Constitutional forum constitutionnel

Centre for Constitutional Studies
Centre d'études constitutionnelles

Volume 15, Number 2, 2006

Constitutional Forum constitutionnel

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Constitutional Forum constitutionnel is published three times per year by the Centre for Constitutional Studies/Centre d'études constitutionnelles with the generous support of the Alberta Law Foundation.

Alberta LAW FOUNDATION

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

ISSN: 0847-3889
PUBLICATION MAIL AGREEMENT #4006449667

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Jane Austen and the Council of the Federation

Jean Leclair*

As I was preparing this article[1] about the Council of the Federation, about the manner in which it differed from its predecessor, the Annual Premiers' Conference, my thoughts were constantly harking back to my favorite English author, Jane Austen. Although the titles of her novels are different, and despite the fact that Elizabeth Bennet is not an exact replica of Elinor Dashwood,[2] Jane Austen always writes the same story: the battle between reason and emotion, between sense and sensibility. Now, quite frankly, as do Alain Noël and others before me, I believe that the Council of the Federation is not more than a light institutionalization of the Annual Premiers' Conference.[3] It is the same story again. And one that also has to do with the tension between sense and sensibility. During my preparation, I also recalled the very first sentence of Jane Austen's masterpiece *Pride and Prejudice* which runs as follows: "It is a truth universally acknowledged, that a single man in possession of a good fortune, must be in want of a wife." Amusingly, the Council of the Federation's philosophy could be articulated in a similar fashion: "It is a truth universally acknowledged, that a federal government in possession of a good fortune, must be in want of provinces."

After briefly describing the political context that led to the creation of the Council, I will try to evaluate its potential as a means of "revitalizing the Canadian Federation and [of] building a more constructive and co-operative federal system."[4] Such success, I believe, greatly depends on the provinces' willingness to pool their sovereignties, and thereby trade their competitive understanding of federalism for a more collaborative one. Furthermore, being an intergovernmental body within the executive branch of government,[5] the Council's potential as a mechanism for renewal is hampered by the democratic deficit from which it suffers. Finally, the non-constitutional soft-law character of the agreements, brought to life under the aegis of the Council, is an inappropriate remedy for questions of symbolism, recognition and identity. I will round up these preliminary comments by explaining how the European Union's Open Method of Coordination could help improve the Council.

Some Background Information: Executive Federalism in Canada

The legislative powers distributed to the central government and the provinces, under sections 91 and 92 of Canada's 1867 federal Constitution,[6] are said to be "mutually exclusive." Therefore, the division of powers guarantees the autonomy of both levels of government, and more particularly, that of the provinces. It is also agreed that those sections grant legislative jurisdiction "in relation to" certain matters within the enumerated classes of subjects. In short, exclusivity is a concept related to the types of legislative purposes that can be fulfilled by exercising a given power. Envisaged in such a manner, the exclusivity principle does not prevent the two orders of government from legislating over the same issue.[7] When a statute

relates to a subject matter that falls under a head of *federal* jurisdiction, when viewed at from one angle, and a head of *provincial* jurisdiction, when viewed at from another angle, courts conclude that the subject has a "double aspect." Legislation on such a subject can therefore be passed by either Parliament or a province, insofar as each is pursuing a purpose that lies within its jurisdiction.[8] For example, "environmental protection" is not expressly mentioned in either sections 91 or 92 of the *Constitution Act, 1867*. However, both levels of government can promote the protection of the environment by resorting to their respective heads of exclusive jurisdiction. The central government, endowed with the exclusive power to enact "criminal law" (section 91(27)), can prohibit any activity detrimental to the environment's integrity. Provinces can achieve the very same objective by regulating local industrial activities that pollute the environment, such activities falling within the purview of their exclusive jurisdiction over "property and civil rights" (section 92(13)).[9]

Thus, courts have developed an understanding of federalism that is sensitive to both the need for autonomy (the exclusivity principle), and to the inescapable demands of interdependence (the aspect and double aspect doctrines).[10] It is not, however, the role of courts to manage the day-to-day consequences of this interdependence. Consequently, intergovernmental bodies had to be created. Importantly, these informal arrangements have no foundation in statutes, conventions of parliamentary government, or the Constitution. They have provided the channels through which intergovernmental negotiation, in general, and constitutional adaptation, in particular, were made possible. Arrangements such as the First Ministers' Conferences (annual federal-provincial conferences of the provincial Premiers and the federal Prime Minister), the Annual Premiers' Conference (replaced in 2003 by the Council of the Federation), the Western Premiers' Conference, the Atlantic Premiers' Conference, and the meetings of standing federal-provincial committees of finance ministers and line ministers have all given birth to what is generally referred to as "executive" and "interstate" federalism.

In the words of J. Peter Meekison, "From an institutional perspective the key distinction between interstate and intrastate federalism is how the provincial voice is expressed, through an intergovernmental forum or through a restructured upper house."[11] In Canada, the ever-growing importance of executive and *interstate* federalism lies in the dismal failure of *intrastate* federalism.

The Canadian Senate, whose members are appointed by the Prime Minister on the basis of pure patronage, is "not a provincial chamber, like the German Bundesrat, but a partisan one."[12] The failure of the Senate to adequately represent the regions only reinforces the provincial premiers' claims that they are the only legitimate voice of their constituents. Furthermore, Canada's British Westminster style of governance, which is based on a first-past-the-post electoral system, a fusion of legislative and executive powers, party discipline, and ministerial solidarity, has lent support to the establishment of all-powerful executives at both the provincial and federal level.[13] Party discipline, in particular, makes it impossible for individual members of the governing party to express the wishes and preferences of their region's constituents where these do not meet with the approval of Cabinet. All these elements prevent Parliament (the Senate and the House of Commons) from performing its role as an inter-regional bargaining forum.[14] Moreover, whereas national political parties have traditionally tried to make their deputation representative of the regional, linguistic, and ethnic diversity of Canada, we have witnessed in recent years a regionalization of party politics, with the Conservative Party representing mostly Western Canadian interests and the Bloc Québécois intent on promoting Quebec's right to secede from Canada. In short, since intergovernmental relations cannot take place *within* the federal institutions, they must therefore take place *between* governments.[15]

In addition, the failure of the 1987 Meech Lake Accord and the 1992 Charlottetown Accord has demonstrated that the cumbersome mechanism established by the amending formula of the *Constitution Act, 1982*[16] makes major constitutional reforms impossible.

