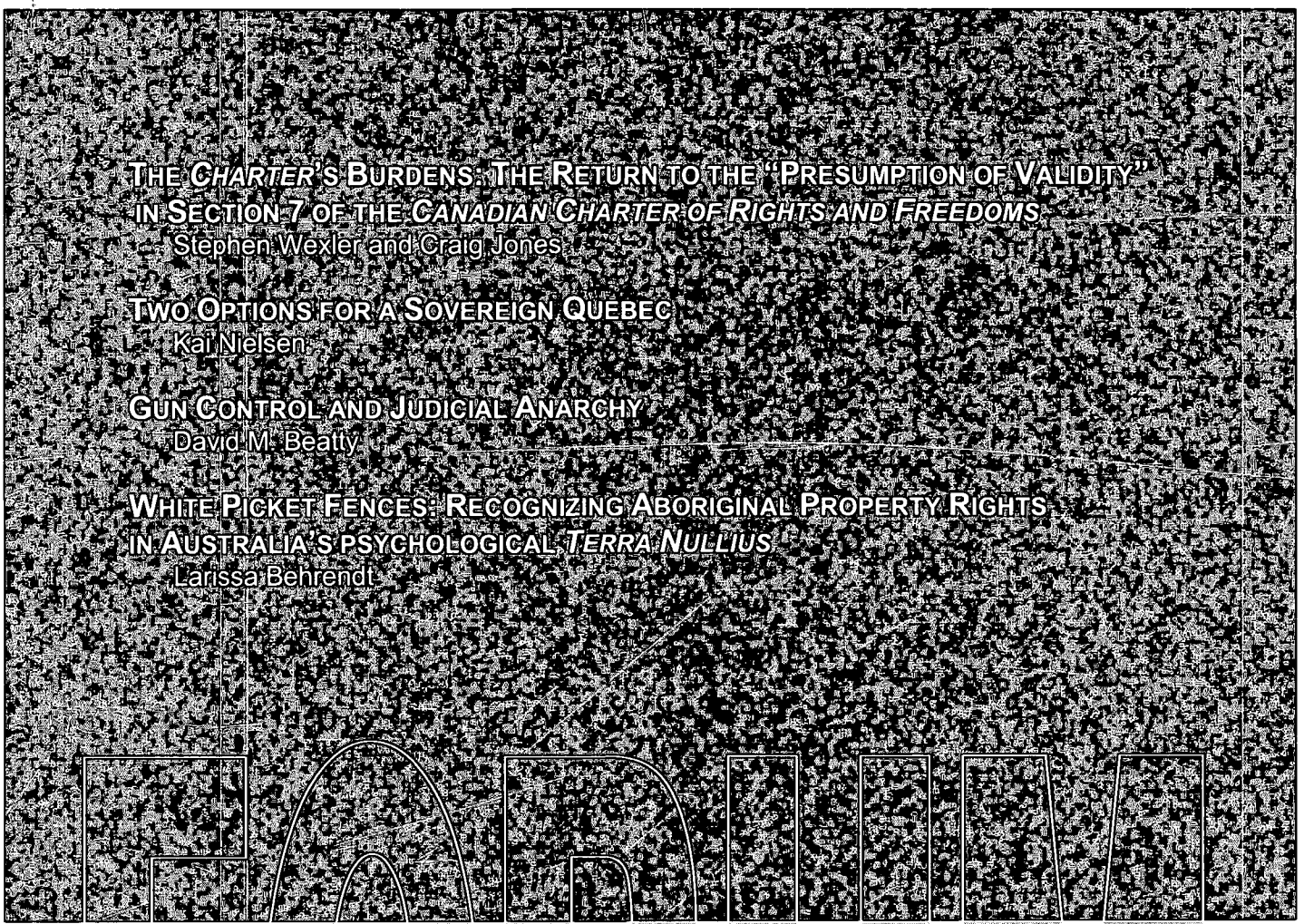

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CONSTITUTIONAL FORUM CONSTITUTIONNEL

Centre for Constitutional Studies/Centre d'études constitutionnelles

Volume 10, Number 2 Winter 1999 Edmonton, Alberta

CONSTITUTIONAL
FORUM
CONSTITUTIONNEL

Editor:
David Schneiderman

Design & Layout:
Christine Urquhart

Constitutional **Forum** Constitutionnel is a quarterly publication of the Centre for Constitutional Studies / Centre d'études constitutionnelles published with the financial support of the Alberta Law Foundation.

The opinions expressed herein are those of the individual contributors only. Contributions and replies are invited in either official language. Notes and articles should be limited to 3,000 words in length. The Editor and Management Board reserve the right to edit any submissions. Inquiries and contributions should be directed to the Editor, David Schneiderman, 459 Law Centre, University of Alberta, Edmonton, Alberta, T6G 2H5 or by telephone at (403) 492-5681 or Fax (403) 492-9959; or e-mail: curqhart@law.ualberta.ca.

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Constitutional **FORUM** Constitutionnel is indexed in: **Index to Canadian Legal Periodical Literature, Index to Canadian Legal Literature** and **Current Law Index.**

ISSN: 0847-3889

THE *CHARTER*'S BURDENS: THE RETURN TO THE "PRESUMPTION OF VALIDITY" IN SECTION 7 OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

Stephen Wexler and Craig Jones

The evolution of Canadian constitutional law since the introduction of the *Charter of Rights and Freedoms* in 1982 has been a study in contrasts. While the *Charter* provided a novel and powerful forum for the advancement of progressive ideals, the jurisprudence by degrees calcified and accreted into a fairly regular pattern, particularly in one important respect: it became an article of faith that it was up to the party alleging infringement to demonstrate it; once this was done, the onus switched to the state to justify the infringement if it could under the saving provisions of section 1. But in recent years, a line of jurisprudence has begun to deviate markedly from this norm: bluntly, the state's burden under section 7 of the *Charter*, which guarantees life, liberty and security of the person, has evaporated. The purpose of this paper is to outline the jurisprudence in which this has occurred and discuss the implications of the reversal for the future of *Charter* litigation.

Identifying the shift in the burden under section 7 begs the questions: *why* was the burden shifted? What is the *effect* of this shift? Do recent cases indicate that there is perhaps some value in erecting barriers to the use of the *Charter*, and in particular section 7, too aggressively? Is this simply an acknowledgment that the movement away from the "presumption of validity" — which had until the *Charter* given the state the benefit of the doubt on most constitutional questions — has been a failed experiment? Or is there something more at work here, a judicial progressivism wielding the burden as shield *and* sword?

BURDEN SHIFTS AS JUDICIAL TOOLS

It is a trite observation that one of the most effective ways to determine the likely outcome of a legal question is to examine what the burdens are and upon whom they lie. In deciding who has to prove what, and what standard of proof must be met, courts and lawmakers determine the "paths of least resistance" that the analysis will take. In essence, the burdens reveal the starting point for a decision, a judicial predisposition; beyond the *letter* of law, burdens reveal the law's *attitude*.

When a burden shifts through the development of jurisprudence, it is frequently an act of progressivism on the part of the court to bring the outcome of a given case in line with changing times and mores. The results of these burden manipulations can be startling and profound. In the aftermath of the Second World War, for instance, the young Justice Sir Alfred Thompson (later Lord) Denning shifted a single burden of proof and radically altered the benefits available to disabled veterans. Denning's decision in *Starr, Nuttall and Bourne* v. *Minister of Pensions*[1] re-empowered tens of thousands of citizens whose entitlement to benefits had pivoted on a single evidentiary hurdle. Denning held that veterans need not prove their injuries occurred during active duty. Ex-soldiers, Denning decided, need only demonstrate that they were fit going into the forces (something generally well documented) and unfit after their service; the burden would then rest on the state to prove that their ailments were *not* service-related. The *Starr* decision may have significantly shaped the social and political reconstruction of postwar England.[2]

Courts manipulate burdens to allow outcomes in accordance with prevailing social norms. As the norms shift, often, so do the burdens. For example, the famous "persons case" *Edwards* v. *Canada* overturned the presumption against women being included in the definition of "persons" who could serve in the Senate:[3]

> The word "person" ... may include members of both sexes, and to those who ask why the word should include females, the obvious answer is why should it not? In these circumstances the burden is upon those who deny that the word includes women to make out their case....

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[1] [1946] K.B. 345.

[2] For an excellent account of the circumstances surrounding this decision, see Doris Freeman, *Lord Denning: A Life* (London: Random House, 1993).

[3] *Edwards* v. *A.-G. (Canada)*, [1930] A.C. 124 (Privy Council).

In *Edwards*, social and political expectations had shifted towards a comprehension of the equality of women, the assumption of which was becoming the norm. Therefore, the newly "obvious" burden was established against anyone asserting that women were *not* equal, rather than those who said that they were.

Canadian constitutional jurisprudence reveals a burden that, while it has always existed, was not widely noticed until it was shifted. Our point in this paper is that, in placing the burden (on the state) in section 1, the *Charter* reversed the previous "presumption of validity" that had placed the burden on the party challenging the law and protected the state from overly ambitious litigants and overly progressive judges. Soon, that burden became settled into the case law to the point where it, too, almost disappeared in the legal consciousness; the real effects of such a legal burden did not become apparent until the series of section 7 *Charter* cases shifted it again. Under that section, recent cases indicate that it is the individual that must show that the *Oakes* criteria (used to determine a law's "reasonableness" and "justifiability") are *not* satisfied, rather than the state having to show that they are. Moreover, we will show how the *Oakes* burdens on the state under section 1 have been gradually weakened, while the test under section 7 that must be met by the individual remains robust and difficult to overcome.

Development of the Burdens in *Charter* Litigation

Many of the questions of justifying legislation that trouble the *Charter* were present during the largely ineffective tenure of the earlier *Canadian Bill of Rights*,[4] and have been carried forward into the *Charter* cases. For instance, the "rational connection" branch of the *Oakes* test is a natural extension of the "reasonable relationship" doctrine applied in *Bliss* v. *A.G. Canada*[5] and *A.G. Canada* v. *Canard*.[6] But under the various tests applied in *Bill of Rights* cases, the party challenging the state had to demonstrate that there was no "reasonable relationship." The difference in the *Charter* was that the wording itself seemed to shift the burden on the reasonableness question wholly onto the state:

> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

This wording was interpreted by scholars and courts alike to mean that the "presumption of validity" was no longer available to the state, as noted by Yves Fricot in 1984:[7]

> [T]here is no presumption of the constitutionality of infringement in section 1 cases, and ... the doctrine [of reasonable relationship] ... runs counter to the use of the words "demonstrably justified" in section 1 and to the notion of proportionality....

We are not here interested in the burden on the individual to demonstrate *prima facie* infringement of a *Charter* right. While the courts' interpretation of the burdens imposed by the various sections of the *Charter* is interesting, deciding whether a protected right has been infringed in the first instance is a familiar problem for judges; they are well used to answering the question "was the rule breached?" Less familiar and more interesting are the burdens on the question "is it reasonable / justifiable / just to break the rule?" The difficulty, then, surrounds sections 1 and 7, the latter of which introduces a similar subjective "reasonableness" test into the protection of "life, liberty and security of the person."

Before we examine how the burden operates under section 7, though, it is necessary to briefly review how the question of burden developed under section 1.

Section 1 Burden Analysis Pre-*Oakes*: Limitations vs. Denials

Before the development of the *Oakes* test, the courts had some difficulty dealing with the questions of reasonableness and justification of restrictions under section 1. One method developed for dealing with them was to draw a distinction between whether a right had been denied outright or just limited. Section 1, according to the Supreme Court of Canada in *Quebec Association of Protestant School Boards* v. *A.G. Quebec*,[8] might operate to save a limitation on a right, but it could not be invoked when a right has been outright denied:

> The [provision in question] does not constitute a limitation, and even less a limitation "within reasonable limits, of the rights guaranteed by section 23 of the Charter. The [provision] is, for each citizen affected by it, a denial of the rights

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4. By "ineffective tenure" we are referring to the *Bill of Rights*' employment until 1985, when it was reinvigorated as a constitutional document in *Re Singh and Minister of Employment and Immigration*, [1985] 1 S.C.R. 177. However, as in *Singh*, the *Bill*'s protections have been largely superseded by *Charter* protections, and the *Bill*'s section 2(e), which roughly parallels aspects of the *Charter's* section 7, is usually ignored in favour of *Charter* analysis.
5. [1979] 1 S.C.R. 183.
6. [1976] 1 S.C.R. 170.
7. Y. Fricot, "Evidentiary Issues in Charter Challenges" (1984) 16 Ottawa L. Rev. 565 at 578.
8. [1984] 2 S.C.R. 66.

which the Canadian Charter guarantees him: the [provision] must, therefore, yield.

Clearly, at this early stage of *Charter* jurisprudence, there was a burden placed on Quebec, once an infringement had been demonstrated, to prove that the infringement was a "limitation" (and a reasonable one at that), not a "denial." So before *Oakes*, the situation existed in which the *burden* on the question had been established (principally through the wording of the *Charter* itself), but no one was yet quite clear on what the *question* was. The "limitation vs. denial" test used in the *Protestant School Boards* case was subjective to the point that it added little to the plain words of section 1 itself, and proposals for the framing of the inquiry began to emerge, eventually coalescing into the notorious test in *Oakes*.

THE EMERGENCE OF *OAKES*

The various elements of the *Oakes* test were there to see long before their adoption by the Supreme Court of Canada. In 1961, an article in the *Osgoode Hall Law Journal* proposed a series of criteria to determine when a limitation of rights was demonstrably justified. It involved:[9]

> [T]he existence of an evil to be curbed or a benefit to be provided, in the public interest ... the appropriateness of what is proposed as regulation to the end sought ... the extent to which individual privileges and liberties are encroached upon ... [and] the relationship between the degree of imposition and the good achieved.

In other words, pressing and substantial concern and proportionality, with proportionality in turn consisting of three elements — minimal impairment, careful design and proportion to the effect: this is the *Oakes* test in a nutshell.[10] The Rand criteria were applied by O'Leary J. in *Re Service Employees' International Union, Local 204 and Broadway Manor Nursing Home.*[11] But the Rand criteria were still, until the advent of the *Charter*, subject to the "presumption of validity" in which the onus favoured the state. Other elements of what became the *Oakes* test also had found their way into Supreme Court jurisprudence.[12] But it was not until *Oakes* itself that Canadian courts had a fairly defined set of criteria with which to analyze the state's burden under section 1.

