justice system remain in place, even though it is likely and desirable that restorative justice will play an ever more prominent role in criminal justice, both here in Canada and around the world. A moment’s reflection on the importance of traditional standards of criminal justice in this context is of value here. In particular, it is helpful to understand why state-centred criminal justice, rooted in limiting retributivism, must continue to constitute both a defining and a default paradigm in any complex context.

Kurki, supra note 135; McCold, supra note 138; Clairmont, supra note 147; and Latimer, Dowden & Muise, supra note 166.

See the Latimer, Dowden & Muise “Meta – Analysis”, supra note166.

Morris & Maxwell in Strang and Braithwaite, supra note 162.

See, for example, A. Morris & G. Maxwell, “Family Group Conferences and Reoffending” in Morris & Maxwell, supra note 136 and the Latimer, Dowden & Muise, “Meta-Analysis”, supra note 166.

The phrase “default paradigm” is intended to refer here to the idea drawn from the computer world of a system which will determine outcomes in the absence of a valid decision to employ an alternative system or approach. For a discussion of limiting retributivism, see B. Archibald, “Crime and Punishment: The Constitutional Requirements for Sentencing in Canada” (1988), 22 R.J.T. 307.
democratic society which purports to operate in accordance with the rule of law.
Democratically determined criminal laws typically ought to provide clear definitions of behaviour proscribed as unacceptable in society so that people can govern their actions accordingly in order to comply with the law and avoid punishment. That governments, or others wielding official power (including restorative justice conference participants), must be constrained from arbitrary and unlawful behaviour is an axiomatic principle of democracy. Thus, it is important, especially in complex societies where social stratification and subcultural differentiation inhibit the development and maintenance of universal standards of behaviour, that basic norms of criminal conduct continue to be debated, determined and promulgated through authoritative democratic institutions. The abandonment of substantive standard setting in criminal matters to restorative justice agencies, no matter how well-intentioned, well-trained or representative of the local community they may be, is simply “not on” in a democratic society. While restorative conferencing may be an excellent way to deal with the consequences of criminally harmful actions, it is not the forum in which society should determine basic standards of what is right and what is wrong. Restorative conferences are authorized only to respond to criminal offences, not to criminalize what participants may or may not view as harmful or immoral. Legislatures must do that job. Basic notions of liberty in a democratic society demand such a perspective, and cannot be lost sight of in the enthusiasm for restorative justice.

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196 This concept is, of course, critical aspect of the principle of legality which is entrenched in Charter, ss. 7 and 11(g). For judicial discussion of these issues, see R. v. Nova Scotia Pharmaceutical Society, [1992] 2 S.C.R. 606. The requirements of an agreement resulting from a restorative conference must be viewed as punishment in this context, even if all participants are in favour of them and share in a consensus concerning their restorative character.

197 This truism found its classical expression in A.V. Dicey, Lectures Introductory to the Study of the Law of the Constitution (London: Macmillan, 1886) and is the foundation of modern administrative law: see D. Mullin, Administrative Law (Toronto: Irwin Law, 2000).

198 Facts and Norm, supra note 19.

199 The perversions of justice during the totalitarianism of Nazi and Fascist regimes in Europe which gave rise to the Second World War were not lost on post-war European constitutionalists. The post-war Italian and German constitutions made criminal prosecutions mandatory where crimes were found to have been committed, and prohibited the exercise of prosecutorial discretion in this regard. However, even Italy and Germany are now moving toward restorative justice options within the limits of modified constitutional constraints: G. Di Federico, "Prosecutorial Independence and the Democratic Requirement of Accountability in Italy: Analysis of a Deviant Case in
Avenues for recourse to the formal criminal justice system must always be restorative against rules criminal trial, determination restorative innocence responsibility commitment to the rule institutions of criminal justice, democracies.

Similar concerns arise in relation to procedural due process. The disturbing litany of recent cases of wrongful conviction in major western democracies serve as a grim reminder that complacent confidence in the institutions of criminal justice, even in societies characterized by a formal commitment to the rule of law, is dangerous. While offenders who accept responsibility for or plead guilty to offences may properly be dealt with by restorative techniques as described earlier, those who assert their innocence must have access to a fair trial. Despite the claims of some, restorative justice process is rarely an appropriate venue for the determination of contested facts. The procedural protections of the formal criminal trial, including the burden of proof on the prosecution and formal rules concerning the fair presentation of proof, are essential bulwarks against injustice where claims of innocence are asserted. Increased reliance on restorative conferencing cannot be allowed to sap the commitment to procedural criminal justice which is the product of historical struggles against oppressive use of the instruments of state power in democratic societies. Avenues for recourse to the formal criminal justice system must always be

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200 Attentive readers of the popular press will be familiar with the “Birmingham Six” and “Guildford Four” in the United Kingdom; with the celebrated names of Truscott, Marshall, Morin, Milgaard and Sophonow in Canada; and with recent FBI cases resulting in wrongful convictions in the United States.

201 The issue of pressured pleas of guilty or inappropriate acceptance of responsibility by offenders with legitimate grounds for defence arises whether one is dealing with the formal justice system or restorative process: R. v. Adgey [1975] 2 S.C.R. 426. However, as will be discussed below, restorative justice diversion must put in place safeguards to protect against such occurrences to the extent possible.

202 Braithwaite, supra note 146.

203 Despite myths to the contrary, criminal justice systems in the continental tradition do have functional equivalents to the burden of proof Abeyond a reasonable doubt in criminal matters: see H. Jeschek, “Principles of German Criminal Procedure in Comparison with American Law” (1970) 56 Val. L. Rev. 239.

204 While the civilian-derived jurisdictions do not replicate the full array of common law rules of evidence, even they have significant rules about the fair presentation of proof in criminal matters: W. Pakter, “Exclusionary Rules in France, Germany and Italy” (1985) 9 Hastings Int. L. Rev. 1. Such rules are not present in the discursive give and take of restorative conferencing, although protection against derivative use of damaging admissions is given by the statutory rule of privilege in the Criminal Code, s. 717 (3).
preserved for use at any point in restorative process where an offender feels that he is being subjected to an unfair procedure.\textsuperscript{205}

The rules of due process, of course, apply not only to the criminal trial itself.\textsuperscript{206} It is an unfortunate fact of life that police and criminal justice personnel may sometimes exceed their authority in ways which cause damage or prejudice to accused persons. Criminal procedure generally provides the formal means by which to limit or sanction the harmful effects of abuse of the state’s virtual monopoly over the lawful use of force in the apprehension of offenders, the gathering of evidence and processes of trial, sentencing and punishment. Even if restorative process is generally far more satisfactory to both offenders and victims as a means of responding to criminal wrongs, it has only an indirect, if any, capacity to deal effectively with these procedural problems.\textsuperscript{207} Where an accused claims to have been subjected to improper police procedure or other abuse by those in authority, the formal criminal trial must be available as an effective forum in which to air such allegations and seek redress.\textsuperscript{208} Restorative justice cannot “do it all.”

The foregoing concerns about the inadequacies of restorative justice as a total response to crime are put forward from the perspective of accused persons or those who might find themselves in that unfortunate position. However, there are equally if not more compelling reasons to reject any notion of a procedural monopoly for restorative justice which are rooted in concerns about crime prevention. The retributive paradigm, with its

\textsuperscript{205} \textit{Criminal Code}, s. 717 reflected, for example in the “discretionary factors” enumerated in the \textit{Nova Scotia Programme}, \textit{supra} note 177, embodies these procedural safeguards.

\textsuperscript{206} The extent to which the criminal trial (as opposed to collateral legal procedures against malefactors in positions of authority) ought to provide the opportunity to sanction wrongdoing has long been a matter of controversy: see H. Packer, \textit{The Limits of the Criminal Sanction} (Stanford: Stanford University Press, 1968). Exclusionary rules of evidence or stays of proceedings, even in relation to potentially guilty offenders, are of course widely used mechanisms for depriving the State of a conviction where its operatives have exceeded their lawful authority, and have been given a new lease on life in Canada by the \textit{Charter}, s. 24: see Stuart, \textit{Charter Justice in Canadian Criminal Law}, \textit{supra}.

\textsuperscript{207} On the conflicting paradigms of procedural justice since the rise of the victim’s rights movement, see K. Roach, \textit{supra} note 5.

\textsuperscript{208} This, of course, does not mean to ignore or denigrate the possibilities of alternative courses of action against the officials concerned, such as civil suits for trespass or false imprisonment, or administrative complaint procedures, such as those found in many police regulatory statutes.
emphasize on punishment, is an unambiguous denunciatory statement about
the unacceptable nature of the criminal behaviour in question.\textsuperscript{209} The
symbolic and educational nature of the criminal trial and its attendant
punishment are difficult to discount, even for those who are most sceptical
of the deterrent effects of sentencing.\textsuperscript{210} Restorative conferencing, which
is complex to explain and not often exemplified in current popular films or
other communications media, may not have this same denunciatory impact.
More importantly, thoughtful restorative justice advocates must admit that
there are some dangerous, manipulative or irrational offenders for whom
incapacitation is the only strategy.\textsuperscript{211} Abolitionists may cringe at the idea,
but it is hard to deny that incarceration is a necessary evil in a fallen
world.\textsuperscript{212} Restorative justice may be appropriate for a range of serious
offences beyond those one might think of at first blush.\textsuperscript{213} Nonetheless,
incarceration is the ultimate sanction, and it is a right and proper tenet of
criminal justice that such punishments are to be imposed only by a judge
following a formal criminal conviction, obtained in a manner consistent with
appropriate procedural safeguards.\textsuperscript{214}

\begin{itemize}
  \item \textsuperscript{209} Denunciation is an express aim of sentencing in many jurisdictions, including, of
course, Canada: \textit{Criminal Code}, s. 718.
  \item \textsuperscript{210} Criminological literature is replete with studies which indicate that public confidence
in the deterrent effect of criminal sentences is almost entirely misplaced: see S. Lab, \textit{Crime
Prevention: Approaches, Practices and Evaluations} (Cincinnati: Anderson
  \item \textsuperscript{211} The controversy over the prediction of dangerousness is even more intense than that
over deterrence. The reason may lie in the fact that predictions of dangerousness,
always statistically problematic, are used to justify indeterminate incarceration with
all its politically fraught consequences: A. von Hirsch, “Selective Incapacitation
Re-examined: The National Academy of Science’s Report on Criminal Careers and ‘Career
Criminals’” (1988) 7 \textit{Criminal Justice Ethics} 19; and C. Webster, B. Dickens & S.
Addario, \textit{Constructing Dangerousness: Scientific, Legal and Policy Consequences}
(Toronto: University of Toronto Centre of Criminology, 1985).
  \item \textsuperscript{212} G. West & R. Morris, \textit{The Case for Penal Abolition} (Toronto: Canadian Scholars’
Press, 2000).
  \item \textsuperscript{213} The empirical literature somewhat surprisingly indicates that restorative methods are
more effective in relation to offences of personal violence than with minor public or
property offences: this is one of the conclusions of the Canberra Re-Integrative
Shaming Experiment (RISE) Study: H. Strang, “Justice for Victims of Young
Offenders: The Centrality of Emotional Harm and Restoration” in Morris & Maxwell,
\textit{supra} note 136.
  \item \textsuperscript{214} The constitutional right to jury trials in common law jurisdictions, or to trials by
superior courts judges in civilian jurisdictions, are naturally enough connected to the
\end{itemize}
One is thus left with a situation where both formal justice and restorative justice are each necessary but insufficient on their own. The formal state-centred adversarial system is critical for the definition of crime and punishment, as well as for the establishment of procedural due process to be invoked *in extremis* where required. It must continue to be the “default paradigm”. Restorative conferencing provides a healing corrective to an alienating and bureaucratic formal system when offenders are willing to accept responsibility for the harm caused or plead guilty to offences charged and come to terms with the needs of victims and the community. The notion that a crime is simply a wrong against the state, to be prosecuted by its agents, can be supplemented by a recognition that victims, offenders, their families and communities are adversely affected and can be involved in determining solutions where appropriate. However, it is naive to think that restorative justice is a complete alternative which is opposed to and must replace the formal criminal justice system. The two are inextricably linked and complement each other. The question is how are the tasks to be allocated in ensuring that retributive and restorative justice mechanisms play a balanced and reciprocally reinforcing role in the criminal justice system.

**CONCLUSION**

In the past twenty years, Canada has been a global pioneer in advancing egalitarian citizen participation in the administration of criminal justice. The formal adversarial criminal trial has taken on a variety of inclusionary characteristics. This adversarial process has been supplemented by restorative conferencing as a potential alternative at virtually all levels of the system. These restorative methods can enhanced the capacities of individuals to achieve their goals in relation to criminal justice, while simultaneously encouraging community development, crime prevention and healing of harms caused by criminal wrongs. These are forms of reflexive justice well adapted to the needs of Canada’s complex multi-cultural society which maintain a commitment in criminal justice to the principles of autonomy, equality, relationship and procedural fairness. The combination serious of offences and the degree of attendant stigma and punishment. For example, *Charter*, s. 11(f) provides that any person charged with an offence has the right “except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment.”
of inclusionary adversarial proceedings and healing restorative ones has extraordinary potential for the enhancement of citizen participation, both individual and collective. This is all to the good. But the process must be fully understood and its structures properly balanced if the legitimacy of our criminal justice system is to be maintained. It is, moreover, easy to become lost in the forest of conflicting rhetoric and technical terminology in these new debates on criminal justice. A map with as simple directions as possible is required in order not to lose the forest for the trees. Perhaps the foregoing may have served the purpose.
Inquiries and the Goals of Citizens

Dawna J. Ring*

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Inquiries, unfortunately, often involve tragedies that have affected people, their families and their communities. Pursuing the goals of justice by citizens in inquiries are often very similar to the goals they would have in Court. This paper will explore some of the advantages and disadvantages of public inquiries as a method of finding the truth and pursuing the goals of citizens as groups and individuals; how inquiries interact with the justice system; and considering the method of inquiries as an alternative to Court. My experience is with the Blood Inquiry\(^1\) and I will use it for illustration.

I. INDIVIDUAL

In order to fully understand the goals of groups and individual citizens and whether inquiries are a useful tool in pursuing those goals, we need to have some knowledge of these people and the tragedies that have affected their lives and our community.

Janet Conners was a lab technician at the Victoria General Hospital in Halifax. She had a young son from her first marriage when she met Randy Conners. Janet was a Sunday School teacher, Beaver and Cub leader, and a volunteer with the Canadian Literacy Council.\(^2\)

Randy Conners was a computer scientist with the Federal Government who had a wonderful sense of humor. Randy was also a hemophiliac which is a genetic male disease. Hemophiliacs have a

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\(^2\) See Janet and Randy Conners testimony before Justice Krever on March 22, 1994, transcript vol. 22; documents exhibits in vol. 34, Exhibit 89.
decrease in a clotting protein, either Factor VIII or IX. The degree of clotting protein reduction characterizes a hemophiliac as either mild, moderate or severe. Regular movement causes trauma in our joints. For most of us, our blood clots instantly and we do not know that any trauma has occurred. For hemophiliacs, this can cause bleeds in their joints, and may eventually cause arthritis. Randy was like most hemophiliacs, he bled only in his joints and did not have life threatening spontaneous bleeds in his organs.

Randy’s treatment evolved over time as blood products became available. Initially, he would be treated with elevation and ice; whole blood transfusions; and then cryoprecipitate (a blood component). Eventually a freeze-dried product was produced from between 2,000 to 20,000 donations per production batch. If the product was sufficiently heat-treated, during the process, it would kill the virus causing AIDS. In 1979 Randy was provided with a repeatable prescription of this freeze-dried product with no need to return to his specialist, unless he had problems. He took this product on a prophylactic basis, three times a week. After 1979, he did not see his specialist again. Randy merely went to his local hospital to pick up his product. He was the only severe hemophiliac receiving product from that hospital in the early 1980s. Randy received non heat-treated product.

No one said anything to him, not the Red Cross, the hospital, public health personal, the doctor, etc. No one warned him his product might contain the virus causing AIDS. No one told him to only take it for a life-threatening bleed. No one told him to switch to cryoprecipitate, which would expose him to fewer donors (8). In 1986 Randy was diagnosed as HIV positive. Janet and he were in love. She was not prepared to leave him because he was sick. She would not have left him had he had cancer. They were married that year. Randy adopted Gus and he was the only father Gus knew. Gus was five years old.

3 Freeze-dried product must be heat-treated at 68º for several hours to kill HIV (Krever Report, supra note 1 at 755).

4 AIDS means Acquired Immune Deficiency Syndrome, which denotes the last stage of a disease caused by HIV (Human Immunodeficiency Virus).

5 Cryoprecipitate is a blood component made from a single donation. Randy may have needed eight donations to stop a bleed in his joints.
Although one of the first things known about AIDS was that it was a sexually transmitted disease, hemophiliacs were told that they were not passing it on to their wives and that they could practice safe sex “if they wanted to.” No one ever explained the proper method of using condoms. Janet and Randy used Vaseline instead of water-based lubricants. Vaseline breaks down condoms. There were many breakages. In 1988, when Gus was just seven years old, Janet developed lumps and was being checked for breast cancer. However, she was also being tested regularly for HIV. She was told by her doctor’s nurse, on the street, that she was not seeing the breast cancer specialist the following day. Janet knew then, she was infected with HIV.

Their lives fell apart. Randy was devastated he had passed this disease on to his wife. He was devastated that when both of them died, their son would be orphaned. He was devastated that Janet would watch her own death as Randy’s health deteriorated. At the time, those with HIV experienced terrible discrimination. They coped with their pain and sorrow privately. They had trouble functioning. Money was an issue. Finally in 1989, the Federal Government offered a compensation package of $30,000 a year for four years to those directly infected with HIV from blood. It did not provide any money for the secondarily infected spouses and children. Many of those infected with HIV from blood would die during the next four years.

Janet and Randy were on the executive of the Nova Scotia branch of the Canadian Hemophiliac Society at the time. They knew the plight of other hemophiliacs. To fight for the compensation needed by all members of their association in Nova Scotia, they personally went public and fought for compensation from the province. Nova Scotia broke ranks with other provinces and did the right thing. It provided compensation. Nova Scotia is the only place in the world that has provided the same amount of compensation to those directly infected with HIV from blood and the

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6 There was no scientific basis for this statement. There had never been a sexually transmitted disease known to be transmitted through homosexual activities that was not transmitted by heterosexual activities (Krever Report), supra note 1 at 610).

7 This is known as the Extraordinary Assistance Plan (EAP).

8 The Nova Scotia Compensation program provided $30,000 per year from 1993 until the death of the infected person, plus a variety of other components including post-secondary education costs for children and caregivers, etc. Blood Inquiry Exhibit, vol. 22, Exhibit 89.
spouses and children that were secondarily infected with HIV from blood recipients.

Janet Conners did not wish to become a national/international spokesperson and advocate, but she did.

HIV is a horrible disease. The immune system deteriorates and as it does, a variety of sicknesses befalls its prey. A person with HIV does not know how they will feel on any given day. If they catch the flu, it can take six weeks to overcome it. The drugs they must take are numerous and nauseating. Janet Conners describes it as being on chemotherapy everyday.

In the last two years of Randy’s life he wasted away. Gus says that this was the hardest thing to experience about his father’s illness and subsequent death. Randy went down to 98 pounds. He required 24-hour care. He had long bouts of diarrhea, necessitating him to wear diapers and use bed pads. He was weak and nauseated. He was intubated in hospital for pneumonia and survived to testify before Justice Krever. He died a few months later at the age of 38. Gus was only 13 years old.

Janet was Randy’s caregiver. He required 24-hour care which she provided. At the time of his death, she had full-blown AIDS. She too was beginning the wasting syndrome. Medication was causing her hair to fall out. She had to cut it and dye her hair to give it substance. When sick, Janet was and is still incapable of making meals or participating in her son’s life.

The current treatments have kept Janet Conners alive, but sickness remains irregular and at times lengthy. As previously stated, everyday is chemotherapy. The drugs have affected her organs and last year she suffered a heart attack. The anti-viral drugs eventually stop being effective and the disease again ravages her body. Janet is on the last drug that will help her. Unless a new drug is developed, when her current drug stops being effective, she will die.

On the day we were to review the final draft of our submissions to Justice Krever for the Blood Inquiry, Janet did not arrive at my office. The next day I received a call from her. Uncharacteristically, she had cried all morning, picked Gus up from school, brought him home and hugged him. She talked to him about the things she hoped to accomplish before she died. She talked about the skills and guidance she hoped she could teach him and the memories she hoped they could share.
For most of Gus’ young life, he has lived with the fact that both of his parents will die of HIV. He saw his father deteriorate before his eyes. He saw these similar signs begin in his mother. While in Junior High, a teacher commented to the class “they should put everyone with AIDS on an island and let them all die together.” While Janet encouraged Gus to study his history courses, he responded “that isn’t the history I am interested in.”

Gus lost his innocence as a young boy. He had a childhood filled with grief. He does not know how to feel joy. Gus has lost faith in our society.9

Their story is similar to the story of the other 1,200 people who became infected with HIV from blood.

II. PAUSE

I would like you to think about their lives. I would like you to imagine what it would be like to walk the rest of your life in their shoes. The constant illness, the fear of spreading this disease to your spouse, the things you wouldn’t be able to share with your family, the activities and events you would miss. Assume your financial needs are taken care of. How much would I have to pay you, for you to become infected with HIV today? $175,000? $300,000?…

III. STANDING

The Orders in Council appointing Justice Krever,10 specifically included “an examination of the roles, views and ideas of relevant interest groups.” Janet Conners applied to Justice Krever as an individual to receive standing to represent the interests of persons secondarily infected with HIV, the spouses and children,11 who had been ignored by Canada’s Blood System and Public Health. In addition to blood, HIV/AIDS may be transmitted sexually to a spouse; and to a child while in the uterus, at birth, and possibly through breast feeding.

9 Janet Conners comments about the affects of this tragedy upon her son.
10 Justice Krever was appointed by the Governments of Canada, Ontario, Prince Edward Island and Saskatchewan (Krever Report, supra note 1 at 1079-1095).
11 Krever Report, supra note 1 at 591.
Justice Krever granted her standing.\textsuperscript{12} Others joined her. It was a group, but it was not an organization. The significance of this is that it had no other source of funding to do all of the work it did during the Inquiry. This included not only the fulfillment of its responsibilities before the Blood Inquiry, but the continuous lobbying for change which occurred during and after the inquiry.

\textbf{IV. GOALS}

The goals of the Secondarily Infected Spouses and Children with HIV were:

1. To find out the truth of what happened;
2. To make recommendations to correct the system; and
3. To ensure it never happens again.

The third goal was very important, as Janet knew she would be leaving her son alone in this world to fend for himself. She was determined that when she would not be here to protect him, hopefully, she would have done enough to change the blood system to ensure that he would be safe.

The goals of this group substantially mirrored the Orders in Council, creating this public inquiry.\textsuperscript{13}

There were also unspoken hopes. These hopes were that during this inquiry those in the blood system would accept responsibility for their actions; say they were “sorry,” and correct the wrongs. My clients knew that these were not part of the inquiry process. However, these hopes naturally flow from one’s expectations of what caring institutions and a caring community ought to do once the truth is exposed.

\textsuperscript{12} \textit{Ibid.}, at 1107.

\textsuperscript{13} \textit{Supra} note 6.
V. JUSTICE

In order to understand to what extent public inquiries fulfill the goals of justice of these individuals and groups, we have to first understand what is the public’s perception of “justice.” Justice is correcting a wrong. To achieve justice we must be able to fully explore all of the facts of what went wrong and then provide all of the remedies to correct that wrong.¹⁴

Our legal system is not that definition of justice. If justice is demonstrated as a plain sheet of paper, our legal system provides squares, circles and triangles within which one’s case must fit. There are perimeters.¹⁵ Those perimeters determine the relevant evidence or facts that will be explored in that specific case and the type of remedies that may be provided.

Each individual person’s philosophy and value system determines how much the legal system’s squares, circles and triangles, fulfill one’s concept of Justice.¹⁶

VI. WERE THE PUBLIC’S GOALS ACHIEVED THROUGH THE INQUIRY PROCESS?

A. Goal No 1 – Truth

An inquiry has the potential of enabling a community to find out all of the facts relevant to a specific tragedy, unimpeded by the parameters of specific legal actions, such as mere negligence. This ability to explore all of the facts of a problem is the greatest advantage of an inquiry process. This is particularly so now because our society has become much more complex over the last century.

The complexity of our society is well illustrated by Canada’s blood system. There were numerous players, in various jurisdictions, internationally and within Canada, combining public and private sectors in complex relationships intertwining numerous areas of the law.

¹⁴ Supra note 2 at 9-10.
¹⁵ Ibid., at 11-13.
¹⁶ Ibid., at 13.
The main player was the Canadian Red Cross. It is a non-profit organization which has as one of its founding principles, the principle of independence. Within its own structure it had a complex system of 22 committees. A number of these lacked any independent expertise to analyze the information being provided to it about blood. Its national office set the policies. It had 17 centres across the country. Although most followed national policy, each operated independently. They did not share blood resources when one had an overabundance and another did not have a sufficient supply of blood.

The Provincial and Territorial Governments were and are responsible for health and the blood system. The Provincial Governments are responsible for health care in their jurisdictions including blood, blood products and public health. The Provincial Governments provided 97% of the budget of the Canadian Red Cross for the blood system. The Federal Government was responsible for regulating blood and blood products. Provincial and Federal Governments established the Canadian Blood Committee to set policies and monitor the blood system, amongst other things. The appointments to this Committee were often accountants. In our opinion, this Committee lacked the expertise to monitor a blood system properly. Budgetary analysis, although a major focus, was misguided.

Blood products were made by Canadian and multinational corporations. Political factors, including jobs for Canadians, influenced decisions about Canadian manufacturers despite concerns some had about the safety of the products.

Blood was distributed by hospitals under the direct order of doctors. Any doctor, regardless of his expertise and his knowledge of blood and transmission of infectious diseases through blood, is permitted to order blood for a patient. Although it has been described by some as the

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17 Krever Report, supra note 1 at 51-58.
18 Ibid., 91 and 152.
19 Ibid., at 91.
20 Ibid., see also sections beginning at 111 and 149.
21 Ibid., at 90.
22 Ibid., at 96.
23 Ibid., chapter 4.
most dangerous drug we have available,\textsuperscript{24} any physician may order it for a patient.

Another complicating factor in this inquiry was the reputation of the Canadian Red Cross. It saved peoples’ lives during and since World War II. Its workers were on the front lines, risking their own lives to save others. Anyone who has given blood has experienced the wonderful people who are the current front line workers and volunteers at the Canadian Red Cross. It was an institution that could do no wrong. Despite the evidence, people would not believe it was true. As I repeatedly stated throughout the Blood Inquiry, trying to convince people that some people within the Red Cross did terrible things, was like trying to prove “Santa Claus was a pedophile.”

**Extensive Investigation** To obtain the truth in a complex system is an extensive effort. Justice Krever conducted provincial hearings, national hearings, brought forth international experts, and had round-table expert sessions. It consumed 247 days of hearings, 474 witnesses, collected between 800,000 and 1 million pages of documents. Almost 100,000 pages of exhibits, in more than 436 volumes, were introduced. 50,011 pages of transcripts were produced.\textsuperscript{25}

One truly did not have a full appreciation of the facts, the intricacies, the complexities and the problems, until the end of this inquiry. No trial or court proceeding could have accomplished this.

**VII. LIMITS ON TRUTH/DISADVANTAGES OF INQUIRIES**

Public inquiries can be limited in their ability to find the truth. Most limits on the ability to fully explore the truth are a disadvantage to the process and its efforts in pursuing the goals of citizens in groups or as individuals.

**Orders in Council** The Orders in Council creating the public inquiry determine the breadth of the investigation and therefore the amount of truth that can be explored. The initial time and funding

\textsuperscript{24} Dr. Tom Asher, witness at Blood Inquiry on December 13, 1995. Affidavit included in Final Submissions of Secondarily Infected Spouses and Children, vol. 2.

\textsuperscript{25} *Krever Report*, supra note 1 at 6-10.
allotments in the Orders are often too little to complete the task. If extensions and additional funding are not provided, truth is limited.  

**Commissioner’s Rulings** The rulings of the Commissioner can limit the exploration of truth. In the Blood Inquiry we requested that Ministers of Health be witnesses in the proceedings. We thought it was important to know whether or not any of this information came to the attention of the Minister. Would these types of matters normally have come to the attention of the Minister? If not, why not? Knowing what we know now, should these matters be brought to the attention of the Minister? If not, why not? How should they be handled within the Department and the Government to provide proper safety? Justice Krever did not agree with our position on this point and the Ministers were not called. This portion of truth could not be pursued.

**Time** Even if extensions of time are granted, time itself is a limiting factor. The hearings of the Blood Inquiry spanned two years. Did every question get asked? No. A Commissioner must strike a balance between an exhaustive exploration of the truth and completing the investigation in a timely manner, so that changes can be implemented in a timely manner to protect society from immediate problems and further tragedies.

**Funding** Funding is critical if citizens as individuals or in groups are to have an opportunity to participate in an inquiry process. The group I represented, Janet Conners and other Secondarily Infected Spouses and Children with HIV, were not a formalized organization and had no other source of funding than that recommended by Justice Krever. The funding amounts provided were 50 hours of preparation prior to the commencement of the inquiry and then 10 days for each day I attended the hearings. The fees were at Federal Government rates. The work required to do this job properly went far beyond this money allocation. It compensated me for approximately one quarter of the legal services I

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26 Somalia Inquiry.

27 Our groups shared funding with the Canadian Hemophiliacs Infected with HIV. We were to divide our time at the hearings, that is we could not both be present at the same time unless the witness was of major importance. This increased our workload as it was necessary to prepare summaries to keep each other up to date. To keep abreast and adequately represent our clients we had to review some documents and transcripts from hearings we did not attend. None of this was compensated for.

28 These rates are below all private practice rates.
provided to this group. Despite the insufficient funding, nine of the ten
counsel representing citizens and interest groups gave 110 % of their
efforts. Lawyers agreeing to represent individuals and interest groups
before inquiries do so at a personal cost. Therefore, it is not always easy
to obtain counsel to act for public interest groups. Without legal counsel,
the goals of citizens cannot be obtained through inquiries.