Formally amending the Constitution to improve intrastate federalism is thus out of the question in the near future. In the present context, the non-constitutional path is the only politically feasible avenue of reform in Canada. Since the 1992 referendum, the "C" word is anathema in our country.

Therefore, although it has been criticized as "contribut[ing] to undue secrecy in the conduct of the public's business" and "to an unduly low level of citizen participation in public affairs," and although it has been said to "weaken and dilute the accountability of governments to their legislatures and to the wider public,"[17] executive federalism remains the only available channel through which the provinces can voice their concerns over national affairs. And since "national affairs" in the central government's understanding seems to be more and more synonymous with "intraprovincial matters," the provinces are understandably searching for an efficient, albeit non-constitutional, institution to check the federal government's insatiable appetite for power.

According to the exclusivity principle, the central government is not allowed to legislate over matters falling within the purview of the provinces. However, under the guise of its spending power, the federal government can achieve the very same result. Indeed, conditional grants have proven a successful means of regulating matters falling within provincial jurisdiction. One must bear in mind that, in Canada, the fiscal power of the federal government has always far exceeded that of the provinces. As such, its spending power, unobstructed by the fragile legal framework imposed under intergovernmental agreements, has enabled it to encroach upon the exclusive heads of power of the provinces. Although such power has been the subject of much criticism, Ottawa is not willing to relinquish its spending power in areas of provincial jurisdiction. Parliament's enumerated powers, despite being generously interpreted by the Supreme Court of Canada in recent years,[18] are still primarily concerned with specific and technical matters: criminal law, banking, navigation and shipping, interprovincial and international trade and commerce, etc. None of these subject matters are electorally appealing. On the other hand, the spending power allows the central government to involve itself in issues that matter to the average Canadian, such as health and education. "Ottawa . . . seeks public credit for leadership and funding on matters that are profoundly important to all Canadians."[19] The central government has even gone so far as to completely bypass provincial governments by unilaterally introducing direct spending programs in areas of provincial authority (*i.e.*, the Millennium Scholarship Fund, Canada Research Chairs, Canada Foundation for Innovation, Medical Equipment Trust Fund, Canada Child Tax Benefit, and various transfers to municipalities, etc.).[20]

Even though federal transfers certainly have been instrumental in providing Canadians with a "high minimum level of important social services,"[21] they have undoubtedly affected the distribution of legislative powers in Canada. And provinces are not in a position to refuse the funds, even though they might strongly disagree with the conditions attached to them. Moreover, the intergovernmental agreements that form the basis of these spending programs are extremely vulnerable to the unilateral action of the signatories. The Supreme Court has concluded that the principle of parliamentary sovereignty authorizes Parliament to renege on a promise made to a province in an intergovernmental agreement.[22]

Although not initially designed for this task, the Annual Premiers' Conference (APC) became the intergovernmental body whose primary purpose was to curb this type of federal invasion. Between 1887 and 1926, these interprovincial conferences were held sporadically. They fell into disuse after 1926 until their resurrection by Quebec's Premier Jean Lesage in 1960. Since then, they have become annual events. In 1960, Ontario's Premier, Leslie Frost, reportedly said that he wanted "to restrict [these] meetings to provincial matters," and insisted "there must not be any ganging-up on Ottawa."[23] Be that as it may, after a review of the APC's accomplishments over the years, J. Peter Meekison concludes that "the focus of the APC

since its formation in 1960 has gradually shifted away from the discussion of interprovincial issues. The conference is now primarily concerned with policy issues that reflect the current state of federal-provincial relations."[24] Former Ontario Premier Bob Rae puts it more bluntly: "The Annual Premiers' Conference, particularly in the late 1990s, was nothing more than a highly ritualized commentary and denunciation of how the federal government should do its job."[25]

The Council of the Federation has been portrayed by those who brought it to life as an entirely new institution – one that "replaces the Annual Premiers' Conference and goes much further."[26] This institution would not fall into the "ganging-up on the federal" trap. According to them, the Council would enable the provinces to collaborate as they had never previously done. In the words of Quebec Premier Jean Charest: "Ça va, pour la première fois, amener les gouvernements provinciaux à travailler en étroite collaboration à un niveau jamais connu auparavant. C'est peut-être un peu surprenant qu'on ne l'ait pas fait avant."[27]

Benoît Pelletier, Quebec's intergovernmental affairs minister, emphasized that federal bashing was out of the question: "Il faut que cela fasse contrepoids au fédéral. C'est ça le but. Mais cela doit se faire d'une façon positive. On ne veut pas d'une institution négative, qui ne fasse que se plaindre ou qui fasse du 'federal bashing.'"[28]

In other words, because formal constitutional reforms are impossible, the renewal of the federation will be made possible, according to Pelletier, by "a non-constitutional institution"[29] where provinces and territories, represented by their premiers,[30] "as necessary partners . . . will progressively develop their own vision of what Canada should become, and firmly consolidate their rightful place within our country."[31]

Whether this "new" institution will meet with success greatly depends on what the premiers seek to achieve. What is their understanding of a "more constructive and cooperative federal system"?[32] The Council is meant "to make Canada work better for Canadians,"[33] but how are the latter's voices to be heard if the Council "comes under the executive branch, rather than the legislative branch, of the provincial and territorial governments"?[34] Will this institution be successful in dealing with issues of Québécois or Aboriginal identity? These are the questions I will now briefly address.

The Council of the Federation: A Light Institutionalization of the Annual Premiers' Conference

As I said in the introduction, the Council of the Federation is not very different from the Annual Premiers' Conference. Notwithstanding the wording of the founding agreement, they share the same degree of institutionalization, given that the conception of federalism underlying both the APC and the Council is one based on competition and not on collaboration and cooperation.

Had the Council been built around a truly collaborative model of federalism, it would have displayed a much higher degree of institutionalization. In the words of Martin Papillon and Richard Simeon:

> The collaborative model that sees governance in Canada essentially as a partnership between two equal orders of government that collectively work together to serve the needs of Canadians . . . emphasizes the need for co-operation, harmonization, and mutual agreement on common values and standards.[35]

As the authors underscore, such a model demands the issuing of binding decisions and the establishment of enforcement mechanisms. On the other hand, "a more competitive view of Canadian federalism . . . stresses the importance of autonomous governments, acting on their own within their jurisdictional limits, to meet the needs of their own electorates."[36] As such, it is based on "vigorous intergovernmental competition, and a wide diversity of policy responses . . . ."[37] Importantly, "[i]n this model, co-operation is not the holy grail; it may even result in 'lowest common denominator solutions'

that please no one."[38] Binding enforcement mechanisms are strangers to the competitive model.