We will not engage here in a discussion of how the *Oakes* test has evolved and sharpened in the intervening years. The important point is that there is an established test to be applied when questioning the reasonableness and justifiability of a law, and that the burden is on the state to meet each aspect of this test. Once that is accepted, we can move on to look at how this presupposition against the state has been undermined, and in particular how it has been reversed through the operation of section 7.

THE BURDENS IN SECTION 7

Section 7 of the Charter is different from others that guarantee rights in that it provides an *internal* qualification distinct from section 1's "saving provision." Section 7 provides that:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof *except in accordance with the principles of fundamental justice* [emphasis added].

This makes section 7 considerably more complicated, because section 1 (and thus *Oakes*) is triggered not simply by an infringement on the rights of life, liberty and security of the person, but by one not imposed in accordance with the principles of fundamental justice. If an infringement is not consistent with this principle, then the question in theory turns to the section 1 *Oakes* analysis. Yet this question is now inconsequential, because once an infringement has been found to be "fundamentally unjust," it will almost never be deemed "reasonable in a free and democratic society."[13]

Practically speaking then, the considerations that would be undertaken under a section 1 analysis arise earlier, when considering whether the infringement is compatible with "fundamental justice." In fact, as we shall see, the *Oakes* criteria have entrenched themselves fully into the section 7 "fundamental justice" portion of the test. Why is this important? In section 1, it is the state that must justify the legislation, whereas in section 7, the burden remains with the aggrieved party. If the courts are in effect doing away with the section 1 analysis in section 7 cases, then they are in fact absolving the Crown from justifying section 7 infringements.

It is apparent from the cases that, while the courts have transplanted section 1 considerations into the "fundamental justice" branch of section 7, they did not also import the state's burden to justify the infringement. Consider this quote from *R.* v. *Jones*:[14]

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[9] I. Rand, "Except by Due Process of Law" (1961) 2 Osgoode Hall L.J. 171 at 187.

[10] *R.* v. *Oakes*, [1986] 1 S.C.R. 103.

[11] (1983) 44 O.R. (2d) 392, 4 D.L.R. (4th) 231 (Ont. H.C.).

[12] Y. Fricot, "Evidentiary Issues in Charter Challenges" (1984) 16 Ottawa L.R. 565.

[13] *Godbout* v. *Longueuil (City)* (1997) 3 SCR 844.

[14] [1986] 2 S.C.R. 284 [emphasis added].

> I have already stated *if it can be established* that the ... action is exercised in an unfair or arbitrary manner, then the courts can intervene.

Similar wording is found in *Rodriguez* v. *British Columbia*[15] at para. 21:

> The issue is whether ... the appellant's situation is contrary to the principles of fundamental justice.

And later, at para. 29:

> The [issue is] whether the blanket prohibition on assisted suicide is arbitrary or unfair ... and lacks a foundation in the legal tradition and societal beliefs which are said to be represented by the prohibition.

Arbitrariness and unfairness, of course, are usually considered as part of the section 1 *Oakes* analysis. Here, they are included in the analysis of the breach of section 7, and the wording clearly indicates that the burden is on the aggrieved party to establish arbitrariness, not on the Crown to prove its absence.

"Fundamental Justice" Generally

The process for determining whether section 7 has been unjustifiably breached is set out most helpfully in *Rodriguez*. To remain consistent with the principles of fundamental justice, a law must be based on some social consensus that the prohibition is correct and that a fair balance is struck between the interests of the state and those of the individual. To discern the principles of fundamental justice governing a particular case, it is helpful to review the common law and the legislative history of the offence in question. Also, it is open to the court to consider the rationale behind the practice itself (in *Rodriguez*, the continued criminalization of assisted suicide) and the principles that underlie it.[16]

In *Cunningham* v. *Canada*,[17] McLachlin J. concluded that the appellant had been deprived of a liberty interest protected by section 7. She then considered whether that deprivation was in accordance with the principles of fundamental justice:[18]

> The principles of fundamental justice are concerned not only with the interest of the person who claims his liberty has been limited, but with the protection of society. Fundamental justice requires that a fair balance be struck between these interests, both substantively and procedurally ... In my view the balance struck in this case conforms to this requirement.

It is this second stage of the section 7 inquiry, the "fundamental justice" stage, that requires the "fair balance" analysis usually considered under section 1. Why then is the fundamental justice stage of section 7 even necessary, if section 1 covers the same ground? Perhaps the answer to this is that the *only* practical difference is the burden on the parties in each section.

In *Godbout* v. *Longueuil (City)*,[19] LaForest J. (with McLachlin and L'Heureux-Dubé JJ. concurring) attempted to clarify some aspects of the section 7 analysis, holding, among other things, that a broader view of the liberty interest must be taken. The line of cases culminating with *Godbout* is very important for the purposes of our paper, because they reveal the other side of section 7 developments. For all the barriers erected in the path of section 7 redress, the Canadian courts are nonetheless experimenting with a more progressive approach to the *breadth* of section 7 protections. The potential of this approach will be discussed briefly in our conclusion.

For the time being, we will return to our assertion that the tests in section 1 and the "fundamental justice" branch of section 7 have become virtually identical, save the opposite burden in each.

The *Oakes* Criteria as Indicia of Breaches of "The Principles of Fundamental Justice"

At one time, it was accepted that there were two considerations in deciding whether a rule or law breached the principles of fundamental justice under section 7. The first was to ask whether the rule was in accordance with fundamental tenets of the legal system, as for instance in the *mens rea* requirement in serious criminal cases.[20] The second was to consider whether the law was manifestly unfair, as was asserted unsuccessfully in *Rodriguez*. These two broad notions inevitably invited consideration of many of the same factors that weighed in the traditional section 1 analysis, and a *de facto* consideration of these factors was adopted gradually by the Supreme Court of Canada. As mentioned, it also became quickly apparent that any legislation challenged under section 7 that would fail a section 1 analysis would also fail the "fundamental

[15] [1993] 3 S.C.R. 519.
[16] *Supra* note 15 at 589-608.
[17] [1993] 2 S.C.R. 143.
[18] *Ibid.* at pp. 151-52.
[19] *Supra* note 13.
[20] *Re Section 94(2) of the Motor Vehicle Act of B.C*, [1985] 2 S.C.R. 486.

justice" provisions, and perhaps vice-versa, as in *R.* v. *Heywood*:[21]

> This Court has expressed doubt about whether a violation of the right to life, liberty or security of the person which is not in accordance with the principles of fundamental justice can ever be justified, except perhaps in times of war or national emergencies: *Re B.C. Motor Vehicle Act, supra* at 518. In a case where the violation of the principles of fundamental justice is as a result of overbreadth, it is even more difficult to see how the limit can be justified. Overbroad legislation which infringes section 7 of the Charter would appear to be incapable of passing the minimal impairment branch of the section 1 analysis.

But isn't "overbreadth" supposed to be weighed under section 1? While the *Oakes* test is not applied specifically in the initial stage of section 7 analysis, it is safe to say that the factors taken into account when considering "fundamental justice" tend to fit into the categories covered by *Oakes*. So, while the *Oakes* test may not be determinative in considering the fundamental justice of a section 7 matter, it is an accepted and stringent analysis, and it is apparent that *Oakes* sets out the fundamental framework through which a section 7 analysis may proceed.[22]

The examples of *Oakes*-type questions being asked at the fundamental justice stage are legion. The recent case of *Godbout,* considered "pressing and substantial concerns" (analogous to the first branch of the *Oakes* test). *Jones* and *Rodriguez,* considered the "arbitrary or unfair" effects of legislation, straight out of the second branch. Minimal impairment, from the next part of the second branch of *Oakes*, was considered in *Heywood* and *Godbout*. Proportionality between effects on individual vs. state interest weighed in during the fundamental justice considerations in *Rodriguez, Godbout* and *Thomson Newspapers Ltd.* v. *Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*.[23]

Even the principle, most frequently argued under section 1, that the courts must behave more deferentially in cases involving broad policy has been applied to section 7's "fundamental justice" analysis. In particular, a deferential approach has been held to be appropriate in reviewing legislative enactments with legitimate social policy objectives, in order to avoid impeding the state's ability to pursue and promote those objectives.[24] Likewise, *Rodriguez* held that when dealing with contentious and morally laden issues, Parliament should be given wide latitude.

In *Rodriguez*, Justice MacLachlin objected to the majority's inclusion of certain elements of the *Oakes* test in the "fundamental justice" analysis (discussed earlier), arguing that the effect of this was to relieve the heavy burden upon the Crown and place it on the individual:[25]

> It is not appropriate for the state to thwart the exercise of the accused's right by attempting to bring societal interests into the principles of fundamental justice and to thereby limit an accused's section 7 rights. Societal interests are to be dealt with under section 1 of the Charter, where the Crown has the burden of proving that the impugned law is demonstrably justified in a free and democratic society. In other words, it is my view that any balancing of societal interests against the individual right guaranteed by section 7 should take place within the confines of section 1 of the Charter.
>
> I add that *it is not generally appropriate that the complainant be obliged to negate societal interests at the section 7 stage, where the burden lies upon her, but that the matter be left for section 1, where the burden lies on the state.*

Nonetheless, in the recent decision in *Godbout,* the inclusion of *Oakes* criteria in the section 7 analysis was accepted by La Forest J., with L'Heureux-Dubé and McLachlin JJ. concurring:[26]

> I should explain that I see no need to examine the issues in this appeal under the rubric of section 1 of the Charter, given *that all the considerations pertinent to such an inquiry have, I think, already been canvassed in the discussion dealing with fundamental justice.* Moreover, and as this Court has previously held, a violation of section 7 will normally only be justified under section 1 in the most exceptional of circumstances, if at all .... Such circumstances do not exist here [emphasis added].

Remember that inclusion of *Oakes* criteria in the section 7 analysis was found to be unacceptable to MacLachlin J. in *Rodriguez*, as noted above. Resistance in the Court to this important change has apparently disappeared.

There are indications that the Court would like to treat section 7 questions generally with more deference to government than it does elsewhere. For instance, in

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[21] [1994] 3 S.C.R. 761.

[22] We say "may" here, rather than "must," because the Supreme Court has yet to offer a definitive instruction in this respect.

[23] [1990] 1 S.C.R. 425.

[24] *Ontario* v. *Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031.

[25] *Supra* note 15 at 621-622 [emphasis added].

[26] *Supra* note 13 at 909 [emphasis added].

considering whether a practice offends the principles of fundamental justice, it is appropriate to consider whether the "vast majority" of judges have not found it so. This is true whether the practice has its origins in statute or the common law. It is also appropriate to consider whether legislative practice has been similar.[27]

Further, it has been held in *Rodriguez* that "principles which are 'fundamental' [are ones that] would have general acceptance among reasonable people."[28] If the *Oakes* criteria are indeed to be considered in the "fundamental justice" analysis, then the burden would be on the individual to demonstrate this "general acceptance." When one considers the poor ability of individuals, particularly criminal defendants, to marshal the resources to present such a case, and combines that consideration with the overall burden shift that we demonstrate here, the result appears clear: the inertia of the criminal law will not be lightly interfered with.

So we find that under section 7, the Court has methodically made relief under section 7 more difficult for the individual and eased the burden on the state. But while this process was underway, there was a corresponding lessening of the state's burden under the *Charter* generally. The cases in which this has occurred indicates something close to a wholesale return to the "presumption of validity" doctrine that the *Charter* was thought to have retired.

The Lightening of the State's Burden under Section 1

The relief on the state's burden under section 1 of the *Charter* is most apparent by examining the sort of evidence that has been required for the "reasonableness" onus to be met. We have discussed already the difficulty faced by an individual (particularly a criminal defendant or other private party) in showing a breach of "fundamental justice" under section 7. However, the state has been able to avail itself of very relaxed evidentiary requirements under section 1. Sometimes, no evidence has been presented or even requested. The majority in *Jones* in effect took judicial notice of the satisfaction of the *Oakes* criteria, and even LaForest J., who did engage in the *Oakes* exercise, held that "a court must be taken to have a general knowledge of our history and values and to know at least the broad design and workings of our society."[29]

Similarly, in *Gray* v. *R.*,[30] the Manitoba Court of Appeal found that in its section 1 analysis, "it is undesirable to proceed on the basis of evidence." The court was happier with undertaking its section 1 analysis on the basis of "common sense."

Clearly, these decisions were signaling a discomfort in the judiciary with forcing the state to comply with the rigorous *Oakes* analysis, at least when enforcing the minutiae of criminal law. The courts apparently thought the burden on the Crown was unnecessary in many cases, and were content just to deem the point moot. This was similar to the approach taken in several other *Charter* cases, such as *Bonin* v. *R.*[31] In that case, the B.C. Court of Appeal found that previous section 1 findings, in theory findings of fact, could have precedential value through judicial notice. In doing so, the Court of Appeal seemed to elevate findings of fact in section 1 cases into findings of law,[32] so further reducing the Crown's burden.

And yet, as the section 1 burden on the state is relaxed, there has been no reduction of the parallel burden on the individual in section 7; in fact, as we have seen, it has if anything increased. He or she is still expected to present convincing evidence that justice demands change, whereas the state benefits from the presumption that change is not necessary — the "presumption of validity" *redux*.

Conclusion: The Burden Shift and the Future of Section 7

If we accept, as MacLachlin J. warned in her *Rodriguez* dissent quoted above, that there has been a shift of the burden in section 7 cases effected by the introduction of the *Oakes* criteria into the "fundamental justice" stage, what is the effect of this?

Section 7 is perhaps the most broad and inclusive of the *Charter*'s provisions. Its guarantees of "liberty" and "security of the person" captures (and in effect puts into question) any criminal law that could result in imprisonment.[33] Before the *Charter*, anyone seeking to

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[27] *Beare* v. *R.*, [1988] 2 S.C.R. 387.

[28] *Supra note 15* at para. 54.

[29] *Supra* note 14 at 299.

[30] (1989), 44 C.C.C. (3d) 222 (Man. C.A.).

[31] (1989), 47 C.C.C. (3d) 230 (B.C.C.A.).

[32] This assumes, of course, that one accepts that one indication of whether a question is one of fact or law can be in part determined by asking "could a precedent on this question be binding?" If the answer is yes, it is almost certain that the court is viewing the question as one of law and not fact, as the latter would be limited *ipso facto* to the circumstances of the case.