**Court Challenges** Funding became a significant hindrance to
finding the truth, when the Power Brokers brought court challenges
against Justice Krever in an effort to silence him from disclosing his
facts.\(^{29}\) The Power Brokers included those involved with Canada’s blood
system: the Red Cross, most governments, multinational corporations, etc.
They argued that Justice Krever should not be able to disclose any
information that may lead the public to think that anyone, corporation or
government, did anything which may be considered civilly or criminally
wrong. In essence he could say nothing.\(^{30}\) The ability to advise the public
of the facts found through an inquiry process was at stake. The legal
services provided for these court challenges were extensive. They
included 63 volumes of materials, three weeks of cross-examinations on
the affidavits and the challenge advanced through all three levels of court,
to the Supreme Court of Canada.\(^{31}\) The funding we were eventually

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\(^{29}\) Section 13 of the *Inquiries Act*, R.S.C. 1985, c. I-11 states:

No report shall be made against any person until reasonable notice has been given
to the person of the charge of misconduct alleged against him and the person has
been allowed full opportunity to be heard in person or by counsel.

\(^{30}\) See section in this paper titled “Why?” for the facts behind the following comment
made by Counsel for the Canadian Red Cross before the Federal Court, Trial
Division, that all Justice Krever was legally allowed to report about the facts of the
depletion of the non heat-treated Factor VIII concentrate was:

“[…] heat-treated products were known to have less risk; […] heat-treated
products became available over time;…for a two-month period both heat-treated
and non heat-treated continued to be distributed in accordance with protocols by
the Medical Scientific Advisory Committee of the Canadian Hemophilia Society;
[…] protocols were never revisited once inventory accumulated; […] the
distribution system could have been improved during that period.” […] The word
“improved” was retracted and counsel further clarified: “He can simply say that as
inventories became more generally available, the protocol could have been
revisited and it wasn’t.”

As Justice Richard, of the Federal Court, Trial Division, rightly asked, if this is all the
Commissioner is permitted to say, would any notices of misconduct be required?

\(^{31}\) *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System)*,
provided with was five hours for only three days, of the eight days of hearings before the Federal Trial Division, that is 15 hours. The funding announcement was not made until after all of the affidavits were submitted and on the final days of the three weeks of cross-examinations.

The Power Brokers tried to starve out the citizens and nearly succeeded. Not all lawyers representing interest groups stayed to participate throughout all aspects of the court challenges. Only three of the ten did. It once again came at a personal sacrifice to lawyers. I slept on the floor of a colleague in Toronto. I gave up some of my capital in my firm. However, during the three years following the commencement of those challenges, the majority of my fees were paid through lobbying efforts of my client and public contributions. Representation of the interests of citizens should not be this uncertain.32

All initial funding recommendations for public interest groups should include funding for all court challenges initiated by others, regardless of whether the Government adopts this funding recommendation.

**Delays** The court challenges added almost two years onto the process. During that time many individuals with HIV and AIDS died and therefore never learned the truth or the facts of what went wrong and why they became infected. Bill Selnes, who represented another *ad hoc* group of citizens known as Canadian Hemophiliacs Infected with HIV, did not have one client alive at the time of presenting his final submissions to Justice Krever.

**Why?** Despite all of the information we obtained, we still do not fully understand why the people working within the system took some of the actions or inactions they did.

We can all speculate and have our theories, but knowing why remains a mystery. One of the devastating facts that became evident during the Blood Inquiry was the method of switching hemophiliacs from non heat-treated to heat-treated product. Shortly after the virus was identified in the summer of 1984, a scientific journal reported in September that heat-treating the product during production, at 68°C for several hours, could kill HIV.33 The Red Cross, on that point and others in

32 *Supra* note 1 at 16-17.
33 *Supra* note 3.
Canada’s blood system, knew that every vial of non-heated product was likely contaminated with HIV.\textsuperscript{34}

For the first six months of 1985, the Canadian Red Cross set out and did redistribute its non heat-treated product across Canada until it was depleted.\textsuperscript{35} During that same period of time it stockpiled one-third of a year’s supply of the safer heat-treated product. In the last week of June, the last vials of non heat-treated product from the national warehouse went to the Toronto Blood Centre and were distributed to the Toronto Hospital for Sick Children. 25 vials appear to have been used.\textsuperscript{36}

On June 30, the day before a full conversion to heat-treated product, the Saint John, New Brunswick Red Cross Centre had over 700 vials of safer heat-treated product, when it handed out the last four vials of non-heated treated product to hemophiliacs in its area.\textsuperscript{37} Dr. John MacKay, Medical Director of the St. John Canadian Red Cross Blood Transfusion Centre, testified about his knowledge during these months:

\begin{quote}
Q. You knew at the time that you were sending out these vials that these vials may have contained the virus that causes AIDS.
A. Yes.
Q. You also knew at that time that AIDS has killed people.
A. Yes.\textsuperscript{38}
\end{quote}

One Medical Director honestly answered, she supposed “they [the hemophiliacs] were all infected anyways.”\textsuperscript{39}

\textsuperscript{34} Dr. Roger Perrault was the National Director of the Blood Transfusion Service within the Red Cross. He was responsible for the Red Cross’ operation of Canada’s blood system. He testified the following:

\begin{quote}
Q. And that by December of 1984 it was estimated that all non heat-treated product may contain the HIV virus, as a result of that?
A. That was known.
\end{quote}

Transcript, vol. 139 at 29770.

\textsuperscript{35} Blood Inquiry Exhibit 631, CRC V28, T1, p. 50455, 50449, 24094; Exhibit 303, p. 101; Exhibit 636, T14.

\textsuperscript{36} Blood Inquiry Exhibit 468.

\textsuperscript{37} Blood Inquiry Exhibit 279, p. 355A.

\textsuperscript{38} Transcript, July 14, 1994, at 12095.

\textsuperscript{39} Transcript 32796.
A psychology study, more than 20 years ago, showed how Harvard students and the general public continued to do as they were told and administered electric shock to friends who pleaded for them to stop. Some continued this action even after the person was unconscious and in a dangerous situation. Those in the blood system were doctors. Well-educated people who had taken a Hippocratic oath “to do nothing to harm another individual.” Only two/three Red Cross Medical Directors of local centres changed hemophiliacs to safer cryoprecipitate and gave out the heat-treated product as it became available to them. But why didn’t all the others? We often asked during our cross-examinations, “If he were your son, what would you have done?” The Canadian Red Cross counsel always objected.

After knowing all the facts, Janet Conners comments, concluding why so many became infected with HIV from blood: “They all died for nothing.”

A. Goal No 2 – Recommendations to Correct the Blood System

Secondarily Infected Spouses and Children with HIV made 116 recommendations to Justice Krever. Other groups also made extensive recommendations to improve the blood system. Justice Krever made 50 general recommendations, with various sub-recommendations in his final report and 43 recommendations in his interim report.

This is the end of the advantages of inquiries into pursuing the goals of individuals and community groups. They knew most of the facts and recommendations were made.

B. Disadvantages

The greatest disadvantage of inquiries as a process to pursue the goals of citizens, is the fact that it provides absolutely no remedies. Recommendations can be made, but there is no ability to force their implementation. There is no mandamus application.

Too many important recommendations gleamed from public inquiries sit on shelves. Political change occurs slowly. In a number of inquiries, Governments bear a responsibility. Are Governments defensive? Do Ministers change too often? Do bureaucrats wield too much power? Is there a lack of initiative to change the status quo?
Another impediment is the lack of corporate memory in governments, and throughout the community. Once an inquiry is over, there is a feeling that it has been dealt with. The community moves onto the next inquiry or the next crisis.

Members of the community who have a specific interest in the topic are left to attempt to affect change through ongoing lobbying. For my clients this has included lobbying to ensure a fractionation plant was not built by the Red Cross in Nova Scotia, attempting to influence policies affecting the blood system generally, home transfusions, proper screening for CJD (mad cow disease), etc. These lobby efforts have been extremely time-consuming and costly. For ad hoc groups such as my clients, there is no funding. All are sick. This has not only consumed thousands of hours of my client’s time, but also of mine. To fulfill this goal, the personal sacrifice of individual lawyers is required. Not all can afford, nor are prepared, to devote that amount of free legal services to assist in ensuring future change. The ability of citizens to encourage the implementation of recommendations is, therefore, very tenuous and unsatisfactory.

C. Goal No 3 – Ensuring It Never Happens Again

Although some recommendations have been implemented, very little has been done to achieve this goal. In regards to some of the key issues affecting safety, there appears to be little more than a name change. The usage of blood and decisions about blood screening, have changed very little and in my opinion insufficiently to protect the public from a reoccurrence. This will be discussed later.

At the end one asks, “Was the four years worth it?” Janet Conners says “Yes” mainly because public awareness was raised. The hearings of the Blood Inquiry were aired verbatim on CPAC (Canada’s Political Channel). There was tremendous media coverage of the Blood Inquiry in all mediums.

Although public awareness was raised, there are impediments to this awareness. First, some, if not most, people would have paid little attention to the details of the Blood Inquiry, thinking it was an issue that did not concern them. They would have thought this, even though every 20 seconds a person in Canada receives blood. That person is someone’s child, sibling, spouse, or parent.
Second, it may have been difficult for people to synthesize through all of the information to pull out the important pieces they needed to know to protect themselves and their loved ones. I will use you as an example.

Did you know that as a society we over utilize blood and provide it to people in non-life threatening situations? Did you know that for most elective surgeries, including open-heart bypass surgeries and hip replacements, people could use their own blood (autologous) without requiring the blood of a stranger (homologous)? Did you know that there are drugs that can be taken by an individual to increase her/his own body’s blood production, enabling them to provide their own blood donation before surgery? Did you know that cauterizing during surgery reduces the amount of blood loss? Did you know there are machines that recycle blood during surgery?

Did you know that blood is the most dangerous drug we use? It is a conduit for diseases. At the time of Justice Krever’s interim report, there were 25 known diseases transmitted by blood. Not all of them have tests, and no test is one hundred per cent. We test for the antibodies of HIV. This is significant because an individual’s body can take between six weeks to six months to develop the antibodies. From the date of infection onward, a person can pass on this disease to others. Therefore, in this six week to six month “window period” our blood system cannot detect HIV in the blood, although the blood can infect a patient.

We continue to have major blood drives at places like universities, where as a group, they generally engage in higher risk activities for HIV such as more than one sexual partner, sex without condoms, experimenting with intravenous drug use, and tattooing. HIV is still a risk in our blood system.

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40 Canada, Commission of Inquiry on the Blood System in Canada: Interim Report (Ottawa: Communication Group, 1995) at 47 [hereinafter Interim Report]: “Testimony at the Inquiry and the few Canadian studies conducted on Blood consumption confirm that physicians continue to administer unnecessary transfusions to their patients.”

41 Ibid., at 53.

42 Dr. Tom Asher’s deposition from blood trial, Conners Final Submission to Krever, vol. 2, Exhibit B, p. 32.

43 Justice Krever’s, Interim Report, supra note 40 at 21-29: see charts at 21, 22 & 29.

44 Ibid., at 23.
Did you know that Dr. Kain, an infectious diseases expert, testified at the Krever Inquiry that because of global warming and global travel, during this decade we will see an increase in the resurgence and emergence of infectious diseases?45 Like AIDS, these diseases can be in the blood system for years before we identify the causative agent and are able to develop a screening test.46

You are a group within our community that had the ability to synthesize this evidence. Did you know all of these facts?

The third impediment is the nature of a patient-doctor relationship. When a person discusses blood with their physician, if the physician says “that was a problem in the 80s, we test the blood now, it is okay, don’t worry about it,” most people will not argue. The above statement is not accurate.

VIII. WILL IT HAPPEN AGAIN?

Yes. Many things need to be implemented to reduce the overutilization of blood. As a result of failing to curb over usage of blood, the current system is making the same choice, as it did during the AIDS crisis.

An example is Creutzfeldt-Jakob Disease (CFD) in humans, known as “mad cow disease” in cattle. There is no test for blood or an individual to detect this disease. We know that the people who pose a risk to Canada’s blood supply system are those that used beef products from areas where cows was infected with mad cows disease. A large concentration of contaminated beef were found in England and to a lesser extent in the rest of Europe. A person who has been in these areas for a longer stay, is at a higher risk of consuming contaminated beef products. However, someone eating one hamburger from infected cattle is at the highest risk of infection. The blood system should be refusing anyone who has spent time in those heavily infected areas. The Canadian blood services will not do that because they anticipate they would lose 20 % of their current donors. If we reduced the amount of blood which we overutilize on people who do not need transfusions, we could take the proper safety measures.

45 Dr. Kain, Blood Inquiry Transcript, p. 44, 668.
46 AIDS first appeared in hemophiliacs in 1978; the virus was not detected until the spring of 1984, (Krever Report, supra note 1, vol. 2, at 367; vol. 1 at XXIV).
Substantial measures must be taken to limit the use of blood, such as education of doctors, promoting bloodless surgery, etc.

In my opinion, ultimately, safety cannot be left to time-consuming committees and a democratic process often consisting of people without sufficient expertise. Lives are at stake. In our view, an infectious diseases expert, appointed to make decisions and to watch global trends of infectious diseases, independent of Government influences, needs to be able to make quick decisions to protect the public from emerging diseases which may be transmitted by blood.

**IX. INQUIRIES INTERACTION WITH THE “JUSTICE” SYSTEM**

There is no direct interaction with the justice system by inquiries. Due to the balance that must be achieved in an inquiry process, it would be improper to permit a direct connection with the justice system. The evidentiary safeguards provided in our civil and criminal law system must be maintained. If people are to be found negligent or criminally responsible, it must still be through those processes.

Does that mean that we should not be able to name names? No. The naming of names was not actually the argument presented by the Power Brokers in the court challenges to the Blood Inquiry. Their argument was that Justice Krever should not be able to make any statement in his report that could lead someone in the public to think that they may be civilly or criminally responsible. To not be able to interpret the facts to state what went wrong is to say “nothing.” 50,000 pages of transcript and 100,000 pages of documents, without analyses, are useless.

Secondly, we cannot forget that the blood system was a public program. The conduct of those involved had the ability to kill people and it did. People involved in public programs must be publicly accountable for their actions or inactions at all times. Their decisions should always be open to the public and transparent. No one working in a public program should be able to hide the facts of their actions or inactions. If their reputations were harmed, they were by their own actions or inactions.
X. INDIRECT INTERACTION WITH THE JUSTICE SYSTEM

There is an indirect interaction with the justice system because of knowledge. A public inquiry that enables a review of all of the facts in a system provides the public with knowledge of what went wrong. The public has the relevant documents, has heard information from people in the system and experts in the field. With this knowledge, the individuals and community groups were able to achieve out of court settlements for funds for the Secondarily Infected with HIV, class actions for those infected with Hepatitis C and CJD, and lay complaints to commence criminal investigations.

XI. JUSTICE AND CITIZEN’S ACCESS TO IT

Inquiries are not satisfactory alternatives to courts. No process is a satisfactory alternative to courts. Our legal system is designed so the justice, as we define it, is provided in a court of law. Justice is not achieved outside of the courtroom.

To illustrate this point, I would like to compare what happened with those who received compensation for their HIV infection and those who had access to the Court for Hepatitis C infection. The compensation for those infected with HIV from blood was a poultry sum, occurring late in their lives. The Federal Government program was not implemented until 1989 and lasted for only four years. The sum was $30,000 per year. For the last two years of Randy Conners’ life, his drug costs alone were $25,000 per year. Most died before the conclusion of these four years. Other than in Nova Scotia, no secondarily infected spouse or child received any monies for their own HIV infection from blood. The amounts were small.

The Hepatitis C 86-90 class action, within the span of three years, was successful in securing $1.5 billion for the benefit of 10,000 Canadians infected with Hepatitis C from blood for the years of 1986-1990. The awards provided for in this court settlement are similar to that which the average person would have received had they been able to take this matter to court.
People’s participation in Justice  The critical question is why are people unable to participate in our court justice system? One of the main reasons is because the courts have closed their doors to the people of Canada. The Supreme Court of Canada did this in the Trilogy cases of 1978, when it inappropriately limited non-pecuniary damages to $100,000, a sum now worth $275,000.

In Andrews, the Court rightly noted that Andrews would be “deprived of many of life’s pleasures and subject to pain and disability” for which he was entitled to compensation. “The award must be fair and reasonable...” The court also rightly pointed out that there was “no medium of exchange for happiness. There is no market for expectation of life. ... No money can provide true restitution.” However, the court was wrong to conclude it is sufficient to adopt, as its paramount principle, compensating a person for their care. Rather than attempting to value the non-pecuniary losses such as pain, suffering, and loss of amenities, the Court instead adopted a “functional approach” which provided some additional funds for physical arrangements, which can make a person’s life more endurable.

Even if one were to accept these principles, it is inconceivable that anyone who has received HIV from blood deserves anything less than the maximum limit. However, our courts have used this functional approach to do even a greater disservice to the people of Canada. Now you get even less than the maximum, if you are older and are infected with this horrible disease.

When I asked you how much would I have to pay you for you to be infected with HIV today, I mentioned the amount of $175,000 or $275,000. I am sure you were insulted. So are the people of Canada who come before the Courts for non-pecuniary damage awards for personal injuries. The awards are insulting.

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The Supreme Court of Canada in 1978 assumed high non-pecuniary damage awards would have a negative impact on our society.\textsuperscript{50} Our non-pecuniary damage awards have been at the opposite end of the spectrum from American awards and, in my opinion, have had a negative impact on our society.

Multinational corporations operating in both the United States and Canada produce most goods used by the public of Canada, and this will likely increase with the North American Free Trade Agreement (NAFTA). The multinational corporations involved in Canada’s blood supply system were the same companies that operated in the United States. Why do these corporations get to pay less to a person injured in Canada than a person suffering the same injuries in the United States? We need to ask: is the injured public of Canada subsidizing the damage awards of the United States?

These differing damage awards have been included in multi-jurisdictional product liability settlements.\textsuperscript{51} The corporations will argue they will only pay what a country will provide to its injured public. There is no justification for these varying awards between Canada and the United States. These variations in general damage awards are offensive to the public of Canada.

Low damage awards do not deter tortuous behavior. The cost of destroying, rather than depleting, the non heat-treated product with HIV, was approximately $2 million.

Another example occurred with Armour Pharmaceutical Company. Armour had processed a heat-treated product using a shorter time period and lower temperature, insufficient to kill HIV. Armour abandoned its license in the United States for this short heat-treated product and was only licensed in the US for the safer longer heat-treated

\textsuperscript{50} There does not appear to have been a sufficient evidentiary basis for this statement. In my opinion, it has not been borne out.

\textsuperscript{51} As one example: the Sixth Amended Disclosure Statement, March 28, 1988 of A.H. Robins Company, included a resolution of the claims of those injured by its Dalkon Shield, an IUD. Stated in its Dalkon Shield Trust Claims Resolution Facility, Annex 4, Plan Exhibit C, Section G6 at page CRF-5:

6. Foreign Claims. In evaluating and paying the claims of claimants residing in foreign countries, the Trustees shall take into consideration, but not be bound by, the laws as well as the treatment of claims in that country of claims such as that made by the claimant.
product. After this product was no longer being used in the United States, the short heat-treated product was still shipped and used in Canada. Would they have done this had the damage awards been the same as in the United States? Damage awards affect behavior. In Canada, they fail to protect the public.

In 1978, the court alluded to the difficulty of placing a monetary amount on intangibles such as loss of enjoyment of life, loss of quality of life, loss of life, loss of time with one’s family and community. Merely because it is difficult, does not mean that the courts should shy away from the task. It further does not mean it should diminish the awards to a mere “functional approach.”

Low general damage awards prohibit the person from bringing their claim to court. If their main award is for their future care, they need every penny of that in order to provide for themselves and their families. Negative contingencies can result in the family having less to live off of than what they actually need. Courts do not order solicitor-client costs. A case against Canada’s blood system is very complex and includes many parties and issues as previously noted. The cost of pursuing one of these HIV cases in Court includes disbursements of approximately $200,000. The first trials lasted six months. They are mammoth. Most people are unable to access court because the awards they receive are too little for their costs of going to court.

To be fair to those who are injured in Canada, we must compensate them for the loss of the quality of their life, the years they lose, the little time they have with their children, spouse, family and community. To protect the public of Canada, we need to more closely mirror the American non-pecuniary damage awards.

**XII. OTHER CHANGES**

Further changes are necessary in order to enable citizens to participate in the legal system. Awards for costs must be higher and ordered more often. When we were participating in the court challenges of the Blood Inquiry, it was very difficult. Organizations have limited resources; individuals have none. If the court has granted standing to a group, the costs should be awarded against the losing parties. The Power Brokers had all the money. They intended to starve us out. They did not

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succeed. But that is only because some lawyers decided to continue on without payment.53

Class Actions  Class actions are critical to providing the public with access to the courts. As I have stated in previous presentations, class action legislation was one of the most significant and important pieces of legislation enacted in the 20th century.54 Resources can be pooled to advance the litigation for group. An example of the advantages is products liability cases, like blood litigation, which are complex actions. They are very costly and time-consuming, with disbursements exceeding $200,000. An individual rarely has those resources, even if the lawyer agrees to work for nothing and risks her/his fees for the eight years the case is in litigation. These costs are shared in a class action.

Class actions should be broadened to include all forms of wrongs against the public of Canada. It needs to include all actions and proceedings before the courts. It needs to embrace Charter55 breaches. Although no frivolous case should ever come before the court, including frivolous class actions, areas of the law should not be excluded from class action proceedings.

CONCLUSION

The fact that some citizens have an interest in a particular public topic does not mean these citizens’ goals and focus are different from the community at large. Their claims and issues should not be considered a nuisance, annoying or an unnecessary extra. To the contrary, they will most often facilitate the completion of inquiries.

53 I provided approximately $800,000 of free legal services to this ad hoc group of Secondarily Infected Spouses and Children fighting for compensation from Nova Scotia, Federal and Provincial governments; lobbying efforts; court challenges against Krever; and fees not paid from inquiry funding. I say this only to emphasis that representation of the goals of public cannot be dependent upon lawyers committing that level of volunteer time, as it provides no guarantee they can obtain representation.


It would be best if tragedies did not occur. Unfortunately, they do. Public inquiries are an excellent process for understanding complex systems in our complex society. They assist in finding the facts, analyzing the system, and providing recommendations for solid policy change. Recommendations can sit on government shelves forever. They, however, are never an alternative to the court or the justice system as they provide no remedy and no direct link to the justice system.

Our legal system is designed to dispense justice in the courts. There are no alternatives. The courts need to make themselves available to the people. To do this, the Courts need to first change the amounts for non-pecuniary damage awards and the principles upon which they compensate the injured public. Other changes include, but are not limited to, awarding higher costs more frequently, and embracing and expanding the use of class actions.
The Interplay Between Individual Citizens and the Courts: How Decisions get Played out in the Press

Stephen BINDMAN

As I was preparing for our presentation, I came across the following story on the Internet:

“Murder Suspect to be tried by Media”

LOS ANGELES—Overwhelmed by its ever-growing criminal caseload, the Los Angeles District Attorney’s office announced last week that William Craig, arrested last week in connection with a string of brutal Bel Air stabbings, will be tried by the media.

“More than 150,000 cases come through this office every year and, despite our best efforts, we are simply not equipped to adequately handle them all,” Los Angeles District attorney Benjamin Dozier said. “That is why we are launching this experimental new program in conjunction with the National Society of Journalism Professionals, in which certain criminal cases will be tried by the media. In these cases, the media will serve not only as judge and jury, but also as executioner.”

According to Dozier, an alliance between the judicial system and the media should prove mutually beneficial. “This partnership makes good sense for both sides. By handing over a percentage of cases, our workload is greatly lightened and by taking these cases, America’s
journalists will finally get their wish and be able to actually make the news rather than just merely report it.”¹

You will be pleased to know that despite my background, that is not the model that I am advocating for the relationship between the courts and the media. But I do believe that we have a serious problem and it is this. You in the court business—administrators, judges, lawyers—don’t understand journalists and what we do and why, and we in the journalism business don’t understand you and what it is that you do. Don’t get me wrong—I don’t expect us to be buddy-buddy. A little distrust or wariness may be a good thing. But I believe that until we bridge this chasm and develop a better understanding of our respective worlds and adapt our processes accordingly, the quality of the coverage of our courts will suffer and that is to the detriment of both groups.

About five years ago, I spoke to a conference of Ontario judges about the relationship between the media and the courts and the judiciary. I recently dug out my notes from that talk and I thought I would give you an update on where I think things are today.

On the media side, I complained five years ago about the abysmal lack of training of some court reporters. I noted that they know very little about the court system when they are sent down to cover something at the courthouse. They are literally told to sink or swim and when they finally get the hang of the beat, they are off to city hall. With the exception of large newspapers, most news organizations cannot afford the luxury of a full-time court reporter. The reporter who was covering your case today was probably not there for the testimony yesterday and was probably covering a parade the day before. Maybe tomorrow they will be covering a fire.

To be honest, I am not sure that in the past five years we have made much progress in this area. I am fearful that in the newspaper war that we are seeing these days, more and more reporters are being thrown into situations in which they are not comfortable or properly equipped. I still see a lot of very basic errors being committed that frankly wouldn’t, or shouldn’t, happen with a little basic training. For example, there was recently a story following a Supreme Court ruling that began “The Supreme Court has found the Red Cross guilty of negligence for failing to

¹ “Murder Suspect to be Tried by Media”, online: The Onion http://www.theonion.com/onion3622/murder_suspect.html.
adequately screen blood...” I don’t think it is too much to ask of a reporter to realize that you are found guilty of a crime, not a civil wrong. Then there is my favorite recent story on a ruling by the Alberta Court of Appeal. It said the following in the National Post: “Yesterday’s decision by Madam Justice J. A. Hunt, Madam Justice J. A. Fruman, and Justice J. A. O’Leary…” Did it ever occur to the reporter that it was bizarre that all three of the judges had the same first initials? I think there was a correction the next day. It is a funny example but basic errors like that should not be happening. Part of the fault is on the journalism side. But would it be that big of a deal if you judges actually signed your judgments with your full name?

Justice Kennedy mentioned a project that the deans are involved in and that CIAJ is co-sponsoring. It is a day-long course for journalists that will involve local lawyers, judges and journalists dealing with media issues. We are piloting it in Prince Edward Island at the end of November. If it is successful, we hope to take it on the road across the country and we may be knocking on your door to get involved.

Five years ago I also lamented how little judges understand about the media and their requirements and needs. I am pleased that there have been some positive developments in this area. Many courts have set up court-media working groups to discuss in an off-the-record, unthreatening environment, issues of concern to both members of the media and the courts. Dean is on the one here in Nova Scotia. The Supreme Court has had a similar committee for many years and it has proved to be a great utility and some of the best meals that I have ever had.

Similarly, many courts have a media liaison person who serves as the one point of contact for the media and it can help reporters navigate their way through the system. Contrary to popular belief among some people, when reporters phone the court, they are not necessarily looking for a quote: often they just need help. They need to know when and where a case is being heard, when a ruling is expected, what the next judicial step is, etc. Given their lack of training, it would be of great use if there were a person available at the court to help with “this means this… that means that” or to help the reporter walk through a judgment. You might say, is that really the court’s business? Shouldn’t the media be training their people properly? The fact is, the media are not doing it and in this economic climate, are not likely to. I guess the choice is—no one helps the reporters or the court does.
There is also a very interesting unofficial program in Manitoba. About a year ago, Chief Justice Scott and Associate Chief Justice Oliphant spent a day in a TV newsroom and they watched the entire process of a TV newscast being put together. I think they also spent some time in a newspaper watching how the newspaper is put together; they learned a lot about that as well. I would applaud those efforts of trying to try to understand each other a little better.

A few years ago Justice L’Heureux-Dubé said, “If we don’t help, how can we criticize reporters who get the story wrong?” Five years ago, I urged judges to take steps to make their judgments more accessible and readable to the media and the public. For example, I suggested that you make sure, when possible, when they have a written ruling, that they have extra copies of the judgment available so the media can actually read it without having to desperately scribble notes as judges read it aloud in lightning speed. I also urged judges to take a little extra care in writing and re-writing their judgments so that they are not full of legalese and are understandable to more than the lawyers in the case. Again, I think there have been some positive developments, due in large part to the Internet, which I really don’t think figured into my remarks five years ago.

Many courts across the country have websites with a host of useful information. For example, judgments of the Supreme Court and many other courts of appeal are now posted on the website at the same time they are released in paper. As a result, there is this remarkable thing happening now. Editorial writers across the country are actually reading judgments before they write about them. It is a remarkable new phenomenon that has been facilitated by the Internet. I remember before the Internet I used to have to fax the headnote to editorial writers, those that were actually smart enough to ask “can I get a copy of it?”

Many courts now give advance notice of when important judgments will be released. I think that is important. If you know the day before an important ruling is coming out, it allows the reporter to at least do some homework. Compare this to the usual situation where a ruling lands on their desk at 4:30, when they are in the middle of three other stories and they have no time to do any background work.

Websites are still all new territory for the courts. I would respectfully suggest that there is a lot more that can be done. I don’t think that we have even started to harness the power of the Internet as a powerful tool to educate people about the courts and help them navigate their way through a system that can be intimidating and daunting. As I
reviewed the Canadian sites this week, I got the impression that most sites were designed for use by lawyers and other justice system participants. There were a lot of schedules of hearings and court rules but what about a virtual tour of individual courthouses so that people know where to go and who does what? How about a virtual courtroom where the roles and responsibilities of all of the players are explained?

I must pay tribute now to former B.C. Chief Justice Allan McEachern who has been a pioneer in the use of the Web to reach the public and the media. He has put on the B.C. courts website a compendium of law and judges, a very readable ABC to the law, courts, judiciary and legal profession, the *Charter of Rights and Freedoms,* 2 criminal law, evidence and procedure, sentencing and parole. If you haven’t seen it, I recommend it to you. He also maintained a Chief Justice’s website and responded personally to e-mail queries from the public on a wide range of topics. I understand his site received more than 900,000 visits from computer users and he received 10 to 15 e-mails per week. He also posted periodic comments on judicial matters with intriguing titles such as “A Judge’s Life” and the “Old Boy’s Club”. I understand that Chief Justice Finch is planning to follow in Chief Justice McEachern’s footsteps. It is definitely worth looking at.