As was the case with the APC, and contrary to the initial wish of Quebec's intergovernmental affairs minister Benoît Pelletier, the decisions of the Council will be reached by consensus rather than by majority vote.[39] No improvements were made to the APC's institutional features. There is no mention of qualified majority votes, mirror legislation for the implementation of interprovincial agreements, or dispute-settlement mechanisms. And as was the case in 1973 for the Canadian Intergovernmental Secretariat, the Council secretariat will not serve as an instrument of research, analysis, and prescription; its task shall simply be "to assist the Steering Committee – composed of Deputy Ministers responsible for intergovernmental relations – in the preparation for meetings of the council."[40] Pelletier has recently lamented over the inefficiency of the secretariat.[41]

Furthermore, a truly collaborative model of federalism would involve both a partnership between the two orders of government where federal-provincial issues are concerned and a partnership among the provinces themselves where intra- and interprovincial issues are at stake. As it stands, the federal government is not part of the Council. Consequently, even though the provinces might succeed in building a common front against the federal government, the arrangement will not necessarily promote collaborative federalism since the Council's power is limited to *recommending* a solution to the federal government. Ottawa still holds the big end of the financial stick. So much so, in fact, that it can easily destroy provincial common fronts. Small and poor provinces are particularly vulnerable to the federal "divide and conquer" strategy. The 1999 Social Union Framework Agreement, signed by the federal government and all the provinces, except Quebec, is a good example of Ottawa's successes when it strategically resorts to its fiscal leverage to sway poorer provinces to walk its way.

The power of the Council over federal-provincial affairs will be all the more fragile, since the Council is negotiating with an unpredictable partner. Ottawa's case-by-case approach to intergovernmental issues, adopted after 1992, is certainly flexible, but it leads to incoherent decisions that are rooted in an unascertainable vision of federalism. For example, the equalization agreements reached by Ottawa and two of the Maritime provinces in 2005 afford the latter what some Western provinces have been requesting for years.[42] Why the difference?

Some argue that the eventual integration of the federal government as member of the Council would make it difficult for Ottawa to back down from a decision reached by an institution to which it is part. However, as one commentator puts it, "it is hard to imagine that the federal government would voluntarily constrain its ability to use its unilateral powers by abiding by a process it was not involved in designing."[43]

Again, a truly collaborative model of federalism also involves a partnership between the provinces themselves where intra- and interprovincial issues are at stake. Such matters should be as much a priority as federal-provincial issues on the agenda of the Council. In fact, they have proven to be a very secondary concern. The main purpose of the Council has rather been to build common fronts against what the provinces considered unconstitutional incursions by the central government in their own affairs. Provinces do not seem eager to establish binding mechanisms that could ensure the implementation of their agreements over interprovincial matters.

All in all, the competitive model of federalism seems to hold sway over the collaborative model.[44] I will leave the final word on this subject to Peter Meekison, Hamish Telford, and Harvey Lazar:

> The premiers often talk the language of collaboration, but if we read between the lines, some of them seem to be saying only that they need more fiscal resources from Ottawa. And the federal government at times appears to be seeking a level of policy influence on provincial or joint programs that exceeds its fiscal contribution . . . . [I]nterdependence is likely to remain with us, and will probably

> grow. But it would seem that the various governments of Canada are almost as wary of institutionalizing collaborative federalism as they are of mega-constitutional change. Collaborative federalism thus remains a work in progress.[45]

As we will now see, the Council also suffers from lacking any deep democratic grounding.

The Council of the Federation's Democratic Deficit

Whether the Council embraces a collaborative or competitive model of federalism, it remains an institution of executive federalism. As do all such institutions, it suffers from a democratic deficit. Nothing in the founding agreement requires the premiers to submit their proposals to the scrutiny of their respective legislatures before their discussion by the Council. Neither is there an obligation to have the legislatures examine the agreements once the thirteen premiers have reached them. To my knowledge, in Quebec, neither the role, mandate, nor the very usefulness of the Council of the Federation were formally debated in the National Assembly, even though the opposition requested it adamantly.

Furthermore, if the Council is to work towards the implementation of a collaborative model of federalism, premiers should be held primarily accountable to one another. Yet as a matter of fact, this is not the case; and as a matter of law, it should not be the case. According to our Westminster style of governance, premiers are held accountable to their local legislatures and their constituents. Premiers have no mandate to deal with national issues. They may claim that they do, but as one commentator puts it, "local issues shape votes," and premiers know that quite well.[46] And so the life span of a premiers' consensus will be very short should it go against the will of a province's constituents.

The Council's very existence raises a more important problem: that its presence might endanger any future Senate reform. The reason for this is that it is an institution that only serves to reinforce the executive power. Hence, the premiers might not wish to pursue a Senate reform agenda that has the potential of making Parliament "more regionally responsive, and therefore more able to bypass provinces."[47]

Nevertheless, premiers will not be able to escape the demands of public accountability for long. As Harvey Lazar puts it, "the more these [intergovernmental] processes generate hard outcomes that matter to people, the more governments will need to give attention to democratic concerns."[48] Issues of symbolism, recognition and identity are precisely such matters.

The Council of the Federation: An Inappropriate Institution to Deal with Issues of Recognition and Identity

Executive federalism has met with a lot of success when low-level substantial policy issues are at stake. However, as demonstrated by the demise of the 1987 Meech Lake Accord, it is bound to fail where issues of symbolism, recognition, and identity are concerned. Formal constitutional reforms are the only channels for such matters. In order for symbols to have any value, they must somehow be impervious to change. Only enshrinement in the Constitution provides symbols with the necessary permanency. If I may recall Jane Austen once again, where issues of identity are concerned, one might say that sensibility takes precedence over sense.