[33] While section 7 has of course not been restricted in its application to the criminal sphere, it is fair to say that Canadian courts have been reluctant and cautious in applying it elsewhere. See for instance the various (and contradictory) decisions on the application of section 7 to Human Rights tribunals, such as *Watson* v. *British Columbia Council of Human Rights*, [1994] B.C.J. No. 3196 (B.C.S.C.); *Saskatchewan Human Rights Commission* v. *Kodellas* (1989), 60 D.L.R. (4th) 143 (Sask. C.A.); *Nisbett* v. *Manitoba (Human Rights Commission)* (1993), 101 D.L.R. (4th) 744 (Man. C.A.); *Blencoe* v. *B.C. Human Rights Commission* (May 11, 1998)

challenge an established criminal law under the *Bill of Rights* or the constitution (written or otherwise) would face the difficulty of proving its unjustifiability. In other words, the criminal law in particular existed for hundreds of years with the state relying on the assumption of validity.

On the face of it, the *Charter* appeared to remove this blanket presumption from the arsenal of the state. It would, on a plain reading of section 1, force the state to actively and convincingly justify every aspect of each and every criminal or penal provision whenever challenged to do so. It would require the courts to micromanage every aspect of a system that had evolved over centuries of cases and legislation. Remember the Court had already said that a deferential approach should be taken in relation to section 7 review of legislative enactments with legitimate social policy objectives.[34]

If the burden remained on the state to justify all infringements of, for instance, liberty, it would permit a complete reconstruction of the criminal law at the whim of the Supreme Court of Canada. This would be daunting enough with a *narrow* interpretation of "life, liberty and the security of the person," in other words one where section 7 was *restricted* to the criminal sphere. It would be virtually impossible if the court wanted to take a more broad and progressive approach to these words, as they have shown themselves willing to consider in cases like *Rodriguez*, which explored the liberty and security interests in controlling one's own body, and as for instance the majority of the B.C. Court of Appeal did in *Blencoe*, anticipating the "direction" of the Supreme Court jurisprudence.[35]

So the court has returned to the old doctrine of the "presumption of validity" at least with respect to section 7, and they have done this apparently to protect the bulk of the criminal law from constitutional evisceration. But at the same time, the court has begun to consider the application of section 7 far beyond the criminal realm.

To this end, it is instructive that the cases in which the more progressive possibilities of section 7 are explored are also the ones that most concretely establish the *Oakes* test at the "fundamental justice" stage. So perhaps the shift of the onus onto the individual in section 7 cases is not as restrictive as it appears, and may in fact be necessary in order to allow the courts to expand the interests protected by section 7 beyond their traditional bounds. Essentially, the message from the courts might be "we're willing to look at section 7 very broadly, but apply it slowly; the burden must thus be on the person seeking the application to a particular prohibition or restriction." This is why we say that the burden may be manipulated as both shield *and* (albeit indirectly) as a sword under section 7.

Nonetheless, the clear inertia remains with the state, who as we have seen can uphold laws under section 1 without evidence, based on judicial notice or simply "common sense." Conversely, where under section 7 the individual bears the complete burden, one can not conceive of success without convincing evidence that the law does *not* satisfy the *Oakes* criteria. So not only is the burden shifted under section 7, it is arguably considerably heavier as well. This may in part account for the dismal success rate of section 7 arguments at the highest level.

But optimistically, while the jurisprudence on section 7 appears to have developed more restrictive rules than other sections, in the long term this may not be as regressive as it appears. Tightly controlling access to section 7 relief through the burden-shift that we have discussed here might be the first step in broadening its protection further beyond the circumscribed field of the criminal law. If this is indeed the case, then we might look forward to the next decade, when the Court might begin to progressively expand section 7 protections in new and innovative ways.❑

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[34] *Ontario* v. *Canadian Pacific Ltd*, *supra* note 24.

[35] The court in *Blencoe* used section 7 to protect reputational and other interests in the face of the stigma triggered by a complaint of sexual harassment.

TWO OPTIONS FOR A SOVEREIGN QUEBEC

Kai Nielsen

I

Nationalisms emerging in liberal democracies have usually been liberal nationalisms. German nationalism arising against Weimar is the great and horrifying exception, and Unionist nationalism in Northern Ireland and some Republican nationalism both in the Republic of Ireland and Northern Ireland are less paradigmatic but still counter-examples, as is the phenomenon of Le Pen. Moreover, some forms of Corsican and Basque nationalism also do not fit the liberal mold. It is crucial to see that in the case of Germany (the paradigm disconfirming instance) the circumstances were exceptional, and none of the other examples listed above, France aside, come from societies that are shining examples of liberal democracies. But Norwegian, Icelandic and Finnish nationalisms, when these people were struggling to gain independence, were liberal nationalisms, and the resulting nation-states are models of progressive liberal societies. These nationalisms were neither xenophobic nor exclusionist. They wanted to and did protect their national cultures, but they did not regard themselves as a chosen people with a manifest destiny. The same thing should be said for present day nationalisms arising in secure democratic societies. I refer here to Scottish, Welsh, Quebec, and Catalonian nationalism.

These peoples are all national minorities in larger, allegedly multination states where they have not been able to gain recognition as nations — as a people — of equal status, recognition that is required of a genuinely multination state. They are historical communities that have distinctive institutions and traditions. They have for a long time resided on a given territory that they see as their homeland, they have distinct cultures, and, in all but one instance (the Scots), they have, in contrast with the peoples around them, a distinct language. (It is instructive to remember the Scots once had one — Gaelic — before it was suppressed by the English conquerors as it was in Ireland as well.) These historical communities are in aspiration, if not yet in fact, political communities aiming at some form of self-governance over a chunk of the earth's surface. For a group to be a nation, a considerable portion of its members must see themselves as members of a political community, and in doing so they will aspire to, if they have not already achieved it, some form of self-governance. In addition, for a group to be a nation or a people, there must be a mutual recognition of membership at least by its members — most of them must see themselves as Danish, Spanish, Quebecois, Walloons, Faeroeseans, Filipinos, and the like. And the other members of their society must as well recognize them as having such membership.

This is what it is for a group to be a nation. It is distinct from a state, namely, an institution that successfully claims a monopoly of *de facto* legitimate force in a particular historical territory. Nations frequently are, but they need not be, states (Nielsen 1998b). Consider, as nations that are not states, the Mohawk nation, the Black nation, or the Kurdish nation. They need not be states even in aspiration, but they must, to be a nation, see themselves as a political community seeking some form of political self-governance and some form of homeland, though it may be homeland they will have to share with other distinct peoples where there is a territorial overlap of peoples. Here is where the aim should be to form a genuine multination state — a state with nations as subunits in situations of equality. A nation or a people will want, if they are at all reasonable, to have either a nation-state of their own or to be part of a genuine multination state united in some form of cooperative federation or arrangement. The important thing is that they as a nation will have some form of self-governance and cultural recognition.

The liberal nationalism of a people aspiring to public recognition as a nation will be, as all nationalisms are, cultural as well as political, but it will not be, and cannot be, an ethnic nationalism defining membership in terms of descent and excluding others from membership even though they master the language of the nation, embrace its customs and traditions, accept its laws and political institutions, and reside in its territory (Nielsen 1996-97). Such an ethnic nationalism is exclusionist and

ethnocentric and is not acceptable in a liberal society, including, of course, a socialist society (Couture and Nielsen 1996). A liberal nationalism, by contrast, is not exclusionist or ethnocentric and does not see itself as a chosen people or a favored folk. But in seeing themselves as a people, as a nation, liberal nationalists will see themselves as having a distinct culture, and they will be concerned to preserve it and to see it flourish in a political community.

Quebec nationalism, like Catalonian, Flemish, Scottish, and Welsh nationalism, is such a liberal nationalism. It is a nationalism that does not exclude others and respects the distinctive rights of its English minority (a historical minority) to have English language schools and hospitals, and to use English in the courts and in the national assembly. Such a nationalism goes perfectly well with cosmopolitanism, liberalism, and socialism, with its firm commitment to internationalism (Nielsen forthcoming).

II

It is not unlikely that in a few years' time Quebec will gain sovereignty either as a sovereign nation-state or as a nation in a genuinely multination state in some form of cooperative partnership with the English-speaking Canadian nation, but itself a sovereign nation nonetheless as an equal partner in a multination state. In such an eventuality, Canada and Quebec — the English-speaking Canadian nation and the Quebec nation — would be equal subunits in a multination state, each nation with extensive powers of self-governance. (There may be other nations as equal subunits as well, for instance, the First Nations and the Acadian nation.)

Since its nationalism is a liberal nationalism and the new sovereign entity will be a liberal democracy, Aboriginal peoples, anglophones, and allophones in Quebec will have nothing to fear from a sovereign Quebec. Indeed, depending on how Quebec develops, they might even gain from such a situation.

Assuming that some such situation will come to obtain, I want to discuss two ways of organizing social life in such a society. I speak of them in the context of Quebec, but they are, of course, possibilities for other liberal democracies as well. I only stress that given Quebec's situation they are particularly germane possibilities for Quebec. They are presently utopian, but perhaps will become feasible possibilities a few years down the road. They would, if instituted, enhance human flourishing for the citizens of Quebec. I speak, firstly, of an unconditional guaranteed basic income for all citizens and landed immigrants of Quebec and, secondly, of the establishment of market socialism. The first may be achievable in a progressive capitalist society; the second, even though market-oriented, will require a transition of society from a capitalist one to a socialist one, by which I mean a society in which there is some form of public ownership and control of the means, or at least the major means, of production (Weisskopf 1992a).

In Quebec, after it emerges as a sovereign nation, a serious consideration of such presently utopian notions is apposite for a number of reasons. A new sovereign nation, in starting afresh either as a sovereign state or an equal partner in a multination state (though in both instances as part of a liberal ethos encompassing a constitutional democracy), has a little more *lebensraum* than an already deeply entrenched state. It is a good time, particularly when neoliberalism is working so badly as far as its effect on the lives of people is concerned to try — not incautiously, but still boldly — some new ways of arranging things. Also, the cultural soil of Quebec is somewhat more receptive to such ideas than the rest of North America. Its traditions are a bit more social democratic and Europe-oriented than that of its neighbors; it has somewhat stronger, more extensive, and slightly more radical labor unions; and it, like the rest of North America, is not a poor society: it is industrially and technologically developed, it has an educated population and well-developed political infrastructures; and it also has an intelligentsia that is more attuned to such ideas than the intelligentsia in the rest of North America tends to be. So perhaps in a sovereign Quebec we can, in the not too distant future, give such ideas a try. I shall now argue that this is something we should do.

III

I will start with a consideration of unconditional guaranteed basic income for all adult citizens and landed immigrants of Quebec, as it would not require changes in the society so deep as those required by market socialism. A non-evasive look at the life and circumstances in the rich capitalist democracies, including Quebec, would incline one to favor the serious consideration of implementing *ugbi* (unconditional guaranteed basic income). In such societies there is a considerable amount of structural unemployment as well as very marginally and insecurely employed people. Often people are — and this is particularly true of women — employed in part-time jobs with no pensions at a very low wage. This situation, bearing in mind the way things are presently going with neoliberalism practically unchecked, is likely to get worse rather than better in spite of neoliberalism's newly found "social conscience." The short term, neoliberalism's suddenly discovered social credo or not, is not something to make one jump for joy. So, unless we are prepared to let people in considerable numbers starve on the streets, we need something like a welfare system. Yet it is widely recognized that the welfare system in the various capitalist states works badly even in the best of such

societies. And in some societies — the United States and Canada, for example — it, to put it crudely, stinks. People are paid, albeit badly paid, to remain unemployed. The welfare system continues the culture of poverty and reinforces the poverty trap. It results in a social structure with a huge social and economic gap between the rich and the poor — a gap that is increasing — with glaringly unequal life prospects of both the employed ("the deserving poor") and the unemployed poor compared with that of the wealthy elites in the society. This deeply unjust situation is being exacerbated as people are more and more being pushed into unemployment or into marginal, insecure, poorly paid part-time employment.

To run the rotten system, moreover, a huge and expensive welfare bureaucracy — a bureaucracy that is inefficient and often corrupt — is needed. It is also a bureaucracy that is paternalist at best and functions intrusively as a parapolice force at worst. It results in a system where its so-called clients are degraded, demeaned, and kept in circumstances of idleness and poverty.

As structural unemployment grows and welfare expenses increase, the tax backlash and welfare backlash will grow. It is time carefully to consider replacing the welfare system with *ugbi*. For Quebec, this means moving from a welfare system to a system that, once institutionally in place and properly functioning, will pay a lifetime guaranteed basic income to all adult citizens and landed immigrants of Quebec unconditionally and on an individual basis without means test or work requirement. It is to be paid at the same rate to all adult citizens and landed immigrants by the state. The basic income should, and indeed must, for the scheme to work, be at a reasonable subsistence level — a level that would allow people to live decently but rather frugally. There would in such a circumstance be security and a decent life for people while still providing most of them with an incentive to take jobs at even a rather low wage level, that, hardly surprisingly, many businesses would find it attractive to make available. Where presently there are few jobs, there would be more jobs, and not make-work jobs either. But, for the worker, having a job would not be essential for her livelihood or the livelihood of the children she may have, but it would provide for some of those little extras, as Brecht once put it, that people want. A reasonable *ugbi* would provide the worker with security while giving her the possibility of working in a work situation that is not grossly unattractive and exploitative. She could avoid such work, if she wanted to, for she, with *ugbi* in place, would be in a position to refuse jobs and thus plainly unattractive jobs. And this would provide an incentive for employers to make the jobs they offer somewhat attractive. These jobs would not be like working at McDonald's.

The rich elites will get *ugbi* as well as the most impoverished people in the society. And it is to be paid to individuals rather than households. Doing it this way would be particularly helpful to vulnerable women in abusive or otherwise unsatisfactory marriages and other forms of cohabitation. The basic income stipend is to be paid irrespective of any income from other sources. It is to be paid without requiring any present or past work performance or even a willingness to accept a job if it is offered. This has a consequence that some would regard as producing an unfair situation, in that some talented people with strong preferences for leisure over income could opt to surf, couch potato themselves, or spend their time listening to Buxtahude, Lenni Cohen, or Blues just as they please, for there is no requirement to work. *Ugbi* is unconditional.

Questions of fairness aside, something that is more problematical here than might seem at first sight, there is the practical problem that if *many* took the full-time leisure option, *ugbi* would plainly go down the tubes. But there is good evidence for the belief that, if work conditions are reasonably decent, the wish to be gainfully employed — to have some meaningful work — is too strong in most people for there to be a world, or even a numerous population, of full-time surfers or couch potatoes. We might, out of feelings of solidarity, resent such surfers and couch potatoes, and perhaps rightly so. Such free-riders in such a situation seem to be exploiting or at least taking advantage of those who work. Still, they, given that they are few, would do little or no harm. So there is no reason to get exercised about them. In a world where full employment is so difficult — perhaps impossible — to achieve, we should not act like Kant's grandparents.