I understand there are several courses now offered for judges in judgment writing that preach simple good writing and I encourage you to participate in those. In fact, I was on a panel recently with Justice Laskin of the Ontario Court of Appeal and we were both preaching the same thing, which is for judges to write journalism-style—short paragraphs, short sentences, the most important information at the top, etc. We both decided we are going to quit our jobs one day and go into the judgment-writing course business.

Finally, I urged judges five years ago to get out of their courtrooms more often and into their communities, giving speeches about the justice system, what they do, how they do it and to give more interviews with the media about a range of subjects. I cautioned, of course, that there are limits to this and that it has to be a careful exercise in line drawing. I am pleased to say that some people seem to be heeding the advice, led by the Canadian Judicial Council, which in September

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1999 published “The Judicial Role in Public Education”. Chief Justice McMurtry in Ontario has organized the Public Legal Education Initiative that will see judges getting out into the community and students and others into the courthouses. I understand also that the National Judicial Institute is contemplating media training for judges so that they don’t put their feet in their mouths.

I know there have been some hiccups along the road—some complaints to the Canadian Judicial Council about judges who have spoken out or given media interviews. I would like to quote from a recent editorial in the Globe and Mail to which I could note agree more: “There are growing pains in any new situation, including this new era of openness. The solution is not for judges to retreat into the safety of silence, but simply to consider whether their comments enhance a debate, clarify a position or just criticize colleagues while espousing philosophical biases.”

I think there is a lot more that can be done. As my personal contribution to this process, I wanted to leave you with the thirteen things you should know about journalism and the courts:

1. 99.9% of journalists are not lawyers and only a slightly lower percentage don’t know the first thing about the law or the way the justice system works;

2. Journalists are not historians and their job is not to be a historian and to accurately record history. As a former boss of mine would say, “We only write the first draft of history.”

3. Journalists are not court stenographers and their job is not to produce a slimmed-down transcription of the day’s testimony and events that reflect everything that went on in the court that day;

4. Journalists shouldn’t write their stories just for those lawyers, historians and stenographers, they should write them for the public at large;

5. Journalists, while attempting to be fair and accurate, also must make their story relevant and interesting to their readers;

6. Reporters, even or especially in the courtroom, search out the novel, the dramatically abhorrent, the dramatic and yes, even the entertaining;
The interplay between individual citizens and the courts

7. Most often, bad news is better than good news. Conflict and drama sell, and regrettably being first is frequently better than being best. Unfortunately we are seeing that a lot in the current newspaper war;

8. Except for large news organizations who can afford the luxury of a full-time court or justice reporter, there are no full-time court reporters, very few at least;

9. Journalists tend to travel in packs, hence the term “pack journalism”. Like all packs of animals, there tends to be one or two leaders who shape the pack. To a large extent, story angles depend for their depth and prominence on many things but mostly on the choice of who happens to actually cover the case. Radio tends to follow print, for example;

10. Journalists and newspapers have opinions. Some journalists, believe it or not, have very strong opinions about all sorts of things, even about the things they write about and it is inevitable that those opinions, that reporter’s upbringing, their life experience, their race, their gender, their class, will all consciously or unconsciously affect how they view the world and hence, how they report;

11. Most journalists have deadlines, tight deadlines. The paper has to be edited at a certain time. The 6 o’clock news, except during wartime, are on at 6 o’clock regardless of when court gets out or regardless of when the reporter’s finish editing their story;

12. Some journalists have special needs, like television. Television needs pictures and sound. That is a fact of life but it is pretty hard to do in a country where cameras are not allowed in the courtroom. Television will go where there are pictures or people willing to appear on camera and hence, there are people who will figure more prominently in stories;

13. Reporters have editors who play a key role in shaping the final product. Reporters don’t write headlines, editors do. I know you all have problems with a lot of the headlines, but don’t blame the reporter, blame the editor.
Improving Media Coverage of the Courts

Dean Jobb*

The title for this session is “How decisions get played out in the press,” part of a wider look at public participation in the justice system. I’d like to read to you from a news report of a high-profile Nova Scotia trial from a few years ago, which highlights some of the problems and challenges that arise in the relationship between the media and the courts:

The headline: “Defence calls nobody: Testimony wraps up abruptly in beating case.”

The opening paragraphs appeared as follows:

“Defence lawyers for the six men accused of beating Darren Watts into a coma outside a Halifax frat house seem sure their clients will walk.

So sure, in fact, they didn’t call any evidence or bring any witnesses forward after prosecutor Craig Botterill closed the Crown’s case yesterday […].”¹

This writer knew embarrassingly little about the justice system and its underlying principles, and reached a number of erroneous conclusions about what happened in the courtroom that day. Would the same report have appeared if the journalist understood the right to silence? How about the presumption of innocence? Not to mention this business about the burden being on the Crown to prove guilt, not on accused persons to prove their

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innocence. These defendants were exercising the well-established legal rights of every citizen. For their trouble, they were portrayed in the press as defiant, even cocky, as they thumbed their nose at the court system and refused to justify their actions.

So what happened as a result of this article? Did defence counsel complain about this twisted portrayal of reality? Did the Crown attorney take the reporter aside and explain the mistakes? Or was it left to the judge to publicly admonish the reporter the next morning for disseminating such nonsense?

The answer, in each case, is no. Nothing happened, other than perhaps the usual complaints about the media’s ignorance in the judges’ lounge or around the law firm water cooler. This reporter may still be none the wiser, and still criticizing arrogant crooks who refuse to confess to their crimes.

This was not a trial before a jury, which may in part explain why no one thought it necessary to set the record straight. In a jury trial, defence counsel would certainly have sought a mistrial on the strength of such a highly inflammatory report—motion that may well have been granted.

It’s unfortunate there was no jury to taint, because reports such as this seriously taint how members of the public perceive the justice system and the motives of the players within it. How are citizens to understand the system, let alone have faith in the rule of law, the presumption of innocence and its other hallmarks, when such distorted and uninformed commentary is left unchallenged and uncorrected?

The media’s powerful role in reflecting how the justice system operates is well understood. Few Canadians personally wind up before the courts, and fewer still drop by the local courthouse on a slow day to see what’s on the docket. The media is the primary vehicle through which people find out about the justice system, and judges have long recognized this. In a 1989 Supreme Court of Canada ruling, Justice Peter Cory wrote: “Discussion of court cases and constructive criticism of court proceedings is dependent upon the receipt by the public of information as to what
transpired in court. Practically speaking, this information can only be obtained from the newspapers or other media.”

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There is much the media could do to improve coverage. An obvious first step would be to ensure the reporters who cover trials and justice issues, the editors who handle their copy, and the pundits and editorial writers who second-guess judicial decisions all have a solid understanding of the law and how the justice system operates.

My personal experience, however, is typical. As a novice reporter I was assigned to my first case, a major influence-peddling trial involving a Nova Scotia senator, and I received all of five minutes’ training on the walk to the courthouse. Unfortunately this is still the norm—often the most junior reporters are assigned to cover the courts, arguably the most complicated and dangerous beat in all of journalism. Don’t expect this state of affairs to change anytime soon; the fact that the story about the silent defendants got into print speaks volumes about the legal knowledge of senior editors who vet copy and do the assigning.

Where does this leave players in the justice system who are concerned about the quality and accuracy of what’s on the airwaves and the front pages? If public confidence in the justice system is to be fostered, University of Ottawa Law Professor David Paciocco argues, those within the system must do a better job of explaining their actions and how the system works. Lawyers and judges, he says, “have an obligation to explain in understandable terms why the system is the way it is and why we do what we do [...]. We would go a long way towards restoring the credibility of the administration of justice if only we would seek to explain the system to the general public.”

Those within the system can continue to grumble about the media’s shortcomings, or they can accept Paciocco’s challenge and help journalists to convey better information to the public. Some suggestions:

- The courts’ business should be treated as if it were also the public’s business—which, of course, it is. Judges often complain that their decisions have been reported on or criticized by people who have not read them. The question judges should be asking is, why is this so? Is this due to laziness on the media’s part, or because the decision was

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3 D. Paciocco, Getting Away with Murder: The Canadian Criminal Justice System (Irwin Law, 1999) at 9, 11-12.
released late in the day, with no regard for news deadlines or for ensuring it was made available to the media in a timely fashion?

All courts should have a protocol for releasing rulings and should provide notice to the media a day or two before any major ruling is released. This would give journalists time to assemble background information and line up legal experts for advice and comment. As well decisions should be released early in the day, so there’s ample time for them to be reviewed and understood before the deadline for filing news copy.

• Make an effort to help the media get it right. Does the court have a designated person to handle media inquiries and to field questions if a point of law, or a publication ban, is unclear? I know there are concerns about court officials being forced to interpret rulings, but surely some basic questions or concerns can be dealt with, even on an off-the-record basis. Perhaps a retired or supernumerary judge, who would be comfortable explaining the law, could be assigned to this duty. And is there any reason court officials could not refer reporters to resource persons in the bar or law schools who are experts in a particular field, who may be able to help journalists to understand rulings and their significance?

• Does the court have a mechanism, like a media-liaison committee, to encourage ongoing debate with media representatives on improving access, and to serve as a means of discussing problem areas or complaints about access as they arise? For that matter, court staff should have a thorough understanding of the access rights of the media and members of the public. Journalists who are continually forced to jump through hoops to consult documentation that is clearly on the public record should not be faulted for believing the courts are secretive bodies and unaccountable to the public.

• Most importantly, as Paciocco urges, the system must be defended. Unless errors and distortions are promptly corrected, the public’s misconceptions—and preconceptions—will be reinforced. The media, which does a fine job of holding everyone else accountable, must be held accountable for its mistakes. So demand quality. Insist on corrections or clarifications whenever errors are made. Consider writing a letter to the editor or an op-ed piece to correct misinterpretations of the law, to put issues into context, or to bring balance to a controversial issue. Seek a
meeting with the media outlet’s editorial board to outline concerns about coverage of specific cases or justice issues in general.
If a news outlet is unresponsive, defensive, or a repeat offender, so to speak, consider lodging a complaint with a press council or a broadcasting standards body. Good journalists and responsible news organizations value accuracy and fairness above all else, and will welcome such input. If an organization does not, that would speak volumes about its standards and priorities.

• Finally, those within the system can support educational initiatives. Lack of knowledge of the justice system is not just a media problem, it is a wider societal problem. We do a poor job of educating our citizens about how their justice system works and why so much emphasis is placed on the rights of accused persons.

We have to teach basic legal principles in public schools and at the university level, and there is a role in this for judges and lawyers. I teach a course called “Media and the Courts” to about 60 journalism students each year at the School of Journalism at the University of King’s College in Halifax. The course is the model for a one-day workshop for journalists, lawyers, judges, and court officials being convened as a pilot project in Prince Edward Island in November 2001, sponsored in part by the CIAJ.4

An informal survey of journalism programs across the country suggests the King’s course is unique in several ways. It is mandatory, which recognizes that all journalists need legal knowledge, and it goes beyond media law issues to teach the fundamentals of the justice system and basic criminal and civil law and procedure. Students also hear directly from judges and lawyers, who each year volunteer to take part in candid panel discussions. Their explanations of judicial independence, the role of counsel and other issues have been a powerful tool in shaping how the students—some of them destined, as the next crop of rookie journalists, to cover the courts within months—view the system.

These are senior students, either in their fourth year or in a one-year program for students who already have an undergraduate degree. I wrote the opening paragraphs of the “silent accused” story on the blackboard last year and asked them to suggest what might be wrong with it. Someone questioned

the use of the word “accused,” of all things, and another thought the reference to the victim being beaten into a coma might be prejudicial. Not one appreciated the way basic legal principles had been mangled. The article simply reinforced their “soft-on-criminals” view of the justice system, a view, no doubt, shaped in large measure by media accounts.

These students, at the end of the course, were assigned to cover a mock trial staged by students in Dalhousie Law School’s criminal law clinic. They saw a trial from start to closing arguments, in all its factual and legal complexity. Some of them even picked up on the fact the Crown improperly led evidence of the accused’s criminal record, something lost on the student defence lawyers until the judge—a real judge—intervened.

I asked the students, at the end of their news reports on the mock trial, for a straw vote on what they thought the verdict should be. Even though, only a couple of months before, they had known little about the concept of reasonable doubt B and likely shared the widespread perception that those accused of crimes are invariably guilty B almost every student believed the accused should be acquitted.

I’m convinced they will be better equipped for their first foray into the courtroom than has traditionally been the case for Canadian journalists.
La discrétion administrative : une occasion de dialogue entre citoyens et tribunaux?

Geneviève CARTIER**

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* Le texte qui suit expose à grands traits les arguments que nous développons dans un article qui sera bientôt soumis pour publication, intitulé « Discrétion administrative et participation des citoyens : opposition ou complémentarité? », réalisé grâce à la subvention de recherche qui nous a été octroyée par l’Institut canadien d’administration de la justice pour l’année 2000-2001. Nous tenons à remercier l’Institut pour le soutien qu’il nous a manifesté tout au long de nos travaux.

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La participation des individus à l’administration de la justice a constitué l’une des préoccupations fondamentales du droit administratif au cours des vingt-cinq dernières années au Canada. La réflexion sur cette question a porté sur la reconnaissance de l’importance de la participation des individus à la prise de décisions qui les concernent et s’est traduite par le développement de normes susceptibles de favoriser l’adaptation des principes de l’équité procédurale aux divers types de processus décisionnels administratifs. Parallèlement, depuis la fin des années 80, la question de la citoyenneté a suscité un regain d’intérêt dans le domaine de la théorie politique\(^1\) et le discours de la citoyenneté a peu à peu investi celui du droit, comme en témoigne le thème du présent congrès.

Jusqu’à maintenant, l’impact de la réflexion contemporaine en matière de citoyenneté sur le droit administratif a été peu exploré. Parmi les questions qui mériteraient d’être analysées dans ce contexte figure la suivante : la substitution de la notion d’« individu », largement utilisée en droit administratif, par celle de « citoyen », est-elle susceptible de modifier la conception des droits individuels et des obligations des décideurs administratifs dans un contexte de prise de décision? La tâche qui nous échoit dans le cadre du présent congrès consiste à aborder les relations qu’entretiennent le processus de décision (judiciaire et administratif), l’opinion publique et la citoyenneté. Notre contribution permettra donc tout

au plus d’entamer une discussion sur les implications de l’adoption d’une
notion de citoyenneté en droit administratif.

Le thème de la séance à laquelle nous avons été invitée à participer,
*Comment réagir à l’opinion publique : le dialogue entre les citoyens et les
tribunaux dans une société changeante*, se composait de deux questions
principales suggérées par les organisateurs du congrès. La première porte sur
les liens qui existent entre l’*opinion publique* et les *décideurs* : dans quelle
mesure les décideurs peuvent-ils légitimement réagir à l’opinion publique? La
seconde traite des relations qu’il peut y avoir entre les *opinions des citoyens*
et le *processus de décision* judiciaire ou administratif : comment, et jusqu’à
quel point, les citoyens peuvent-ils obtenir que leurs points de vue soient
reconnus et respectés dans les processus de décision? Ces deux questions
recèlent des distinctions importantes. Réagir à l’opinion publique, et tenir
compte du point de vue des citoyens, nous paraissent être deux questions
différentes. C’est la seconde qui formera l’objet essentiel de notre analyse.

Nous avons-divisé notre exposé en deux parties. Tout d’abord, nous
soulignons les distinctions qu’il faut faire, à notre avis, entre l’*opinion
publique* et le point de vue des citoyens. Par la suite, nous nous intéressons
plus particulièrement au point de vue des citoyens, dans le contexte précis
des décideurs administratifs investis de pouvoirs de nature discrétionnaire.
Pour l’essentiel, nous avançons que le pouvoir discrétionnaire de
l’administration publique crée un interstice, un espace qui doit être utilisé de
maniè re à permettre aux citoyens de faire valoir leurs points de vue,
individuellement ou collectivement. En ce sens, il est susceptible de favoriser
le dialogue entre citoyens et décideurs.

I. L’« OPINION PUBLIQUE » ET LE « POINT DE VUE DES
CITOYENS »

A. Définition des termes

Notre intérêt pour le « point de vue des citoyens » plutôt que pour
l’« opinion publique » repose sur la compréhension particulière que nous
avons de ces deux phénomènes ou concepts.
Selon l’une des acceptions du dictionnaire, l’opinion publique évoque l’« ensemble des attitudes d’esprit dominantes dans une société (à l’égard de problèmes généraux, collectifs et actuels) [...] »

J.J. Best considère quant à lui que l’opinion publique s’apprécie différemment suivant la perspective dans laquelle elle est considérée. À l’échelle de l’individu, elle consiste dans « [the] individual expression of beliefs, values, and attitudes about political objects. [...] That definition is concerned with looking at what opinions an individual has and how he uses them to deal with his environment. » À un niveau différent et à première vue davantage susceptible de s’appliquer à notre réflexion, l’opinion publique désigne plutôt « [the] aggregation and articulation of individual opinions, as perceived by political decision makers. [...] That definition asks what is the distribution of public opinion toward a given set of political objects in the environment and how and under what circumstances does public opinion play a role in the policy-making process. »

S’ils ne permettent pas de fixer nettement les contours de la notion d’opinion publique, ces énoncés expriment tout de même clairement que l’une de ses caractéristiques importantes est qu’elle constitue l’agrégat des opinions d’un certain nombre d’individus d’une société, à l’égard de questions sociales, politiques, morales, etc. Cet aspect d’agrégat, d’addition d’opinions individuelles semble indiquer que l’opinion publique n’existe pas en tant qu’entité autonome et distincte de la multiplicité des voix qui la composent.

D’autres auteurs expriment cependant l’avis contraire. Ainsi, pour A. Barrère, l’opinion publique « est différente de l’opinion personnelle des membres qui composent le groupe »

De même, G. Burdeau écrit : « [T]andis que l’opinion publique est le produit d’une élaboration, la volonté populaire est le résultat d’une addition. [...] L’opinion publique présente par
rapport aux mentalités individuelles un caractère d’objectivité et d’autonomie beaucoup plus marqué que la volonté populaire. [...] L’opinion publique est un phénomène autonome. »7 J. Stoetzel et A. Girard semblent dire qu’elle n’est ni l’une ni l’autre : « Pas plus qu’elle n’est une chose, l’opinion publique n’est pas la somme des opinions individuelles. [...] Les opinions privées s’accordent et se groupent sous l’effet d’un principe commun de conformisation. »8

Pour les fins du présent texte, nous avons choisi de définir l’opinion publique comme le propose J.J. Best, c’est-à-dire comme un agrégat d’opinions individuelles, et de discuter du « point de vue des citoyens » en le définissant comme comportant cette part d’autonomie que l’on n’attribue à l’opinion publique que de manière très hésitante, comme l’illustrent les exemples précédents. Nous concevons le point de vue des citoyens comme n’étant pas seulement l’expression d’une position subjective sur une question donnée, mais comme comportant une espèce d’universalité, par laquelle un individu entend participer à un débat, à la « chose publique » pourrait-on dire, par une « transcendance raisonnable » de ses particularismes. L’individu-citoyen tend à se détacher de sa situation personnelle; il vise une sorte de synthèse entre le Particulier et l’Universel, que R. Beiner exprime très bien :

« To opt wholeheartedly for [liberal] universalism implies deracination-rootlessness. To opt wholeheartedly for [antiliberal] particularism implies parochialism, exclusivity, and narrow-minded closure of horizons. Yet it is by no means clear that a viable synthesis of particularistic rootedness and universalistic openness is philosophically available. In practice, and perhaps even in theory, we always seem to get drawn to one unsatisfactory extreme or the other. This elusive synthesis of liberal cosmopolitanism and illiberal

Ces distinctions éclairent les différences fondamentales entre la question de savoir comment les décideurs peuvent légitimement réagir à l’opinion publique et celle de savoir comment les citoyens peuvent obtenir que leurs points de vue soient pris en compte dans les processus décisionnels judiciaire et administratif. Nous avons indiqué plus tôt que nous n’entendions pas développer pleinement la question de savoir si les juges et les décideurs administratifs peuvent légitimement réagir à l’opinion publique. Nous nous limiterons à formuler quelques brefs commentaires à cet égard.

B. L’opinion publique : quelques commentaires

La réaction des décideurs à l’opinion publique s’analyse différemment selon la sphère à laquelle ceux-ci appartiennent. En matière politique, les décideurs sont confrontés quotidiennement à l’opinion. Nombre d’études se sont intéressées à l’influence de cette dernière sur les individus et sur les gouvernements, de même qu’à la légitimité, le cas échéant, d’une telle influence. Certains la dénoncent purement et simplement10. D’autres, tout en en reconnaissant sa pertinence, craignent qu’elle ne soit utilisée d’une façon systématique et rappellent l’importance d’éviter le « gouvernement par sondages » : les gouvernants doivent décider à la lumière d’une vue d’ensemble des problèmes qu’ils sont appelés à régler, non sur la base d’informations fragmentaires11. D’autres


10 Comme par exemple Bernard FAÏ, Naissance d’un monstre : l’opinion publique, Paris, Librairie académique Perrin, 1965, p. 13 : "[L’]opinion individuelle tend à devenir collective dès que les contacts entre les hommes se multiplient et que les moyens de communication s’améliorent. Pourtant, cette opinion publique reste précaire, timide, tant que la dominent une foi vigoureuse, une discipline morale et sociale, imposées par des autorités fortes, stables, vigilantes. Dans ces cas, chacun s’incline et s’embrigade dans les cadres qui s’offrent, jusqu’au jour où, libérées de leur tutelle, les opinions privées se fondront en une opinion publique véhément, violente, dominatrice. »

11 J.J. BEST, op. cit., note 3, p. 137: « We rarely know the public opinion on all issues at all times. Instead, we know how the public feels about those issues which are felt to be important at that point in time. As a result, we know a great deal about opinions on
encore considèrent que les réactions gouvernementales à l’opinion publique participent d’une certaine conception de la démocratie : lorsque la majorité du peuple exprime une opinion qu’il est possible de connaître par des mécanismes fiables, les gouvernants disposent alors d’informations essentielles aux décisions qu’ils doivent prendre. Bref, les relations entre l’opinion publique et les décideurs politiques sont complexes et controversées.

En matière décisionnelle juridique, qu’il s’agisse des décisions des tribunaux judiciaires ou de celles des organismes administratifs, les caractéristiques particulières de l’opinion publique en font à première vue une candidate susceptible de jouer un rôle difficile à justifier. Plusieurs questions se posent à cet égard, parmi lesquelles figurent les suivantes.

Premièrement, les décideurs peuvent-ils légitimement réagir personnellement à l’opinion publique? La réponse à cette question fait entrer en ligne de compte les rapports fragiles entre la liberté d’expression des juges, qui leur est garantie par la Constitution, et leur devoir de réserve. Deuxièmement, la culture libérale canadienne, et tout particulièrement la Charte canadienne des droits et libertés, indique aux décideurs qu’ils doivent résister, dans la mesure prévue par les textes constitutionnels qui visent la protection des droits fondamentaux et notamment ceux des minorités, aux mouvements purement majoritaires, même issus du processus législatif. Les décideurs ne doivent-ils pas à plus forte raison demeurer très circonspects à l’égard des mouvements d’opinion? Troisièmement, la réaction la plus légitime des décideurs judiciaires et administratifs à l’opinion publique résiderait-elle dans la motivation de leurs décisions? La jurisprudence relative à la Charte semble démontrer que les décideurs exploitent abondamment ce

issues that are current and controversial, but substantially less about those issues which are remote or resolved. »


Voir par exemple Yves-Marie MORISSETTE, « Figure actuelle du juge dans la cité », (1999) 30 R.D.U.S. 1, 13.
LA DISCRÉTION ADMINISTRATIVE : UNE OCCASION DE DIALOGUE ENT CIToyENS ET TRIBUNaux?

procédé pour justifier leurs positions\textsuperscript{14}. Plusieurs éléments des opinions exprimées par la Cour suprême du Canada sur des questions socialement ou moralement délicates visent bien souvent à répondre à l’opinion publique ou, plus précisément, à justifier devant elle les décisions difficiles qu’elle est appelée à rendre\textsuperscript{15}.

* * *

Si, comme nous venons de le voir, certains traits de l’opinion publique semblent difficilement compatibles avec les processus décisionnels judiciaire ou administratif, nous posons qu’une certaine conception d’un « point de vue citoyen » ne l’est pas, du moins quant aux décisions discrétionnaires de l’administration publique. Nous abordons cette question dans la partie qui suit.

II. DISCRETION ADMINISTRATIVE ET VOIX CITOYENNE

L’opinion publique peut devenir voix citoyenne lorsqu’elle est canalisée dans un dialogue entre une autorité décisionnelle et un ou plusieurs individus. Ce type de dialogue nous apparaît particulièrement susceptible d’être entretenu par les organismes administratifs qui sont investis de pouvoirs de nature discrétionnaire.

Nous aborderons la discrétion administrative sous deux angles. Le premier angle vise ce que nous appelons la « discrétionindividuelle », c’est-à-dire l’exercice d’un pouvoir discrétionnaire qui vise un ou plusieurs individus déterminés. Le deuxième vise la « discrétion collective » ou plus familièrement, le cas des fonctions de nature législative exercées par les autorités administratives, qui visent un nombre indéterminé de personnes. Nous sommes d’avis que les deux types de discrétion permettent la mise en


\textsuperscript{15} Peut-être s’agit-il davantage d’un dialogue, non pas entre les cours de justice et l’opinion publique, mais entre les cours et le législateur qui lui, peut réagir plus directement à l’opinion. Sur la question du dialogue entre les cours de justice et le législateur, voir Kent ROACH, « Constitutional and Common Law Dialogues Between the Supreme Court and Canadian Legislatures », (2001) 80 \textit{R. du B. can.} 481 de même que Kent ROACH, \textit{The Supreme Court on Trial: Judicial Activism or Democratic Dialogue}, Toronto, Irwin Law, 2001.
place des mesures nécessaires pour favoriser la prise en compte du point de vue des citoyens.

A. La discrétion individuelle

Le discours judiciaire actuel en droit administratif adhère à la conception traditionnelle de la discrétion administrative, que nous appelons discrétion comme pouvoir. Cette conception s’accorde difficilement au plan conceptuel avec la participation des citoyens. Nous entendons proposer une conception différente de la discrétion, la discrétion comme occasion de dialogue, qui voit la participation des citoyens comme une condition essentielle à la validité de l’exercice d’un tel pouvoir.
De nombreuses dispositions législatives confèrent à des organismes publics le pouvoir de rendre des décisions de nature discrétionnaire. Selon la conception juridique traditionnelle d’un tel type de pouvoir, l’organisme qui en est investi jouit d’une marge de manœuvre plus ou moins grande, qui lui permet de choisir « entre divers modes d’action ou d’inactions possibles »16. Cette liberté d’action découle du fait que le pouvoir discrétionnaire existe lorsque « le droit ne dicte pas une décision précise »17.

Le pouvoir discrétionnaire soulève plusieurs questions dont la justification de son existence de même que la justification des limites qui peuvent lui être imposées.

1. L’existence du pouvoir discrétionnaire

Il nous semble possible de regrouper les types de justifications à l’existence du pouvoir discrétionnaire formulées dans les décisions judiciaires autour de deux grands axes18. Le premier insiste sur les qualités spécifiques du délégataire : l’expertise ou les qualités professionnelles d’un organisme lui confèrent une position privilégiée qui justifient que le législateur lui accorde une certaine marge de manœuvre. Le deuxième voit dans l’existence d’une discrétion un avantage pour les administrés « dans la mesure où elle permet la prise de décisions adaptées aux conditions de chacun »19. Le premier axe voit la discrétion d’en haut, le second la voit de la base. Une lecture préliminaire de la jurisprudence nous semble révéler une nette préférence pour le premier.

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17 *Baker c. Canada (Ministre de la Citoyenneté et de l’Immigration)*, précité, note 16, par. 52.

18 La vérification de cette hypothèse est au cœur du travail que nous effectuons dans le cadre du projet de recherche subventionné par l’I.C.A.J., *supra*.

2. Les limites au pouvoir discrétionnaire

Les tribunaux ont développé deux types de règles visant à encadrer l’exercice de la discrétion ou à limiter son étendue. Le premier type s’est développé dans la foulée des affaires *Roncarelli c. Duplessis*\(^{20}\) et *Padfield v. Minister of Agriculture, Fisheries and Food*\(^{21}\). Il insiste sur le lien qui existe entre le contexte législatif et l’usage légitime de la discrétion. Les tribunaux ont habituellement justifié la formulation de ce type de règle sur la base de l’intention du législateur : « Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the court »\(^{22}\). Mais un autre type de règle semble vouloir se développer depuis la décision de la Cour suprême dans l’affaire *Baker*. Dans cette affaire, la Cour se dit notamment d’avis que les autorités administratives doivent exercer leurs pouvoirs discrétionnaires d’une manière qui soit sensible aux individus et qui soit « compatible avec les valeurs sous-jacentes à l’octroi d’un pouvoir discrétionnaire »\(^{23}\).

Nous soumettons que les motifs traditionnellement invoqués pour justifier l’*existence* du pouvoir discrétionnaire (c’est-à-dire ceux qui s’orientent dans l’axe de l’expertise et du professionnalisme) s’accordent difficilement avec les motifs invoqués pour justifier les *limites* qui peuvent lui être imposées (la compatibilité avec les valeurs sous-jacentes à l’octroi d’un pouvoir discrétionnaire). Ils s’accordent mal dans la mesure où l’idée selon laquelle un décideur est investi du pouvoir de rendre la décision qu’il *croit* devoir rendre, vu son expertise ou sa position privilégiée, ne se concilie pas d’emblée avec l’idée selon laquelle le décideur soit limité par les valeurs sous-jacentes à l’octroi du pouvoir discrétionnaire. Nous posons l’hypothèse que cette tension résulte d’une conception de la *discrétion comme exercice de pouvoir* et qu’une conception différente de la discrétion, la *discrétion comme occasion de dialogue*, permettrait de mieux concilier l’*existence* de la


\(^{22}\) *Id.*, 1030 (Lord Reid).

\(^{23}\) *Baker c. Canada (Ministre de la Citoyenneté et de l’Immigration)*, précité, note 16, par. 65 (juge L’Heureux-Dubé).
discrétion et les limites qui lui sont imposées par la jurisprudence récente de la Cour suprême.