Quebec's quest for recognition, as underlined by Richard Simeon, has little to do with adding more heads of power to section 92 of Canada's 1867 federal Constitution:

> Quebec's search for recognition is not primarily about whether the province can exercise this or that new responsibility, or about the desire for more cooperative intergovernmental relations. It is inescapably constitutional, focused on the fundamental recognition of a multinational Canada and on an associated distinct role for Quebec. . . . Quebec's concerns are not about

> the mechanics and institutions of federalism, but about the very principles that underlie it.[49]

The parallel health accord successfully negotiated by Quebec in 2004 is an undeniable feat accomplished by the Quebec government.[50] I do not wish to underestimate its success. Nonetheless, the fact that Jean Charest's colleagues did not want to see their federalist friend bite the dust so early in his mandate, the fact that then-Prime Minister Martin and his minority government wished to cajole part of the dissatisfied Quebec electorate back into the Liberal fold, and most importantly, the soft law character of the agreement were certainly determining elements in that success. Moreover, the vulnerability of these soft law agreements to legislative intervention makes them a poor substitute for a formal constitutional amendment.

The citizens of the western provinces also have their own qualms about the central government, and the Council fails to capture the essence of these demands. More intergovernmentalism is not the answer to their request for Senate reform. Most citizens of Western Canada do not seek recognition of greater power for the provinces. Rather, their wish is to reinforce the central government's institutions by making them more sensitive to regional concerns and therefore more legitimate:

> It is unlikely that many western Canadians will see greater intergovernmentalism as an effective or appealing alternative to Senate reform. Such reform is targeted to strengthen the regional voice within Parliament. Thus the Senate reform debate is only loosely connected to steps that might be taken to improve intergovernmental relations.[51]

The Council, I fear, will not be able to make any breakthrough in matters of recognition and identity. By way of conclusion, I will examine how the Council could perform a more useful task within the federation.

Some Suggestions to Improve the Efficiency of the Council

Arguably, the Council could become a more useful institution, if its mandate were narrowed and if it could be sufficiently informed by democratic scrutiny and public debate. First of all, instead of primarily tackling federal-provincial issues, the Council should devote more energy to finding ways to improve both intra- and interprovincial policy issues. The European Union's Open Method of Coordination (OMC) could be a path to follow. It enables member states of the European Union to deal jointly with issues of common interest in situations where they "do not yet want common legislation in a given sphere but nevertheless have the political will to make progress together."[52] In the words of a commentator, the OMC is a soft law mode of governance that "reconcile[s] a common approach with the national prerogative for action."[53] It is a multilateral surveillance mechanism that leads member states to exchange the best practices and to learn from one another. Moreover, the surveillance exercised by all parties provides incentives to achieving common goals in the most efficient manner possible:[54]

> Multilateral surveillance, explains Armin Schäfer, researcher at the Max Planck Institute for the Study of Society, rests on peer review, *i.e.,* on the mutual monitoring and evaluation of national policies by other governments. It is targeted at bringing states to behave in accordance with a code of conduct of specific goals, at developing common standards and at acquiring best practices through international comparison. Precisely because there are no sanctions, this mode of governance builds on a co-operative effort to criticize existing policies and generate new ones. In the absence of other means of leverage, any impact on national governments has to result from the (mild) pressure of having to justify one's action in the light of a common evaluation of the compliance of this action with joint goals. . . .[55]

For instance, the Council's secretariat could gather information on the best practices in the health sector, and provinces could monitor themselves to ensure these practices are

implemented. In such a situation, the federal government could hardly impose unilateral solutions with respect to that sector without taking cognizance of the work performed by the secretariat. In acting otherwise, the federal government would run the risk of being chastized as arrogant and incompetent.

Naturally, embracing the above idea would not make the Council a stronger institution than it is right now. However, it would enable it to perform a task that stands a good chance of meeting with success. Such success could be enhanced if standing committees for intergovernmental relations were established in the different provinces, and if the public could address submissions directly to the Council. In an article entitled "Inter-Legislative Federalism," David Cameron provides interesting insights on how the role of legislatures and of the wider public in the Canadian intergovernmental system could be reinforced.[56] As he underlines, Quebec has been the instigator of many of the fruitful innovations he describes.

Conclusion

The Council, as we have seen, suffers from a number of defects. However, if provincial premiers focused its role on dealing with issues of "sense" – intra- and interprovincial (and to a lesser extent federal/provincial) policy matters – rather than issues of "sensibility" – identity politics – the Council might meet with some measure of success. Finally, such success would only be enhanced if the Council became a truly multilateral surveillance institution along the lines of the European Union's Open Method of Coordination.

Notes

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1 This article is based on a conference delivered at the roundtable "Renewing federal-provincial cooperation in Canada: What can be learned from the EU open method of coordination?" (Institute of European Studies, McGill University/Université de Montréal, February 2005). I gratefully acknowledge the research assistance of Andrée Boiselle and the editorial help of Marianne Breese. I wish to thank Janna Promislow for her very useful comments.

2 These are, respectively, the main characters of *Pride and Prejudice* and *Sense and Sensibility*.

3 Alain Noël, "The End of the Model? Quebec and the Council of the Federation" in *Constructive and Co-operative Federalism? A Series of Commentaries on the Council of the Federation* (Kingston, ON: Institute of Intergovernmental Relations [IIGR], 2003), online: <http://www.iigr.ca/pdf/publications/313_The_End_of_a_Model_Quebec.pdf> at 1; J. Peter Meekison, "Council of the Federation: An Idea Whose Time has Come" in *Constructive and Co-operative Federalism? A Series of Commentaries on the Council of the Federation* (Kingston, ON: IIGR, 2003), online: <http://www.iigr.ca/pdf/publications/311_Council_ of_the_Federatio.pdf> at 3 [Meekison, "Council of the Federation"]; and Ian Peach, "Half Full, at Best: Challenges to the Council of the Federation" (2004) 84 *C.D. Howe Institute Backgrounder*, online: <www.cdhowe.org/pdf/backgrounder_84.pdf> at 3.

4 Québec, Secretariat aux affaires intergouvernmentales canadienne, ministère du Conseil exécutif, *Council of the Federation – A First Step Towards a New Era in Intergovernmental Relations in Canada*, 2d ed. (Québec: Gouvernement du Québec, 2004) at 27 (Appendix: Council of the Federation's Founding Agreement), online: <http://www.saic.gouv.qc.ca/publications/conseil_federation_en.pdf> [*A First Step*].

5 *Ibid*. at 21.

6 *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, ss. 91-92, reprinted in R.S.C. 1985, App. II, No. 5.