Ugbi would do something to lessen structural unemployment. It would take pressure off our more or less welfare states and pseudo-welfare states to create employment — often rather unreal employment — by using targeted wage subsidies, public sector work programs, or other active policies. It could do so because it makes it possible, indeed reasonable, under certain circumstances, for people to take jobs at well below a living wage. Without a minimum wage, as it no longer would be needed, both the private and the public sector would have the opportunity and incentive to create jobs that (a) are somewhat attractive, (b) have some point, and (c) make most people better off then they would be by simply staying home and relying solely on their *ugbi*, even if their jobs do not pay very much.

Ugbi would also help break the poverty cycle, and the endemic joblessness that goes with it, a cycle affecting whole generations of people in contemporary capitalist societies, people who grow up without any work skills and any reasonable expectation of a job. Without the work skills they cannot get a job, and

without a job they cannot gain the work skills. *Ugbi* would also enhance the lives of people by enabling them, if they wished, to drop out of the world of paid employment to pursue an education, start up a new career, start a business, care for children or elderly relatives, do political work, or to work for good causes. They could — and I don't mean this ironically — become full-time revolutionaries, something that might be as good for us as it is for Chiapas. These are things — or at least some of them — that are both beneficial to the individuals involved and to society.

Such a *ugbi* would not be so splendiferous as to encourage people to be free-riders, living high off the hog. With *ugbi* there is simply no possibility of living high off the hog. It still would enable people with pronounced preferences for leisure over income to refuse jobs, provided they were prepared to live rather frugally. This means that more people would be able to live as they like without worsening the lives of others. But, to repeat what I said earlier, it is a realistic assumption to make that most people would choose to work where work is on offer and where the work is not grossly unattractive. (It is not going to be completely unexploitative in any capitalist society, or even in emerging socialist societies.)

Ugbi will not fall like manna from heaven; it must be paid for out of tax revenues. If its adoption would increase people's income tax significantly, it is plainly dead in the water. However, it is quite possible that it would be less expensive than the present welfare system or any plausible modification of it. With *ugbi* we would be rid of the expensive welfare bureaucracy; *ugbi* would, by contrast, be simple and inexpensive to administer. Remember there would be nothing like a means test. But people in the higher income brackets would have most, in some instances perhaps all, of their *ugbi* clawed back in income taxes.

However, at present the bulk of the middle strata of society are very adverse to paying taxes and are in a mean-spirited mood. They might be unimpressed by arguments that *ugbi* might very well be less expensive than the welfare system, for they are out to abolish, or at least extensively dismantle, the welfare system itself. The right wing neoliberal agenda they favor goes in heavily for cuts in social spending. But, if that is done at all extensively, it will lead to increased crime, increased drug use and prostitution, an increase in aggressive public begging, and deteriorating social services (e.g., the public health care system in the societies that have them) and deteriorating infrastructures (highways, metros, etc.). It will also have disastrous effects on education. More money will be needed for more police and more prisons. And again the money needed will not fall like manna from heaven. Money — lots of money — coming out of taxes will be needed; the quality of life will become increasingly more grim for, among others, the middle strata who are now so resentful at paying taxes. But perhaps after a stretch of this social hari kari — this world of *The Three Penny Opera* — the "middle class" will be a little more ready to listen to reason and will become ready to pay taxes, *perhaps* even somewhat increased taxes, for more useful purposes. (Remember that now we get rather poor value for our tax bucks, but with *ugbi* and other progressive policies in place this would cease to be so or at least not so extensively so.) Being decent and caring about people and acting in one's own self-interest would in such circumstances in standard cases ride tandem. *Ugbi* is practically feasible and humane, and it would modestly enhance the productive capacities of our societies. It is an option that a sovereign Quebec — and not only Quebec — should seriously consider.

IV

I now turn to market socialism. In the last decade, socialism has come to seem to many people to be a fantasy and capitalism in some form or other to be, if not eternal, the face of the future for as far as we can see. This confident assessment of things is premature, for capitalism is hurting a lot of people all over the world and sometimes very badly, and increasingly so. This situation obtains for all strata, aside from a small class of rich capitalist elites and their well-paid facilitators though the extent of the hurting, of course, varies. This is evident in the rich capitalist democracies and even more so in Third and Fourth World countries. Eventually people — or so we can reasonably hope and work to facilitate — may come to feel that enough is enough and to realize that this steady and cumulatively deep decline in their quality of life is unnecessary. They will come to suspect that it just isn't, as neoliberal ideology has it, the way things have to be if things are not to get even worse than they already are. It isn't just written into the human condition under conditions of modernity (Bourdieu 1998a and 1998b). And with this realization people may come in time with varying degrees of vigor to struggle against it and to be open to new options. It is here where market socialism, though not necessarily under that name, can be a real and valuable option.

Let us see how this goes. Western socialists have for a long time in their opposition to the Soviet Union made it plain that any acceptable socialism must be democratic. They have also shown how it could be democratic, how socialism extends democracy to the workplace and in doing so extends democracy. They have also shown how it is deeply committed to a radical egalitarianism (Wright 1994, 447-49 and Nielsen 1996a, 121-158). But what many reflective and knowledgeable people with egalitarian commitments are sceptical about is not that socialism, if it could be made to work as a tolerably efficient economic system, could be

democratic, but about whether it could in fact be an efficient way of organizing social life. Moreover, they also recognize, if they are at all knowledgeable, that socialism, no matter how genuine and well-intentioned, could not deliver on justice and equality or even in the long run on democracy if it is not efficient. Because it is widely believed that it cannot be efficient, socialism has come to seem to many people to be a non-starter. Even if great masses of people, out of their frustration with the capitalist order, were to go for it, that, not a few intelligentsia think, would be a mistake — another future of an illusion. The road is not from capitalism to socialism to communism, but from capitalism to capitalism. The most we can hope for against neoliberal excesses is a tamed social democratic capitalism with a somewhat human face.

Here, market socialism enters. Market socialists are (*pace* Bertell Ollman) socialists and are not settling for a social democratic compromise with capitalism (Ollman 1997).[1] Some very intelligent and well-informed analytical Marxians, while remaining firm socialists, have worked out sophisticated models for a market socialism that could have application in the foreseeable future in societies that are now the rich capitalist democracies. (They, of course, could not remain capitalist and be market socialist societies.) They are at least arguably realistic models for a socialism that would be efficient and, as well, make it possible for us to achieve something reasonably approximating (a) equality of opportunity for self-realization and welfare, (b) equality of opportunity for political influence, and (c) equality of social status and social standing (Roemer 1994a and 1994b and Schweickart 1993).

John Roemer, perhaps the leading analytical Marxian economist, characterizes market socialism as "any of a variety of economic arrangements in which most goods, including labor, are distributed through the price system and the profits of firms, perhaps managed by workers or not, are distributed quite equally among the population" (Roemer 1994b, 456). He sees that a central, perhaps the central, question concerning market

[1] Bertell Ollman in his "Market Justification in Capitalist and Marxist Socialist Societies" resolutely attacks root and branch all forms of market socialism. Socialism, he believes, is impossible with markets. Market socialism, he has it, mystifies the politics of class struggle. Retaining a market — any market at all — will interfere with the building of socialism and render large scale economic planning for the meeting of human needs impossible. The market, he believes , should not even be kept as a mechanism for allocating goods. "Leaving most market mystification in place, market socialism cannot be viewed as just another form of socialism, or even a compromise with capitalism. It is a surrender to capitalism." Ollman is well aware that there are market socialists who regard themselves as genuine socialists and not as social democrats or supporters of social democracy, except sometimes tactically. But, as Ollman sees it, their good intentions notwithstanding, their theory is so intertwined with market society that they cannot be genuine socialists. "Market socialism" is an oxymoron. Moreover, their theories are utopian in the bad ways the Marxist tradition has criticized utopian theories for being. Marxist socialists will return the compliment by accusing Ollman of utopianism and Marxist Fundamentalism to boot. I think little will be accomplished by such rhetorical exercises in persuasive definition. I do not believe that Ollman has made a sound case against market socialism or even that he understands it properly. But he does have a strong case against market societies (and with that, of course, against capitalism) and he shows very well how pervasive and humanly destructive market societies with their market mode of thinking — what Erich Fromm called their market orientation — are and how this runs against human flourishing. What I believe Ollman does not see is that market socialism is not caught up, either directly or indirectly, in that; further, he does not realize that it does not reject but actually accepts central planning, rejecting only the administrative (command) allocation of goods as the standard (characteristic) way of allocating goods. What he fails to realize is that we can — and arguably should — have market allocations without having a market society as he characterizes it, without market mystification, and without making the existence of genuinely socialist persons — what Isaac Deutscher called socialist man — impossible, unlikely, or undesirable. (I am here conceiving of socialist persons just as Ollman and Deutscher will conceive of them.) Market mechanisms, as market socialists conceive of them, are mechanisms to efficiently allocate goods. Orienting production as socialists do to meet human needs, we need a device to allocate the various goods needed to satisfy those needs — genuine needs and not "needs" artificially created by capitalism with its market orientation. These market mechanisms are not the reified powers Ollman attributes to the market. For market socialists market mechanisms are, in Ollman's metaphor, can openers and not meat grinders. They are tools to be used in fully socialist and indeed communist societies — full communism, if you will — as well as in capitalist societies, though, as Ollman well shows, they become something dehumanizing in capitalist societies. That is not due to their allocative use. It is one thing to use a can opener to open a can of beans; it is another thing to try to use it to open a bottle of champagne. The value of market mechanisms is that of an instrument — just as a can opener — that we control and that does not control us as markets do in market societies, i.e., the dear old capitalism we know and love. In stressing its usefulness purely as a tool, market socialists say something that (a) is true and (b) helps to give socialism a running chance in the societies in which we now live. But having said all this, and without taking any of it back, I would urge that Ollman's essay be carefully studied by people interested in market socialism and indeed by anyone who seriously cares to think about the world in which she lives. Market socialism is becoming a dogma with those of us who are socialists with anything like an analytical intent. We tend to think that, among socialists, market socialism is something that only Neanderthals would question. And indeed I think it is the only socialist game in town. Ollman, to his credit, gives us some reasons for thinking twice. His account should not be just brushed aside as a bit of Marxist Fundamentalism. We market socialists, given the importance of the issue, should take to heart Cromwell's "Think man, in the bowels of Christ, that you may be wrong" (Ollman 1997; see also Deutscher 1967). See here the debate, and most particularly the debate between David Schweickart and Bertell Ollman, over market socialism (Ollman 1998 and Weisskopf 1992a).

socialism is whether it can give a clear specification of a mechanism by which profits can be so distributed without unacceptable costs in efficiency. Moreover, and connectedly, it is also important to recognize that in a modern economy, innovation is essential if we are to have efficiency, and this requires — or so he believes — the discipline of the market. Without the competition provided by markets, both domestic and international, no business enterprise will be forced to innovate and the economy will stagnate. Hence socialism, if it is to be anything other than badly utopian, needs to be a market socialism. What needs to be brought into being is an economic mechanism under which technological innovation will take place, but in which a characteristically capitalist distribution of income will not result. We need carefully to consider whether competition between business enterprises — competition generating innovation — can be induced without a regime of private productive property in firms (Roemer 1994b, 460)?

Market socialists have given various models for how this might be achieved. (In addition to Roemer 1994a and 1994b and Schweickart 1992 and 1993 see Weisskopf 1992a and 1992b). Let me, to get this conception clearly but boldly before us, give a crude approximation of Roemer's model, a model which he recognizes will surely need to be fine tuned and perhaps in major ways changed as we think it through and consider how it could be applied in real life situations. Moreover, if we ever get into the situation where we could try it on for size, it is to be expected, as the social experiment goes on, that changes would have to be made. But I am claiming that it is some such model that should get on the agenda of a sovereign Quebec where a socialist option would be, at least down the line a bit, an option for Quebec.

Roemer's model involves creating two kinds of money in a market socialist society: *commodity* money (the money with which we are all familiar), used to purchase commodities for consumption, and *share* money, something Roemer calls coupons, used to purchase mutual funds that give their purchasers ownership rights in firms. It is essential that these two kinds of money not be convertible. So there is on his model no way of trading coupons for dollars, francs, pounds, and the like. There is to be an equal distribution of coupons. All citizens, that is, upon reaching the age of majority, are given their per capita share of the total coupon value of the productive property in the economy. With these coupons they can buy mutual funds from which they derive ownership rights. This entitles them to dividends from the profits of the firms and a right to vote for people on the board of directors of the firms in which they own shares. In such a market socialism, there is both a labor market and a stock market. Stocks, however, must be purchased in the form of mutual funds and can be purchased only with coupons. There is no purchasing them with commodity money, e.g., dollars, pounds, francs, kroner. Coupons cannot be given away, but they can be sold for other coupons at their market coupon rate. But, to stress in repeating, shares and coupons are not transferable for commodity money. When a person dies, her shares and unspent coupons revert to the state for redistribution. The non-transferability and non-convertibility of coupons keep ownership from being concentrated. The people rich in commodity money cannot buy out the poor in commodity money. This, though still far from being perfectly egalitarian and still very distant from full communism, prevents the great concentration of wealth and power in the hands of a few that is characteristic of capitalist societies. These great inequalities of wealth and power and the domination and control that go with them are the worst forms of inequality in our societies. And these great inequalities of wealth, so characteristic of capitalism, ensure that in a very fundamental sense our societies will be undemocratic no matter what constitutional forms we have and no matter how faithfully they are adhered to.[2]

Since stocks are sold for coupons and not for dollars or marks and the like, firms cannot directly raise money by selling stocks. Finance capital is raised through credit markets organized by state banks, which are in turn organized like the other public firms, i.e., they themselves have a market socialist organization. Such involvement by the state allows a certain amount of planning of the market similar to the planning in advanced capitalist countries. And it is a planning, in both cases, without direct political influence in the workings (the allocative functions) of the market characteristic of command economies. A market socialist, as Roemer makes plain and as Alec Nove did before him, should not reject central planning *tout court*, but she should reject command/administrative allocation systems, systems that were characteristic of Soviet-style economies. The two ideas are not identical, and it is only the latter that has been shown to fail. With such a market

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[2] After I had written these remarks, I thought of the work of John Rawls — work that I, like many others, greatly admire. That notwithstanding, it seems to me that Rawls's account does not come to grips with such problems and it is anything but clear that it has the resources to do so. He, for the most part, does ideal theory and I do not complain about that, but it is also an ideal theory that is not indifferent to real world conditions and real world problems. Rawls thinks that progressive forms of capitalism can (a) be just and (b) sustain democratic societies — that is, capitalism can be compatible with a democratic political order. It is hard to see how either (a) or (b) could be true if the above remarks in the text are on the mark. But do they not straight forwardly tell it like it is? I have tried to argue that they do, and it is hard to see how public reason, and attention to constitutional essentials, to constitutional design, and to the role of law will make any difference here.

socialist scheme, we have "relatively freely functioning market mechanisms along with a sustainable egalitarian distribution of property rights, a roughly equal distribution of profits and a significant planning capacity of the state over broad investment priorities" (Wright 1994, 448-49). This yields, where we also have a democracy, efficiency with at least an approximate justice and a rough equality and, as well, both a respect for autonomy and for an enhanced autonomy for all — in short, a realization of many of the traditional ideals of socialism as well as those in liberal social democracies.