Cette proposition exige quelques précisions. La Cour suprême parle des valeurs sous-jacentes à tout pouvoir discrétionnaire (« à l’octroi d’un pouvoir discrétionnaire ») : elle semble indiquer par là que le pouvoir discrétionnaire en général est délégué sur la base de valeurs qui lui sont caractéristiques. Rien ne semble empêcher que des valeurs plus spécifiques au contexte législatif en cause n’entrent en jeu. Mais le pouvoir discrétionnaire traduit en lui-même un certain nombre de valeurs, desquelles dépend la validité de son exercice.

À notre avis, une des valeurs sous-jacentes à tout octroi de pouvoir discrétionnaire réside dans l’obligation faite aux décideurs d’agir avec sensibilité à l’égard des individus, ce qui doit se traduire par la mise en place d’un dialogue. La discrétion comme pouvoir met l’accent sur le détenteur du pouvoir. Elle voit la discrétion comme l’attribut d’un décideur public, choisi sur la base de son expertise ou de sa situation privilégiée dans l’appareil administratif au regard de l’individu, et qui rend des décisions d’autorité. La discrétion comme occasion de dialogue met l’accent sur l’individu visé par la décision. Elle voit la discrétion comme une invitation à entrer en communication avec l’administré, de manière à identifier la solution qui soit la meilleure, compte tenu des circonstances particulières de l’individu. Cela ne signifie pas que ce dernier doive renoncer à tenir compte de considérations d’intérêt public, mais plutôt qu’il ne puisse le faire qu’au terme d’une démarche véritablement tournée vers l’individu.

C’est ainsi que, pour être en mesure de justifier l’obligation d’entendre un individu même dans le cadre de l’exercice d’un très large pouvoir discrétionnaire, il est difficile d’adopter une conception de la discrétion comme pouvoir : il faut plutôt la concevoir comme une occasion d’entamer un dialogue avec un individu. Alors que l’obligation d’entendre s’oppose intuitivement à la liberté d’action que confère la discrétion comme pouvoir, la même obligation s’avère au contraire complémentaire à l’exercice de la discrétion comme dialogue. Cette nouvelle conception permettrait à notre avis de mieux comprendre la pratique juridique actuelle, en même temps qu’elle en orienterait le développement vers des objectifs davantage liés à des valeurs démocratiques, notamment la participation des citoyens et
l’obligation des pouvoirs publics de rendre des comptes ou, plus globalement, de justifier leurs actes.

L’exercice de la discrétion implique donc deux niveaux de discussion. Le premier permet à l’individu de transmettre des informations sur sa situation personnelle. Au-delà de ces considérations subjectives, l’exercice d’un pouvoir discrétionnaire implique une marge de manœuvre quant à la détermination des critères qui guideront le décideur : c’est le deuxième niveau, qui s’intéresse à la question de savoir sur quelle base l’autorité doit décider (puisqu’il n’y a pas de normes, le décideur peut fixer des critères qui constitueront la base de sa décision). C’est ici que la conception de discrétion comme occasion de dialogue prend tout son sens. À ce deuxième niveau, celui de la détermination des normes, l’individudialogue non pas comme individu, mais comme citoyen : il essaie de transcender sa situation particulière pour suggérer ce que devraient être les critères de la décision qui sera rendue dans l’affaire qui le concerne. C’est en ce sens que l’exercice du pouvoir discrétionnaire devrait être conçu comme un moyen, une occasion de transformer l’opinion individuelle et subjective en voix citoyenne, en même temps qu’un moyen d’inciter les décideurs à être sensibles à la situation particulière d’un individu.

En somme, concevoir la discrétion comme une occasion de dialogue exige des décideurs administratifs investis de pouvoirs discrétionnaires qu’ils reconnaissent et respectent le point de vue des citoyens. Le décideur doit utiliser l’espace qui sépare la décision discrétionnaire de l’autorisation législative qui en permet l’existence de manière à créer un champ de dialogue à l’avantage de ces derniers. Dans ce contexte, le fait que des pouvoirs décisionnels soient confiés à des organismes sur la base de leur expertise et de leur professionnalisme ne doit pas être considéré comme une fin de non-recevoir à une participation effective des citoyens dans le cas de pouvoirs discrétionnaires. En d’autres termes, une véritable participation des citoyens à l’administration de la justice est possible si le concept de discrétion est redéfini. Cette conception permettrait à l’individu de passer de l’état de sujet à l’état de véritable citoyen, dans le sens où la personne qui est visée par la
décision discrétionnaire est en partie maître des considérations qui en constitueront la base.  

B. La discrétion collective

Bien que la jurisprudence ait toujours refusé de reconnaître des droits procéduraux dans le contexte de l’exercice de pouvoirs de nature législative, c’est-à-dire de l’exercice d’une discrétion collective, les principes énoncés dans le cadre de la discrétion individuelle nous paraissent tout aussi applicables à l’exercice de ce type de pouvoir.

La règle selon laquelle la discrétion collective est exclue du champ d’application de la justice naturelle et de l’équité procédurale prend sa source dans l’affaire Procureur Général du Canada c. Inuit Tapirisat du Canada. Dans cette affaire, le juge Estey s’est dit d’avis que les fonctions de nature législative sont intrinsèquement incompatibles avec l’imposition d’obligations procédurales : de telles obligations ne sont pas souhaitables dans un contexte à maints égards politique et elles seraient très difficiles à mettre en pratique, vu le nombre souvent élevé d’individus potentiellement affectés par ce type de décision. Cette « abstinence judiciaire » semble persister, mais nous croyons qu’il est possible de démontrer que toutes les conditions sont réunies pour qu’elle prenne fin, permettant ainsi de confirmer que le point de vue des citoyens peut être pris en compte dans un autre processus de décision administrative, celui qui mène à des décisions de nature législative. Voyons brièvement le raisonnement susceptible de mener à une telle conclusion.

L’affaire Inuit Tapirisat est difficilement conciliable avec les principes énoncés dans Nicholson c. Haldimand-Norfolk Regional Board of

24 Voir C. VINCENZY, Crown, Powers, Subjects and Citizens, Londres, Pinter, 1998, p. 280 et suiv.; W. KYMLICKA, op. cit., note 1, p. 296 : « [“Public-spiritedness”] includes the ability and willingness to engage in public discourse about matters of public policy, and to question authority. These are perhaps the most distinctive aspects of citizenship in a liberal democracy, since they are precisely what distinguish “citizens” within a democracy from the “subjects” of an authoritarian regime. »


26 Une analyse approfondie de cette question fait l’objet d’une étude dont nous soumettrons bientôt les résultats pour publication, sous le titre « Procedural Fairness in Legislative Functions: The End of Judicial Abstinence? ».
Commissioners of Police\textsuperscript{27}, pour deux raisons principales. Premièrement, Nicholson indiquait la nécessité d’éviter les classifications formelles pour déterminer le champ d’application de l’équité procédurale et marquait la reconnaissance de la légitimité de l’administration publique de façon plus générale. Cet aspect est totalement occulté dans \textit{Inuit Tapirisat}, qui réintroduit l’obligation de qualifier les actes posés par l’Administration pour déterminer l’existence d’obligations procédurales, tout au moins à l’égard des décisions de nature législative. Deuxièmement, Nicholson insistait sur l’importance de tenir compte des conséquences des décisions sur les individus qu’elles visent pour connaître le champ d’application de la procédure, traduisant ainsi une vision « ascendante » de la procédure, c’est-à-dire qui la voit de la base vers le haut. À l’inverse, l’exercice de qualification imposé par l’affaire \textit{Inuit Tapirisat} implique le maintien d’une approche procédurale « descendante », c’est-à-dire qu’elle la perçoit du haut vers la base.

L’affaire \textit{Inuit Tapirisat} est donc affectée de faiblesses importantes et son influence considérable et persistante sur le droit de la procédure administrative s’explique par des considérations essentiellement liées aux relations délicates qui existent entre le domaine politique, les principes démocratiques et le modèle judiciaire de la procédure en droit administratif. Pour les fins de la présente discussion, retenons que les principes qui fondent le refus d’imposer des obligations procédurales aux organismes exerçant des fonctions de nature législative sont fort contestables. Par ailleurs, à cet argument qui présente la question à la négative s’ajoutent ceux qui permettent de justifier positivement l’imposition d’obligations procédurales à la charge des décideurs investis de pouvoirs de nature législative. Parmi les considérations importantes à cet égard figure l’énoncé de l’affaire \textit{Baker} selon lequel « il est inexact de parler d’une dichotomie stricte entre les décisions “discrétionnaires” et les décisions “non discrétionnaires” »\textsuperscript{28} et que la même approche peut être utilisée pour en effectuer le contrôle judiciaire. Cet énoncé sous-entend que l’exercice du pouvoir discrétionnaire s’effectue dans une

\textsuperscript{27} [1979] R.C.S. 311.

\textsuperscript{28} \textit{Baker} c. \textit{Canada (Ministre de la Citoyenneté et de l’Immigration)}, précité, note 16, par. 54.
sphère gouvernée par des principes juridiques. Or, à notre avis, un tel énoncé s’applique tout autant à la discrétion exercée sur une base individuelle qu’à celle qui s’exerce sur une base collective. Ceci implique que l’exercice de la discrétion collective s’exerce dans une sphère gouvernée par des principes juridiques, parmi lesquels figure l’équité procédurale.

Imposer une obligation de respecter l’équité procédurale aux organismes administratifs investis du pouvoir d’adopter des règlements ou des normes à portée générale, donc investis d’une discrétion à portée collective, favorisera la mise en place de processus qui permettront de reconnaître et de respecter le point de vue des citoyens. La définition des obligations précises des décideurs dans de tels cas, c’est-à-dire les conséquences concrètes liées à l’obligation de reconnaissance et de respect du point de vue des citoyens de la part des décideurs, reste à faire. Cette obligation risque de comporter dans plusieurs cas la mise en place de mécanismes de consultation, dont les spécificités devraient, selon la Cour suprême, relever du décideur concerné. Dans l’affaire Baker en effet, la Cour a indiqué qu’une attitude de déférence s’impose en matière procédurale, puisque le choix des procédures exercé par un organisme, tout comme la conception de mécanismes particuliers de consultation, constitue un facteur important dans la détermination du contenu de l’obligation d’équité. L’intérêt d’un tel développement consiste sans contredit à favoriser l’épanouissement d’une véritable citoyenneté par la création d’un nouvel espace de dialogue, collectif celui-là, qui marque une distance certaine à l’égard de la discrétion comme exercice de pouvoir.

CONCLUSION

Les particularités respectives de l’opinion publique et du point de vue des citoyens nécessitent un traitement différencié des conséquences qu’ils sont susceptibles d’engendrer à l’égard des décideurs publics et des processus de décision.

30 Baker c. Canada (Ministre de la Citoyenneté et de l’Immigration), précité, note 16, par. 27.
Le pouvoir discrétionnaire se prête particulièrement bien au développement de mécanismes permettant de favoriser la participation des citoyens dans l’administration de la justice. L’espace qui sépare l’habilitation législative de la décision discrétionnaire doit servir d’occasion de dialogue entre décideurs et citoyens. La marge de manœuvre qui caractérise le pouvoir discrétionnaire, qu’il soit individuel ou collectif, doit s’interpréter à l’avantage des individus et non des décideurs. C’est ainsi qu’à la conception de la discrétion comme exercice de pouvoir pourra se substituer la discrétion comme occasion de dialogue, susceptible de favoriser la reconnaissance et le respect du point de vue des citoyens. La pleine reconnaissance d’un droit de participation des individus à des décisions qui les concernent confère à ces derniers les véritables attributs de la citoyenneté, que l’administration de la justice a tout intérêt à préserver.
Pouvoir judiciaire et opinion publique :
réflexions autour d’un malaise
Jacques Frémont*

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Dans la célèbre affaire fictive des *Speluncean Explorers*, le théoricien américain Lon Fuller avait, par les mots du non moins fictif juge Handy, provoqué son lectorat sur la question de l’opinion publique et du juge en disant que :

« About 90 % of the public expressed the belief that the defendants should be pardoned or let off with the kind of token punishment. It is perfectly clear then how the public feels about the case. We could have known this without the poll of course on the basis of common sense, or even by observing that on this court there are apparently four and a half men or 90 % who share the common opinion. This makes it obvious not only what we should do, but what we must do if we are to preserve between ourselves and public opinion a reasonable and decent court. »

Il ajoute :

« Of all branches of the government, the judiciary is the most likely to lose its contact with the common man. The reasons for this are of course fairly obvious. Where the masses react to a situation in terms of a few salient features, we pick into little pieces every situation presented to us. Lawyers are hired by both sides to analyze and dissect. Judges and attorneys vie with one another to see who can discover the greatest number of difficulties and distinctions in a single set of facts. Each side tries to find cases, real or imagined, that will embarrass the demonstrations of the other side. To escape this embarrassment, still further

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distinctions are invented and imported into the situation. When a set of facts have been subjected to this kind of treatment for a sufficient time, all the life and juice have gone out of it and we are left with a handful of dust. »\(^2\)

La lecture des médias rappelle régulièrement l’omniprésence de l’opinion publique au sein de notre société. Les médias la façonnent, lui permettent de prendre forme et de s’exprimer. Cette opinion publique est rarement monolithique, souvent plurielle. Les pouvoirs politiques de toute nature en tiennent compte de façon continue et, certains diront, obsessive. Sur plusieurs sujets, tels les attentats du 11 septembre 2001, l’opinion publique s’impose avec une vigueur impressionnante; les sondages d’opinion en témoignent et le public attend de l’État les mesures les plus vigoureuses dont certaines sont clairement attentatoires aux droits et libertés traditionnellement reconnus, qu’il s’agisse, par exemple, de détention de suspects sans autre forme de procès ou de port obligatoire de la carte d’identité. Sur d’autres sujets, l’opinion publique paraît nettement plus divisée et plus nuancée.

L’opinion publique constitue par ailleurs un moteur incontournable au plan de la fabrication de la norme juridique. Les politiciens responsables de l’élaboration des lois et règlements cherchent à démontrer qu’ils font quelque chose, qu’ils sont à l’écoute de la population et répondent aux pressions de l’opinion publique. Le débat qui entoure l’élaboration de l’opinion publique est, il faut le dire, souvent superficiel et peu informé. Il verse souvent dans le simplisme, l’émotif et le non-raisonné, tant du côté des politiciens que de celui des commentaires du public; on verse dans ce que Habermas appelle les « emotionalized majority opinions »\(^3\). Une fois fabriquée, la norme juridique donne moins de prise à l’opinion publique. Elle vit par elle-même, se développe et risque de se retrouver devant les tribunaux. C’est alors que se pose de façon parfois brutale la question de ses contours et de sa validité, constitutionnelle ou autre. C’est aussi à cette occasion que se pose parfois de façon non moins brutale celle des relations entre le pouvoir judiciaire et l’opinion publique.

\(^2\) Ibid.

\(^3\) Jürgen HABERMAS, Between Facts and Norms, Cambridge, MIT Press, 1996.
La question des relations entre le pouvoir judiciaire et l’opinion publique nous paraît être éminemment difficile à appréhender tant au plan de la théorie du droit qu’à celui, éminemment pratique, du quotidien du juge. Même s’il sent intuitivement qu’une certaine relation peut exister entre le pouvoir judiciaire et l’opinion publique, il peut se trouver franchement inconfortable d’en établir les contours et d’en définir les paramètres; il a peut-être le réflexe de tout simplement nier que toute relation puisse ou doive exister entre le troisième pouvoir et cet élément omniprésent de notre vie politique et sociale. Le sujet mérite réflexion, ne serait-ce que sommaire.

I. UNE RÉPONSE CLASSIQUE RÉDUCTRICE?

La réponse classique de la communauté juridique et judiciaire à l’équation opinion publique/pouvoir judiciaire est bien connue : l’opinion publique a autant à voir avec le processus judiciaire que le poisson avec un vélo! Pour le juriste, l’opinion publique n’est pertinente au sein du processus démocratique qu’au plan politique. Habermas rappelait, en caricaturant certes, que l’approche libérale veut que le pouvoir législatif prenne des décisions en fonction du futur, afin de guider les actions futures et que le pouvoir administratif se confine plutôt au présent en tentant de régler les problèmes, tels qu’ils se présentent, alors que le pouvoir judiciaire, on l’aura compris, oriente sa réflexion sur le passé, intervenant *ex post facto* dans les décisions politiques de la législature cristallisées dans le droit que les juges sont chargés d’appliquer.

Si cette vision certes réductrice devait primer, il faudrait conclure que les outils du système judiciaire n’ont rien à voir avec l’opinion publique; il travaille avec des normes, des règles de droit, des principes généraux, la doctrine et, à la rigueur, avec des valeurs qui n’ont rien à voir avec l’opinion publique. Au surplus, s’interroge-t-on, en raisonnant par l’absurde, on se demande comment, s’ils devaient le faire, les tribunaux pourraient travailler avec l’opinion publique. Comment pourraient-ils la définir? L’opinion publique étant par nature volatile et changeant à toute vitesse, comment serait-il possible de la saisir, de la cristalliser afin de l’utiliser? Le droit est, par définition, une institution essentiellement stable. Il se trouve à évoluer plus ou moins rapidement tout en visant à maintenir une cohérence intra-systémique et à répondre à des exigences minimales de rationalité. Dans ce contexte et toujours selon la vision classique, imposer aux tribunaux de tenir compte de l’opinion publique serait difficile et irait à l’encontre de toute notion du principe démocratique le moindrement évolué.
Pour tant, n’importe quel observateur de la scène judiciaire, surtout ces dernières années, ne peut s’empêcher de soupçonner que les tribunaux ne sont pas complètement insensibles aux opinions des sociétés au sein desquelles ils évoluent, du moins dans certaines circonstances. C’est ainsi que, ces dernières années, les tribunaux canadiens semblent avoir évolué en parallèle avec un certain mouvement de durcissement du droit criminel suscité par le Parti réformiste dans l’Ouest et repris par le législateur fédéral. D’autre part, il est manifeste que les juges, avant de disposer d’un cas individuel et particulièrement lors de la préparation de leurs motifs, pèsent attentivement leurs décisions et leur justification, notamment en fonction de la réaction éventuelle du public. Si l’importance de la rhétorique judiciaire a depuis longtemps été constatée, elle a singulièrement crû ces dernières décennies.

Dans ce contexte, la réponse classique de l’ignorance copieuse de l’opinion publique par le pouvoir judiciaire est-elle encore correcte? Probablement, mais peut-être pas nécessairement pour les motifs traditionnellement invoqués.

II. LE PARADIGME SYSTÉMIQUE ET LE DROIT

Une des façons les plus éclairantes de comprendre le phénomène du droit et du pouvoir judiciaire est de le situer au sein de ce qu’il est convenu d’appeler le paradigme systémique. Cette approche est particulièrement éclairante pour le sujet qui nous occupe puisqu’elle situe le processus judiciaire au sein du système plus large de la démocratie.

En vertu du paradigme systémique, le droit, ses normes, ses institutions, dont le système législatif et le pouvoir judiciaire, constituent en fait un système. Ce système comprend un certain nombre de caractéristiques : c’est ainsi qu’il consiste en un ensemble d’éléments qui ont entre eux des relations spécifiques et qui, dans leur totalité, présentent une certaine unité. Le système est composé des normes juridiques, des concepts, des institutions, des principes généraux et des valeurs.

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Cette approche, qui peut sembler évidente à plusieurs, a néanmoins le mérite de permettre de rendre compte de la complexité du phénomène juridique tout en intégrant ses éléments. Cette intégration peut en effet être conceptualisée par le principe de la hiérarchie des normes (approche classique de Kelsen dans sa Théorie pure du droit\(^6\)) ou encore, de façon plus contemporaine et plus stimulante conceptuellement, de façon réflexive. On parle alors de systématicité circulaire\(^7\) où il n’y a ni base ni sommet entre les normes et les institutions : ces dernières, tout en jouant des rôles et en exerçant des fonctions différentes, se trouvent plutôt à interagir entre elles, notamment par le biais de la communication. C’est ainsi, par exemple, que la norme est élaborée par le pouvoir politique, puis appliquée par l’administration et censurée (ou non) par les tribunaux ; elle retourne alors aux acteurs politiques qui choisissent de la maintenir ou de la modifier, à la lumière des messages reçus par les acteurs, y compris par les acteurs sociaux… et le cycle recommence avec la nouvelle norme. On comprend que, de ce point de vue, le processus ne soit pas hiérarchique, mais cyclique ; il évolue dans le temps et au fil de ce qui survient à la norme et aux institutions qui l’appliquent : il est réflexif.

Au sein de cette approche réflexive et systémique, la question de l’ouverture du système juridique sur son environnement devient fondamentale : le système juridique est-il (ou doit-il être) ouvert sur son environnement politique, social et/ou économique ou, au contraire, fonctionne-t-il de façon plus ou moins fermée sur lui-même, faisant peu ou pas état de ce qui se passe à l’extérieur ? Sur cette question, deux écoles s’affrontent. En vertu de la première approche, plus classique et intuitive, le système juridique est ouvert sur son environnement : il varie au gré, notamment, de l’évolution de la société, de ses valeurs et de son système économique (et peut-être, de l’opinion publique).

L’approche alternative consiste au contraire à considérer le système juridique comme un système clos, autonome et en régénération constante : le système juridique (dont ses acteurs) définit lui-même son contenu, ses frontières (opérationnelles) et son évolution. Il serait alors dépourvu d’*inputs* ou d’*outputs* et ne serait pas sensible à son environnement (sauf lorsqu’il décide, on le verra, d’en intégrer ses


éléménts). Il est clos et totalement autonome par rapport à son environnement : c’est l’approche autopoïétique.

En termes plus concrets, les tenants de cette approche considèrent que le système juridique fonctionne pour l’essentiel en vase clos. C’est-à-dire que le système et ses acteurs (les juristes, professionnels du droit, les juges) n’ont à tenir compte dans leur quotidien que de ce qui constitue effectivement du droit, soit les normes juridiques elles-mêmes, soit l’interprétation juridique et judiciaire qui leur est donnée. On comprendra qu’en vertu de cette approche, les juges n’ont alors à prendre en considération ni les revendications sociales, ni l’opinion publique, ni d’autres considérations relatives à des dimensions sociales, économiques ou politiques. Ils n’ont qu’à tenir compte du droit et de ce que les juristes considèrent être du droit : c’est en quelque sorte la revanche de l’empire du droit!

Les tenants de l’approche autopoïétique considèrent par ailleurs que la clôture du système est opérationnelle, c’est-à-dire qu’elle se situe au plan de son fonctionnement. Malgré cette clôture, le système aurait recours à la communication comme véhicule mais qui prend connaissance de ce qui se passe dans les autres sous-systèmes (politique, économique, social) par le biais du mécanisme de couplage structurel. Le système serait donc alors normativement clos, mais cognitivement ouvert. Autrement dit, le système juridique est clos, mais n’y pénétrera que ce que les acteurs du système décideront qui est acceptable et au moment où ils le décideront.

C’est ainsi que le système juridique choisit d’intégrer ou non un nouveau fait ou une nouvelle valeur. On se souviendra, par exemple, des affaires Bliss8 et Canada Safeway9 vers la fin années 1970 et au début des années 1980 sur la question de la discrimination à l’égard des femmes en matière d’assurance-chômage. En effet, dans Bliss, la Cour suprême avait décidé que le régime en vertu duquel les femmes enceintes n’étaient pas traitées de la même façon que le reste de la population active en matière de droit aux prestations d’assurance-chômage n’était pas discriminatoire (c’était la nature qui discriminait!). La Cour suprême, quelques années plus tard, rectifiait le tir en précisant que :

« L’arrêt Bliss a été rendu il y a plus de 10 ans. Pendant cette période, la participation des femmes dans la main-d’œuvre a changé en profondeur. Avec dix ans de recul et d’expérience en matière de litiges relatifs à la discrimination dans les droits de la personne et la jurisprudence qui en a résulté, je suis prêt à dire que l’arrêt Bliss est erroné ou, du moins, que maintenant on ne pourrait plus rendre le même arrêt. »

On pourrait aussi prendre comme exemple les affaires *Egan*\(^{11}\) et *Friend*\(^{12}\), respectivement de 1994 et 1997, au même effet pour les conjoints homosexuels. Que s’est-il passé dans ces cas? L’opinion publique a-t-elle joué un quelconque rôle?

### III. LE SYSTÈME JURIDIQUE ET L’OPINION PUBLIQUE

C’est donc dire, en vertu de cette approche, qu’a priori, l’opinion publique n’a rien à voir avec le système juridique ou ses acteurs. Cependant, les institutions du système juridique, telles la législature, peuvent choisir d’intégrer ou non l’opinion publique : c’est ainsi que le législateur peut en tenir compte dans l’élaboration de la norme. L’influence de l’opinion publique sera toutefois nettement moins directe pour les tribunaux ou le système judiciaire : ils ont alors le choix soit de confirmer les choix du législateur (qui eux, sont influencés par l’opinion publique) ou de les infirmer, le tout en fonction non pas de l’opinion publique, mais bien des principes juridiques applicables.

Dans ces cas, deux types de mécanismes impliquant le recours à l’opinion publique peuvent alors jouer. Il existe tout d’abord en droit positif un certain nombre de normes qui renvoient ou peuvent explicitement renvoyer à l’opinion publique : il en est ainsi de l’article 24(2) de la *Charte canadienne des droits et libertés*\(^{13}\) qui renvoie à la question de la déconsidération de la justice\(^{14}\) ou encore de l’interprétation donnée à la définition de la pornographie qui renvoie à des critères

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\(^{10}\) *Ibid.*


\(^{13}\) Partie I de la *Loi constitutionnelle de 1982*, constituant l’annexe B de la *Loi de 1982 sur le Canada* (R.-U.), 1982, c. 11 [ci-après *Charte*].

Dans ces cas, les tribunaux doivent tenir compte de l’opinion publique parce qu’ils en sont mandatés par le législateur, la constitution ou le système juridique. Quoique la mise en œuvre de ce mandat ne soit pas évidente, la légitimité de ce faire ne se soulève pas.

Existe par ailleurs un certain nombre de cas où le pouvoir judiciaire est appelé à décider de laisser ou non pénétrer le droit et le système juridique de nouvelles valeurs, valeurs qui peuvent parfois refléter celles de l’opinion publique ou de certaines opinions publiques. C’est alors par le biais de mécanismes que les autopoïètes appellent de « couplage structurel » que le droit ou le système juridique appréhendra ces réalités sociales ou autres. Le test de l’article premier de la Charte est un exemple de mécanisme qui donne ouverture, au sein du système juridique, à des réalités autres que celles reconnues comme juridiques par la communauté juridique. Le recours à la preuve extrinsèque en matière constitutionnelle ou les règles spéciales en matière de locus standi en sont d’autres. Mais dans tous les cas et ultimement, ces mécanismes de couplage restent dans les mains de la communauté juridique qui choisira ou non d’intégrer les valeurs de l’opinion publique au sein du système juridique.

On aura compris de ce qui précède que pour l’essentiel, le système juridique est fermé et qu’il doit rester imperméable à l’opinion publique. Il est essentiel d’en conserver la « pureté » et de le tenir à l’écart d’opinions volatiles, difficiles à appréhender et souvent éloignées des principes fondamentaux et de la rationalité si chère à notre système juridique. On a par ailleurs vu que le système juridique peut, dans certains cas, avoir à en tenir compte mais que cela ne surviendra que dans les cas où le système et ses acteurs, notamment les juges, en auront consciemment décidé, soit par des normes explicites à cet effet, soit par la mise sur pied de mécanismes qui le requièrent dans les faits. Cependant, les tribunaux et le système juridique ont un autre rôle à jouer à l’égard de l’opinion publique, celui d’assurer la présence de l’opinion publique au sein de notre système démocratique.

IV. LA COUR COMME PROTECTRICE DU MODÈLE DÉLIBÉRATIF IMPLIQUANT L’OPINION PUBLIQUE

Si le rôle du système judiciaire est pour le moins restreint par rapport à l’opinion publique, celui des tribunaux est important à l’égard de la protection de l’opinion publique dans son interaction avec les autres institutions du système démocratique.

On a amplement discuté, ces dernières années, du paradigme délibératif au sein de nos démocraties contemporaines. Le thème de la présente session en témoigne d’ailleurs. Habermas a démontré qu’au sein d’une approche républicaine, le paradigme dominant n’est pas celui du marché, mais bien celui du dialogue. Dans cette perspective, le dialogue sert essentiellement à l’élaboration des politiques et, par conséquent, à l’élaboration des normes. La délibération devient alors cruciale pour assurer la légitimité du système. En découle l’importance de l’existence de conditions procédurales propres à assurer un exercice correct de la fonction délibérative. Ce n’est qu’à ce prix que les institutions démocratiques, et notamment la législature, pourront se former une opinion et décider de façon sinon correcte, du moins légitime.

Quel doit être, dans ce contexte délibératif, le rôle de l’opinion publique? L’opinion des citoyens est importante et constitue en quelque sorte le médium par lequel la société se définit comme un tout politique. Il reste néanmoins que l’opinion politique n’aura qu’un rôle normatif somme toute minimal; elle ne représente qu’une partie fort modeste d’un système beaucoup plus complexe. Étant donné qu’il ne saurait être question que les citoyens agissent collectivement à chaque fois au sein de nos collectivités, il s’agit plutôt que le processus délibératif assure, au sein du processus collectif de prise de décisions, tant l’institutionnalisation des procédures nécessaires à l’établissement des conditions appropriées de communication que l’interface entre les processus institutionnalisés de communication d’une part, et l’opinion publique constituée par définition de façon informelle d’autre part.

Autrement dit et si on voulait caricaturer, on pourrait représenter le processus délibératif comme un flux informationnel entre, à une extrémité, l’opinion politique, et à l’autre le processus administratif.
Le pouvoir judiciaire n’ayant rien à voir avec cette partie du processus délibératif, il s’en trouve donc exclu. Dans ce contexte, le rôle du droit et des tribunaux à l’égard de l’opinion publique et du flux est limité, mais néanmoins crucial : ils ont le mandat d’être particulièrement vigilants afin de s’assurer que le processus de communication fonctionne effectivement.