7 Furthermore, there are express constitutional exceptions to the exclusivity principle. Some areas of jurisdiction are expressly made concurrent: agriculture and immigration (s. 95), old age pensions (s. 94A), and export from one province to another of the primary production from non-renewable natural resources and forestry resources (ss. 92A (2) and (3)).

8 For an overview of the division of powers in Canada, see Jean Leclair, "Reforming the Division of Powers in Canada: An (Un)Achievable Endeavour?" in Gerhard Robbers, ed., *Reforming Federalism – Foreign Experiences for a Reform in Germany* (Frankfurt am Main: Peter Lang, 2005) 93.

9 *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, 1992 CanLII 110; and *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213, 1997 CanLII 318.

10 See Jean Leclair, "The Supreme Court of Canada's Understanding of Federalism: Efficiency at the Expense of Diversity" (2003) 28 Queen's Law Journal 411 [Leclair].

11 Meekison, "Council of the Federation," *supra* note 3 at 2.

12 *Discussion Paper No. 29: Intergovernmental Cooperation Mechanisms: Factors for Change?* (Ottawa: Commission on the Future of Health Care in Canada, 2002) (by Réjean Pelletier), online: Health Canada <http://www.hc-sc.gc.ca/english/pdf/romanow/pdfs/29_Pelletier_E.pdf> at 4.

13 C.E.S. Franks, "A Continuing Canadian Conundrum: The Role of Parliament in Questions of National Unity and the Processes of Amending the Constitution" in J. Peter Meekison, Hamish Telford & Harvey Lazer, eds., *Canada: The State of the Federation 2002 — Reconsidering the Institutions of Canadian Federalism* (Kingston, ON: IIGR, 2004) 35 [*Canada: The State of the Federation 2002*]; Jacques-Yvan Morin & José Woehrling, *Les Constitutions du Canada et du Québec du régime français à nos jours* (Montréal: Les Éditions Thémis, 1994) at 171-72, 176 (note 147), 178, 191-92, 224, and 235-50.

14 On the diminishing role of Parliament in federal-provincial relations, see Franks, *ibid*.

15 Herman Bakvis & Grace Skogstad, "Canadian Federalism: Performance, Effectiveness, and Legitimacy" in Herman Bakvis & Grace Skogstad, eds., *Canadian Federalism: Performance, Effectiveness, and Legitimacy* (Don Mills, ON: Oxford University Press, 2002) 3 at 7.

16 Being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c. 11.

17 Donald Smiley, "An Outsider's Observations of Intergovernmental Relations Among Consenting Adults" in Richard Simeon, ed., *Confrontation or Collaboration: Intergovernmental in Canada Today* (Montreal: Institute for Research on Public Policy, 1979) 105 at 105.

18 See Leclair, *supra* note 10, pp. 421-30.

19 Bakvis & Skogstad, *supra* note 15 at 14.

20 As underlined by Tom McIntosh, there might be a political price to pay for such direct spending in provincial areas of jurisdiction:

> While there may be political credit to be won for creating programs such as the National Child Benefit or the Canada Research Chairs program, this credit diminishes over time and the programs become simply part and parcel of 'what the government does.' Any attempt to shift spending priorities or reallocate resources from those programs to others may come with a political price.

"Intergovernmental Relations, Social Policy and Federal Transfers After Romanow" (2004) 47 Canadian Public Administration 27 at 42 [McIntosh].

21 P.W. Hogg, *Constitutional Law of Canada*, student ed. (Toronto: Thomson Carswell, 2003) at 160.

22 *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, 1991 CanLII 74.

23 Quotes taken from J.P. Meekison, "The Annual Premiers' Conference: Forging a Common Front" in *Canada: The State of the Federation 2002*, *supra* note 13, 141 at 145.

24 *Ibid*. at 142; see also *ibid.* at 146.

25 Bob Rae, "Some Personal Reflections on the Council of the Federation" in *Constructive and Co-operative Federalism? A Series of Commentaries on the Council of the Federation* (Kingston, ON: IIGR, 2003), online: <http://www.iigr.ca/pdf/publications/326_Some_Personal_Reflection.pdf> at 3.

26 *A First Step*, *supra* note 4 at 19.

27 ("This will, for the first time, lead the provincial governments to work in close collaboration at a level never formerly known. That it has not happened before is somewhat surprising.") Quoted in "Conseil de la fédération – Les provinces sont fébriles" *La Presse* (5 December 2003) A4; "Le Conseil de la fédération permettra de négocier d'égal à égal, croit Charest" *La Tribune* (5 December 2003) B1.

28 ("It's necessary that this be a counterweight to the federal. That's the goal. But this ought to be done in a positive way. We don't want a negative institution, one that only complains or that engages in 'federal-bashing.'") Quoted in "Les PM gardent le cap sur la santé – La création du Conseil de la fédération est reportée au 5 décembre" *La Tribune* (25 October 2003) B1.

29 *A First Step*, *supra* note 4 at 7 (see the section "A Word for the Minister for Canadian Intergovernmental Affairs and Native Affairs").

30 Section 5 of the Founding Agreement states: "The members [of the Council] shall be represented on the Council by their Premier. . . ." *A First Step*, *ibid.* at 30.

31 *Ibid.* at 7 (see the section "A Word for the Minister for Canadian Intergovernmental Affairs and Native Affairs").