I am not so innocent as to think that a Quebec government that would be immediately formed after sovereignty would, should, or indeed could, put market socialism or even *ugbi* on its agenda or even give either of them serious consideration. That is a pie in the sky. Market socialism, in particular, would, I would sadly surmise, be rejected out of hand. What I am saying is that as the failure of its more or less neoliberal programs becomes increasingly apparent to broad sectors of the population, a population somewhat more attuned to social democracy than the populations of the United States or English-speaking Canada, socialism and *ugbi*, if intelligently explained and firmly urged, might in time get a serious hearing. Here is a task for critical intellectuals in Quebec. And there are similar tasks for intellectuals elsewhere. In the immortal words of Adlai Stevenson: Eggheads of the world unite. You have nothing to lose but your yokes.❑

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GUN CONTROL AND JUDICIAL ANARCHY

David M. Beatty

IN POLITICS AND LAW

In Canadian politics gun control is still a hot button — especially in the north, west and the more rural parts of the country.[1] Many — maybe even most — people who live on the land see laws that attempt to regulate ownership of guns as the work of eastern city slickers pontificating to their country cousins on how to live the safe, moral and healthy life. For them, gun control laws, and especially those passed by the federal government, show "a lack of respect, understanding and tolerance for the needs and values of those Canadians for whom firearms are a part of daily life."[2]

So it was no surprise when Ralph Klein's government in Alberta asked its Court of Appeal to rule on the constitutionality of Canada's new *Firearms Act*, which the federal Liberals had enacted at the end of 1995.[3] Even though he must have known what the Court's answer would be, at least he could be seen as keeping faith with his people and sustaining the debate with the east.

As a matter of constitutional law, the validity of the latest restrictions on the possession and ownership of guns is unassailable. Even before the case was referred to the Court, those who knew their constitutional law had no doubt the *Firearms Act* would pass the test.[4]

The new law grew out of an already extensive set of rules and regulations governing the possession and ownership of guns that the federal government had been developing ever since it first enacted a *Criminal Code* in 1892. Essentially, the *Act* mandates a universal licensing and registration system for the acquisition and possession of all guns. Whereas before, owners of rifles and shotguns were not required to register their weapons or pass a safety test, in the future they, like owners of every other kind of gun, would be obliged to do so or else face the threat of criminal prosecution.[5]

In law, there are only two ways these new restrictions could be attacked. It could be argued that the new legislation was unconstitutional because it invaded the provinces' jurisdiction over "property and civil rights." Alternatively, it might be said the law was defective because it infringed the "liberty and security of the person" of ordinary law-abiding citizens that is guaranteed in section 7 of the Charter of Rights.

Both arguments are, however, hopeless non-starters. Indeed, except for a claim by Aboriginals,[6] the Charter argument is so weak it did not even get off the ground. Apparently, Ralph Klein and his colleagues realized that the new rules constitute such modest and marginal limitations on people's freedom to own and use guns that they did not even refer the Charter question to their Court. In an age in which everything from cars to dogs is subject to licensing and registration regimes, it would be ludicrous to argue that owners of weapons as dangerous as guns have a constitutional

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1 As can be seen in the participation of the governments of the three prairie provinces, Ontario and the two territories in the reference Ralph Klein put to Alberta's Court of Appeal.

2 *Reference re Firearms Act* (1998) 164 D.L.R. (4th) 513 (Alta. C.A.) per Conrad J.A. at para. 598.

3 S.C. 1995, c. 39

4 See e.g., Allan Hutchinson and David Schneiderman, "Smoking Guns: The Federal Government Confronts the Tobacco and Gun Lobbies" (1995) 7 Constitutional Forum 16.

5 The legislation "grandfathered" and essentially exempted anyone who already possessed a rifle or shotgun and who did not acquire any new weapons.

6 Note that the Chiefs of Ontario did ask the Court to expand the reference to rule on their challenge that the legislation violated their Aboriginal rights, but Catherine Fraser declined (see *Reference re Firearms Act*, *supra* note 2 at para. 10).

right to possess them without having to register them or even prove that they know how to use them safely.

Klein did put the division of powers argument to his Court of Appeal, but, in truth, its chances of success were just as remote. The rules of constitutional law are absolutely clear that the federal government is entitled to regulate potentially dangerous substances like guns, explosives, hazardous products, toxic substances and even food in order to prevent accidents and misuse under its power in section 91(27) of the old *B.N.A. Act* to enact criminal law.

In two recent landmark rulings, the Supreme Court of Canada has endorsed an extremely broad reading of the federal government's power to designate as criminal any conduct that threatens the peace, order, security, health or morality of the country.[7] According to the Supreme Court, any federal legislation that contains a prohibition backed by a penal sanction and is directed to one of these purposes is constitutional unless it can be shown that the real purpose of the law is something other than what the government claims it to be.[8]

In its recent jurisprudence, the Supreme Court has also recognized that "the private possession of weapons and their frequent misuse has become a grave problem for the law enforcement authorities and a growing threat to the community. The rational control of the possession and use of firearms for the general social benefit is too important an objective to require a defense."[9] Indeed, Chief Justice Dickson explicitly endorsed the legitimacy of earlier gun control laws whose purpose is to limit "the ownership of dangerous weapons to those people who will use them in an honest, responsible fashion."[10] And, according to Gerald LaForest, who authored the majority opinions in *R.J.R. MacDonald* and *Hydro Québec,* the federal power even extends to offenses like gun control that have a "significant regulatory base."[11] As a matter of constitutional law, no one can deny that gun control is a legitimate subject for some federal regulation. The only question is how much and what kind.

Beyond the stricture against "colourable" attempts to invade provincial jurisdiction,[12] the Supreme Court only requires the federal government to satisfy one other requirement when it is pursuing an objective — like public safety — that it is authorized to address in section 91. This test focuses on the means — the particular policy instrument — the government chooses to realize its purposes; it requires that the means be closely connected — sufficiently integrated — with the larger aims and objectives of the legislative regime of which it is a part.[13]

The Court has described this standard as a flexible one that varies with the degree to which the federal initiative invades provincial jurisdiction. The deeper and more substantial the invasion, the more rigorous and demanding the test. Laws that constitute severe encroachments on the provincial domain must be shown to be "necessarily incidental" or "truly necessary," while those that impinge only marginally need simply demonstrate a "functional relationship" with the larger policy objectives.

When this principle is applied to the licensing and registration requirements of the *Firearms Act*, it strains credulity to claim they pose a significant threat to provincial control over property and civil rights. The hard empirical reality is that essentially the same system of licensing and registration has been in place for every other kind of firearm except rifles and shotguns for the last twenty years without threatening the autonomy and sovereignty of the provinces in any noticeable way.

The *Firearms Act* is aimed at one very specific kind of property that is inherently dangerous and that has been the subject of evolving and extensive federal regulation for a very long time. This is not a law about property and civil rights in general. Recognizing a valid federal concern in the registration of guns provides no precedent for federal control over other forms of property like bridges or farm equipment or dogs.

Moreover, the *Firearms Act* poses no threat to the laws the provinces have already enacted regulating the use of guns in urban areas or for hunting. There was nothing in the earlier legislation and there is nothing in this *Act* that interferes with a province's capacity to enact laws of this kind that are sensitive to their local circumstances and needs.

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7 *R.J.R. MacDonald Inc.* v. *Canada* (1995) 127 D.L.R. (4th) 1; *R.* v. *Hydro Québec* (1997) 3 S.C.R. 213, 266-67, 273, 275.

8 The proviso is known as the 'colourability' doctrine and has been invoked very sparingly by the Court because it effectively if not explicitly requires the Court to rule that a government was acting in bad faith. See, for example, *R.* v. *Morgentaler* (1993) 107 D.L.R. (4th) 537.

9 *R.* v. *Schwartz* (1988) 2 S.C.R. 443, 487 (per McIntyre J.).

10 *Ibid.* at 470.

11 *R.* v. *Wholesale Travel Group* (1991) 3 S.C.R. 154, 210 (per LaForest J.).

12 *Supra* note 7.

13 *General Motors of Canada Ltd.* v. *City National Leasing* (1989) 58 D.L.R. (4th) 255 (S.C.C.).

Indeed, the new *Act* even contemplates each province being able to designate the senior official who administers the registration and licensing procedures. In truth, the only dimension of their autonomy that the provinces have lost is the choice of not having any licensing and registration system for rifles and shotguns.

Because the new licensing and registration rules have such a limited impact on the provinces' sovereignty to control property and civil rights, they are effectively immune from a constitutional challenge. It is simply not possible to say these provisions will not further the government's objectives — of reducing the risks of loss of life and violent injury associated with the accidental or deliberate misuse of guns — in any way at all.

How can the federal government be said to be acting irrationally when it tries to tighten up a system that, everyone seems agreed, is not doing the job? Hundreds of Canadians continue to die every year as a result of accidents and misuse of guns, and rifles and shotguns account for a larger percentage of the carnage than any other kind of firearm.[14] Even if (as surely must be the case) these new restrictions will not solve the problem, the fact remains that making it more difficult for people who can not or will not use guns safely serves the overall objectives of the government's gun control policy in very direct and immediate ways.

In all of its different aspects, then — its purposes, its methods and its effects — the new licensing and registration requirements of the federal government's *Firearms Act* are constitutionally unimpeachable. Even after only a couple of weeks studying the law, not many students have any doubt about that.

In The Alberta Court of Appeal

At this point, some people might object that I have grossly oversimplified the rules and requirements of constitutional law and the results to which they lead. How, it might fairly be asked, could the law be so simple and straightforward if the five judges on the Court of Appeal who sat on the case needed to write four separate opinions, totaling more than two hundred pages, to explain their reasons and then divided 3:2 in the result? Doesn't the division of opinion among Alberta's legal elite suggest a much more complex and complicated picture of the law than the one I have presented?

The simple answer is no. Sadly, the fact is that the practice of writing lengthy, multiple opinions is now very much in vogue on virtually all appellate courts in the country, including the Supreme Court of Canada, even when, as in this case, the right answer is absolutely unambiguous and clear-cut.

Moreover, two of the judges who voted to uphold the legislation (Mary Hetherington and Ronald Berger) wrote very similar opinions that were based squarely on the Supreme Court's recent rulings in *R.J.R. MacDonald* and *Hydro Québec* and which were short and to the point. Only Catherine Fraser (the Chief Justice) and Carole Conrad, writing for herself and Howard Irving in dissent, went on at length, and most of what they had to say was entirely superfluous doctrinal packaging that either added nothing of substance to our understanding of how deeply the universal requirement of licensing and registering all firearms undercuts provincial sovereignty or, even worse, provided a camouflage behind which the judges could give vent to their political views about gun control regardless of what the rules of constitutional law required.

Catherine Fraser was tempted more than anyone by the thrill of dissecting the maze of doctrinal encrustations that have been built up around the resolution of federalism cases over the years. She went on for over one hundred pages discussing the intricacies of doctrines like "pith and substance," "sufficiently integrated," "double aspect" and "colourability" even though she knew and acknowledged that all of them were simply variations on the same theme.[15] She struggled with whether she and her colleagues should evaluate the specific provisions regulating licensing and registration first or only after they had examined the larger legislative regime of which they were a part, even though she recognized it did not matter in the end.[16] Although she had no doubt about the validity of the *Act*, she could not resist working through the labyrinth of doctrinal principles that plague this part of our constitutional jurisprudence before she announced that result.

Carole Conrad also wrote a very lengthy judgment — in which she cited precedents and principles of constitutional law extensively — but in her case the doctrinal exegesis was made to serve blatantly political

[14] The evidence is summarized by Catherine Fraser in *Reference re Firearms Act*, *supra* note 2 at paras. 101-21 of her judgment.

[15] *Ibid.* at paras. 30, 38.

[16] Ibid. at para. 45.

ends. Conrad and her colleague Howard Irving just could not get over the fact that this legislation makes ordinary activities of law-abiding citizens a crime. In page after page in her judgment she bristles at the idea that the federal government can "turn today's law-abiding gun owners into tomorrow's criminal offenders."[17]

To protect the freedom and liberty of her people, Conrad manipulated the doctrine and the case law in a way that is shockingly crude and professionally inappropriate. She pays lip service to the sweeping definitions the Supreme Court announced in *R.J.R. MacDonald* and *Hydro Québec* and then substitutes a much more restrictive definition of her own that would only allow the federal government to make specific acts that were dangerous or morally blameworthy criminal offenses.[18] Even though the majority of the Court in *Hydro Québec* explicitly said it was within the powers of the federal government to enact a general regulatory scheme that would enable it to differentiate substances that were dangerous from those that were not (which paralleled the approach of the licensing and registration scheme in the *Firearms Act*),[19] Conrad insisted section 91(27) had been limited to proscribing specific conduct that was proven to be dangerous or culpable in some way.

In denying that the criminal law powers authorized the federal government to regulate dangerous substances, she actually cited Antonio Lamer and Frank Iacobucci's opinion in *Hydro Québec* even though it was written in dissent.[20] In a judgment of almost two hundred paragraphs, she devoted only five at the very end to explain why the new legislation was not sufficiently integrated with the government's objective of reducing the number of deaths and injuries that are caused by the accidental or deliberate misuse of guns, to satisfy the test the Supreme Court established in *General Motors*.[21]

So there is in fact nothing in any of the judgments that were written in the case that is inconsistent with the claim that the question, of whether the federal government's *Firearms Act* is constitutional or not, is an extraordinarily easy one that could have been answered in a short opinion of ten to fifteen pages. However, even if the division of opinion on Alberta's Court of Appeal does not make the case a close or complicated one, the fact that four judgments were handed down and two judges wrote in dissent makes it automatic that the question will now be taken to Ottawa and put to the Supreme Court.