Le pouvoir judiciaire se retrouve en quelque sorte gardeien de la démocratie délibérative au sein de nos démocraties contemporaines. À ce titre, les tribunaux doivent notamment assurer la promotion de la délibération au sein du processus politique et de ses institutions, tout en forçant la reconsidération des décisions où la délibération n’a pas eu lieu ou n’a pas offert des conditions suffisantes de qualité. Par la nature même du contrôle qu’il exerce au sein de nos démocraties, le pouvoir judiciaire se trouve souvent à forcer la législature à exprimer les finalités qu’elle poursuit à l’occasion de l’élaboration de normes. Autrement dit, le rôle des tribunaux est favoriser la mise en place d’un processus délibératif qui permette aux meilleurs arguments de triompher, de balancer les intérêts en présence et de permettre aux compromis d’émêler. Le processus, s’il est correctement appliqué, devient alors une source importante de légitimation démocratique. Le rôle des tribunaux, dans cette approche, ne devient pas, on l’aura compris, celui de contrôler le contenu des politiques, mais plutôt d’appliquer le droit qui aura correctement été adopté en vertu d’un processus délibératif au besoin, ajusté aux intérêts en présence.

CONCLUSION

On voit par la discussion qui précède toute la richesse et la difficulté des rapports entre le pouvoir judiciaire et les tribunaux. Le défi consiste pour la communauté juridique et judiciaire de comprendre le rôle de l’opinion publique et son impact sur le système juridique et son fonctionnement.

Notre exploration préliminaire a révélé que, plus ou moins intuitivement mais à bon escient, le système judiciaire s’est depuis toujours distancié de l’opinion publique et qu’en ce faisant, la bonne attitude a été prise. En effet, outre de rares cas, l’opinion publique ne peut ni ne doit avoir d’impact sur le fond des questions dont les tribunaux sont saisis. Il faut cependant que le pouvoir judiciaire soit conscient du rôle que l’opinion publique a joué dans l’élaboration des normes; à ce titre les tribunaux se trouvent en quelque sorte sur le receiving end du processus.
Par contre, et c’est sans doute plus significatif, le pouvoir judiciaire doit prendre conscience de sa responsabilité cruciale à l’endroit de l’opinion publique et du processus délibératif puisque l’opinion publique représente un élément essentiel du processus démocratique surtout perçu sous l’angle du paradigme délibératif; un des rôles les plus importants des tribunaux doit alors être de protéger à tout prix et d’exemplifier le processus délibératif. On peut donc douter que l’opinion du juge Handy citée au début de ce texte soit promise à un brillant avenir et c’est bien ainsi!
Canadians as Citizens of the International Community: Asserting Unimplemented Treaty Rights in the Courts

Hugh M. Kindred

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* This paper draws heavily on my presentation, entitled “The Use of Unimplemented Treaties in Canada: Practice and Prospects in the Supreme Court”, to the Third Trilateral Conference of Japanese, American and Canadian International Lawyers, held at Ottawa in October 2000.

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Though we seldom stop to think about it, it is common knowledge that Canadians, as citizens of the world, carry both international criminal responsibilities and international human rights protections. But far too few lawyers, let alone members of the public, realize that international crimes are fully implemented by legislation within Canada but international human rights are not.

Sections have been progressively added to the Criminal Code to give effect to numerous conventions, to which Canada is a party, that outlaw serious international criminal offences, such as torture, hostage taking, hijacking of aircraft and ships, and other terrorist activities. In addition, the Crimes against Humanity and War Crimes Act confirms that genocide, crimes against humanity and war crimes, as defined internationally, are punishable offences in Canada.

Yet nowhere to date is there legislation explicitly implementing within Canada such fundamental international human rights conventions as the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child, as well as many other like treaties. This is a surprising fact in a country that is generally known for its efforts to protect

1 Criminal Code, R.S.C. 1985, c. C-46 as amended, ss. 7(1), (2), (2.1), (2.2), (3.1), (3.2), 76, 77, 78, 78.1, 269.1 and 279.1.
human rights. It also has important implications because of well-established Canadian constitutional principles about the domestic legal effects of international agreements. As Lord Atkin observed in 1937 in the famous Labour Conventions Case:

Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action.\(^6\)

On the face of this statement, Canadians would appear to have no international treaty rights or obligations until they are legislated into domestic law.

It is no answer to the lack of legislative implementation of the international human rights conventions to say that the Canadian Charter of Rights and Freedoms\(^7\) is sufficient. As citizens of the world, we are entitled to all our rights. It is also an inadequate justification to assert that the Canadian Charter and other domestic human rights acts overlap the human rights recognised by international treaties and therefore legislative implementation is unnecessary. In the first place, the international crimes created by treaty undoubtedly overlap existing offences within the Criminal Code, yet Parliament still enacted them.

Secondly, the suggestion that Canadian human rights laws already encompass the extant international human rights protections,\(^8\) as the Canadian government is wont to do in its mandatory periodic reports to the United Nations Human Rights Committee,\(^9\) is an inadequate answer to a Canadian who claims to be the victim of abuse. He or she is surely entitled to expect a definitive judgment of his or her rights in a Canadian court. At

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\(^8\) Limited, of course, to those found in treaties to which Canada is a party.

present, there is no way within Canada to determine whether in a particular instance a Canadian may have greater rights by international standards than by Canadian laws.\footnote{As a result, Canadian claimants are forced to pursue the inadequate international avenues for redress of their international rights, such as petitioning the UN Human Rights Committee under the ICCPR.}

The inability of Canadians to vindicate their international treaty rights because they have not been legislatively implemented within Canadian law is not limited to the field of human rights. It simply yet sharply illustrates a growing constitutional problem. The requirement of domestic implementation by legislative action of the contents of international treaties was not such an impediment to Canadian citizens when it was implicitly adopted with the Constitution Act, 1867\footnote{(U.K.) 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No 5.} or even when confirmed by Lord Atkin as “well-established” in 1937. In those times, the bulk of treaties compared to today was small and dealt principally with inter-state affairs. Treaties on peace and friendship, defense arrangements and diplomatic relations are typical examples.

By contrast, contemporary treaties are far greater in number and increasingly concern intra-state affairs. In addition to criminal responsibility and human rights, already mentioned, international conventions now also govern such matters as identity and citizenship, health, food, education, property, resources, pollutants, the environment and the movement of people and goods, as well as all forms of transportation and communications. By and large, most aspects of the daily lives of Canadians are now the subject of international treaties. We are truly international citizens. But, given the rapidly increasing flow of treaties which require legislative action, either federally or provincially or both,\footnote{In the Labour Conventions case, supra note 6 at 351, Lord Atkin also famously said: “For the purposes of ... the distribution of legislative powers between the Dominion and the Provinces, there is no such thing as treaty legislation as such. The distribution is based on classes of subjects; and as a treaty deals with a particular class of subjects so will the legislative power of performing it be ascertained.”} the number that may linger unimplemented in Canada is likely to grow substantially. Thus the
predicament of unimplemented treaties, though not new, is now a significant concern.
Since the legislatures have not satisfactorily fulfilled their role as scrutineers and implementers of Canada's treaty obligations, the judiciary has been called upon to protect Canadians' international treaty rights. That task has proved none too straightforward. The cases display a great array of views and a high degree of confusion about the impact of international treaties binding on Canada but not implemented domestically by legislation. The object of this paper is to cast some light on this confusion and uncertainty. In particular, it will seek to induce a principled approach to the use of unimplemented treaties from the more recent judgments of the Supreme Court of Canada that have involved international law.

Since the Canadian Constitution barely mentions international law, the courts have looked to British constitutional practice for guidance. Very frequently the starting point for their judgments has been the famous statement of Lord Atkin on behalf of the Judicial Committee of the Privy Council in Chung Chi Cheung v. The Queen:

The Courts acknowledge the existence of a body of rules which nations accept amongst themselves. On any judicial issue they seek to ascertain what the relevant rule is, and, having found it, they will treat it as incorporated into domestic law, so far as it is not inconsistent with rules enacted by statutes or finally determined by their tribunals.

The simplicity of this statement belies its uncertainty in practical application. It does not adequately explain when applicable international law

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15 Ibid., at 168.
will be overridden by conflicting cases and statutes. Since legislation takes precedence over caselaw in the event of conflict or contradiction, the issue of greatest tension over the application of international law arises in the face of a contrary statute. That is also the aspect on which this paper will concentrate, first by discussing the principles of statutory interpretation that are relevant when international law is involved in a case, and then by addressing the more particular issues arising from the interaction of statutes and unimplemented treaties.

I. **Principles of Statutory Interpretation with Reference to International Law**

Canadian courts have long recognized it is their duty to seek to interpret statutes in conformity with international law. This principle obtains whether the source of international obligation is customary international law or treaty, and whether the treaty has been implemented or not. In 1968 Pigeon J. spoke in the Supreme Court of a “rule of construction that Parliament is not presumed to legislate in breach of a treaty or in any manner inconsistent with the comity of nations and the established rules of international law.”\(^\text{16}\) In *National Corn Growers Assn. v. Canada (Import Tribunal)*\(^\text{17}\) Gonthier J. observed that “where the text of the domestic law lends itself to it, one should also strive to expound an interpretation which is consonant with the relevant international obligations.”

In 1998, in *Ordon Estate v. Graill*,\(^\text{18}\) Iacobucci and Major JJ., writing for the Court, stated:

*Although international law is not binding upon Parliament or the provincial legislatures, a court must presume that legislation is intended to comply with Canada’s obligations under international instruments and as a member of the international community. In choosing among possible interpretations of a statute, the court should*

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\(^{17}\) [1990] 2 S.C.R. 1324 at 1326 [hereinafter *National Corn Growers*].

\(^{18}\) *Supra* note 10.
avoid interpretations that would put Canada in breach of such obligations [...].\textsuperscript{19}

\textsuperscript{19} \textit{Ibid.}, at 526.
The following year Justice L’Heureux-Dubé made the same point in her judgment for the Court in *Baker v. Canada (Minister of Citizenship and Immigration)*\(^20\) by quoting approvingly from *Driedger on the Construction of Statutes*:

> [T]he legislature is presumed to respect the values and principles contained in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. *In so far as possible, therefore, interpretations that reflect these values and principles are preferred.*\(^21\)

This firmly rooted principle of statutory interpretation may also be derived from Lord Atkin’s statement in the *Chung case*\(^22\) about the status of international law domestically. Courts will “treat it as incorporated into domestic law, so far as it is not inconsistent with rules enacted by statutes....” International law and domestic legislation coexist harmoniously so far as possible, and only if they are too inconsistent to do so does the latter overreach the former.

The rationale for this principle is not hard to appreciate. Its solidity lies in the presumption that every legislature intends to act in compliance with international law and in every judge’s purpose to uphold the law, whether national or international. States are bound to fulfill their treaty obligations and may not invoke domestic law as justification for their failure to do so.\(^23\) Courts will not purposefully place the state in breach of international law by their decisions if such a consequence can be avoided.

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\(^20\) [1999] 2 S.C.R. 817 [hereinafter *Baker*].


\(^22\) *Supra* note 14.

The courts’ respect for international law is bolstered by at least two other principles of statutory interpretation. Statutes, the Supreme Court has said, are to be interpreted in context. This is the “modern” method of interpretation advocated by Justice L’Heureux-Dubé in *Hills v. Canada (Attorney General)* 24 in 1988 and discussed with great care and length in *2747-3174 Québec Inc. v. Quebec (Régie des permis d’alcool)* 25 in 1996. In the latter case, she adopted the reformulation offered in *Driedger on the Construction of Statutes*:

> There is only one rule in modern interpretation, namely, courts are obliged to determine the meaning of legislation in its total context, having regard to the purpose of the legislation, the consequences of proposed interpretations, the presumptions and special rules of interpretation, as well as admissible external aids. 26

Since 1996, a line of Supreme Court cases 27 has approved this contextual approach to statutory interpretation. In addition, as pointed out in *Gladue*, the *Interpretation Act* 28 importantly provides: “Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.” 29

From these propositions it follows that where the context of the legislation includes a treaty of other international obligation, the statute should be interpreted in light of it. For example, in *Re Canada Labour Code* 30 the Supreme Court was invited to apply the *State Immunity Act* 31 which, consistent with current customary international law, grants only

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26 Ibid., at 1005-1006.
29 Ibid., s. 12. Provincial Interpretation Acts read to the same effect. See the reference to the Ontario Act s. 10 in *Re Rizzo & Rizzo Shoes Ltd.*, supra note 27 at 41.
restrictive immunity to states for their activities. Mr. Justice La Forest stated for the majority: “the proper approach to characterizing state activity is to view it in its entire context.”

In addition to employing international law sources where the context demands it, the Supreme Court has now firmly determined they shall also be interpreted according to international principles. It would seem obviously sensible that where a statute implements a treaty, the intent of the legislature is to give effect to the terms of the treaty and hence their meaning should be determined according to international law’s principles of interpretation. Those principles are readily accessible, having been codified in the *Vienna Convention on the Law of Treaties*.

In the past, courts were likely to interpret statutes involving treaties according to the domestic rules of statutory interpretation. *Schavernoch v. Foreign Claims Commission* exemplified this approach. The appellant sought payment of a claim under regulations made pursuant to an act that implemented a treaty for the lump sum settlement of Canadian claimants. Absent some ambiguity in the regulations which might have permitted recourse to the underlying treaty, the Supreme Court refused to consider it. Estey J. said: “Here the regulations fall to be interpreted according to the maxims of interpretation applicable to Canadian domestic law generally.”

A more enlightened approach has recently suffused Supreme Court practice. As Bastarache J. stated straightforwardly in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*:

Since the purpose of the [Immigration] Act incorporating Article IF(c) [of the Convention Relating to the Status of Refugees] is to implement the underlying Convention, the Court must adopt an interpretation consistent with Canada’s obligations under the Convention. The wording of the Convention and the rules of treaty interpretation

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32 *Re Canada Labour Code, supra* note 30 at 76.
33 *Supra* note 23, arts. 31-32.
35 Ibid., at 1100.
interpretation will therefore be applied to determine the meaning of Article 1F(c) in domestic law...\textsuperscript{37}

\textsuperscript{37} Ibid., at 1019-1020.
In confirming the duty of the Court to give effect to the treaty and not simply the statute, Justice Bastarache declared that both the treaty provisions themselves and the international rules for their interpretation should be employed. He went on to enumerate those rules by reproducing them as codified in the *Vienna Convention on the Law of Treaties*,\textsuperscript{38} notwithstanding that, unsurprisingly, the treaty itself has not been implemented in Canada.

Even before these clear directions from Bastarache J., the Supreme Court had become used to referring to relevant treaties and other international legal sources to interpret domestic statutes. In *National Corn Growers*,\textsuperscript{39} Gonthier J. reached beyond Estey J.’s very restrictive approach in *Schavernoch v. Foreign Claims Commission*.\textsuperscript{40} He admitted the particular treaty to the Court’s scrutiny in all circumstances, not just when the text of the statute displayed an ambiguity. As he logically pointed out: “[a]s a latent ambiguity must arise out of matters external to the text to be interpreted, such an international agreement may be used ... at the preliminary stage of determining if an ambiguity exists.”\textsuperscript{41}

Pressing beyond reference simply to the treaty itself, La Forest J., in a trio of cases, employed a wide variety of international resources to help him interpret related statutes. In *R. v. Parisien*,\textsuperscript{42} he observed: “[i]n interpreting this undertaking, it must, as in the case of other terms in international agreements, be read in context and in light of its object and purpose as well as in light of the general principles of international law.”\textsuperscript{43} In *Canada (Attorney General) v. Ward*,\textsuperscript{44} the Supreme Court had to determine a refugee’s claim under the *Immigration Act*\textsuperscript{45} which, *inter alia*,

\textsuperscript{38} *Supra* note 23.
\textsuperscript{39} *Supra* note 17.
\textsuperscript{40} *Supra* note 34.
\textsuperscript{41} *Supra* note 17 at 1372.
\textsuperscript{42} [1988] 1 S.C.R. 950.
\textsuperscript{44} [1993] 2 S.C.R. 689 [hereinafter *Ward*].
gives effect in Canada to the Refugee Convention.\textsuperscript{46} To do so, Mr. Justice La Forest made very extensive use of the drafting history of the Convention and commentaries upon it. He drew heavily upon the \textit{travaux préparatoires}, even citing individual state’s positions, and upon the practice under the Convention as endorsed by states in the U.N. High Commissioner for Refugees’ Handbook on Procedures and Criteria for Determining Refugee Status. He also made wide reference to scholarly writings, both Canadian and international, on the Convention, as well as analysing numerous other cases, mostly Canadian but some foreign, about the status of refugees. His judgment, for the Court, made a rich use international legal sources to nourish the interpretation of the statute. It stands out as the example for all courts to follow in the future.

In the third case, \textit{Thomson v. Thomson},\textsuperscript{47} La Forest J. noted the approach he had established in the \textit{Ward} case and added:

\begin{quote}
It would be odd if in construing an international treaty to which the legislature has attempted to give effect, the treaty were not interpreted in the manner in which the state parties to the treaty must have intended. Not surprisingly, then, the parties [to the case] made frequent reference to this supplementary means of interpreting the Convention [on Child Abduction], and I shall also do so.\textsuperscript{48}
\end{quote}

Indeed, it seems odd that the courts should ever have thought otherwise. Having now admitted as much, it is only reasonable that all the supplementary sources and extrinsic aids permitted by international law to interpret a treaty should be admitted and used in a national court seized with the task of interpreting a statute that applies the treaty.

\textsuperscript{48} \textit{Thomson v. Thomson}, \textit{ibid.}, at 578.
II. THE USE OF UNIMPLEMENTED TREATIES IN THE INTERPRETATION OF STATUTES

Much has been written about the influence of international human rights covenants and treaties in Canadian law.\(^49\) Certainly since *Slaign Communications Inc. v. Davidson*,\(^50\) and probably before, the Supreme Court has explicitly accepted that the *Canadian Charter* should be interpreted in light of Canada’s international human rights obligations. In that case, Dickson C.J., in his majority judgment, reiterated what he has said in dissent in *Ref. Re Public Service Employee Relations Act*:\(^51\)

The content of Canada’s international human rights obligations is [...] 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.\(^52\)

Using this general statement, he enlarged on the particular relationship between international law and the *Canadian Charter*:

[...] Canada’s international human rights obligations should inform not only the interpretation of the content of the rights guaranteed by the Charter but also the interpretation of what can constitute pressing and substantial objectives which may justify restrictions upon those rights. Furthermore, for purposes of this stage of the

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\(^{50}\) [1989] 1 S.C.R. 1038 [hereinafter *Slaign Communications*].


\(^{52}\) *Slaign Communications Inc. v. Davidson*, *supra* note 50 at 1056.
proportionality inquiry, the fact that a value has the status of an international human right, either in customary international law or under a treaty to which Canada is a State Party, should generally be indicative of a high degree of importance attached to that objective.53

The principle is thus established that Canada’s international human rights obligations, whether of customary or treaty law origin, should inform and nourish the interpretation of the Canadian Charter of Rights and Freedoms. This has been achieved even though the Canadian Charter makes no reference to international human rights treaties54 and Canadian courts have not been much concerned to discuss whether it does or does not implicitly implement them.55 The question that remains is how far this accepted principle may be generalised to other fields of international treaty law and other areas of domestic legislation? Is the judicial approach peculiar to the protection of human rights, particularly because the Canadian Charter is not just an ordinary statute but is one of the constitutional documents of the country? Or is the use of international legal resources in Canadian Charter jurisprudence the leading edge of a more general approach to the curial admission and employment of unimplemented treaty obligations?56

The practice of the Supreme Court outside of Canadian Charter cases has been limited. Cases before the adoption of the Canadian Charter in 1982 were mostly antagonistic towards unimplemented treaties. The early case of Re Arrow River and Tributaries Slide and Boom Co.57 was one of the more supportive ones. Faced with a provincial act allowing for tolls on the use of the Arrow river and its tributaries in apparent contradiction to the unimplemented Webster-Ashburton Treaty, all three Supreme Court justices who wrote opinions seriously considered the treaty and attempted to

54 See the discussion in Bayefsky, supra note 9 at 63. She also makes a strong argument from legislative history and official representations that much of the Canadian Charter does implement many of Canada’s treaty obligations respecting international human rights: ibid., at 33-63.
55 See Schabas, supra note 49 at 47.
construe away the conflict with the statute. In the end, two justices did so by interpreting the treaty, in different ways, as not affecting the statute. Only Lamont J. saw an insurmountable conflict in which the treaty had to give way to the statute for lack of legislative implementation.

However, in 1956, in Francis v. The Queen, the Supreme Court stepped back from its constructive approach in Re Arrow River. Contenting itself that the Jay Treaty had not been implemented by legislation and was not a Peace Treaty, which, it was supposed, might not need legislative implementation, the Court refused to consider the treaty further. Thus the legislation respecting customs duties was applied without any reference to the particular rights of the Native applicant under the Jay Treaty.

The “Laskin Court” of the 1970s was of the same mindset. In MacDonald and Railquip Enterprises Ltd. v. Vapor Canada Ltd., Chief Justice Laskin discussed the constitutional process and need for certainty of implementation of a treaty, without any comment on the relevance of the unimplemented treaty before him. In Capital Cities Communications Inc. v. Canadian Radio-Television Commission the Supreme Court was invited, inter alia, to interpret the Broadcasting Act in light of the Inter-American Radio Communications Convention of 1937. Laskin C.J. refused, saying: “I do not find any ambiguity that would require resort to the Convention, which is, in any event, nowhere mentioned in the Broadcasting Act, and certainly the convention per se cannot prevail against the express stipulations of the Act.”

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58 Compare with the judgment of Riddell J.A. in the Ontario Court of Appeal, (1931) 66 O.L.R. 577, in which he used the same interpretive approach to reach a different result, reading down the statute in face of the treaty.


63 Capital Cities Communications, supra note 61 at 173. Laskin C.J. also held that the Convention was not impliedly implemented by the Radio Act, R.S.C. 1970, c. R-1, as rep. by Radiocommunications Act, R.S.C. 1985, c. R-2.
Chief Justice Laskin’s attitude was shared by Estey J. in *Schavernoch v. Foreign Claims Commission* in which the interpretation of regulations to disperse funds from a foreign claims settlement, made under the *Appropriation Act No. 9, 1966*, was in issue. Even though the Act and regulations very probably implemented the treaty settling the foreign claims, Estey J. had no time for them at all. He stated:

If one could assert an ambiguity, either patent or latent, in the Regulations it might be that a court could find support for making reference to matters external to the Regulations in order to interpret its terms. Because, however, there is in my view no ambiguity arising from [...] these Regulations, there is no authority and none was drawn to our attention in argument entitling a court to take recourse either to an underlying international agreement or to textbooks on international law with reference to the negotiation of agreements or to take recourse to reports made to the Government of Canada by persons engaged in the negotiation referred to in the Regulations.

The need to discover an ambiguity in the legislative text as a prerequisite to considering the relevance of a treaty was often asserted by the courts, in apparent disregard of their own principle that statutes should be interpreted to conform with international law so far as possible. But there was some resistance to the prevalence of this attitude. Pigeon J., contrary to Laskin C.J.’s majority judgment in *Capital Cities Communications*, expressed a strong dissent:

I cannot agree that [Canadian Radio-Television] Commission may properly issue authorizations in violation of Canada’s treaty obligations. Its duty is to implement the policy established by Parliament. While this policy makes no reference to Canada’s treaty obligations, it is an integral part of the national structure that external affairs are the responsibility of the federal Government. It is an over-

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64 *Supra* note 34.
65 S.C. 1966, c. 55.
66 Estey J. recognised that the lower court thought so but did not comment himself: *Schavernoch v. Foreign Claims Commission*, *supra* note 34 at 1095.
67 *Ibid.*., at 1098.
simplification to say that treaties are of no legal effect unless implemented by legislation.\textsuperscript{68}

Indeed it is an oversimplification to say treaties binding on Canada are of no legal effect unless implemented by legislation when they concern matters within domestic Canadian law. Pigeon J. considered “judicial notice ought to be taken that, by virtue of the Convention the appellants had a legal interest entitled to protection.” He held “the Commission could not validly authorize an interference with this interest in violation of the Convention signed by Canada.”\textsuperscript{69} This would have been a far-reaching application of an unimplemented treaty had it commanded the respect of the majority. Fortunately the Supreme Court’s decisions of the 1980s and 1990s moved away from its opinions, represented by Laskin C.J., in the 1970s. Later cases have begun, hesitantly, to dispel the “over-simplification” of the Court’s treatment of unimplemented treaties, with which Pigeon J. charged it.

No doubt changes in the membership of the Supreme Court from the 1970s to the 1980s made a difference in judicial attitudes. Even so, there can be no escaping the ferment created in the courts by the introduction of the Canadian Charter of Rights and Freedoms in 1982. It forced courts, and the Supreme Court in particular, into the midst of Canadian social policy. Given the breadth of the human rights principles contained in the Canadian Charter and the necessity of balancing their application with the needs of a free and democratic society, the Supreme Court has come close to creating Canadian social policy. Inevitably its decision-making authority had to be exercised over a much wider range of subject matter and materials, and, in its role of interpreter of the Canadian Charter, it has had to seek, review and utilize a greatly expanded range of legal sources. The Court’s readiness to use what in previous times would have been regarded as inadmissible extrinsic evidence of a statute’s purpose and of the legislature’s intent has clearly spilled over from its decisions about the Canadian Charter into other cases on its docket, including some involving international law.

\textsuperscript{68} Capital Cities Communications, supra note 61 at 188.

\textsuperscript{69} Ibid., at 189.
Early in the 1980s the Supreme Court heard the unusual case of *Zingre v. The Queen*. It involved a request by Switzerland pursuant to an extradition treaty to a Manitoba court to issue a commission authorizing two Swiss investigating judges to take testimony in Canada for the possible prosecution of three Swiss nationals for crimes committed in Manitoba. In a judgment for the whole of the Supreme Court, Dickson J. noted that the argument in favour of granting the order rested on the treaty:

In responding affirmatively to the request which has been made the Court will be recognizing and giving effect to a duty to which Canada is subject, by treaty, under international law. It is common ground that the treaty applies. [...] It is the duty of the Court, in interpreting the 1880 Treaty and s. 43 of the Canada Evidence Act to give them a fair and liberal interpretation with a view to fulfilling Canada’s international obligations. [...] The Treaty of 1880 places Canada under a specific obligation to comply with the Swiss request. If Canada denies the Swiss request it will be in breach of its international obligations.

Notably, Justice Dickson did not enquire about the unimplemented status of the treaty; he simply applied it. Indeed, as apparent authority, he reported:

As the Canadian Department of External Affairs stated in a note to the Swiss Federal Policy Department [...] “it is a recognized principle of international customary law that a state may not invoke the provisions of its internal law as justification for its failure to perform its international obligations.”

Perhaps in future more Canadian courts, and the Supreme Court in more cases, will recognize this verity. Then the role of unimplemented treaties might be better articulated than it has been so far.

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71 The case was decided the year before the Canadian Charter was adopted while the Supreme Court was still led by Laskin C.J. Yet it is interesting to note that Laskin C.J. concurred in the judgment of Dickson J. who went on to be the Chief Justice in the formative years of the Court’s views of the Canadian Charter in the 1980s.
72 *Zingre v. The Queen, supra* note 70 at 409-410.
Two other cases in which the Supreme Court made reference to international law to interpret statutes are *Bell Canada v. Quebec (CSST)*\(^7\)\(^4\) and *Re Canada Labour Code.*\(^7\)\(^5\) Writing for the whole Court in the *Bell Canada* case, Beetz J. observed:

What is perhaps the best argument [...] comes from the very wording of the international documents which are the basis of contemporary legislation on occupational health and safety.\(^7\)\(^6\)

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\(^{74}\) [1988] 1 S.C.R. 749 [hereinafter *Bell Canada*].

\(^{75}\) *Supra* note 30.

\(^{76}\) *Bell Canada, supra* note 74 at 806.
He cited as evidence for this observation the Preamble to the Constitution of the International Labour Organization77 and Article 7 of the International Covenant on Economic, Social and Cultural Rights,78 both of which are binding on Canada.

Re Canada Labour Code concerned the proper interpretation of the State Immunity Act79 La Forest J. based his opinion on the view that the Act was “a codification that is intended to clarify and continue the theory of restrictive immunity, rather than to alter its substance.”80 Thus he read the Act as giving effect to the customary international law of restrictive immunity. In neither case did the justices choose to explain the reasons why they relied on international law. They were both, no doubt, correct in their observations but it would have been helpful if they had articulated the basis for them, even if that were only to reaffirm the principle that, so far as possible, statutes should be interpreted to conform with international law. The cases stand, however, as examples fulfilling that expectation.

The fullest deliberation to date on the use of international law, and unimplemented treaties in particular, is to be found in the 1999 case of Baker v. Canada (Minister of Citizenship and Immigration).81 Ms. Baker, a Jamaican citizen, entered Canada in 1981 and had four Canadian-born children before she was ordered to be deported in 1992. She applied for permanent residency based on humanitarian and compassionate grounds (H&C), pursuant to the Immigration Act,82 section 114(2). Her application having been denied, she appealed on several grounds, including the argument that the immigration officer’s discretion under section 114(2) had been improperly exercised because it did not take appropriate account of the interests of her Canadian children.

78 Supra note 4.
79 Supra note 31.
80 Supra note 30 at 73.
82 Supra note 45.
In allowing the appeal, the majority opinion of Justice L’Heureux-Dubé argued to an important conclusion. She started from the premise that the Immigration Act required the immigration officer to exercise the discretionary power based upon compassionate and humanitarian considerations in a reasonable manner. She continued: “Determining whether the approach taken by the immigration officer was within the boundaries set out by the words of the statute and the values of administrative law requires a contextual approach, as is taken to statutory interpretation generally.” As a result, a reasonable exercise of the statutory power in her opinion required close attention to the interests of the appellant’s children because children’s rights “are central humanitarian and compassionate values in Canadian society.” Evidence for these contextual values were to be found, she stated, in the purposes of the Act, in international instruments and in departmental guidelines on making H&C decisions.