32 *Ibid.* at 27 (see the Preamble to the "Founding Agreement").
33 *Ibid*.
34 *Ibid*. at 21.
35 "The Weakest Link? First Ministers' Conferences in Canadian Intergovernmental Relations" in *Canada: The State of the Federation 2002*, *supra* note 13, 113 at 130 [Papillon & Simeon].
36 Papillon & Simeon, *ibid*. at 131.
37 *Ibid.*
38 *Ibid*.
39 *A First Step*, *supra* note 4 at 30 (see Section 10 of the "Founding Agreement").
40 *Ibid.* at 31 (see Section 16 of the "Founding Agreement").
41 "Québec souhaite que le Conseil de la fédération soit plus fort" *Presse Canadienne* (16 January 2005).
42 See "Ottawa conclut une entente avec Terre-Neuve et la Nouvelle-Ecosse" *Presse Canadienne* (28 January 2005); "Martin est sur la défensive après avoir signé l'entente avec T.-N. et la N.-E" *Presse Canadienne* (14 February 2005); and "Yves Séguin réclame d'Ottawa le même traitement que les Maritimes" *Presse Canadienne* (15 February 2005). The saga is still ongoing: "Des experts recommandent un compromis pour bonifier la péréquation" *Presse Canadienne* (5 June 2006).
43 Ian Peach, "Filling the Empty Vessel: Defining the Mandate and Structure of a Council of the Federation" (October 2003) *SIPP Briefing Note* (Regina: Saskatchewan Institute of Public Policy), online: University of Regina: <http://www.uregina.ca/sipp/documents/pdf/BN_4_Council_of_the_Federation_IPeach.pdf> at 4.
44 McIntosh, *supra* note 20 at 47: "The new arrangements for managing intergovernmental relations and conflict being proposed – both the Council of the Federation and annual first ministers meetings – appear designed more as vehicles to intensify rather than resolve the disagreements."
45 "The Institutions of Executive Federalism: Myths and Realities" in *Canada: The State of the Federation 2002*, *supra* note 13, 3 at 26.
46 Gordon Gibson, "A Council of the Federation" *Fraser Forum* (November 2003) 8 at 8, online: Fraser Institute <http://www.fraserinstitute.ca/admin/books/chapterfiles/A_Council_of_the_Federation-Nov03gibson.pdf>. See Tom Kent, "An Elected Senate: Key to Redressing the Democratic Deficit, Revitalizing Federalism" *Policy Options/Options politiques* (April 2004) 49 at 50:

> Their [Premiers] elections are fought on provincial, not national issues. A premier is elected to run the business of the province, not for his or her views on national affairs. . . . It is the democratic deficit in Ottawa, not their own qualifications and mandates, that gives premiers claim to act as national politicians.

47 Richard Simeon, "Federal-Provincial Relations" in *The Canadian Encyclopedia* (Toronto: Historica Foundation of Canada, 2006), online: <http://www.thecanadianencyclopedia.com/index.cfm?PgNm=TCE&Params=A1ARTA0002749>. See also Roger Gibbins, "The Council of the Federation: Conflict and Complementarity with Canada's Democratic Reform Agenda" in *Constructive and Co-operative Federalism? A Series of Commentaries on the Council of the Federation* (Kingston, ON: IIGR, 2003) online: <www.iigr.ca/pdf/publications/309_The_Council_of_the_Feder.pdf> at 4 [Gibbins].
48 "Non-Constitutional Renewal: Toward a New Equilibrium in the Federation" in Harvey Lazar, ed., *Canada: The State of the Federation 1997 – Non-Constitutional Renewal* (Kingston. ON: IIGR, 1998) 3 at 25.
49 "Let's Get at the Basic Question Indirectly" *Policy Options/Options politiques* (January-February 2000) 11 at 13-14.
50 "Asymmetric Federalism that Respects Quebec's Jurisdiction," online: <http://pm.gc.ca/grfx/docs/QuebecENG.pdf>.
51 Gibbins, *supra* note 47 at 4.
52 Grainne de Burca & Jonathan Zeitlin, "Constitutionalising the Open Method of Coordination: What Should the Convention Propose?" CEPS Policy Brief No. 31 (Brussels: Council for European Policy Studies, March 2003), online: University of Pittsburgh <http://aei.pitt.edu/1980/01/PB31.pdf> at 1, citing the Convention Secretariat.
53 Armin Schäfer, "Beyond the Community Method: Why the Open Method of Coordination Was Introduced to EU Policy-Making" (2004) 8:13 European Integration Online Papers 1, online: <http://eiop.or.at/eiop/texte/2004-013a.htm> at 13.
54 This seems to be what the late Claude Ryan had in mind when he said that "to increase the chances of its success, certain conditions should be met. Among other things, the council should: . . . pursue objectives that emphasize research, co-operation and joint projects in areas of provincial jurisdiction . . . ." See Claude Ryan, "Quebec and Interprovincial Discussion and Consultation" in *Constructive and Co-operative Federalism? A Series of Commentaries on the Council of the Federation*

(Kingston, ON: IIGR, 2003), online: <http://www.iigr.ca/pdf/publications/316_Quebec_and_Interprovinci.pdf> at 6.

55 Armin Schäfer, *MPIfG Working Paper 04/5: A New Form of Governance? Comparing the Open Method of Coordination to Multilateral Surveillance by the IMF and the OECD* (Köln: Max Planck Institute for the Study of Societies, 2004), online: <http://www.mpi-fg-koeln.mpg.de/pu/workpap/wp04-5/wp04-5.html> at 12.

56 In *Canada: The State of the Federation 2002*, *supra* note 13, 463.

Arbitration Using Sharia Law in Canada: A Constitutional and Human Rights Perspective

Shirish P. Chotalia*

Introduction

Recently, Canadian media reports warned that the Government of Ontario was considering the implementation of Sharia law as a judicial equivalent to Ontario law.[1] Such reports were not accurate. Rather, the issue was whether arbitration by Islamic tribunals using Muslim law, which is often called Sharia law by non-Muslims, ought to be allowed under the auspices of general arbitration statutes.[2] A cross-section of Muslim Canadians actively mobilized to oppose such a possibility through coalition-building and letter-writing campaigns.[3] In June 2004, Marion Boyd was commissioned by the province to examine the issues surrounding the use of private arbitration to resolve family and inheritance cases, and the impact of the same on vulnerable people. The *Boyd Report*, tabled in December 2004, recommended that religious institutions be allowed to arbitrate such disputes on the basis of religious law, provided that a list of forty-six safeguards were adhered to.[4]

After the *Boyd Report*, some religious groups argued in favour of religious adjudications.[5] Much public debate ensued, leading to a vociferous statement by Premier Dalton McGuinty, who vocally rejected religious adjudication.[6] Further, the Government of Ontario outlined that it "will ensure that the law of the land in Ontario is not compromised, that there will be no binding family arbitration in Ontario that uses a set of rules or laws that discriminate against women."[7] The province amended its *Arbitration Act*[8] and *Family Law Act*[9] to provide that family arbitrations were conducted "in accordance with Ontario law or the law of another Canadian jurisdiction."[10]

The controversy over this issue raises many questions in the minds of Canadians: Should Canada allow subsets of Canadians to be governed by Muslim law if they choose it? What is the basis of Canadian law? What is the basis of Muslim law? Can Muslim law be reconciled with Canadian laws and *Charter*[11] rights? If not, what are the constitutional obligations of the Canadian government to ensure that Muslim law is not used to bypass or subvert Canadian law? What are Canadian values? Can parties contract to be bound by unconstitutional laws? What practical considerations are inherent in sanctioning Muslim law? On the flip side, does prevention of the use of Muslim law to resolve private disputes violate freedom of religion? Is using other religious law acceptable? Given that arbitration has been used for decades in the commercial sphere, to what extent should it be extended to incorporate religious law? Finally, to what extent are Canadians prepared to allow the privatization of justice? The issues are complex and multi-dimensional. This article examines a few select perspectives that may help Canadians to ponder further upon these questions.