In The Supreme Court

The fact that the case is such an easy one presents the Supreme Court with a unique opportunity not only to settle the parameters of legitimate federal regulation over firearms and other dangerous weapons once and for all, but also to bring a measure of coherence and integrity to the rules and doctrines of constitutional law that, as the judgment of the Alberta Court of Appeal painfully demonstrates, it currently lacks.

With two new members on the Court since its last big ruling on the federal government's criminal law powers in *Hydro Québec*, the judges in Ottawa could use this occasion to distance themselves from the sweeping definition a majority of them endorsed in that case. As Justices Hetherington and Berger explained in the reasons they wrote, the way the Supreme Court has come to define the federal government's power to enact criminal law allows it to prohibit and attach a penal sanction to almost any behaviour that threatens the peace, order, health, safety, morality, etc., of the country, regardless of its effectiveness or its impact on provincial autonomy.[22]

The way the Court has come to articulate the federal government's criminal law power is completely at odds with the more nuanced definitions it has established for the other major sources of federal lawmaking authority such as the 'peace, order and good government' and the trade and commerce clauses. When the federal government pursues some policy objective under one of these heads of power, the Supreme Court has required it to respect the equal autonomy of the provinces and not cut into their jurisdiction too deeply. To justify policies in these domains, the Court has insisted that there be a measure of rationality and proportionality not only in objectives it pursues, but in its methods (means) and effects as well.[23]

If the Supreme Court were to use the gun control case to imply a parallel requirement of proportionality into section 91(27), it would give its federalism

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[17] *Reference re Firearms Act, supra* note 2 at para. 521; see also paras. 436, 467, 471-72, 520-21, 535, 578, 582 and 591-92.

[18] *Ibid.* at paras. 438, 494, 506, 508, 520, 534-35, 537, 538, 552, 555-56, 558, 572 and 583.

[19] See *R.* v. *Hydro Québec, supra* note 6 at 267.

[20] *Reference re Firearms Act, supra* note 2 at para. 567.

[21] *General Motors, supra* note 12.

[22] See *Reference re Firearms Act, supra* note 2 at paras. 373, 381 and 412; see also Fraser C.J.C. at paras. 24 and 318.

[23] See my *Constitutional Law in Theory and Practice* (Toronto: University of Toronto Press, 1995) at 32-39.

jurisprudence a coherence and integrity that it has lacked for a long time. It would bring to an end the practice of judges picking and choosing bits and pieces from precedents and doctrines that overlap and duplicate each other. Rather than a jurisprudence in which the principles are allowed "to march in pairs" (as Paul Weiler put it so precisely 25 years ago),[24] all federal — and indeed provincial — initiatives, regardless of their substance or purpose, would be tested by the same principles that maximize the autonomy and equal sovereignty of each.

Moreover, if the Supreme Court were to make the idea of proportionality the central precept of its analysis of federal-provincial relations, it would also allow the judges to write much clearer and crisper judgments that would be accessible to lawyers and laypersons alike. For the many gun owners who surely feel aggrieved by the decision of the Alberta Court of Appeal, undoubtedly one of its most egregious features is that, for all practical purposes, it stands unjustified and unexplained. The length and doctrinal complexity of the judgments guarantee that very few people, outside of the lawyers involved in the case, will really understand why the five judges voted and wrote as they did.

Cutting ordinary members of the public out of the debate about an issue as politically charged as gun control not only undermines the democratic character of our government, it impacts negatively on the law as well. For the many people who do not know or understand the reasons why the Court upheld the validity of the *Firearms Act*, the coercive impact of the decision will strike them as being illegitimate and lacking in integrity.

There are few precepts of any legal system that would be considered more basic and inviolable than the one that requires that justice must not only be done, it must be seen to be done as well. When the state, even in the person of the judge, acts in a way that impacts negatively on people for reasons they can not comprehend, law comes to be seen, to borrow H.L.A. Hart's famous phrase, as nothing more than "the gunman situation writ large."❑

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[24] Paul Weiler, "The Supreme Court and The Structure of Canadian Federalism" (1973) 23 U.T.L.J. 307, 364.

WHITE PICKET FENCES: RECOGNIZING ABORIGINAL PROPERTY RIGHTS IN AUSTRALIA'S PSYCHOLOGICAL *TERRA NULLIUS*

Larissa Behrendt

> "To accept one's past — one's history — is not the same thing as drowning in it; it is learning how to use it. An invented past can never be used; it cracks and crumbles under the pressures of life like clay in a season of drought."
>
> James Baldwin, *The Fire Next Time*[1]

DIFFERENT CONCEPTIONS OF PROPERTY

On January 22, 1997, the front page of the *Sydney Morning Herald* had news of a tragic fire in Melbourne. The photographs showed flames licking a house, charred bicycles, and men fighting to save property.[2] The newspapers were able to play an angle that evoked sympathy from Australians. The loss of property was emphasized in its human elements. On the left of the news of the fire was another news item. It was headed, "Aborigines Set Strong Demands for Wik Talks."[3] The "Wik talks" were the latest battleground in the fight by Aboriginal people for the recognition of their property rights by the laws, institutions and consciousness of the Australian people.

The media covered the Wik case from a politically loaded perspective. The *Sydney Morning Herald* ran another headline declaring that the Wik decision was "A Decision for Chaos." It printed a photograph of a farmer, a Mr. Fraser, looking forlornly down at his land under the headline "Family's Land Dream Turns into Nightmare." Mr. Fraser's reaction was one of bewilderment:[4]

> I can't believe these judges made that decision. It's not a decision. I can't see that we have made very much progress. We are obviously going through another period of indecision and I am not sure how much of that sort of punishment people can take.

The newspaper coverage highlighted three *contemporary* perceptions in the public consciousness:

- The loss of property — houses, bicycles, cars — is seen as a tragedy when (white) people lose their homes, but when Aboriginal people lose a property right, it does not have a human aspect to it.
- Aboriginal people, in getting recognition of a property right, are seen as gaining something (making "strong demands") rather than being recognized for something they already have that should be protected.
- Aboriginal property interests are seen as threatening the interests of white property owners. The two cannot coexist. Recognition of Aboriginal rights leads to "uncertainty" and "indecision."

These three perceptions — that there is no human aspect to Aboriginal property rights, that Aborigines are getting something for nothing, and that white property interests are more valuable than black ones — are not just played out in the headlines of Sydney newspapers.

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[1] J. Baldwin, *The Fire Next Time* (New York: Vintage International, 1962) 81.

[2] "Night of Terror as Bushfires Spread" *Sydney Morning Herald* (22 January 1997) 1.

[3] "Aborigines Set Strong Demands for Wik Talks" *Sydney Morning Herald* (22 January 1997) 1.

[4] "Family's Land Dream Turns Into Nightmare" *Sydney Morning Herald* (24 December 1996) 1.

These contemporary perceptions assist in the rewriting and revising of Australia's historical treatment of indigenous peoples, allowing a sanitized, temporal reimagination. Their influence can be found pervasively throughout the history of colonized Australia, starting from the day that the British declared Australia was theirs on the basis of a legal fiction: that the land was *terra nullius* — vacant.

The way Australians perceive Aboriginal land rights reveals much about their perception of their own history and their sense of self. For most Australians, the right to own property and to have property interests protected is a central and essential part of their legal system. For Aborigines, Australian law has operated to deny property rights, acknowledge them sparingly, and then extinguish them again; it has been a tool of oppression and colonization. For a society in which all members were supposed to be equal under the law, an analysis of the way in which property rights have been treated with such different standards shows the dual system of laws that has operated in Australia since 1788 — one system for white Australia, the other for black.

THE DOCTRINE OF *TERRA NULLIUS*

The British claimed Australia on the basis that it was *terra nullius* — vacant and/or without a sovereign.[5] This claim ignored the international standards of the time, failing to recognize the sovereignty of indigenous Australians and Aboriginal customary laws, including property laws.[6] Instead of admitting the land was invaded, the British used the doctrine of *terra nullius* to create a myth that the land was "settled."[7] This myth was institutionalized in the legal system. This legal fiction was well suited to the aims of a colony that sought to expand its frontiers and establish a lucrative pastoral industry. It was fed by Eurocentric notions of property use, influenced by the Lockean concept of mixing labor with the soil. The lack of fences, public buildings and hard agricultural power of labor encouraged interpretations that the Aborigines were nomadic with no significant attachment to their land. Since land use was so radically different between the two cultures, Europeans dismissed indigenous use and relations to the land as wasteful, trivial and primitive. Even from the earliest days of the colony, the British saw themselves as being in competition with the indigenous inhabitants for land.

Aborigines had a complex relationship to the pastoralists. From the start, indigenous rights to land conflicted with the colonial agenda. Yet the farmers needed Aborigines to support the system by providing their cheap or slave labor. Aboriginal reserves were supported by farmers who wanted this pool of labor confined and supervised nearby.[8] The creation of early reserves was recognized as a compromise for stolen land. Reserves were given on benevolent terms rather than on rights-based terms, and indigenous rights would eventually be overrun by lust for land, eradicated through lack of legal recognition and through a failure by the trustees to provide protection for the few interests that Aboriginal people still had. Squatters tried to exclude Aborigines from their own land, continuing to take and claim reserve land. Ironically, Australia's pastoral industry could not have carried on without the labor of Aborigines, especially during the gold rush. The faithfulness of Aboriginal people to pastoral leases on their traditional land made them loyal workers. It was here that dual occupancy emerged as an ideal arrangement, with farmers allowing indigenous people to remain on pastoral leases in return for a pool of cheap labor, though only token wages were paid or rations given to indigenous workers.

Governments and churches were supposed to represent and protect Aboriginal interests but were ineffective since their agenda (concerned with

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[5] *Cooper* v. *Stuart* (1889) 14 AC 285 held that the British claim to sovereignty over Australia was justified on the basis that it was an uninhabited territory. Blackstone stated that where land was acquired by settlement, British law prevailed. See W. Blackstone, *Commentaries on the Laws of England* (Chicago: University of Chicago Press, 1979). The view was that the British had annexed parts of Australia in 1788, 1824, 1829 and 1879. The Crown had become both absolute and beneficial owner of the land. Aborigines had no property interests.

[6] An advisory opinion of the International Court of Justice held that international law did not permit territory inhabited by indigenous people to be treated as vacant: *Advisory Opinion on Western Sahara* [1975] ICJR at 39; cited in *Mabo et al* v. *Queensland* (No. 2) 175 CLR 1 at 40.

[7] B. Elder, *Blood on the Wattle: Massacres and Maltreatment of Australian Aborigines since 1788* (Frenchs Forest: Child & Associates, 1988); J. Roberts, *Massacres to Mining: The Colonization of Aboriginal Australia* (Melbourne: Dove Communications, 1981). Australian history books have portrayed the British invasion of Australia as a "peaceful settlement," denying the massacres and injustices suffered by indigenous peoples as a result of the European lust for land. History was painted by the victors and they created an image that the settlers arrived and the Aborigines quietly retreated. It is still controversial to promote the idea in schools that Australia has a bloody past. The use of the word "invasion" was avoided because of its perceived political implications. Instead, notions of "discovery" are used to describe the manner in which white men trekked over craggy mountain ranges. Aboriginal guides can expect as much recognition for helping these "explorers" and "discoverers" as the sherpas who assisted Sir Edmund Hilary.

[8] H. Goodall, *Invasion to Embassy: Land in Aboriginal Politics in New South Wales, 1770-1972* (Sydney: Allen and Unwin, 1996) 92.

assimilating and Christianizing indigenous peoples) was so different from the agenda of the Aboriginal community (concerned with reclaiming land and maintaining cultural practices). The subsequent statutory body designed to protect indigenous interests in New South Wales, the Aborigines Protection Board, also failed to act in the best interests of the Aboriginal people. The Board sold off Aboriginal land to fund its policy of removing children.[9] It also leased Aboriginal land for its own revenues, interrupting the successful leases of Aboriginal farmers to lease lands to white farmers.[10] Even today, land becomes alienated for the use of pastoral leases, urban development and mining opportunities, diminishing the rights of Aboriginal people to stay on traditional lands.[11]

The loss of traditional land was crippling to Aboriginal communities. Only ancestral land was of value to Aboriginal people. One clan's land did not have spiritual and cultural significance to another Aboriginal community. In this way, Aboriginal attachment to land was non-transferable. Not only were Aboriginal communities less capable of surviving in unfamiliar territory, but religious life was seriously impaired or lost. Traditional aspects of Aboriginal culture were destroyed when groups were massacred, had their children taken away, or were removed from ancestral lands, since oral traditions could not be passed down to younger generations. Missionaries did not allow Aboriginal people to use their own languages or practice their ceremonies and attempted to convince Aboriginal people that Aboriginal culture and custom were pagan. Similarly, language and culture could not be exercised or expressed on government reserves.

Land did become claimable under land rights legislation passed in certain Australian states and territories. The first[12] was the *Aboriginal Land Rights (NT) Act, 1976*. New South Wales eventually passed the *Aboriginal Land Rights (NSW) Act, 1983*. It was passed with the *Retrospective Validation of Revocations (NSW) Act, 1983*.[13] The *Retrospective Validation of Revocations (NSW) Act, 1983*, validated reserve land illegally taken from Aboriginal people totaling over 25,000 acres. When the NSW government passed the *Aboriginal Land Rights (NSW) Act, 1983*, it was handing over 6,000 acres while removing hopes of regaining the 25,000 that had been lost through the illegal actions of the Lands Department. These acts, while granting land, did not recognize a title by right. In *Milirrpum* v. *Nabalco Party Ltd. (The Gove Land Rights Case)*[14] Justice Blackburn held that given Australia was settled rather than conquered, its common law did not recognize native title. This legal fiction reinforced the general historical perceptions that Australia was *terra nullius*, a settled country, and that any property given to indigenous peoples was a benevolent act. These legal perceptions were finally destroyed in *Mabo et al* v. *Queensland* (No. 2) (the *Mabo* case).[15]

THE MABO DECISION

In 1992, the *Mabo* case defined native title as a right that exists when an indigenous community can show that:

(i) there is a continuing association with the land (shown by the Aboriginal community); and
(ii) no explicit act of the government, federal or state, has extinguished that title (extinguishment to be shown by the government).

The answer to these two separate questions will determine whether native title still exists.