When Justice L’Heureux-Dubé examined the evidence of international instruments, she cited the Convention on the Rights of the Child as a treaty ratified by Canada. Noting that it has not been implemented by legislation and therefore has no direct application within Canadian law, she continued: “Nevertheless, the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review.” Finding that “[t]he values and principles of the Convention recognize the importance of being attentive to the rights and best interests of children when decisions are made that relate to and affect their future," she determined that the immigration officer’s decision, because it had minimized the interests of the children, was in conflict with the H&C values of the Act. It was therefore unreasonable and could not stand.

The sum of Justice L’Heureux-Dubé’s reasoning constitutes a full-scale demonstration of reference, even deference, to unimplemented but binding treaties as a positive aid to statutory interpretation. This goes

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83 Baker, supra note 20 at 860.
84 Ibid.
85 Supra note 5.
86 Baker, supra note 20 at 861.
87 Ibid.
beyond the principle that courts should take care to interpret statutes in accordance with international law where possible. Justice L’Heureux-Dubé’s judgment demands that courts make affirmative use of international law, and ratified treaties in particular, in the interpretation of domestic statutes.

Her opinion cannot be sidelined on the grounds that it only affects judicial review of the discretionary exercise of administrative powers. Justice L’Heureux-Dubé was careful to discuss whether the approach of the immigration officer was “within the boundaries set by the words of the statute.” She was not second-guessing his decision; she was interpreting the statute that gave him the power to decide. In addition, it appears to make no difference whether the legislation being interpreted is federal or provincial. Justice L’Heureux-Dubé made no reference to the fact that the Immigration Act happens to be a federal statute. There is, it seems, no more encroachment on the legislative authority of the Provinces than there is on the powers of the federal Parliament.

Yet Justice L’Heureux-Dubé’s reasoning did not meet the approval of the whole Court. Iacobucci J. wrote:

I do not agree with the approach adopted by my colleague, wherein reference is made to the underlying values of an unimplemented international treaty in the course of the contextual approach to statutory interpretation and administrative law, because such an approach is not in accordance with the Court’s jurisprudence concerning the status of international law within the domestic legal system. [...] the result will be that the appellant is able to achieve indirectly what cannot be achieved directly, namely, to give force and effect within the domestic legal system to international obligations undertaken by the executive alone that have yet to be subject to the democratic will of Parliament.

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88 Ibid., at 860.
89 The Court was unanimous in the decision but divided 5-2 over L’Heureux-Dubé J.’s opinion about the role of international law.
90 Supra note 20 at 865-866.
As this article has shown, Iacobucci J. is largely correct that L’Heureux-Dubé’s “approach is not in accordance with the Court’s jurisprudence” on the use of international law. She has definitely pushed the Court beyond the resistance to the use of unimplemented treaties that it showed in the 1970s and the tentative references for interpretive assistance made in the 1980s and early 1990s. Viewed from this perspective, Justice Iacobucci’s minority view is a rearguard defence of an attitude that Justice L’Heureux-Dubé has carried the majority of the Court beyond.

Whether L’Heureux-Dubé J.’s approach will lead to the achievement indirectly of what cannot be achieved directly, as charged by Iacobucci J., remains to be seen. Certainly, that was not her intent. She recognised that treaties “are not part of Canadian law unless they have been implemented by statute,” citing Francis v. The Queen and Capital Cities Communications Inc. She was careful to confine her references to the Convention on the Rights of the Child to its values and principles, not its specific provisions. Quoting Driedger on the Construction of Statutes, she emphasized with italics the sentence that reads: “In so far as possible, therefore, interpretations that reflect these values and principles are preferred.”

**CONCLUSION: PROSPECTS FOR THE USE OF UNIMPLEMENTED TREATIES**

The judgment in Baker has carried Canadian courts into new territory. The role of unimplemented treaties is better defined. They have an affirmative function in statutory interpretation and may no longer be ignored as of no effect. Yet all this should cause no surprise. What is

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91 Ibid., at 865.
92 Ibid., at 861. L’Heureux-Dubé J. also left open the issue whether an unimplemented treaty can give rise to a legitimate expectation that rights expressed in the treaty must be taken in account in the execution of a discretionary power: ibid., at 841.
93 Supra note 59.
94 Supra note 61.
95 Supra note 5.
96 See the whole passage supra at note 21.
97 And probably also in determining the contents and meaning of the common law and the Civil Code of Quebec, S.Q. 1991, c. 64, though they have not been addressed here.
surprising is that the Supreme Court has taken so long to reach this position. It is more than twenty years since Pigeon J. charged: “[i]t is an oversimplification to say that treaties are of no legal effect unless implemented by statute.”

Although many refinements about the impacts of unimplemented treaties will have to be made in subsequent cases, the prospects may be projected from the same principles of statutory interpretation that foreshadowed these developments so far.

The three principles of statutory interpretation with reference to international law, discussed previously, add up to an obligation on the courts to pay much more attention to international norms, whether customary or treaty, and whether the treaty has been implemented or not. The first principle constrains a court to interpret a statute in conformity with international law, so far as possible. It does not require the court to pay heed to an international obligation, such as an unimplemented treaty, that conflicts with the statute, but it does demand that the court gives due consideration to the treaty to determine that an interpretation of the statute consistent with the treaty cannot be achieved.

Principle number two requires that every statute be construed in its context. When the context involves international elements and sources, they must be consulted. It does not matter whether the international legal sources are binding norms or not for Canada. It may be that those that are binding, like unimplemented treaties, have greater weight depending on their relevance to the statute and the contextual purpose for consulting them. As Dickson C.J. said in *Slaight Communications*, 99 in interpreting the *Canadian Charter*, “the fact that a value has the status of an international human right, either in customary law or under a treaty to which Canada is a State Party, should generally be indicative of a high degree of importance attached to that objective.”

But, in addition, as Dickson C.J. indicated in his reasons 101 in the earlier case of *Ref. Re Public Service Employee Relations Act*, 102 all norms

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98 *Capital Cities Communications*, supra note 61 at 188.
99 *Supra* note 50.
100 *Ibid.*, at 1057.
101 Which he relied on in *Slaight Communications*.
102 *Supra* note 51.
of international law provide a relevant and persuasive source for interpretive purposes.\(^\text{103}\)

The third interpretive principle explains the range of international sources that may be consulted in order to determine the meaning and effect to be ascribed to relevant international norms. The former conservative approach towards extrinsic evidence has been abandoned in favour of reference to a very broad range of sources. For instance, the Supreme Court has referred, where relevant, to binding and non-binding treaties and their *travaux préparatoires*, to United Nations resolutions and other documents, such as guidelines for practice under a treaty, to other states’ and foreign courts’ application of a treaty, and to scholarly commentaries about related international law. Reference to all of these sources is consistent with, indeed necessary for, a contextual approach to statutory interpretation. In addition, it is mandated by the international rules of treaty interpretation, as codified in the *Vienna Convention on the Law of Treaties*,\(^\text{104}\) and now adopted in Canadian courts as the appropriate rules of interpretation in a case involving international treaty law.

The combined application of these three principles places a heavy duty on a court to find an interpretation of a statute that conforms with Canada’s obligations under an unimplemented treaty after a thorough consideration of all international, as well as domestic, legal sources relevant to the context of the statute. Prior to *Baker*, the practice of the Supreme Court did not appear to recognize the principles of statutory interpretation with reference to international law that it itself has wrought. Justice L’Heureux-Dubé’s judgment in *Baker* is a much fuller construction of the relevance of unimplemented treaties than any of the tentative references to them in previous cases. Her judgment is significant in several aspects. It espoused a contextual approach to statutory interpretation and thus drew upon a relevant but unimplemented treaty along with references to other international instruments. It justified this approach on the principle that an interpretation of a statute consistent with international law is to be preferred. Indeed, the judgment went further than verifying that the interpretation of

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\(^{103}\) See the comments of Schabas, *supra* note 49 at 37.

\(^{104}\) *Supra* note 23.
the statute was not inconsistent with the treaty. It made affirmative use of
the principles and values of the treaty to inform the statute’s interpretation
in context.

In conclusion, unimplemented treaty rights and obligations are
attaining progressively more significance in Canadian courts. Formerly the
courts typically treated unimplemented treaties as if they hardly existed and
certainly as irrelevant to Canadian law. But, as has been shown, the Supreme
Court has firmly moved from that position. Now the courts will use all
available international law to inform the contextual interpretation of a
Canadian law and will favour an interpretation consistent with a relevant
binding, though unimplemented, treaty.

The jurisprudence of the Supreme Court also hints that
prospectively Canadian courts may adopt an even stronger role for
unimplemented treaties, namely that Canadian law must be interpreted so as
to be consistent with Canada's international legal obligations whenever
possible. Such a position would endow binding treaties, whether
implemented or not, with legal authority in Canadian law, unless overridden
by directly conflicting legislation. This result would be completely
appropriate to the needs of Canadians as citizens of the increasingly
interdependent international community.
In his provocative book, *Contingency, Irony and Solidarity*, the American pragmatist philosopher, Richard Rorty, makes the following claim:

Old metaphors are constantly dying off into literalness, and then serving as a platform and foil for new metaphors.¹

Today I detail a process in which the Supreme Court of Canada is an active, if uncertain, participant; a process through which the old metaphors of “national sovereignty” and the “state legal system” are dying off, being replaced by new metaphors of “transnationalism” and “interpenetration of normative traditions”.

Lest I be accused of flighty, professorial thought, let me situate the discussion by quoting from the judgment of the Supreme Court in *Baker v. Canada (Minister of Citizenship and Immigration)*,² from 1999. Justice L’Heureux-Dubé, writing for the majority, asserted that “the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review.”³ This argument adopts and extends the suggestion made by then-Chief Justice Dickson some twelve years earlier that the norms of international law “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.”⁴ In *Baker*, the Court held that the values contained in an

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international human rights treaty could shape not only a process of statutory interpretation, but the exercise of Ministerial discretion as well.

Former Justice La Forest has made the point most forcefully: human rights principles “are applied consistently, with an international vision and on the basis of international experience. Thus our courts—and many other national courts—are truly becoming international courts in many areas involving the rule of law.”

Former Justice La Forest is undoubtedly correct to point to a global judicial development: a growing interest in international law both as a formal instrument of interpretation for national law and as a broader underlying metaphor for our desire to transcend the parochial and to open our minds to legal influences that may not be binding, but are appropriately influential. One can point to important recent judgments of courts in the United Kingdom, the United States, South Africa, Israel and Australia, that participate in what one commentator has called transgovernmentalism. Anne-Marie Slaughter describes how networks of state institutions, including courts, are increasingly knowledgeable about each other’s work, and increasingly open to the influence of non-national law, including international law.

Thirteen years ago, my colleague H. Patrick Glenn argued that our legal traditions should be influenced by what he called “persuasive authority”, rather than relying solely upon binding sources of law to guide decision making. The invocation of international legal values in Baker is a prime example of just such a development.

Recently, another Canadian colleague, Karen Knop, has borrowed Glenn’s theme to suggest that it is a mistake to emphasize the role of national courts in “enforcing” international law, that the very idea of compliance is outdated, and that international law is best

viewed as “foreign” law to be employed as persuasive authority when domestic courts see fit.  

In her excellent article, Knop relies heavily on Baker to demonstrate the new, more open, attitude of the Supreme Court of Canada to the influence, if not authority, of international law. She contrasts this open attitude to the accusations of “traditional” international lawyers who have criticised the Court for its unprincipled use of international law. Now here is the rub: amongst those “traditional” lawyers, Knop lists me. She quotes me, quite accurately, as writing that: “Although the Court often involves international treaties as an aid to interpretation, particularly of the Charter, it does so in a fluid, not to say unprincipled, manner… Treaty obligations are not so much ‘relevant and persuasive’ as instrumentally useful or merely interesting.”

There is no epithet more hurtful to a North American law teacher than to be called “traditional”! You will therefore not be surprised to hear that I want to argue that my past criticism of the Supreme Court of Canada’s engagement with international law is in no way “traditional”, if we interpret that word to mean outdated and fusty! To do so, I will recall Rorty’s understanding of the life cycle of metaphors: old metaphors do not simply die, they are part of the process of regeneration. They serve “as a platform and foil for new metaphors.”

The old metaphors of “national sovereignty” and “state legal system” are not yet dead. They are the very platform from which the metaphor of “transnationalism” is being launched. So we are living in an “in-between time” where, as T.S. Eliot suggests in his magical poem “Burnt Norton”, we suffer the disaffection of experiencing neither the illucidation of daylight nor the purification of darkness. Hence, the dichotomy that Knop sets up between a traditional focus on international law as “binding” on domestic courts, and international law as “persuasive authority” is, I think, a false dichotomy. In our world, international law can be both, but is often neither, and that is the struggle with which international lawyers must engage.

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10 Rorty, supra note 1.
To make the argument more concrete, let me canvass briefly various ways in which the Supreme Court of Canada has employed, been influenced by and ignored international law. It is important to set the context. Canada is one of the minority of states where the relationship between international law and domestic law remains a constitutional conundrum. Our written constitutional texts do not address the issue, and the Supreme Court has not seen fit (or perhaps has not been given a good opportunity) to pronounce upon the matter. We know for certain that we do not know whether customary international law forms part of the law of Canada. This position is in contrast to that of the United Kingdom where Lord Denning in Trendtex Trading Corp. v. Central Bank of Nigeria\(^{12}\) and Lord Wilberforce in I Congreso del Partido\(^{13}\) held that the United Kingdom courts could directly apply emerging customary law to establish a controlling norm within the United Kingdom legal system, in those cases, the norm of restrictive state immunity. Similarly, in the famous Mabo case, the High Court of Australia held that the development of the common law could be influenced by both customary and treaty-based international law.\(^{14}\) The Supreme Court of the United States established a century ago in the Paquete Habana\(^{15}\) that “[c]ustomary international law informs the construction of domestic law, and, at least in the absence of any superseding positive law, is controlling” to adopt the description of that famous case offered by Justice Blackmun.\(^{16}\)

Meanwhile, the Canadian Supreme Court has vacillated between an approach seeming to accept the direct application of customary international law and one requiring some form of explicit transformation of custom into domestic law.\(^{17}\) In the recent Quebec


\(^{13}\) [1983] 1 A.C. 244 (H.L.).


\(^{15}\) (1900) 175 U.S. 677.


Secession Reference, the Court offered an at best enigmatic aside that it could not apply “pure” international law directly. If the Court believed that customary international law could condition domestic law, then such an application would be in no way precluded. One can conclude either that the Court currently favours a requirement of transformation of customary law or that the aside was not meant to signal any particular attitude and may not have been fully thought through.

The situation for obligations that Canada has voluntarily assumed under international treaty law is even more complex, despite a seemingly bright line rule. The “rule” is that treaties must be incorporated into Canadian domestic law before they can be controlling upon domestic legal actors, including courts. This well-established proposition was reaffirmed in Baker, following a consistent line of cases.

Yet on this subject the Supreme Court is confronted with two significant problems. The first is well known, that a central underlying reason for the requirement of explicit transformation of treaty obligations into domestic law is the need to uphold the division of legislative power within the Canadian federation. This rationale was promoted in the Labour Conventions Case, and it may have influenced the dissenting opinion of our learned chair in Baker, although his reasons focus purely upon the need to carefully balance the powers of the legislature and the executive. So, the potential influence of “persuasive authority” could be limited by legitimate concerns, rooted in domestic constitutional law, that are unrelated to the compelling logic or the moral imperatives of the untransformed treaty norms.

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19 Supra note 2 at 230 (per L’Heureux-Dubé J.) and at 234 (per Iacobucci J., dissenting in part).
21 [1937] A.C. 326 (P.C.) [hereinafter Labour Conventions Case].
22 Supra note 2 (per Iacobucci J., dissenting in part).
The second problem is less obvious, but it is fast becoming a central issue for those concerned about the relationship between international and domestic law in Canada. As a country whose self-definition is arguably influenced by perceptions of international influence and responsibility, Canada is a great ratriyer of international treaties, especially those related to human rights and the rule of law. Yet the Canadian executive often takes the position that Canada can ratify these treaties on the basis of existing conformity with the newly articulated conventional obligations. Canadian courts are then placed in an uncomfortable position: they are asked to assess Canada’s compliance with international obligations, but are not given any explicit implementing legislation to analyse. So the traditional focus upon the “bindingness” of an international norm proves deeply problematic. The Canadian Government asserts, and reports to international treaty bodies, that we are bound by norms that are already implemented, but courts have to find the mechanism of implementation in the interpretation of legislative texts or of the common law created before the ratification of the supposedly implemented treaty. In part to address this problem, the Supreme Court has adopted two interpretative presumptions that have a long history in the common law: first, that unless there are unmistakable signals pointing to the nonconformity of Canadian law with an international obligation, domestic law, including statutes and the Charter, should be interpreted to uphold Canada’s treaty commitments; second, that in interpreting ambiguous domestic legislation, recourse should be had to underlying international treaty commitments.

But these presumptions have not been adequate to the task, and the Court has confronted diverse situations in which international law could be binding within Canada’s legal system, or where it would be at least “persuasive,” but where the Court’s attachment to international law has wavered and vacillated. In most cases where the Supreme Court has examined international law sources, the citations have been superficial and instrumental. For example, in looking at Canadian

23 See for example Toope, supra note 9.
26 See Capital Cities Comm. Inc. v. C.R.T.C., supra note 20; and the opinion of Iacobucci J. in Baker, supra note 2 (dissenting in part).
obligations under international human rights treaties, the Court has typically gone no further than the parsing of treaty texts, eschewing recourse to authoritative pronouncements of treaty-based monitoring bodies. The majority judgment in Keegstra\textsuperscript{27} is an exception. Similarly, the Court has usually refused to look at the travaux préparatoires of relevant treaties as a guide to interpretation. Once again, I can point to a notable exception, and one that I hope will be emulated in the future: Pushpanathan.\textsuperscript{28} In Reference Re Public Service Employee Relations Act (Alta),\textsuperscript{29} where Chief Justice Dickson and Justice Wilson marshalled a compelling case that Canada was bound by international commitments to protect the right to strike as an aspect of the freedom of association, the majority simply chose to ignore the relevant international law.

Even when international law is favourably invoked, the Court often neglects to state the basis upon which the international norms are alluded to. This is particularly true for treaty commitments that have not been expressly incorporated into domestic law. So it is common for the Court to cite the International Covenant on Civil and Political Rights\textsuperscript{30} and the European Convention for the Protection of Human Rights and Fundamental Freedoms\textsuperscript{31} in one breath, failing to distinguish between a treaty commitment of Canada, arguably transformed into Canadian law through the vehicle of the Charter, and a treaty to which Canada could never be a party.\textsuperscript{32} In the Québec Secession Reference, the Court discussed international treaty law in detail, looking only at the words of texts, and completely neglected the influential and fast-changing parallel customary law on the issue of secession.\textsuperscript{33} International law remains a seemingly mysterious set of norms referred to haphazardly by the Court.

In a time of changing metaphors, from “national sovereignty” to “transnationalism”, the Court’s reliance on interpretative presumptions has proven to be unsatisfying and inadequate. So, the Supreme Court has begun to invoke the general values of international society, as stated in formal treaties, to shape its readings of domestic law.

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\textsuperscript{27} Supra note 4.

\textsuperscript{28} Supra note 25 at 1035.

\textsuperscript{29} Supra note 4.

\textsuperscript{30} December 19, 1966, 999 U.N.T.S. 171.

\textsuperscript{31} November 4, 1950, 213 U.N.T.S. 221.

\textsuperscript{32} See for example the majority opinion in Keegstra, supra note 4; and Kindler v. Canada (Minister of Justice), [1991] 2 S.C.R. 779 (dissenting opinion of Cory J.).

\textsuperscript{33} See Toope, supra note 18 at 524-525.
have already pointed to Baker, but another excellent recent example can be found in Pushpanathan,34 where Justice Bastarache argued that “until such time that the international community declares drug trafficking to be a major violation of human rights amounting to persecution” it would not be possible to invoke trafficking as a grounds for exclusion under the Canadian legislation implementing the United Nations Convention relating to the Status of Refugees.35 So collective international values expressed in a range of treaties and declarations serve now to guide the interpretation of Canadian law. International law can be invoked generally, and without doctrinal mechanisms of restraint, as influential or persuasive.

Following the critical legal scholar David Kennedy, Karen Knop employs another revealing metaphor, stating that international law can now be treated in Canada simply as “foreign” law. She suggests that just like “foreign” law, international law is a “translation of norms from elsewhere” and that international law should find its new inspiration in the insights of comparative law.36

Just to prove that I am no more a traditionalist than Knop, I will state directly that as far as it goes, I find the “foreign” metaphor instructive. I delight in the greater openness to the influence of international legal values represented by Baker and Pushpanathan. My own recent work on conceptions of legal normativity in international society fully supports both a discursive and an interactional model of law.37 I agree with Justice Iacobucci’s suggestion in Vriend v. Alberta38 that various institutions develop law by engaging in a democratic dialogue. That is just as true of the institutions of international and domestic law as it is of courts and legislatures within the framework of the Charter.

But the “foreign” metaphor is not the whole story and, ironically, it points us to the very opposite of the model of persuasive authority that Knop would uphold. To construct the “foreign”, one must accept the continuing influence of the dying metaphor of national sovereignty. I think that Knop is right to do that, for I have suggested that we are living in-between metaphors of sovereignty and

34 Supra note 25.
36 Knop, supra note 8 at 535.
transnationalism. But if that is true, then it seems to me that for the foreseeable future, the Supreme Court of Canada will have two distinct roles to play when engaging with international law.

The first is the role it adopted in Baker and Pushpanathan, opening itself to the persuasion of international legal values in shaping Canadian domestic law. Here the Court has taken on a significant role of global leadership, in stark contrast to the Supreme Court of our neighbours to the South, despite the valiant efforts of Justices Blackmun, O’Connor, Ginsberg and Breyer. But the Supreme Court of Canada must also play a second role, that of articulating clearly how the dying metaphors of “national sovereignty” and “state legal system” continue to play themselves out. The Court can undertake this role more effectively than it has done in the past. I therefore harbour three hopes. I hope that the Court will soon be given another opportunity to consider whether or not customary international law forms part of the law of Canada, or at least whether the common law should be developed in the light of customary obligations. I hope that the Court will soon be asked to address the increasingly thorny question of how Canadians can benefit from treaty commitments undertaken by Canada on the basis of prior conformity with treaty rules. I hope that the Court will take greater care to distinguish amongst international obligations that should shape Canadian law and international legal values that can shape Canadian law. For, to adopt a final set of interrelated metaphors, in this in-between time, international law is both “foreign” and “part of us”. The Supreme Court of Canada translates external norms, but it does so by participating in the creation and re-creation of norms that shape our emerging transnational society.

As Lon Fuller helped us to understand decades ago, the judge “ought to be proud that his [or her] contribution is such that it cannot be said with certainty whether it is something new or only the better telling of an old story.”39 The Supreme Court’s telling of the story of international law in Canada will depend upon old and new metaphors, the old metaphor of binding law and the new metaphor of persuasive authority. Both metaphors must be employed, but not usually at the same time or in the same way. Articulating the differences will be the challenge of the Court in the years immediately ahead. Thank you.

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39 L.L. Fuller, *The Law in Quest of Itself* (Chicago: Foundation Press, 1940) at 140.
Inside and Out: The Stories Of International Law and Domestic Law

Stephen J. Toope*

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In his marvellous novel, *The Storyteller*,¹ Mario Vargas Llosa tells three interrelated stories using two distinct narrative voices. The first voice is authorial, an author close to Vargas Llosa himself: a Peruvian writer fascinated by the process of storytelling and by questions of identity. The second voice is much more mysterious, the voice of Tasurinchi, a Machiguengas Indian storyteller—or so it seems. I give away very little of the plot by telling you that Tasurinchi is not who he appears. Or is he? Tasurinchi tells part of his own story, but more importantly, he tells the story of the Machiguengas. Tasurinchi begins his life as Saúl Zuratas, a Peruvian Jew with a deforming birthmark on one side of his face. He is a university pal of the Peruvian author. Because of the deformity, Saúl’s nickname is “Mascarita”, the mask. It turns out that the mask of deformity is far less relevant than Saúl’s later adopted mask as a Machiguengas storyteller. Or is it?

My enigmatic questions hint at the mysterious reflections of this work of genius. Vargas Llosa is preoccupied by what shapes our identities, and the respective roles of inheritance and will. He is also preoccupied by the power of the story, and the storyteller, in transmitting and creating social myths that shape communal identity and promote social cohesion. Can one be simultaneously inside and outside a given society? If one is, in some sense, an outsider, can one ever feel truly integrated in a “foreign” society? What is the role of stories in enabling social integration?

Consider the words of the great American legal theorist, Lon Fuller, addressing the role of the judge—at least in the common law tradition:

“[the judge] ought to be proud that his [or her] contribution is such that it cannot be said with certainty whether it is something new or only the better telling of an old story.”

Like the Machiguengas storyteller, the judge tells stories about history, obligation, aspiration, and our communal lives together. The judge can never be sure how much of the story she tells is inherited and how much is new creation. How much of the judge’s identity is found in tradition and how much is found in self-willing?

To connect these seemingly random thoughts, I must invoke the recent writings of a well-known American international lawyer, David Kennedy of Harvard University. Kennedy argues that international law should root its objects and methodology in new approaches to comparative law. Instead of being concerned with “governance”, international law should strive for cultural understanding. For Kennedy, current international law aspires inappropriately to transcend culture. I accept the validity of this critique, but would reject the conclusions that Kennedy draws, largely because he is firmly committed to dichotomous thinking. International law is either inside our system—treated as binding—or by implication, international law is best seen as “foreign” law that needs to be translated into domestic systems and interpreted into local culture. My argument is that international law is both outside and in. It is not only a foreign story but is part of our story. So those charged with relating the story of international law in Canada are best analogized to storytellers, rather than to translators. Like most storytellers, they are preoccupied with questions of identity and human social relationships. The telling of the story can build identity and social cohesion. In Canada, the story of international law is about us and about others. Our story of international law must be read with other

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2 L.L. Fuller, The Law in Quest of Itself (Chicago: Foundation Press, 1940) at 140.
“foreign” narratives. In more traditional terms, Canadian interpretation and implementation of international law builds international law even outside our borders. So international law is inside and out.

This returns us to the story of Saúl Zuratas. While studying law and ethnology in university, Saúl discovers the Indians of Amazonia. He becomes fixated with their struggle to maintain identity in the face of the economic and cultural expansionism of white Peruvian—implying Western—society. One day Saúl disappears. The story circulates that he has made aliya to Israel. However, over time it emerges that Saúl has instead gone deep into Amazonia, severing his connections to the world he knew in Lima and becoming a Machiguengas. We do not know of Saúl’s early days with the tribe, but learn that he is accepted when he discovers that he is viewed as a storyteller:

One day, as I arrived to visit a family, I heard them saying behind my back: “Here comes the storyteller. Let’s go listen to him.” It surprised me a lot. “Are you talking about me?” I asked. “Ehé, ehé, it’s you we’re talking about.” So there I was—the storyteller. I was thunderstruck. There I was. My heart was like a drum. Banging away in my chest. Boom Boom. Had I met my destiny? Perhaps.5

Telling a story is rewarding. It is rich with implications for the speaker and the listener, and for their relationship.

I. THE STORY OF INTERNATIONAL LAW IN CANADA

Who tells the story of international law in Canada? In a sense, we all do, or at least we are all potential storytellers. Every refugee claimant, every person who invokes an internationally recognized right, every lawyer who argues from international sources, every law professor who writes as an “eminent publicist” (to quote art. 38 of the Statute of International Court of Justice6), every environmentalist who speaks of sustainable development or precaution—we all tell part of the story of international law.

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5 Vargas Llosa, supra note 1 at 210.
For the sake of precision, we must focus on two formal legal actors, the legislature and the courts, in their storytelling roles. Have their stories about international law shaped our identity and helped to bind our society together? My short answer is “yes, to some extent, but they could both do better. Their stories are not as compelling as they could be.” Let me explain.

First, a few basic propositions. It is trite law that international treaties are not “self-executing” in Canada. Our dualist constitutional framework requires the transformation of treaties by legislative action within the strictures of the division of powers in sections 91 and 92 of the Constitution Act, 1867. Like most “trite” law, this brief résumé masks as much as it reveals. On the other hand, no one could ever describe the law concerning the interplay of international customary law and Canadian domestic law as “trite”. “Confused” and “incoherent” would be more apt descriptors.

A detailed analysis of the status within domestic law of treaties ratified by Canada is now required. The power to conclude treaties is vested in the Governor-in-Council as delegated authority under the Royal Prerogative. Nonetheless, as Justice Rand stated in Francis v. The Queen, in the absence of a constitutional provision declaring a treaty to be the law of the state, legislative transformation of the international obligation is required to implement the obligation within domestic law. With the continuing vitality of the Labour Conventions Case, we also know that

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9 [1956] S.C.R. 618 [hereinafter Francis]. Justice Rand was in dissent in Francis, but not on this point. See also Capital Cities Inc. v. Canada (CRTC), [1978] S.C.R. 141. But see R. v. Martin, [1994] 72 O.A.C. 316 (Ont. C.A.) at para. 4, where the Court held that a “general implementing power” could give domestic effect to an international treaty, even in the absence of express transformation. The power was granted merely “to implement an intergovernmental arrangements and commitments.”
10 See Attorney General for Canada v. Attorney General for Ontario [1937] A.C. 326 (P.C.) at 347-348 (per Lord Atkin) [hereinafter Labour Conventions Case]; see also
transformation must take place within the jurisdictional confines of the Constitution Act, 1867. Unlike in Australia, there is no independent federal treaty implementation power.11

The key question is what constitutes “transformation”? Here the story of international treaty law in Canada becomes complex, and the other formal storyteller—the courts—joins in the narrative. In a narrow sense, transformation is an explicit legislative act through which Parliament or a provincial legislature adopts the treaty obligation and implements it within Canadian law. But even with this narrow understanding, practice is diverse. A treaty text may be incorporated directly by reproducing all or part of the treaty within a statute, either in its body or as a schedule.12 Alternatively, a preambular statement may indicate that a given piece of legislation is passed to fulfill specific treaty commitments.13 Less direct is the common Canadian practice of “inferred implementation” through the enactment of new legislation or through the amendment of existing legislation.14 Whether this form of inferred implementation constitutes real “transformation” is a hard question, one that leads to considerable pressure being placed on our courts to sort out the status of the treaty commitment, an issue that gives rise to various interpretative difficulties. Even greater difficulties arise when

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12 See R. Sullivan, ed., Driedger on the Construction of Statutes, 3d ed. (Toronto: Butterworths, 1994) at 396. See, for example, the Comprehensive Nuclear Test Ban Treaty Implementation Act, S.C. 1998, c. 32 [not in force at 13.12.2000]. Even express incorporation in a statute may be read narrowly, with a court seeking the precise intention of Parliament to “transform” specific treaty provisions. In Pfizer v. The Queen, [1999] 4 F.C. 441, the Federal Court held that referential incorporation of the WTO Agreement (cast as approval of the treaty) did not constitute “transformation”. On the other hand, in R. v. Crown Zellerbach Canada Ltd., [1988] 1 S.C.R. 401, the Supreme Court relied on mere references to an international treaty to interpret the “purposes” of an Act that did not expressly transform the treaty


14 See Sullivan, supra note 12.
“transformation” is said to occur as a result of prior statutory, common law, or even administrative policy conformity with the new treaty obligation.  