Issues Surrounding Sharia Law

At the outset, it is important to note that there does not exist a monolithic group of laws that are universally accepted by Muslim Canadians as constituting Sharia law. Indeed, Muslim Canadians are extremely diverse, hold varying religious beliefs, and recognize different sources of religious law and different religious leaders.[12] Many Muslim Canadians are extremely progressive in the area of gender equality and public service.[13] The very term "Islam" means "peace," and most Muslims conceive Islam as a religion that by its very essence is about peace and justice.[14] Further, most Canadian Muslims have chosen to immigrate to Canada, thus demonstrating their commitment to Canadian laws and values. Indeed, the Islamic Council of Imams of Canada confirms that the composition of the Muslim Canadian community is diverse.[15] This diversity is further accentuated in varied practices based on different schools of thoughts and cultural conventions, codified in some Muslim countries and regions. Thus, the Council of Imams warns that attempting to apply Sharia law "'could create controversies and problems in applying such varied law, standards, and principles with the multi-ethnic, multinational, diverse population in Ontario.'"[16] The Muslim Canadian Congress is blunt: "There is no such thing as a monolithic 'Muslim Family/Personal Law' which is just a euphemistically racist way of saying we will apply the equivalent to 'Christian Law' or 'Asian Law' or 'African Law.'"[17] "Sharia," meaning "the way,"[18] encompasses general codes of behaviour, the moral categories of human actions, the rules of rituals, as well as civil, commercial, international, and penal law.[19] Sharia is a comprehensive religious term used to define how Muslims should live, while *fiqh* (jurisprudence) is limited to laws promulgated by Muslim scholars based on their understanding of the Koran or the practices of the Prophet.[20] For the purposes of this article, "Muslim law" is used as a general term to refer to some limited interpretations of "Islamic personal law," expressly acknowledging that there is disagreement within the Muslim community as to the various interpretations.[21] Under Canadian arbitration statutes, binding arbitration is generally used in commercial contracts, and given that often these are international in scope, the parties expressly choose the law of the jurisdiction applicable to the contract. In 1991, Ontario along with other provinces, legislated a new arbitration act.[22] The wording of this act was broader than that of other provincial arbitration statutes. For instance, in Alberta, the *Arbitration Act* states: "In deciding a matter of dispute, an arbitral tribunal shall apply *the law of a jurisdiction* designated by the parties."[23] The Ontario *Arbitration Act*, on the other hand, states: "In deciding a dispute, an arbitral tribunal shall apply *the rules of law* designated by the parties."[24] In Ontario, religious institutions have interpreted the statute so as to permit them to arbitrate on the basis of religious law. Thus, Christians and Jews have been arbitrating private disputes through application of religious laws for some time.[25]

In 2003, a new organization called the Islamic Institute of Civil Justice (IICJ) was established to offer binding arbitration to the Muslim community of Ontario in the form of a Sharia Court. The new system sought to apply personal Islamic law, purportedly under the auspices of the province's *Arbitration Act*.[26] This development was perceived to mean that Muslims would be required to settle their personal disputes exclusively through the Sharia Court. In media comments, the president of the IICJ indicated that the decisions of the Sharia Court would be "'final and binding,'" and that in order to be regarded as "'good Muslims,'"[27] Muslims would be required as a part of their faith to agree to this forum for dispute resolution. Such statements raised acute alarm throughout Ontario and Canada about the fear that Canadian women could be subjected to abuse similar to that suffered by women in Afghanistan, Pakistan, Iran, and Nigeria that utilize Sharia law:[28]

> "We wish to state our opposition to the recent move for establishing an 'Islamic Institute for Civil Justice' in Canada. This move should be opposed by everyone who believes in women's civil and individual rights, in freedom of expression and in freedom of religion and belief . . . . [T]he reality is that millions of women are suffering and being oppressed under Shariah

> Law in many parts of the world. Some of us managed to flee to a safe country, a country like Canada with no secular backlash."[29]

Concerns were raised by many prominent Islamic Canadians, and Canadian Muslim organizations expressed anxiety about whether Islamic tribunals could fairly arbitrate, or to arbitrate at all, issues of family and property law.[30] As well, fear was expressed that the historical efforts of entrenching equality rights could be undermined through private arbitration.[31] For example, the Muslim Canadian Congress took the position that the Ontario *Arbitration Act*, at the time, did not permit the arbitration of family law disputes, such as marriage, divorce, custody, maintenance, access, or matrimonial property, which were to be resolved solely and exclusively by the Ontario family law statutes.[32] The Congress's submission contended that to the extent that the *Arbitration Act* purported to allow such arbitration, it was unconstitutional, because it breached sections 2, 7, and 15 of the *Charter*, the "unwritten constitutional norms" of the rule of law, and "common law rights of equality of citizenship."[33] Thus, it was repugnant to public policy in the *de facto* privatization of the legislative function and duty of Parliament.[34]

The Canadian Council of Muslim Women submitted that many forms of Muslim family law perpetuate a patriarchal model of community, and of family:

> "It is generally accepted that men are the head of state, the mosque and the family. The responsibilities outlined for males is that they will provide for their families and because they spend of their wealth, they have the leadership to direct and guide the members of their families, including women. . . . Most proponents of Muslim law accept that men have the right to marry up to four wives; that they can divorce unilaterally; that children belong to the patriarchal family; that women must be obedient and seek the male's permission for many things; that if the wife is "disobedient" the husband can discipline the wife; that daughters require their father's permission to marry and she can be married at any time after puberty. A wife does not receive any maintenance except for a period of three months to one year and most agree that the children should go the father usually at age 7 for boys and 9 for girls. If a wife wants a divorce she goes to court, while the husband has the right to repudiate the union without recourse to courts. Inheritance favours males, [because it is argued that they are responsible for the costs of the family] to the extent that the wife gets only a portion at the death of the husband."[35]