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[9] The policy had begun in 1912 even though the legislative power wasn't conferred until 1915. The Board was diminishing indigenous property rights to pursue this policy even when the policy itself was legally unauthorized.

[10] The Aborigines exhibited continued resistance to the policies of the Aborigines Protection Board and the actions the legislative body took to diminish the amount of Aboriginal land held on trust. The Board sold off land to white farmers and terminated the leases of Aboriginal farmers. In 1927 a petition was signed by Aboriginal people that demanded full citizenship rights and land as an economic base. The Aborigines Protection Board insisted that Aborigines were incompetent to run their own affairs and that they had, in theory, full citizenship rights (except access to alcohol). The Protection Board argued that equality of citizenship existed since Aborigines had the franchise. In reality, Aboriginal people were denied public benefits and restricted from public places. Many country towns passed Council regulations that prevented the access of Aboriginal people to community facilities (usually on the pretense of health issues) and imposed curfews after dark to restrict the movement of Aboriginal people.

[11] This is traced below in the last part entitled "Continuing Dispossession."

[12] Legislation was passed in South Australia to allow the Pitjantjantjara special control over their traditional land. This legislation was exceptional in that it was far more generous than subsequent legislation but was also linked especially to traditional lands, which land rights legislations never were.

[13] This latter legislation was passed to rectify the mistake made by the Lands Department when disposing of land that made up Aboriginal reserves. It was discovered that the Crown land had been vested in the Protection Board until 1969, not the Lands Department. This made all revocations of Crown land by the Lands Department invalid.

[14] (1971) 17 FLR 141.

[15] (1992) 175 CLR 1.

The High Court also held that native title:

(a) exists in the manner in which it is defined by the Aboriginal community, i.e., the laws and customs of the community will determine the parameters of the native title;
(b) is held communally; and
(c) can be extinguished by
    (i) *legislation* that has a *clear and plain intent* to extinguish native title;[16] or
    (ii) intent shown by the legislature or the executive that would contradict the common law.[17]

The majority of the Court found that compensation was not payable under common law[18] for extinguishment.

Radical title was vested in the Crown of the "discovering" nation — or the subsequent independent government — but the indigenous people retained the right of occupancy although they could dispose of their interest in the land to the Crown.

The recognition of native title is not just a moral issue but rather one of equality. Even when indigenous rights are recognized under the law, they may be valued less than the property rights that vest in individuals. Indigenous property needs to be valued as non-indigenous property is valued; and native title needs to be conceptualized as a valuable property right, like all other property rights. Joseph Singer notes that "(p)roperty is a set of social relations among human beings."[19] The legal definition of those relationships confers or withholds power over others. Failure to assign protective property rights leaves people at risk, vulnerable to the will of others. Property rights held by indigenous Australians had no status under law and now have an uncertain legal status — uncertain because so many areas are left unclear in the *Mabo* case, and uncertain because the legislative has sought to limit the scope of the legal decision and to extinguish certain native title rights. Property rights, central to the English legal system, are protected tenaciously. Given this tendency of the law, it would seem that future interpretations of indigenous property should acknowledge the vulnerability of the group to the abuse of power by the majority. Broad interpretations and protections need to be applied to counter that imbalance of power.

One of the most distinguishing features of native title is that it finds its source in the culture of indigenous Australians. No other cultural groups in Australia can fulfill the legal requirements to claim native title. The unique relationship that indigenous people have with the land inevitably leads to a unique property right, a historical claim based on a cultural attachment to the land. And it is to this distinguishing feature that reasons for the opposition to the right were directed.

By comparing these property rights with native title, it is clear that it is the *source* of the use of land (i.e., custom), rather than the *nature* of the interest in land that is the differentiating factor between native title and other types of property rights. Native title is not a product of common law; it is only recognized by it and thus different in its *source* from other property rights. But it is a property interest by *nature* and therefore is not necessarily distinguishable from other interests.

Native title recognized a legitimate property right in the Australian system that had been ignored until the *Mabo* case. Native title has been perceived as a new type of property right. This perception of uniqueness is correct inasmuch as the parameter of the right is derived from the traditional practice and interest. But there are several aspects about the "unique" nature of native title that could be applied in other areas of law that would make concepts of property more flexible. Advocates of indigenous rights should emphasize the ways in which native title is not a radical divergence from existing property rights, but is in many ways analogous to already recognized and uncontroversial property rights, such as easements.

Given the fact that native title shares these characteristics with other property rights, the recognition of native title as a legitimate property right in 1992 raises two issues: why had recognition taken so long, and why was it so controversial?

Modern Australia is a country built on the land of its indigenous people — land that was stolen in vicious and deceitful actions, land that made a country rich through pastoral and mining industries. It is no surprise that farmers and miners have been the most vehement

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[16] The grant of a fee simple interest by the Crown will extinguish native title, as per *Fejo* v. *Northern Territory* [1998] HCA 58. The High Court also stated that where native title rights are extinguished, they can not be resuscitated.

[17] Justice Brennan argued that McHugh, Brennan and Mason said that it was not wrongful to extinguish native title this way. Deane and Gaudron said that if this was the case, then it was done wrongfully and it would give rise to compensation.

[18] A right to compensation was found by virtue of s.7 of the *Racial Discrimination Act, 1975 (Cth)*. That section prohibits the deprivation of property on the basis of race. The Court found (by a 4:3 majority) that any extinguishment after the Act was passed breached s. 7. Repealing the Act would eradicate the need to pay compensation.

[19] J. Singer, "Sovereignty and Property" (1991) 86 Northwestern University Law Review 41.

opponents to the recognition of native title rights. Both groups have actively lobbied using often blatantly false propaganda to have the *Mabo* decision overturned by the legislature, making no effort to hide the political nature of their resistance to the recognition of native title interests. Advocates for mining and pastoral interests have resorted to scare tactics that have misled and frightened Australians who were led to believe that Aboriginal statehood was the real goal and that the High Court's decision made freehold land vulnerable to claims. Lobbyists and mining companies fed into this ignorance by warning that the *Mabo* decision could lead to the confiscation of private property (freehold title), an underhanded lie easily dismissed by a reading of the law. Self-interested groups have characterized the recognition of native title as the giving of indigenous people an interest in land for free, thus feeding on the racist prejudices of sectors of the Australian population who remain ignorant of the barbarities of their own history and conveniently fail to recall the enormous theft of land that their country, even their own homes, are built on. For example, Hugh Morgan stated: "As far the campaigners are concerned, they have made it crystal clear that their endeavours, extending over two generations, will only be concluded when a separate, sovereign Aboriginal state is carved out of Australia. We can reasonably predict that this Aboriginal state will have all the trappings of sovereignty, but will rely almost entirely on subvention from Australia and its continuing existence."[20]

Resistance to the recognition of native title rights also comes from a confusion of the issues of sovereignty and property, a confusion that also occurs within the indigenous community. In the *Mabo* case the High Court stated that the issue of indigenous sovereignty was not an issue that could be considered by the domestic courts of Australia. The Court has clearly stated in both the *Mabo* case and *Coe* v. *Commonwealth of Australia and the Government of the United Kingdom of Great Britain and Northern Ireland* that the issue of Aboriginal sovereignty needs to be heard by an international forum. They claim that domestic courts do not have the jurisdiction to hear this issue.

The Keating government sought to clarify interests, secure title, regulate procedures and set up a tribunal system to hear claims under the *Native Title Act, 1993 (Cth)*.[21] On June 30, 1993, before the *Native Title Act, 1993 (Cth)* became law, the Wik and Thayorre peoples made a native title claim on the Cape York Peninsula. In 1996, Justice Drummond in the Federal Court made a decision that the claim of the Wik and Thayorre Peoples could not succeed over the claimed areas as they were subjected to pastoral leases. He considered that the grant of a pastoral lease extinguished native title rights.[22]

The plaintiffs appealed to the High Court, which declared that native title can only be extinguished by a written law or an act of the government that shows a clear and plain intention to extinguish.[23] The Queensland lease did not show such an intention. Pastoral leases did not give exclusive possession to the pastoralists; the grant of a pastoral lease did not extinguish native title interests. Native title could coexist with a pastoral lease, but if the interests of the landholders conflicted, the native title interests would be subordinated; in other words, the nature of the native title right (e.g., performance of a ceremony) must in no way conflict with the purposes of the lease (e.g., farming or grazing).[24]

The Court held that a native title holder cannot exclude the holder of a pastoral lease from the area covered by the pastoral lease or restrict pastoralists from using the lease area for pastoral purposes. Nor can a native title holder interfere with the pastoralist's ability to use land and water on their leasehold, the pastoralist's privacy, or the pastoralist's right to build fences or make other improvements to the land. Whenever there is a conflict between the use under the lease by the pastoralist and the indigenous people's native title interest, the interest of the farmer will always trump.[25] Pastoralists do not even pay for the infringement or extinguishment of native title interests. Any compensation is payable by the Crown.

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[20] H. Morgan, "The Dangers of Aboriginal Sovereignty" *News Weekly* (29 August 1992) 13.

[21] The *Native Title Act, 1993 (Cth)* and the National Native Title Tribunal have been subject to criticism from all parties involved with the native title process. Criticism is primarily aimed at the lethargy of the system and the unworkability if the Act: Aboriginal and Torres Strait Islander Commission, *Proposed Amendments to the Native Title Act 1993: Issues for Indigenous Peoples* (Canberra: Australian Government Publishing Service, 1996); Commonwealth of Australia, *Towards a More Workable Native Title Act: an Outline of Proposed Amendments* (Canberra: Australian Government Publishing Service, 1996).

[22] *Wik Peoples* v. *The State of Queensland; The Thayorre People* v. *The State of Queensland*. Federal Court. Matter No. QC 104 of 1993 Fed. No. 39/96.

[23] *Wik Peoples* v. *The State of Queensland & Ors; The Thayorre People* v. *The State of Queensland & Ors*. High Court. Matter No. B8 of 1996.

[24] The Court did not decide whether the Wik and Thayorre people had an interest in that they had sought to have affirmed. That issue was reverted to the lower Court.

[25] In *Eaton* v. *Yanner; ex parte Eaton* (unreported, 27 February 1998), the Queensland Court of Appeal in a 2-1 decision held that native title rights were extinguished by the enactment of fauna conservation legislation, since it is inconsistent with any right the owner has to take fauna from the land. Application for leave to the High Court has already been filed.

The legal interests of farmers remain unchanged. There is no impact on the value of the pastoral lease. Financial institutions base their loans on the property's capacity to carry stock (its ability to generate income), the equipment owned by the pastoralists, and improvements to the land. These matters were unaffected by the decision in the *Wik* case. It was only the pastoralists' *perception* of their property rights that changed. In fact, coexistence of the native title interest and the leasehold interest reflect arrangements informally created by pastoralists who allowed indigenous people access to traditional sites and whose properties had supported communities of indigenous people by using them as a pool of cheap labor.

As with the result in the *Mabo* case, the decision in the *Wik* case ignited public hysteria that was further fueled by the deceitful misrepresentations of industry and government. Government propaganda scared farmers by telling them that Aborigines could claim their land.

CONTINUED DISPOSSESSION

The Howard government's[26] response to the *Wik* case was laid out in their proposal to implement a "Ten Point Plan." This plan sought to extinguish native title interests by converting the leasehold interest into a freehold interest — a windfall to the farmers since they would gain freehold title of land they currently held as leasehold. The cost of conversion and any compensation that would become payable due to an extinguishment of native title was to be covered by the public purse. Indigenous peoples would lose, even if compensation was payable. If the native title interest was the right to enter the land and perform a ceremony, the monetary amount payable for the extinguishment of that right would fail to compensate for the substance of the right being extinguished. Such compensation would be a percentage of the property value and thus would only nominally account for cultural and religious practices being lost. Aboriginal people would have preferred to have keep their property interest.

The Federal Government tried to gain popular support for its Ten Point Plan by portraying pastoral leases as small, family run farms. In reality, the pastoral industry is dominated by big individual and corporate farmers.[27] Cheryl Kernot, then leader of the Democrats, noted that "a search of register of members of Federal Parliament reveals no fewer than 20 members and nine senators, representing the Liberal, National, One Nation and Labor parties, have interests in farming, grazing or pastoral activities."[28] Along with those members of Parliament are some of Australia's richest individuals: Mrs. Janet Holmes a'Court, Mr. Kerry Packer and Mr. Rupert Murdoch. Foreign-controlled corporations also have rural landholdings of more than seven million hectares.[29]

With this windfall at stake, it was little wonder that the mining and pastoral industries have pushed the Liberal government to take an inflexible line with the proposed bill. Senator Herron, the Minister for Aboriginal Affairs, stated his commitment clearly:

> The backbone of this country, I'm proud to say, are the pastoralists. I have no doubt the wisdom they will bring to the judgment they deliver, in the development of policy, will be to the betterment of this country as a whole ... I'm quite proud of the fact there are so many pastoralists on our side, in both the Liberal Party and the National Party....[30]

The bill that contained the Ten Point Plan reflected the extent to which Aboriginal stakeholders had been dismissed by the Prime Minister and his supporters. The bill was revised in the Upper House to allow Aboriginal people the right to negotiate. The Howard government rejected the amended bill and tried again three months later to get the Senate to pass it in its original form. The government's uncompromising line and its rhetoric of business uncertainty ignored the fact that there have been successfully negotiated agreements between

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[26] Elected in 1996.

[27] "Richest of Rich are Wik Winners" *Sydney Morning Herald* (10 May 1997) noted that "The biggest corporate landholders are the Adelaide based S. Kidman and Co with 11.7 million hectares. Then comes the AMP Society owned Stanbroke Pastoral Co., the Elders-owned Australian Agricultural Co., and the Foster family's north Australian Pastoral Co. with six million hectares."

[28] "Conflict of Interest? So What?" *Sydney Morning Herald* (10 May 1997) noted the conflicts of interest: "Mr. Hugh McLachlan — cousin of defense Minister, Mr. Ian McLachlan — Mr. Don McDonald, the National Party president, control tracts of land under pastoral leasehold agreements." Between them the two men control seven million hectares. "Mr. McLachlan is Australia's biggest private landowner, with 4.7 million hectares and Ian McLachlan is one of Australia's largest wool producers." At least three ministers in the Queensland government hold extensive pastoral leases. Former Director of the National Farmers Federation, Nick Farley acknowledged that "The value of pastoral properties will increase and it is therefore a windfall profit for individuals paid for by the taxpayers."

[29] "Richest of Rich are Wik Winners" *Sydney Morning Herald* (10 May 1997).