 Courts have traditionally attempted to deal with the wide-ranging uncertainties of statutory transformation of treaty obligations by invoking judicially-crafted interpretative presumptions. The first presumption is that if a domestic statute is read as transforming a treaty, a court should have reference to the treaty to interpret the act, and to the international law rules of treaty interpretation to interpret the treaty. In practice, this has meant that interpretation will depend principally upon the court’s understanding of articles 31 and 32 of the Vienna Convention on the Law of Treaties. Although I commend the approach, I would caution that mere reference to the Vienna Convention rules may not provide a rich understanding of the complexity of treaty interpretation. There is simply no golden rule of treaty interpretation. In international law practice, “purposive” approaches are mixed with “plain meaning” approaches in a rather unprincipled mélange.

 Other presumptions are more important when the status of treaty transformation is less clear. Without having to opine on the precise direct effect of a given treaty within Canadian law, courts have been able to offer flexible presumptions such that in interpreting Canadian statutes one should presume that a legislature intended to act in conformity with Canada’s

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international obligations, or, alternatively phrased, that a court should strive to interpret a provision so as to be consistent with international law. The latter presumption has been widely invoked in cases under the *Canadian Charter of Rights and Freedoms*, which makes sense given that the *Charter* nowhere states expressly that it is transforming international treaty commitments. Vague presumptions are all that is available to our courts. As concerns the *Charter*, the presumption has been rephrased as a more positive obligation to use international human rights law as “guidance” in interpretation. The lead was taken by former Chief Justice Dickson who suggested that because the *Charter* accords with the contemporary spirit of the international human rights movement, international human rights law should be “relevant and persuasive” in *Charter* interpretation. The persuasiveness of international law seems especially strong in interpreting section 1 of the *Charter*, most probably because its reference to a “free and democratic society” invites international comparisons.

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19 See, for example, Daniels v. The Queen, [1968] S.C.R. 517 at 541.

20 See, for example, National Corn Growers, supra note 16; Zingre v. The Queen, [1981] 2 S.C.R. 392 at 409-410 (per Dickson J.); and Pushpanathan, supra note 16. The presumption was phrased in wide terms by Justice MacKay of the Federal Court in José Pereira E. Hijos S.A. v. Canada (Attorney General), [1997] 2 F.C. 84 at para. 20:

“In construing domestic law, whether statutory or common law, the courts will seek to avoid construction or application that would conflict with the accepted principles of international law.”


22 In *R. v. Keegstra*, [1990] 3 S.C.R. 697 at 837-838 (per McLachlin J.) [hereinafter Keegstra], even the dissenters held that section 2 (b) of the *Charter* should be interpreted “as a matter of construction” in a manner consistent with international approaches. But their concern was not to allow international law to restrict the full scope of *Charter* rights. On the latter point, see also *R. v. Cook*, [1998] 2 S.C.R. 597 at para. 147 (per Bastarache J.).


In the 1987 Labour trilogy, Chief Justice Dickson attempted to introduce a distinction between general international human rights law which served as the context for the Charter’s adoption and was therefore “relevant and persuasive” in Charter interpretation, and human rights treaties to which Canada is a party, which would serve as the benchmark for all Charter rights. The Charter should be presumed to guarantee protection “at least as great” as that afforded under Canada’s treaty obligations. The Court subsequently ignored this distinction. This is a loss, not only in Charter cases, but in all cases where international law is invoked. That part of international law that is “inside” Canada is not only persuasive, it is obligatory. When we fail to uphold our obligations, we tell a story that undermines respect for law internationally.

The interpretative presumptions articulated by our Courts have not been adequate to deal with the uncertainty caused by the practices of various legislatures and governments in treaty transformation. I do not blame the courts. How can they deal cogently with utterly inconsistent practice and even open hypocrisy? The problem is revealed by the case of treaties ratified by Canada but which remain “untransformed”—at least in explicit terms—into Canadian law. This governmental approach is especially common vis-à-vis human rights treaties. In the absence of express legislative transformations, are solemn international obligations of the Canadian government to be given no account by Canadian courts? One might be tempted to say, “Yes—that is the nature of our constitutional system”. But what if the point is put somewhat differently? Canada ratifies an international treaty on the basis of prior domestic law conformity. The Government then responds to the questioning of international treaty monitoring bodies by saying that Canada has already implemented its treaty obligations. Should courts simply defer to a subsequent government argument that the international treaty obligation has no relevance because it has not been expressly “transformed”? What of the assertion of prior compliance? What of Canada’s reputation for good faith in reporting upon implementation as an aspect of its treaty obligations? Should the government be held to its word?

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These sorts of questions must have influenced the majority judgment in *Baker v. Canada (Minister of Citizenship and Immigration)*, a controversial decision that has already generated significant debate. *Baker* involved both the statutory basis for, and the proper scope of, Ministerial discretion concerning a deportation order. Ms. Baker was an illegal immigrant who had lived in Canada, supporting herself as a nanny, since 1981. In 1992 an immigration officer ordered her deportation. Since 1981, Ms. Baker had given birth to four children in Canada. They were Canadian citizens. She also had four children in Jamaica. After the birth of her last child, Ms. Baker was diagnosed with paranoid schizophrenia. To prevent her deportation and the consequent separation from her Canadian children, for two of whom she was sole caregiver, Ms. Baker requested an exemption from the rule that one must apply for permanent residency from outside Canada. Under the *Immigration Act* and Regulations, an exception was available on humanitarian or compassionate grounds. The application was denied, and the Immigration Officer’s notes, including disparaging comments about Ms. Baker and about Canadian immigration policy, were submitted in evidence at trial.

The Supreme Court’s decision, *per* Justice L’Heureux-Dubé, was complex and wide-ranging, necessarily focussing upon process standards in administrative law. For our purposes, however, the key ruling was that even though Canada had never explicitly transformed its obligations under the United Nations *Convention on the Rights of the Child* into domestic law, an immigration official is nonetheless bound to consider the “values” expressed in that *Convention* when exercising discretion. In the *Baker* case, the *Convention*’s emphasis upon “the best interests of the child” should have weighed heavily in considering Ms. Baker’s application. Justice L’Heureux-Dubé stated, and a majority of the Court agreed, that “the values reflected in international human rights law may help inform the contextual approach to

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29 S.O.R./78-172, s. 2.1.
statutory interpretation and judicial review.”\(^{31}\) Justices Iacobucci and Cory dissented on this point, stating that the Court should go no further than to reaffirm the traditional presumption of statutory conformity with international obligations.\(^{32}\) The idea that untransformed international “values” should shape Canadian law was cause for concern, just as it was some 54 years earlier when a judge of the Ontario Supreme Court took an analogous approach in *Re Drummond Wren*,\(^{33}\) suggesting that international perspectives should shape Canadian “public policy” which in turn affect statutory interpretation. Most Canadian constitutional lawyers have treated *Re Drummond Wren* as a noble aberration. However, *Baker* may turn it into something quite different.

The Supreme Court of Canada is not alone in suggesting that values contained in untransformed treaty obligations may shape the proper interpretation of domestic law. In the equally controversial decision of *Minister of Immigration & Ethnic Affairs v. Teoh*,\(^{34}\) the Australian High Court invoked the doctrine of “legitimate expectations” to give rise to a procedural right to notice and an opportunity to present argument if a statutory decision-maker proposed to act contrary to the terms of a ratified but unimplemented treaty.\(^{35}\) Chief Justice Mason and Justice Deane held that the fact of non-transformation does not mean that ratification holds no significance for Australian law, both statutory—and with care and reticence—even common law. Their reasoning can be analogized to the doctrine of “holding out” as an element of good faith:

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\(^{31}\) *Baker*, supra note 26, at para. 70


“ratification of an international convention is not to be dismissed as a merely platitudinous or ineffectual act. Rather, it is a positive statement by the Executive to the world and to the citizens that the Executive and its agencies will act in accordance with the convention.”

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36 *Teoh, supra* note 34, at para. 34 (*per* Mason C.J. and Deane J.). It should be noted that there is considerable doubt as to the “stability” of the *Teoh* decision given changes in the composition of the High Court. See Donaghue, *supra* note 11 at 253.
The Teoh decision caused apoplexy within the Australian government, and various bills were lodged in Parliament to overturn the judgment.\(^{37}\) Such legislation was unnecessary even for those opposed to the Court’s approach in Teoh, since the Court had already provided an escape hatch for the government. A mere “Executive Statement” could oust any “legitimate expectation.” Shortly after the judgment, such a general “Executive Statement” was issued covering all ratified but unimplemented treaties. Governments are jealous of their wiggle room!

_Baker_ and Teoh are salutory challenges to governmental hypocrisy (or perhaps incompetence) in ratifying international treaties and failing to address the domestic law implications of those treaties. Viewing unratified treaties as persuasive authority in interpreting domestic statutes and in shaping administrative discretion is a healthy development. As Justice Brennan argued in the famous Australian case on aboriginal property rights, _Mabo v. Queensland_(No 2),\(^{38}\) international law can serve to provide “a basic legal environment” in which domestic law rights can be recognized. This observation is more compelling if one considers treaty commitments undertaken voluntarily by national governments.

William Schabas was right in suggesting, however, that _Baker_ was also a missed opportunity.\(^{39}\) That the opportunity was missed is not surprising, for the failure flows from the most perplexing problem facing anyone trying to understand the relationship between international law and domestic law in Canada: the effect to be given to customary international law. In _Baker_, the Supreme Court could have concluded that the “best interests of the child” test has solidified as a norm of customary international law. One would not, then, have been forced implicitly to apply an untransformed treaty rule. Instead, the Court would have had to clarify the age-old question whether international customary law forms part of the law of Canada. Back in 1972, Ronald St. J. Macdonald argued convincingly that until the confusing judgment of the Supreme Court of Canada in the _Foreign

\(^{37}\) See Heerey, _supra_ note 35 at 690.

\(^{38}\) (1992) 175 C.L.R. 1. On international law as relevant “context”, see also Schabas, _supra_ note 7 at 186 (here regarding the “context” for adoption of the _Canadian Charter of Rights and Freedoms_).

\(^{39}\) Schabas, _ibid._, at 182.
**Legations Case,** Canadian law was relatively consistent in favouring a “monist” theory under which customary law applied in Canada of its own force.

Since the **Foreign Legations Case,** Canadian Courts have vacillated on the status of customary international law in Canada. Since the advent of the **Charter,** the situation has not improved. While international human rights law has consistently been held to be relevant and persuasive, the Supreme Court has never clarified when customary international law might be compelling or even binding. One could, of course, read Justice La Forest’s reasons in **Kindler v. Canada (Minister of Justice)** as at least accepting implicitly that a customary law rule could directly shape Canadian law. He emphasized the importance of universal practice and international consensus in shaping norms that would have an impact in Canada. Although he used different words, the analysis is close to the traditional invocation of practice and *opino juris* as the measure of existence for customary law. In Justice La Forest’s view, the norm against the death penalty was not strong enough to guide domestic law—unlike norms against genocide, slavery and torture.

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40 Reference as to Powers to Levy Rates on Foreign Legations and High Commissioners’ Residences, [1943] S.C.R. 208 [hereinafter Foreign Legations Case].


44 *Ibid.,* at 833 (per La Forest J.). It should be noted that Australian courts have also been struggling with the question of customary international law’s role in the domestic legal system. See Mathew, *supra* note 35 at 194-195. In Israel, the Supreme Court has taken an expansive view of the direct operation of customary international law in Israeli law, but has reduced the effect of this approach by imposing a heavy burden to prove the existence of custom. It seems likely that the reason for this burdensome imposition is that the cases on custom have usually arisen in contexts where national security concerns are strong. See E. Benvenisti, “The Attitude of the Supreme Court of Israel Towards the Implementation of the International Law of Human Rights” in B. Conforti & F. Francioni, eds., *Enforcing International Human Rights in Domestic Courts, International Studies in Human Rights,* vol. 49 (The Hague: Martinus Nijhoff Publishers, 1997) 202 at 209-213. Within the United States legal system, customary law is applied automatically and is controlling unless displaced by domestic positive law.
Query whether or not United States v. Burns\(^ {45} \) can be read to support the emergence of a binding customary law rule against the death penalty.

In Reference re Secession of Quebec,\(^ {46} \) the Supreme Court, in answering an argument put by the amicus curiae, hinted that it would not have jurisdiction to decide questions of “pure international law.” If this means simply that customary law becomes part of “the laws of Canada” for the purposes of the Court’s jurisdiction under section 3 of the Supreme Court Act,\(^ {47} \) the observation is unobjectionable. If, on the other hand, the implication is that the Supreme Court cannot directly apply international customary law, this would be unfortunate, for the well-known reasons offered up by Lord Denning in the Trendtex case.\(^ {48} \) Given that the Supreme Court’s international law analysis in the Secession Reference failed completely to engage with the customary law on self-determination, a dualist position may unfortunately have been implicitly adopted.\(^ {49} \) In the upcoming Suresh\(^ {50} \) case, the Supreme Court will be given an opportunity to clarify their position. The Court should finally allow Canada to align itself firmly with the eminently sensible US and U.K. positions. The Court could do worse than simply reaffirming the observation of Robertson J.A., in the Federal Court of Appeal decision in Suresh:

“principles of customary international law may be recognized and applied in Canadian Courts as part of the domestic law, ... in so far as those principles do not conflict with domestic law.”\(^ {51} \)

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\(^ {45} \) [2001] 1 S.C.R. 283.

\(^ {46} \) [1998] 2 S.C.R. 217 at para. 11-12 [hereinafter Secession Reference].


\(^ {48} \) Trendtex Trading Corp. v. Central Bank of Nigeria, [1977] 1 Q.B. 529 (C.A.) (stressing (a) the need for domestic legal systems to allow changing international law to effect internal change as well; and (b) the reciprocity inherent in “comity” and its value for internationally engaged states). See also Macdonald, supra note 7 at 111.


\(^ {50} \) Suresh v. Canada (Minister of Citizenship and Immigration), 2002 SCC 1.

\(^ {51} \) Suresh v. Canada (Minister of Citizenship and Immigration), [2000] 2 F.C. 592 at 625 (C.A.) per Robertson J.A.
This statement accepts the need for automatic incorporation, but upholds the democratic accountability of domestic legislatures and courts. The opportunity for plain speaking on this thorny question was missed in Baker and should now be taken up.

II. THE POWER OF STORYTELLERS

The issue of customary international law’s status within Canadian law returns to the themes of The Storyteller. Our official storytellers have thus far failed to develop a compelling narrative. International law is both inside and outside Canadian law. The Canadian story of international law is not merely a story of “persuasive” foreign law. International law also speaks directly to Canadian law and requires it to be shaped in certain directions. International law is more than “comparative law”, because international law is partly our law. The decisions that we take in Canada, in our government policies, in our legislative acts and in our courts, contribute to the wider story of international law around the globe. The Secession Reference will contribute to the law of self-determination. Canada’s efforts to protect the arctic environment have already changed rules of territory and the law of the sea. The politically charged decision to protect straddling fish stocks by using force has arguably led to new international regulation on conservation of this increasingly scarce resource.

The process of relating international law to domestic law is not a translation of norms from outside. Rather, Canadian voices join with foreign voices, weaving an increasingly rich and multi-textured narrative of international law. Oftentimes, the story will be one of persuasion, but sometimes the story will be one of obligation—to norms that we have helped to articulate through processes of interaction and the construction of shared expectations.

52 See, for example, M. Byers, Custom, Power and the Power of Rules: International Relations and Customary International Law (Cambridge: Cambridge University Press, 1999), at 92-97.

53 The point here is descriptive, rather than normative. My own view is that Canada’s use of force to seize a Spanish trawler on the high seas was both illegal and unwise.

None of this would surprise Saúl Zuratas, a.k.a. Tasurinchi. Over time, this Machiguengas storyteller reaches into his own past as a Jew and he begins to weave together mythologies of Amazonia and the ancient Middle East. As his own acceptance into the Machiguengas is complete, he is free to allow different stories to blend together, stories from inside and outside. Ultimately, Tasurinchi blends together even the name of the creator. The great spirit of the Machiguengas becomes known in Tasurinchi’s stories, in part, as Jehova. The story of one people’s remarkable survival is linked to another people’s survival. The joining of stories is not a denial of the specificity of culture but a recognition that stories build together—protecting and reshaping cultures.

The process of Michiguengas storytelling moves the Peruvian author immeasurably, just as the story of building allegiance to international law can move us today. For ours is a story of resisting the weight of mere power, of upholding the sanctity of nature, of struggling to promote respect for all persons, of fulfilling our need to connect with one another. Remember E.M. Forster’s invocation: “only connect”. Storytelling is a tremendous gift, a gift that helps us connect. The reflections of our anonymous Peruvian author—undoubtedly close in thought to the living author, Vargas Llosa—offer fitting closure:

I was deeply moved by the thought of that being, those beings, in the unhealthy forests of eastern Cusco and Madré de Dios, making long journeys of days or weeks, bringing stories from one group of Machiguengas to another and taking away others...

... the fleeting, perhaps legendary figures of those ... [storytellers] who by occupation, out of necessity, to satisfy a human whim using the simplest, most time-hallowed of expedients, the telling of stories, were the living sap that circulated and made the Machiguengas into a society, a people of interconnected and interdependent beings.⁵⁵

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⁵⁵ Vargas Llosa, supra note 1 at 93.
From inside Canada, we can join with those outside, telling the story of international law, and helping to create a human society of interconnected and interdependent beings.
The Application of International Human Rights Law by Administrative Decision-Makers

Audrey Macklin*

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A casual survey of Canadian jurisprudence about the application of international human rights norms in domestic law will quickly reveal two tendencies: First, most of the case law emerges from the administrative realm and second, most of those administrative cases concern some aspect of immigration or refugee law. This is true not only of Canada but also of New Zealand and Australia. Significantly, all three jurisdictions are known as “countries of immigration”, and all partake broadly in the British common law tradition in respect of administrative law and the domestic incorporation of international law.1 In my remarks today, I wish to pose and reflect upon several questions:

What have the Canadian courts said thus far about the application of international human rights law in the administrative context?

• Why does migration law figure so prominently in this branch of the case law?

• What do immigration decision-makers actually do with international law?

• What does the application of international human rights law by administrative tribunals signify about the relationship between international and domestic law,

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1 The United States’ approach to both spheres of law is distinct: Though a land of immigration, its “plenary powers” doctrine has a peculiarly insulating effect on judicial scrutiny of immigration law. The constitutional structure of Government in the US also differentiates that country’s doctrine regarding domestic application of international law. For its part, the U.K. conceives of itself less as a country of immigration, which perhaps account for the relative under-representation of immigration cases in its jurisprudence.
and between the various institutional actors who participate in this conversation?

I. JUDICIAL PRONOUNCEMENTS ON THE DOMESTIC APPLICATION OF INTERNATIONAL LAW

I leave the full ventilation of this topic to the speakers on another panel devoted specifically to this subject, and confine myself to a few brief comments. Common law orthodoxy dictates that international law does not “enter” domestic law unless the law in question forms part of customary law, or is expressly incorporated into the domestic legal system through an act of the legislator. In Canada (unlike England), the force of the former proposition is still contested. In any event, the status of an international norm as “customary law” depends on general practice and opinio juris, (the acceptance of the norm as law). Once Canada signs and ratifies a treaty or international convention, Canada becomes bound under international law by the obligations contained therein. The international community’s ability and willingness to enforce compliance is famously compromised, but international obligations are enforceable before domestic courts only if incorporated through an Act of Parliament.

These formal requirements generate thick barriers impeding the direct injection of international legal obligations into the corpus of Canadian law. Over the years, however, Canadian courts have opted to enfold international law into the domestic sphere on a more tentative, selective basis. The effect is to preserve enough judicial space to invoke international law when it is instrumentally useful, while leaving enough “wiggle room” to avoid being bound by it when it is not. This is particularly true in relation to Charter interpretation, as typified by the remarks of the late Chief Justice Dickson: “[T]hough 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.” ² In virtually the same breath, Dickson C.J. expressed the view 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.\(^3\)

I suggest that the subtext of this presumption is that the Charter was partly inspired by, and drafted in the shadow of, Canada’s extant human rights obligations. Perhaps more contentiously, I also suspect that Dickson C.J.’s presumption reflects a certain confidence that Canada’s status as a Western democratic state puts it at the vanguard of human rights protection, such that it has nothing to fear [and perhaps little to gain] from the application of [less sophisticated] international standards. Given the paucity of jurisprudence at the international level that interprets the provisions of various conventions, the abstract expression of the norms provides relatively little guidance to their application in specific cases anyway.

In *Baker,*\(^4\) L’Heureux-Dubé appears to extend the role of international law in Charter interpretation to cover the exercise of statutory discretion, specifically the power to grant “humanitarian and compassionate” relief to an undocumented migrant living in Canada.\(^5\) At issue was the impact upon the exercise of discretion by the *Convention on the Rights of the Child* (CRC), and particularly the provision making the best interests of the child “a primary consideration” in decisions by the state that affect children. While conceding that the CRC, which Canada had signed and ratified, was not binding unless and until incorporated, “the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review.”\(^6\)

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\(^3\) *Ibid.*, See also *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 38 [hereinafter *Slaight*]. While Dickson C.J. was writing in dissent in *PSERA*, his dicta regarding international law were incorporated into the majority judgment in *Slaight*.

\(^4\) *Baker v. Canada (MCI)*, [1999] 2 S.C.R. 817 [hereinafter *Baker*]. The facts of the case are well known: Mavis Baker was a Jamaican citizen who lived in Canada for 12 years (1981-1992) as undocumented live-in domestic worker. During that time, she bore four children. After the birth of her last child, she developed post-partum psychosis, applied for welfare and was ordered deported. In 1993, she applied for permanent residence under the humanitarian and compassionate (H&C) provision of the *Immigration Act*, and was rejected in 1994. The evidence submitted on her behalf indicated that she was making progress in terms of her mental health, and further that both she and her Canadian-born children would suffer if she was separated from them.


\(^6\) *Baker, supra* at para. 70.
In reference to the CRC and the cast at bar, L’Heureux-Dubé concludes that:

“The principles of the Convention and other international instruments place special importance on protections for children and childhood, and on particular consideration of their interests, needs, and rights. They help show the values that are central in determining whether this decision was a reasonable exercise of the H&C power.”

Of course, it has not escaped notice that L’Heureux-Dubé deliberately stops short of adopting the “primary consideration” standard imposed by the CRC, and uses the phrase “important factor” instead, thereby emphasizing that the CRC was merely influential, not binding.

If I have correctly described the relationship between Baker and preceding Charter cases, one may well wonder why the concurring judges in Baker objected to using international law to interpret the grant of discretionary power administrative law when they had no difficulty using it to interpret the Charter. David Dyzenhaus suggests that Iacobucci and Cory JJ.’s dissent on this point may have been driven by a desire to contain the Charter’s realignment of the doctrine of parliamentary supremacy and separation of powers between the executive, the legislature and the judiciary.

I am persuaded by this explanation, and wish to supplement it with a minor point: Not long after Slaight, the Supreme Court of Canada has developed a jurisdictional mechanism to control administrative decision-makers’ ability consider and apply the Charter. On my reading of the test laid out in Cuddy Chicks, I doubt that the Immigration officers involved in the Baker case would possess the requisite jurisdiction to apply the Charter. Yet L’Heureux-Dubé’s injunction that the exercise of discretion must be exercised “in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the Charter [emphasis added]”, implies a blurring of those jurisdictional boundaries; the insertion of international human rights law into the exercise of discretion by administrative decision-makers effectively

7 Ibid., para. 71.
8 D. Dyzenhaus, Baker and the Unwritten Constitution (forthcoming).
leapfrogs over the jurisdictional hurdle. By emphasizing that *Baker* was not a Charter case, and that unincorporated international human rights law can only aid Charter (as opposed to statutory) interpretation, the concurring judges preserve the courts’ near-monopoly over the meaning and scope of human rights norms. Obviously, the courts must contend with the reality of federal and provincial human rights statutes, but I would argue that the very strict standard of review applied to human rights tribunals by the courts evinces the profound judicial discomfort with ceding interpretive authority over human rights to administrative actors.

**II. CANADIAN MIGRATION LAW AND INTERNATIONAL HUMAN RIGHTS**

Why do so many of the cases raising international human rights law before the courts arise in the field of immigration and refugee law? One reason may be that immigration and refugee lawyers are more likely than other lawyers to raise the arguments. I do not mean this flippantly: The very nature of immigration and refugee law enlarges one’s field of vision to the international realm. Over the years, a small but dedicated group of immigration and refugee lawyers have educated themselves about Canada’s international human rights undertakings. Where Canadian courts have rendered adverse decisions, these lawyers have not hesitated to approach the UN Human Rights Committee, the Organization of American States human rights tribunal, and other transnational bodies, to lodge complaints against Canada. Some of these lawyers have also established links with advocates in other jurisdictions, and are able to access jurisprudence from other supra-national jurisdictions, such as the European Court of Human Rights.

There is another reason why international human rights law figures prominently in the litigation strategy of immigration advocates, and it is this: *Chiarelli*. Critics of the Charter, and opponents of immigration, are fond of citing *Singh* as evidence of the broad and (in their view illegitimate) protection afforded to non-citizens under the Charter. Indeed, the current hysterical demands from some quarters to invoke section 33 to override the Charter in its application to non-citizens emerges from this understanding. *Singh* allows that the Charter applies to

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9 *Chiarelli v. Canada (Minister of Justice)*, [1992] 1 S.C.R. 711 [hereinafter *Chiarelli*].
all those present on Canadian soil, and that exposing a refugee to the risk of persecution by the country of nationality violates security of the person. In Chiarelli, however, the Court eviscerated much of Singh’s potential by ruling that non-citizens (except refugees) possessed virtually no cognizable life, liberty, or security of the person interest that would be violated by their removal from Canada. As Sopinka J. baldly stated, “[t]he most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country”. From this re-inscription of the right/privilege distinction (derived from common law and Bill of Rights jurisprudence), it is a short step to concluding that the principles of fundamental justice require very little of state actors when deciding to remove non-citizens, unless the person in question is at risk of death or [perhaps] torture.\(^\text{10}\)

To appreciate the sweep of Chiarelli, it is useful to compare Mr. Chiarelli to Ms. Baker: Mr. Chiarelli immigrated with his family to Canada as an adolescent, and held the legal status of permanent resident. Ms. Baker was an undocumented migrant who had no legal status in Canada. If taking away Mr. Chiarelli’s permanent resident status and deporting him on account of criminality did not deprive him of life, liberty and security of the person under section 7 of the Charter (because he had no unqualified right to enter and remain), it is difficult to see how Ms. Baker would have fared any better under the Charter. After all, she had no right (qualified or otherwise) to be in Canada. No wonder Ms. Baker’s counsel relied so heavily on international human rights law, and no wonder the Supreme Court of Canada was anxious to avoid deciding the case on Charter grounds.

Despite media rhetoric to the contrary, the Charter is a national constitutional document, rooted in a historical liberal tradition where membership in that nation-state (as expressed in the juridical status of citizenship) is the pre-requisite to the enjoyment of rights and liberties. Of course, the Charter is also the product of post-War human rights consciousness, where entitlement to fundamental rights is predicated on the moral equality and dignity of all human beings. Cases such as Singh, Andrews, Chiarelli, Dehghani, etc. express the tension between these two visions. At the moment, the vision of Chiarelli dominates within Charter jurisprudence. The fact that Ms. Baker’s interests as an undocumented migrant attracted more recognition under administrative law than did Mr.

\(^{10}\) This latter exception remains to be resolved in Suresh.
Chiarelli’s interests as a permanent resident under the Charter reveals a lurking paradox which the courts will not be able to avoid indefinitely. It also underscores why one might prefer direct recourse to international human rights law domestic cases involving the rights of non-citizens, or relationships between citizens and non-citizens. In important ways, non-citizens remain foreigners to the Charter, whether by virtue of de jure or de facto exclusion from the ambit of protection; conversely, non-citizens are full members of the human community defined under international human rights law, and entitled to the equal protection of those norms.

III. INTERNATIONAL LAW BEFORE THE TRIBUNAL

Members of the Convention Refugee Determination Division (CRDD) of the Immigration and Refugee Board regularly and unselfconsciously rely upon the provisions of international human rights conventions. The fact that the refugee definition and exclusion provisions (Articles E & F) from the UN Convention Relating to the Status of Refugees have been integrated virtually verbatim into the text of Canada’s Immigration Act provides a rare and unambiguous fusion of the “here” of domestic law with the “there” of international law. I believe this phenomenon generates an openness on the part of the IRB to considering international sources of law, a practice which is encouraged in various training manuals and guidelines issued by the IRB, such as the Guidelines on Child Refugee Claimants: Procedural and Evidentiary Issues, and the Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution.

With few exceptions, however, decision-makers invoke human rights instruments in an ad hoc manner, and without grounding their reliance on any theory explaining the relevance of international law. Having said that, it should be noted that in the overwhelming majority of cases, decision-makers cite human rights contained in international conventions in order to determine whether what the claimant fears in the country of origin constitutes persecution. The underlying principle is that persecution subsists, at a minimum, in violations of the fundamental

rights contained in the International Bill of Rights\textsuperscript{12} and other prominent human rights instruments, such as the *Convention on the Rights of the Child, Convention Against Torture, Convention on the Elimination of All Forms of Discrimination Against Women, Convention on the Elimination of All Forms of Racial Discrimination*, etc.