[30] *Ibid.*

indigenous communities with native title interests and mining or pastoral companies.[31]

The Prime Minister continued to push an approach informed by the ideologies of white Australian nationalism and the doctrine of *terra nullius*. This link to the ideologies of the past is evident in the words of Hugh Morgan:

> When we look back, however, over the period since Sir Robert Menzies retired, just over 25 years ago, and observe how, bit by bit, the language of cultural despair has been adopted by Ministers of the Crown; how the politics of guilt have become the bi-partisan stock in trade of Government and Opposition; how vast tracts of land have been allocated to Aborigines, on the basis of race and descent, under unique terms (terms which effectively take land out of the Australian economy); it is impossible to avoid the conclusion that very powerful forces are at work in our hearts and minds. We seem to have lost our self-respect, and we have certainly lost our admiration for the pioneers who came here from Europe over a century ago and developed this land.[32]

Morgan plays a clever semantic trick here. By claiming that land claimed by Aboriginal Australians have been "allocated" on the "basis of race and descent," he is decontextualizing the principle behind the land rights movement and the legal basis of the *Mabo* and *Wik* cases (that Aboriginal people had legitimate property interests in land that were illegally ignored). Without this context, Morgan portrays the rights of indigenous peoples as being "something for nothing," made even more abhorrent by the fact that it is a windfall based on race (ironically, race was the reason why the land was lost in the first place, since Aboriginal property rights were not afforded the same legal recognition as the property rights of other Australians). Morgan seeks to block any objection to his reasoning by raising the alarm that talk of the historical context is only the "politics of guilt." It is in this rhetorical, semantic play that many Australians can find comfort. It is a retelling of their history that romanticizes the "pioneers who came here from Europe." Morgan thus creates an historical and a psychological *terra nullius*.

The non-recognition of Aboriginal property rights has two ideological strands:

(1) the notion of national identity; and
(2) competition for economic resources and profit.

The first leads to a denial of the presence of indigenous people and a failure to recognize their pre-existing property rights. As "other" to the national image, indigenous peoples draw resentment and envy that they might control rich resources. Similarly, economic motivations, not without racist undertones, perpetuate a sense of envy and resentment as Aborigines are perceived as "getting something for nothing." These ideologies combine to form a mixture of forces that perpetually deny the recognition of the property rights of Aboriginal people.

On the day that the Senate voted the changes to the Ten Point Plan Bill, New South Wales suffered from a spate of serious bushfires. Before Christmas, a severe fire threatened homes at Bangor, on the southern outskirts of Sydney. The newspaper headlines blazed, "I've lost everything. We have no house."[33] Impatience with the failure of the Ten Point Plan to pass even affected the Labor Party,[34] providing further evidence of the fact that Australians view this native title right as "getting something for nothing" and expendable.[35] While it is easy to lament the loss of property in a fire, it seemed impossible for sectors of Australia's dominant culture to see a human aspect, let alone a moral or a legal aspect, in the loss of a property interest held by an indigenous person if it is linked to traditional title. These interests

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[31] For example, the negotiation of the Century Zinc mine in the Gulf of Carpentaria in March, amid the claims that the Wik decision would prove disastrous for Australian business. "Native Title's $1Bn Victory" *Sydney Morning Herald* (28 March 1997). See also I. Manning, *Native Title, Mining, and Mineral Exploration* (Canberra: National Institute of Economic Industry and Research, 1997). Similarly, the Cape York Land Council announced a deal between traditional owners and the Chevron Corporation that will allow a gas pipeline to be constructed from Papua New Guinea to Australia. "Mining Giant puts Squeeze on Senate" *Sydney Morning Herald* (26 November 1997).

[32] H. Morgan, "The Dangers of Aboriginal Sovereignty" *News Weekly* (29 August 1992) 13.

[33] "I've Lost Everything. We've No House" *Sydney Morning Herald* (3 December 1997).

[34] The Queensland leader of the Labor Party stated that the federal Labor Party should pass the 10 Point Plan "so we can get on with our lives." It is clear that his "we" does not include indigenous Australians. "Howard Exploits Crack in Labor's Wik Line" *Sydney Morning Herald* (16 January 1998).

[35] Land is not the only thing that Aborigines are seen to get for nothing. Any kind of assistance attaches this rhetoric and resentment. Pauline Hanson, Member of the House of Representatives, stated: "I talk about the exact opposite — the privileges Aboriginals enjoy over other Australians. I have done research on the benefits available only to Aboriginals and challenge anyone to tell me how the Aboriginals are disadvantaged when they can obtain three and five percent housing loans denied to non-Aboriginals." Reported in *Hansard*, 10 September 1996.

are seen as countering progress and going against the best economic interests of Australia.

Aboriginal leaders had stated that a constitutional challenge to the amendments to the *Native Title Act* contained in the Ten Point Plan, on the grounds that legislation that extinguished the rights of indigenous peoples, was not a valid use of the race power in section 51(xxvi) of the Constitution;[36] such exercises, it was argued, had to be beneficial. Alternatively, the *Native Title Act*, as it would come to exist after the proposed amendments were made, would be such a "manifest abuse" of the race power that the Court should strike it down. Some light was shed on the outcome of such a challenge by the High Court in *Kartinyeri* v. *The Commonwealth*.[37] The plaintiffs had sought to have a legislative act of the government declared unconstitutional. After a dispute over a development site that the plaintiff had claimed was sacred to her, the government sought to settle the matter by passing an act, the *Hindmarsh Island Bridge Act 1997 (Cth)*, that would repeal the application of heritage protection laws to the plaintiff. The plaintiff argued, *inter alia*, that when Australians voted in the 1967 referendum to extend the race power (section 51[xxvi]) to include the power to make laws concerning Aboriginal people, it was with the understanding that the power would be used to benefit indigenous peoples. Because the *Hindmarsh Island Bridge Act* was passed under the race power and was an act that deprived indigenous peoples of a right, the Act was unconstitutional. The Court rejected the plaintiff's arguments by majority of 5-1.[38] The majority held that the power to make laws also contains the power to repeal them. Justice Gaudron and Justices Gummow and Hayne in their judgements implied the possible existence of a supervisory jurisdiction of the court to prevent "manifest abuse" of the race power. Justice Kirby in dissent held that the race power could not support discriminatory legislation. This decision was seen as a victory by the Howard Government, who saw constitutional challenges to amending legislation that extinguished native title rights as much harder to mount.

Three days after the decision in the *Hindmarsh* case was handed down, Howard's Ten Point Plan bill was debated for a second time. It was amended in the Senate (again by one vote) on the April 4, 1998. Some concessions were made: the registration test was loosened to include indigenous people who were forcibly removed by government legislation and unable to maintain connections to their land; some aspects of the Act were made subject to the *Racial Discrimination Act, 1975 (Cth)* ; a proposed sunset clause to set a limitation period for the launching of all native title claims was removed; and a limited right to negotiate in relation to mining and pastoral land was retained, but without the requirement of "good faith" negotiations or an independent arbitral body. This time the bill passed, becoming the *Native Title Amendment Act* (1998).

There is already evidence of the disempowerment of Aboriginal people by the effects, real and psychological, of the new native title framework. The Jawoyn people surrendered native title rights over horticultural land in the Northern Territory in exchange for two renal dialysis machines and an alcohol rehabilitation center,[39] services that other Australians would consider a basic right. Aboriginal people are operating in a political climate in which they perceive that they have to trade one basic right for another.

Australian law has an expansive interpretation of a property right. In *WSGAL Party Ltd.* v. *Trade Practices Commission*[40] the Court, in interpreting the acquisition power in section 51(xxxi) of the Australian Constitution,[41] held that the words "for any purpose in which the Parliament has the power to make laws" are not to be read as an exclusive or exhaustive statement of the Parliament's powers to deal with or provide for the involuntary disposition of or transfer of title to an interest in property.[42] For there to be an acquisition of property by the Commonwealth, there must be an acquisition of an interest in property, however slight or insubstantial.[43]

Property is a comprehensive term and extends to every valuable interest. For this reason, section 51(xxxi)

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[36] Section 51(xxvi) states that:

> 51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: ... (xxvi) The people of any race, for whom it is deemed necessary to make special laws. The 1967 Referendum facilitated changes to this section that allowed it to include indigenous Australians.

[37] [1998] HCA 22.

[38] Only Kirby J. dissented. Interestingly, he relied on international standards and Australia's international obligations. Note also that one High Court justice (Justice Callinan) had to excuse himself from hearing the case when it was revealed that he had given advice to the government about the matter before his appointment to the Court.

[39] "Aboriginal Health Care 'Barter' Condemned" *The Age* (21 October 1998).

[40] (1994) ATPR 41-314 at 42,175-42, 177.

[41] Section 51(xxxi):

> 51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: ... (xxxi) The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has the power to make laws.

[42] At 585 (at 678).

[43] *Ibid.*

has been held not to be confined to acquisitions by the Commonwealth but extends to its agents and "by any other person."[44]

A broad interpretation of what constitutes native title would include all manifestations of indigenous rights to such title. This would mean, in practical terms:

(a) the recognition of *fishing rights* where the elements needed to establish native title can be shown.[45]
(b) the native title to be recognized where mining and pastoral leases have not substantially disrupted the attachment to land. The mere signing of a lease in 1896 that was never executed should not disrupt any attachment that indigenous peoples have with land. The test is whether there is a *clear intent* to stop the native title. Unless the attachment has been disrupted, the clear intention may not be present.

Again, the justification is as much legal as moral. If there is a guarantee of equal protection, all property rights need to be protected in a way that values the right held by the individual, whether that protection is in the form of recognition of the right or in the form of just terms compensation. As Joseph Singer states, "(t)he definition and distribution of property rights create both power and vulnerability...[P]roperty law should protect the vulnerable and control the powerful — not the other way around."[46]

Litigation is currently taking place that will allow the High Court to decide whether native title rights include fishing rights.[47] Property rights have been found to "extend to every species of valuable right and interest including real and personal property, incorporeal hereditaments such as rents and services, rights of way, rights of profit or use in land of another, and choses in action."[48] Rights include "any tangible or intangible thing which the law protects under the name of property."[49] By definition, fishing rights clearly constitute a property right. The broad definition of property rights under Australian law should support a claim that native title rights include fishing rights where those customs are continued and the other tests for native title (continual attachment, no act of extinguishment) are met.

These recent developments concerning Aboriginal property rights in Australia have been frustrating for the Aboriginal community and the advocates and supporters working to protect those rights, as each incremental and piecemeal gain made within the judicial system has been truncated or extinguished by a legislature with a conflicting ideology and agenda. For Australia's indigenous peoples, the legacy of *terra nullius* may have been overturned by the *Mabo* case, but another ideological enemy remains: as long as Australia has a dominant sector that embraces a psychological *terra nullius*, any legal advances are vulnerable to legislative extinguishment. This psychological *terra nullius* allows Australians like John Howard to separate the property rights of indigenous Australians from those of all other Australians. It is a distinction that devalues indigenous property rights (as lacking a human aspect, as gaining something for nothing, as leading to uncertainty and indecision). Until this *terra nullius* is overturned, Aboriginal property rights will remain vulnerable.❑

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[44] *Ibid.* at 586 (at 679). A. Turello, "Extinguishment of Native Title and the Constitutional Requirement of Just Terms" (1993) 3 *Aboriginal Law Bulletin*.

[45] J. Behrendt, "So Long and Thanks For All the Fish" (1995) 20 Alternative Law Journal 11.

[46] Singer, *supra* note 19..

[47] This issue was considered in *Yarmirr* v. *Northern Territory (The Croker Islands case)* [1998] FCA 771. Native title was found to exist over coastal sea in accordance with the *Native Title Act, 1993 (Cth)*. The court rejected the Northern Territory's contention that native title ended at the low watermark, preferring a requirement of common law recognition that corresponded to the nature of the native title rights asserted. Native title rights were shown to exist in this case but did not extend to control of access or resources. The plaintiffs could only travel through or within the area, could hunt, fish and gather for non-commercial purposes, visit places of spiritual and cultural importance and safeguard cultural and spiritual knowledge. Should Justice Olney's findings be overturned in the High Court and extended to exclusive possession, these rights would be lost by the application of the *Native Title Act*.

[48] *Minister of State for the Army* v. *Dalziel* (1944) 68 CLR 261, per Starke J. at 290.

[49] *Ibid.*, per McTiernan J. at 295.

STYLE GUIDE

MANUSCRIPT FORMAT:

- We prefer that manuscripts are double spaced, with at least one inch margins all around.
- Please avoid using computer codes, other than those concerning font and line spacing. Use hard retruns only at the end of a paragraph.

COMPUTER SOFTWARE:

- We prefer submissions in WordPerfect 6.1 or in other PC-DOS systems. Please use 3½" diskettes.

SPELLING:

- Please follow *The Canadian Oxford Dictionary* for spelling usage.

STYLE:

- Please follow *The Chicago Manual of Style*, 14th ed. where not inconsistent with the *Canadian Uniform Guide to Legal Citation.*
- Use double quotation marks, except for quotes within quotes.
- Commas, periods, and other marks should be inside quotation marks, except for colons and semi-colons.

CITATIONS:

- Please follow the *Canadian Uniform Guide to Legal Citation,* 3rd ed. for citations. Author's first names may be used, but we ask that the style be uniform throughout. Footnotes or endnotes are acceptable for submissions.
- For books: P.J. Williams, *The Alchemy of Race and Rights* (Cambridge: Harvard University Press, 1991).
- For edited books: R.F. Devlin, ed., *Canadian Perspectives on Legal Theory* (Toronto: Emond Montgomery, 1991) or S.L. Elkin and K.E. Soltan, eds., *A New Constitutionalism: Designing Political Institutions for a Good Society* (Chicago: University of Chicago Press, 1993).
- For edited books by separate author: C. Taylor, *Reconciling the Solitudes: Essays on Federalism and Nationalism,* ed. by G. Laforest (Montreal and Kingston: McGill-Queen's University Press, 1993).
- For translated works: A. Honneth, *The Struggle for Recognition: The Moral Grammar of Social Conflicts,* trans. J. Anderson (Cambridge: Polity Press, 1995).
- For newspaper articles: "Nunavut Proposal Would Ensure Half of Government Seats Go to Women" *The Edmonton Journal* (25 November 1996) A8.
- For articles: B.S. Turner, "Outline of a Theory of Human Rights" (1993) 27 Sociology 489.
- Subsequent references: *Ibid.* if immediately above or *supra*, note # if further above. You may use *infra*, note # for references below.
- Pinpoint Citations: Use "at [page number]". As in: *Supra*, note 10 at 29.