The singular feature of this use of international law is that the human rights norms are deployed by a domestic tribunal of one state in the service of judging the practices of another state. Details regarding whether the state of nationality has signed and ratified the instrument tend not to attract discussion, and the binding nature of the instruments is taken for granted. This is perhaps explicable if one presumes that the various norms have attained the status of customary international law, but I have located only one case\textsuperscript{13} where the tribunal explicitly predicated their application of the International Bill of Rights to Ghana upon the claim that the instruments “are generally considered to be part of customary International Law, and thus binding upon both Canada and Ghana.” Apart from this, CRDD panels simply cite international human rights treaties without asking whether and to what extent the countries of nationality are bound by them. Alternatively, in circumstances where the country of nationality is a party to the relevant convention, one could conceive of refugee determination as the closest that individual states party come to adjudicating and providing a remedy for other states’ breaches of international human rights obligations.

Tribunals occasionally rely upon international law to exclude certain refugee claimants from the ambit of protection. The exclusion provisions under Article 1F of the *Refugee Convention*, reproduced in an Appendix to the *Immigration Act*, deny refugee protection to those who, *inter alia*, have committed a crime against peace, war crimes, crimes against humanity, or acts “contrary to the purposes and principles of the United Nations.” In *Pushpanathan v. Canada (MEI)*,\textsuperscript{14} the Supreme Court of Canada overruled a determination by a CRDD tribunal that drug trafficking within Canada constituted an act contrary to the purposes and principles of the United Nations.

\textsuperscript{12} The *Universal Declaration of Human Rights, The International Covenant on Civil and Political Rights, the International Covenant on Social Economic and Cultural Rights*.

\textsuperscript{13} *RSF (Re)* [1997] CRDD No. 78, No M95-13161 (Didier, Prevost).

\textsuperscript{14} [1998] 1 S.C.R. 982 [hereinafter *Pushpanathan*].
A reading of the judgment most favourable to the domestic application of international human rights would acknowledge the Supreme Court of Canada’s reluctance\textsuperscript{15} to let a tribunal curtail Canada’s international human rights obligation (not to \textit{refoule} a refugee) by adopting a broad and self-serving interpretation of the purposes and principles of the United Nations. In delivering the majority judgment, Bastarache J. concluded that:

“in the absence of clear indications that the international community recognizes drug trafficking as a sufficiently serious and sustained violation of fundamental human rights as to amount to persecution, either through specific designation as an act contrary to the purposes and principles of the United Nations, […] or through international instruments which otherwise indicate that trafficking is a serious violation of fundamental human rights […], individuals should not be deprived of the essential protections of contained in the [Refugee] Convention for having committed those acts.”\textsuperscript{16}

If the traditional theory of incorporation imposes a heavy burden on those arguing that international law binds domestic tribunals, at least the approach in \textit{Pushpanathan} imposes an analogous burden on domestic tribunals seeking to invoke international law in aid of limiting extant human rights obligations: the international community must clearly and unambiguously adopt the alleged policy or principle before a domestic tribunal can rely upon it.

Refugee law is unique insofar as the international refugee definition is adopted and applied in Canadian law, with the effect of compromising the putative right of states to admit or exclude whomever they please. Perhaps still smarting from this concession, most states (including Canada) resist any further incursion by international law across legal borders. Thus, Immigration officers (such as those in \textit{Baker}), and the Immigration Appeal Division (which hears appeals concerning family sponsorship, loss of permanent resident status and deportation), do not

\textsuperscript{15} This reluctance is manifested both substantively in terms of the result reached by the Supreme Court of Canada, but also methodologically through the Court’s adoption of a strict standard of review (correctness) against which the CRDD’s interpretation of article 1F(c) would be assessed.

\textsuperscript{16} \textit{Pushpanathan, supra} note 14.
routinely consider international law. Their respective institutional cultures (unlike the refugee division) neither facilitate nor particularly encourage the internalization of international law; I understand (anecdotally), that Baker has had little effect on how Immigration officers actually think about the best interests of children, though it may have affected how they phrase their decisions.

CONCLUSION: LOCALIZATION AND LAW

The picture I’ve sketched here takes as a given the unidirectional flow of law from the global to the local level. What strikes me in attempting to address this topic is the juxtaposition of the esoteric quality ascribed to international law, with the prosaic—dare I say parochial—character of domestic administrative bodies, also known by the unflattering label “inferior tribunals”. Yet this picture conveys a misleading and simplistic set of relationships by failing to acknowledge the concurrent processes of transmission from the domestic to the international and the web of emerging relationships shaping the which are constantly evolving and shaping both the international and the domestic legal discourse. I wish to provide two examples that give meaning to Stephen Toope’s assertion that “in this in-between time, international law is both ‘foreign’ and ‘part of us’”17. While Toope focuses on how the Supreme Court of Canada “translates external norms […] by participating in the creation and re-creation of norms that shape our emerging society,”18 my examples are drawn from refugee law.

In the late 1980s, the Executive Committee of the United Nations High Commissioner for Refugees [hereinafter UNHCR] endorsed an interpretation of the refugee definition that recognized women’s refusal to abide by certain socially enforced norms of sex-role behaviour as persecution on account of membership in a particular social group. In 1993, the Canada’s Immigration and Refugee Board enacted the Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution, which have since been revised. These guidelines have served as a template and a catalyst for other national jurisdictions to adopt locally viable guidelines or at least to take more seriously gender-related refugee

18 Ibid., at 540-541.
claims. Indeed, the phenomenon provides a concrete example of how, in Karen Knop’s words, “we might value the hybridity of domestic decisions as a source of alternatives that helps other domestic courts to particularize international law in a way that makes sense to them.” Refugee law is ideally suited to this transnational translation of norms because all States Party to the Refugee Convention submit the identical refugee definition to local interpreters.

Meanwhile, the UNHCR has responded to gender persecution initiatives at the domestic level by elaborating upon its own work in this area, and other UN bodies (including the Special Rapporteur on Violence Against Women) have provided both empirical and political support for the recognition of gender-based persecution within and beyond the refugee domain. The linkages between these developments in the refugee field and in the international prosecution of war crimes, in combating trafficking, and in other domains has contributed to the overall development of transnational and domestic initiatives around gender related persecution, some of them legal. These conversations occur within and between national jurisdictions, and between national and transnational jurisdictions, and manifest in a concrete way the interactive process which Toope and others describe.

The creation of an International Association of Refugee Law Judges [hereinafter IARLJ] has furnished an institutional framework within which many of the conversations can take place. The ensuing training, debate, and exchange of ideas seems to actualize Anne-Marie Slaughter’s model of transgovernmentalism. Slaughter speaks of the emergence of “a distinctive mode of global governance: horizontal rather than vertical, composed of national government officials rather than international bureaucrats, decentralized and informal rather than organized and rigid.” In a field such as immigration and refugee law, where border-policing in the “national interest” constantly threatens to overwhelm the international obligation to admit refugees, forging interpretive communities across borders is all the more crucial.

19 Knop, supra note 11 at 533.
20 Quoted from Knop, supra note 11 at 519.
INTERNATIONAL LAW WAS ORIGINALLY CONCEIVED OF as a law of nations. It had very little to do historically with citizens or citizenship or the common people at all. There was no room at all for citizen participation in international law, and this is still a problem, although things have changed a lot over the years. People occasionally ask international lawyers, “Can I take a case before the International Court of Justice?” We patiently explain that unlike most courts that people are used to in the domestic context, no individual or citizen can ever take a case before the International Court of Justice. It is a court for states, not individuals. Yet to answer that international law is a law of states is a gross oversimplification. Citizens participate in international law in a myriad of ways. The story of their growing involvement in international law is one of the great legal stories of the past half-century.

Probably we could trace this back to the Charter of the United Nations,1 the great treaty of our age, establishing the United Nations and establishing its operations. It begins in its preamble with the words “we the peoples.” These words reflect an enormous popular participation in the international law making that led to the creation of the United Nations in June 1945. Important aspects of the emerging human rights context associated with the United Nations at the time was President Franklin D.

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Roosevelt’s famous “four freedoms” speech, in 1941, and the Atlantic Charter, signed by Roosevelt and Churchill on board a ship just off the coast of Newfoundland.2

Citizen participation became still more significant with the Universal Declaration of Human Rights in 1948 [hereinafter Declaration], to which several non-governmental organizations (NGOs) contributed in a number of significant ways. They submitted a number of the initial drafts that assisted McGill University law professor John P. Humphrey, who acted as secretary during the drafting process, in preparing his initial version of the Declaration. NGOs were also active during the drafting process, lobbying delegates of the Commission on Human Rights and the Third Committee of the General Assembly, struggling to ensure that what would be called a “common standard of achievement for all peoples and all nations” truly reflected the aspirations of citizens rather than the selfish concerns of states.3

We speak increasingly of the role of “civil society” in international law. It seems to me that it is not far from being synonymous with the concept of citizenship, at least as it is meant in the title of this conference. Civil society is certainly, in international law, the term that we use more and more to describe how citizens or the general public participate in international law. Recent examples would be the role of NGOs as organs of civil society in the drafting of the Ottawa Treaty on anti-personnel mines.4 Indeed, they were honoured for their contribution with the Nobel Peace Prize in 1998.

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2 For a contemporary reference to these sources and the human rights context of the Charter of the United Nations, supra note 1, see one of the first Canadian judgments in the field of human rights, Re Drummond Wren, [1945] 4 D.L.R. 674, [1945] O.R. 778 (H.C.).


A few minutes ago my colleague Stephen Toope referred to the *Rome Statute of the International Criminal Court*. He added, “if it ever comes into force”, which is a little bit too negative. It is a certainty that the *Rome Statute* will come into force, perhaps by the end of this year; and if not by the end of this year, early in the year 2002. It requires sixty ratifications to come into force. Canada was the fourteenth to ratify and we ratified in July 2000. That was fifteen months ago. There are now forty-two ratifications. We have had twenty-eight ratifications in the last fifteen months and we need eighteen more. By all counts that means it is going to happen very soon. The impetus for the adoption and subsequent ratification of the *Rome Statute* is largely due to civil society, to NGOs, to the citizen. This is recognized in all of the literature on the subject, it has been noted by journalists, and it is conceded, sometimes reluctantly, by governments. Moreover, when the court is set up it will also have room for citizenship involvement because it provides for the possibility of citizens making complaints to the court, helping to initiate prosecutions, and actually contributing to the proceedings to the extent that they are victims of atrocities over which the court will have jurisdiction.

The title of this session is Canadians as Citizens in the International Community, and any number of them could be mentioned. Let me just refer to two of them, although I could mention many. The great John P. Humphrey, one of Stephen Toope’s distinguished predecessors as Dean of the McGill University Law Faculty—not his immediate predecessor, but way back about 1945—was of course the author of the very first draft of the *Universal Declaration of Human Rights* in 1947. Humphrey took various national bills of rights, together with proposals coming from the emerging NGOs community, and made a several-hundred page long compilation of fundamental rights. Out of this,

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7 See, for example, *Rome Statute*, *supra* note 5, arts. 15(2), 44(4); *Draft Rules of Procedure and Evidence*, UN Doc. PCNICC/2000/INF/3/Add.1, rules 17(2)(a)(v), 18(e), 104(2).
he prepared a forty-eight article synthesis that was used, subsequently, by Eleanor Roosevelt, René Cassin and other members of the Commission of Human Rights in fine tuning the text. Philippe Kirsch was formerly legal advisor to the Department of Foreign Affairs, and may not yet be as much of a household name as John Humphrey. Unlike Humphrey, we haven’t made a stamp in his honour, not yet at any rate. Ambassador Kirsch was chairman of the 1998 Rome Conference that adopted the Statute of the International Criminal Court. Since then, he has presided over the complex deliberations involved in establishing the new institution, which is arguably the most important international organization to be created since the founding of the United Nations in 1945.

Let me turn now specifically to administrative justice and how international law is relevant to administrative justice. Professor Toope described the operative principles and made the very interesting and useful distinction between treaties which bind Canada and other sources of international law. He cited the trilogy of decisions on the right to strike, issued by the Supreme Court of Canada in 1987. In one of the three rulings, Chief Justice Brian Dickson explained the basis for the use of international law in the interpretation of the Canadian Charter of Rights and Freedoms. I think that Stephen was actually Chief Justice Dickson’s law clerk when those reasons were drafted. We might even sense his personal influence in the words. I think his fingerprints are on that judgment somehow.

Chief Justice Dickson’s dissent—it might be better to describe the relevant portion of the judgment as obiter, and none of the other judges disagreed with his remarks in this area—made this distinction between binding international law and non-binding international law. The first category, the really blue ribbon category, consisted of binding international law. More specifically, he meant international human rights.

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treaties that had been ratified or acceded to by Canada, such as the *International Covenant on Civil and Political Rights*\(^{11}\) and the *International Covenant on Economic, Social and Cultural Rights*.\(^{12}\) The second category, which was indeed a secondary category, consisted of international human rights norms that do not impose strict legal obligations on Canada. A good example here would be the *European Convention on Human Rights*,\(^{13}\) which can only bind members of the Council of Europe. For obvious reasons, Canada will never be a full member of that regional organization. But non-binding instruments also include a range of declarations, standards, principles and so on that international lawyers often refer to as “soft law.”

According to Chief Justice Dickson, the *Canadian Charter* should necessarily be interpreted in a manner consistent with these international obligations:

> “Canada has thus obliged itself internationally to ensure within its borders the protection of certain fundamental rights and freedoms which are also contained in the Charter. The general principles of constitutional interpretation require that these international obligations be a relevant and persuasive factor in *Charter* interpretation. As this Court stated in *R. v. Big M Drug Mart Ltd.*, [1984] 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.”\(^{14}\)

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\(^{14}\) *Re Public Service Employee Relations Act*, supra note 9 at 348.
I agree with Professor Toope in saying that that these remarks by Chief Justice Dickson have, by and large, been neglected in subsequent Charter jurisprudence. The words have been cited occasionally,15 but the interpretative approach, by which ratified treaties are accorded a special status, has little or no echo in Canadian jurisprudence. Certainly, judges have shown no readiness to read rights into the Charter simply because they are recognized in an international legal instrument that binds Canada, unless of course there is some very significant and credible “hook” created by an existing provision.

Non-binding legal instruments, said the Chief Justice, may be relevant and persuasive aids to interpretation: “...the similarity between the policies and provisions of the Charter and those of international human rights documents attaches considerable relevance to interpretations of those documents by adjudicative bodies, in much the same way that decisions of the United States courts under the Bill of Rights, or decisions of the courts of other jurisdictions are relevant and may be persuasive.”16 In effect—and the reference to the United States Bill of Rights tips us off here—Chief Justice Dickson was telling us to apply international law as a particularly compelling variety of comparative law.

In my view, far richer material, from the standpoint of international law, is to be found in this second category, which Chief Justice Dickson had actually given a subordinate role. It is this second limb of the Dickson approach that has found genuine resonance in Canadian law, and not just with respect to the Canadian Charter. After


16 Re Public Service Employee Relations Act, supra note 9.
all, there is no particular reason to distinguish between the Charter and other bodies of Canadian law with respect to the relevance of comparative law. The foreign or international comparative source must of course demonstrate some intrinsic relevance for it to be of interest to the judge. The fact that similar institutions to our own, in countries with similar legal institutions, have addressed similar legal problems, should be enough to interest the Canadian judge.

Perhaps the principal reason why Canadian case law has turned to the non-binding law, rather than the binding law, is because there are no hassles about the technical application of public international law. Conventional or treaty law is not directly applicable before the courts in a dualist legal system like that of Canada. The executive cannot usurp the role of the legislature by making international commitments and then requiring that the courts enforce them. But the common law has long recognized an interpretative presumption by which statutes should be construed, in case of ambiguity, in a manner consistent with the country’s international obligations.

Most of this has remained highly theoretical, and until the coming into force of the Canadian Charter there was precious little international law before the courts. Since April 1982, Canadian judges have found international law to be a fertile reference, because it helps them to construe and apply the Charter. Concepts like freedom of expression, equality, and limitations in a free and democratic society, resonate throughout the many sources of international human rights law. In the early 1980s, some legal scholars attempted to argue that international human rights law might actually bind the courts, and Chief Justice Dickson’s first category was a cautious and compromising nod in that direction. But ultimately, whether or not the international legal source is


actually binding upon Canada has proven to be an issue of little or no significance.

In a way, the two categories in Chief Justice Dickson’s “right to strike” opinion reflect the distinction that international lawyers make between “hard law” and “soft law.” The “hard law” means that the Canadian Charter has to be applied in a manner that is “just as great” (to use Chief Justice Dickson’s words) as what is provided for by in similar provisions of the “hard law”, that is, the treaties that Canada has ratified. But in my view, the “soft law” is a lot more interesting. It is not only potentially more helpful to judges and litigators in their application of the Charter, it provides much greater potential for growth and evolution. “Soft law” is not binding, in much the same way as the second category identified by Chief Justice Dickson is not binding. But, as the late Chief Justice pointed out, it is not irrelevant either. And we avoid all of the complex technical arguments that seem to excite law professors but also to terrify judges and lawyers.

In the international sphere, tribunals regularly make use of non-binding or soft law in order to apply “hard” provisions. For example, the International Criminal Tribunal for the former Yugoslavia regularly refers to the Rome Statute of the International Criminal Court, even though the instrument is not yet in force. It is an authoritative statement of the views of the international community about the scope of international criminal law. The judges are asking, for example, “what are the defences available to the defendant in an international prosecution for crimes against humanity?” There is an enumeration of them together with detailed definitions in the Rome Statute, whereas there is next to nothing on the subject in the Statute of the International Criminal Tribunal for the Former Yugoslavia.

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21 Prosecutor v. Tadic (1998), Case No IT-94-1-A (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber), Decision on Appellant’s Motion for the Extension of the Time-Limit and Admission of Additional Evidence; Prosecutor v. Delalic et al. (1998), Case No IT-96-21-T (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber); Prosecutor v. Kordic & Cerkez (1999), Case No IT-95-14/2-PT (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber), Decision on Joint Defence Motion to Dismiss the Amended Indictment for Lack of Jurisdiction based on the Limited Jurisdictional Reach of Articles 2 and 3; Tribunal Prosecutor v. Kordic & Cerkez (2001), Case No IT-95-14/2-T (International Criminal for the Former Yugoslavia, Trial Chamber).
The United Nations Human Rights Committee, which applies the *International Covenant on Civil and Political Rights*, often uses a “soft law” instrument, the *Standard Minimum Rules for the Treatment of Prisoners*. The elaborate text of the *Standard Minimum Rules*, which are merely a resolution adopted by the United Nations Economic and Social Council, assists the Committee in applying article 10 of the Covenant, which governs conditions of detention.

I am not without examples of the use of “soft law” by Canadian courts and tribunals. The *Standard Minimum Rules for the Treatment of Prisoners* have been consulted by Canadian judges in the interpretation of section 12 of the *Charter* in a case dealing with prison conditions. Judge Michèle Rivet, who is president of the Quebec Human Rights Tribunal, regularly uses “soft law” instruments such as documents of the European Union, in order to develop concepts relating to discrimination and harassment. The Supreme Court of Canada has also looked to European Union documents for guidance in a similar context.

An excellent recent example of this relationship between hard and soft law, and the relative importance of the two categories in Canadian law, can be seen in this February’s celebrated death penalty case, *Burns and Rafay*. The Supreme Court of Canada was in a sense revisiting two judgments of a decade earlier, *Kindler* and *Ng*, in which it refused to intervene in order to prevent the Minister of Justice from extraditing to the United States without assurances that the death penalty would not be imposed. A big part of the argument was that the *Charter* would be infringed not only by the death penalty itself, but also by the lengthy wait for execution that seems an inevitably feature of capital punishment

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22 UN Doc. E/3048 (1957).
practice within the United States. The authority for treating the “death row phenomenon” as being contrary to the prohibition of cruel and unusual punishment was a 1989 judgment of the European Court of Human Rights. But in Kindler and Ng the majority of the Supreme Court of Canada refused to follow the European Court precedent.

Over the ten years that followed, the Court realized that it was out of step with similar institutions, like the South African Constitutional Court and the Judicial Committee of the Privy Council. When a new case presented itself, the Court jumped at the chance to revise its approach. Notably, this time it endorsed the European Court jurisprudence, which is clearly within Chief Justice Dickson’s second category. But what is quite astonishing is that the Supreme Court never even mentioned the case law of the United Nations Human Rights Committee. While its decisions are not binding in Canada, the Human Rights Committee is the authoritative interpreter of an instrument to which Canada is bound, the International Covenant on Civil and Political Rights. Loo, the Human Rights Committee has consistently refused to recognize the death row phenomenon. If the Department of Justice had been doing its homework, it might have insisted upon this point in oral argument before the court.

So that faced with a conflict in international authorities, the Supreme Court of Canada opted for the one that was clearly “soft” rather than the one that was “semi-hard”. I think Burns and Rafay proves my point that the first category of Chief Justice Dickson has not proven to be significant, and it is in the second category that the interesting things happen. Indeed, over the past twenty years or so, the Supreme Court of Canada has frequently relied upon case law of the European Court and Commission of Human Rights, while generally ignoring that of the body with which Canada is actually related, in a legal sense, namely the Human Rights Committee.

The Supreme Court’s capital punishment cases are really administrative law cases, in that they deal with the use of ministerial discretion in authorizing extradition without assurances that the death penalty will not be imposed. “Soft law” provides administrative decision-

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makers with a rich reservoir of material that can inspire them in their work. For Chief Justice Dickson, the second category provided “relevant and persuasive” authority. It is almost an oxymoron to talk about relevant and persuasive authority, because if it is only relevant and persuasive, maybe it is not authority. That is part of the ambiguity of what “soft law” is all about. I suppose that administrative law is the mother of all “soft law.”

I have explained why the approach to international law in Canada has turned out the way it has, but I may not have been clear enough about my view that this has probably been a desirable development. The danger with an approach that insists upon binding international legal instruments and technical rules of application is that it may ultimately discourage the resort to non-binding sources, used in a sense as comparative law. Let me give an example from my new home, Ireland, about some of the problems with the “hard law” approach. Like Canada, of course, Ireland is both a common law system and a dualist system. International law is only a part of the law of Ireland if it has been implemented by legislation, subject to all of the caveats that my colleagues this morning made in their presentations. Ireland went just a little bit further in its Constitution because there is a provision that says international law is only part of the law of Ireland if it has been implemented by legislation.32 In a dualist system of law you don’t really need such a provision. We don’t have one in Canada, and yet our courts apply the same rule. Unfortunately, because this is in the Constitution, whenever we go before an Irish judge and say, “Justice, would you look at international law?”, the tendency has been to say “well no, I can’t look at international law. Don’t talk to me about international law. I don’t want to know about international law unless it has been implemented by legislation.”

I fear that new legislation pending in Ireland is about to make matters even worse. Ireland is the only country in the Council of Europe not to have legislation implementing the European Convention of Human Rights. There is great pressure to do so, and it is likely that quite soon the Convention will become part of Irish statute law, in much the same way

as the United Kingdom has introduced the *European Convention* into its domestic law. This is half a loaf, as far as implementing human rights norms are concerned, and we in Canada will well remember the disappointing results of the old *Canadian Bill of Rights*, which has many similarities with the British and Irish legislation. Isn’t that why we have a *Charter*? My real fear, though, is that Irish judges will now agree to consider the *European Convention*, precisely because the legislature has told them they should do this, but continue in their indifference to all other sources of international human rights law.

In the past, some Canadian decisions would have shared this hostility to international law. If it is not implemented by legislation, it is just not relevant, they would say. Fortunately, we haven’t taken that route in Canada. But we are still troubled by the distinctions that lurked within Chief Justice Dickson’s dissent in the “right to strike” trilogy. We still ask: Is this an international obligation that binds Canada? Has it been implemented by legislation? Is it binding law or non-binding law? We get a lot of these questions in the dissent in the *Baker* case. It is clear that the Supreme Court of Canada remains troubled by these issues.

We have already been over what the *Baker* case was about in earlier presentations today. It was a case involving the use of administrative discretion in whether or not to expel a Jamaican woman with Canadian-born children. The issue was whether administrative discretion should be guided by an international law obligation that now binds Canada, but that has not yet been implemented in Canadian legislation. Specifically, the obligation is found in article 3(1) of the *Convention on the Rights of the Child*: “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.” Justices Cory and Iacobucci said that requiring an administrative decision-maker to apply this provision would be to usurp the prerogatives of Parliament. In effect, the Minister of Foreign Affairs, who had ratified the *Convention on the Rights of the Child* at the end of 1991, would be doing indirectly what he or she cannot do directly, and that is to change the law within Canada.

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The Irish judges tell us the same thing whenever we try and argue international law before the Irish courts. Before Baker, I would have thought that this argument had been largely laid to rest, but it is obviously still alive and well in spirit and philosophy.

The “soft law” or comparative law approach is one of the ways to get at the obsessions with parliamentary sovereignty that we confront in the dissent in Baker, and that may underlie some of the hesitations that judges have with respect to international law sources in general. But there is another angle to this that I would like to develop, and it concerns a body of international law that has been largely neglected, at least by national courts. Besides treaty law, a second major source of international norms is what we call customary law. According to the recognized definition, found in article 38 of the Statute of the International Court of Justice, international custom is established by “evidence of a general practice accepted as law.” There are references to customary law in the new Crimes Against Humanity and War Crimes Act, which came into force in 2000. Courts may prosecute persons charged with these crimes for acts committed prior to its proclamation, to the extent that the acts were criminal under customary international law.

Customary international law is “the law of the land”, subject of course to the right of the legislature to override it. This means that it is directly applicable by Canadian courts and tribunals. Unlike treaty law, no legislative intervention or implementation is required. Instead of an unproductive, and ultimately frustrating, debate about the domestic legal effect of ratified treaties in Baker, the Justices of the Supreme Court of Canada might instead have asked whether the “best interests of the child” standard is part of customary international law. If the answer is positive, then there is a very strong case that the immigration adjudicator who was examining Mrs Baker’s case ought to have guided his discretion accordingly. This simplifies things enormously, it would seem to me, and

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opens the door to a much broader use of international human rights law within our borders, particularly in the sphere of administrative tribunals.

I know that many of you are a bit overwhelmed by the sources of public international law, although to be fair they are increasingly accessible, above all thanks to the Internet resources of the United Nations High Commissioner for Human Rights, the Council of Europe and various non-governmental organizations like Amnesty International and Human Rights Watch. But there is no website for “customary international law.” If you go to the Government documents section of your local university library and ask “where is the customary law shelf here?”, don’t expect to find anything.

Yet it is out there, for anyone who cares to look. One of the best places to search for it is in treaties, oddly enough. This is because human rights treaties often codify customary international law. In a recent “general comment”, the Human Rights Committee presented a list of customary norms that overlap with the provisions of the International Covenant on Civil and Political Rights. These include the prohibition of slavery, torture, and cruel, inhuman or degrading treatment or punishment, and of arbitrary deprivation of life and of arbitrary arrest and detention, freedom of thought, conscience and religion, the presumption of innocence, the prohibition of advocacy of national, racial or religious hatred, the right of persons of marriageable age to marry, and the right of minorities to enjoy their own culture, profess their own religion, and to use their own language.

What about the “best interests of the child” principle found in article 3 of the Convention on the Rights of the Child? Here there is a very neat fit between customary international law and the convention, because of the simple fact that the Convention, which is barely ten years old, has been ratified by every country in the world, with the significant exception of the United States, and it has signed it. Nobody quarrels with the

38 www.unhchr.ch.
41 Committee on Human Rights, General Comment 24 (52), General Comment on Issues Relating to Reservations Made Upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant, UN Doc. CCPR/C/21/Rev. 1/Add. 6 (1994).
binding force of the *Convention on the Rights of the Child*. It is, in a sense, an instantaneous custom. Some of the provisions in the *Convention* are not acceptable to all countries, and in many cases they made specific reservations to distinct provisions at the time of ratification. Even Canada made some reservations when it ratified the *Convention*. Provisions to which there is a pattern of reservation might not make the grade as customary norms. But no country has made a reservation to article 3, which sets out the “best interests” principle.

Back in 1987, in the “right to strike case,” when Chief Justice Dickson made his comments about the use of international law, it was a lot harder to make the case that the great human rights treaties represented near-universal consensus. That is all a lot clearer now. Aside from the *Convention on the Rights of the Child*, with its 191 ratifications, we have the *Convention on the Elimination of Discrimination of Woman*, with 168, and the *International Convention on the Elimination of All Forms of Racial Discrimination*, with 161. Many human rights treaties have reached the stage of near-universal ratification, giving their provisions a strong claim to customary law status. Consequently, the norms they contain apply even to states that have not ratified them. Moreover—and this is what is interesting for Canadian jurists—they apply before common law courts even where there has been no legislative implementation.

One of the other customary norms that I think would be very intriguing to begin developing in Canadian jurisprudence or Canadian law is the norm set out in article 27 of the *International Covenant on Civil and Political Rights* dealing with the right of minorities to enjoy their own culture, profess their own religion, and to use their own language. The *Canadian Charter* only imperfectly translates minority rights from international human rights law. The main *Charter* provision in this respect is the one dealing with minority language rights, and it only recognizes two minorities, the English inside Quebec, and the French outside of Quebec. It doesn’t talk about minorities in general. Then we have the multiculturalism provision, but it is a little different from the *Covenant* formulation as well. I think it would be awfully interesting if

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administrative judges and others here in Canada started to say there is a minority rights norm applicable in Canada because it is part of customary law. It is codified in a way in article 27 of the *International Covenant on Civil and Political Rights* and it ought to influence Canadian law. It ought to influence how administrative decisions are taken, how discretion is exercised and how laws and even the *Canadian Charter* are to be construed.

As has already been mentioned, customary international law is part of “the law of the land” and is directly applicable before Canadian courts, whether or not it has some legislative reflection. It has no constitutional value, however, and can be overridden by contradictory enactments of Parliament. But where customary international law seems ideally suited to complement the Charter, and to fill its gaps, is before administrative tribunals and similar bodies. Here, as in *Baker*, the decision-maker’s analysis should be informed by international legal norms. These may be found in customary law, and they may be found in “soft law.” Both areas provide administrative law in Canada with rich new avenues to develop.