Shirin Ebadi, the first Muslim woman to win the Nobel Peace Prize (2003) and a leading human rights crusader in her native Iran, has firmly opposed the introduction of Islamic tribunals in Canada, warning that they open the door to potential rights abuses:

> "One country, one legal code, one court – for everybody." … because Muslim law is vulnerable to interpretation. As one extreme example, some Muslim countries allow polygamy and others do not. "Which interpretation would apply here? . . . Because there are many interpretations of the same Islamic teachings and laws, it's not clear what interpretation will be used. Often, a lot of the interpretations are anti-democratic and against human rights. That is my main concern."[36]

Finally, a coalition of Muslim Canadians submitted:

> "Shari'a considers women to be a potential danger by distracting men from their duties and corrupting the community. It therefore suppresses women's sexuality, whilst men are given the rights to marry up to four wives and the right to temporary marriage as many times as they wish. Young girls are forced to cover themselves from head to foot and are segregated from boys. These laws and regulations are now implemented in Canada. . . . According to Shari'a law, a woman's testimony counts for only half that of a man. So in straight disagreements between husband and wife, the husband's testimony will normally prevail. In questions of inheritance, daughters receive only half the portion of sons and in the cases of custody, the man is automatically awarded custody of the children once they have reached the age of seven. Women are not allowed to marry non-Muslim whereas men are allowed to do so."[37]

While the debate has often focused upon gender issues, Muslim law also raises issues of religious and minority rights: it encompasses anti-apostasy provisions, which make it a crime punishable by death for any Muslim to renounce their faith in Afghanistan.[38] Many Afghans are reported to have secretly converted to Christianity in recent years. An international outcry has failed to sway the Supreme Court of Afghanistan.[39] The case highlights the tensions between the West's vision of Afghanistan as a liberal democracy and the orthodoxy of its judiciary, whose outlook is shared by much of the population.[40] The Canadian Council of Muslim Women is concerned that those who are seen to question Sharia law may be accused of apostasy or blasphemy.[41]

As well, Muslims are far from homogenous adherents to a singular theology: there is a vast gamut of Sunnis and Shiites. Ahmadiyya Muslims have for over a hundred years interpreted the Koran as meaning "there is no 'jihad' of killing anymore; instead we have entered in an era of 'jihad' of pen or arguments."[42] Hundreds of these Muslims have been jailed or killed in Pakistan because of their declaration that they are peaceful Muslims. There are extensive and ongoing reports of religious persecution of minorities and of non-Muslims. For example, the Sharia Court in Kuala Lumpur acted against the wishes of a Hindu widow by forcing her Hindu husband, M. Moorthy, to have an Islamic burial instead of a Hindu cremation.[43] Thus, there are ramifications of broad-based persecution under the auspices of some forms of Muslim law of many types of minorities such as non-white Muslims, non-Muslims, followers of minority strand sects within Islam, homosexuals, and women.[44]

Considering that the tenets of the faith may require compliance as a demonstration of faith and morality, it is difficult to ensure free and voluntary consent to religious arbitration by all members of a religious minority. Thus it is not surprising that some of the *Boyd Report*'s recommendation are impractical. More generally, the recommendations are extensive, complex, and require amendments to arbitration and family statutes so as to safeguard concepts of Canadian law, such as "best interests of children" and the presumption of equal division of matrimonial property. In attempting to address such issues of consent, Boyd recommends that prior to entering into arbitration, mediators and arbitrators in family law and inheritance should be required to screen parties separately about issues of power imbalance and domestic violence,[45] and to certify that each party is entering into the arbitration voluntarily and with appropriate knowledge of the arbitration agreement.[46] It is impractical to ask mediators and arbitrators to assess power imbalance, domestic violence, and voluntaries in limited time, particularly without being duly informed of culture, religious, and individual circumstances. Such assessments would be subjective. Crucial terms such as "domestic violence," "power imbalance," and "voluntariness" are undefined, and are incapable of being objectively assessed or measured. Fundamentally, the parameters of religious law are not clearly defined and universally accepted by members of a faith; thus they are incapable of practical application. This raises the legal difficulty that even from an administrative law context, decisions would always be open to review on the basis that there had been an error of law on the face of the record. The state is in no position to be, nor should it become, the arbiter of religious dogma.[47] Basic principles of rule of law and need for certainty of law require demarcation between religious tenets and secular laws.

Should Canadians Be Allowed to Choose to be Governed by Muslim Law?

The Ontario Government acted appropriately to ensure that arbitrations were conducted in accordance with Ontario law or the law of another Canadian jurisdiction. In supporting this position, we must acknowledge that there are two conflicting approaches to the issue. On one hand, exist the constitutional rights of women, racial and religious minorities within the Muslim community itself, and other minorities to equal benefit and equal protection

of secular Canadian law. On the other hand, exist the desires of religious tribunals and, in this case, "Sharia tribunals"[48] to arbitrate personal disputes on the basis of Muslim law between consenting private parties.

Does Muslim law violate the *Charter*?

Given that there is no singular authoritative source of Muslim law *per se*, and that the interpretations of the same are broad and diverse, from a legal perspective, it is not possible to identify concrete parameters composing Muslim law. While individual interpretations of Muslim law need to be scrutinized with respect to whether they infringe the *Charter*,[49] in general, many of the rules of Muslim law on their face appear to do so. In accordance with the extensive submissions of Muslim Canadians and scholars, many interpretations of Muslim law expressly contravene the substantive *Charter* rights of freedom of religion, freedom of speech, freedom of association,[50] gender equality,[51] and process provisions of fundamental justice.[52] Again, in examining Muslim law, we must be cognizant that the same and similar issues arise with other religious law. For example, in the Jewish faith the husband "is responsible to give the *get*" – the revocation of the marriage contract (*ketubah*) – to facilitate divorce, while women receive it. "If a woman does not receive a *get* she becomes an *agunah* and is not free to marry in a religious ceremony; if she does remarry without the *get*, then any children from the new marriage are considered illegitimate (*mamzerim*)" and "will not be allowed to participate in religious ceremonies, to marry a Jewish person, or enjoy full citizenship in Israel."[53] Christian tenets, those of religions of the East, such as Hinduism and Buddhism, or even local Aboriginal spiritual tenets, are neither universally accepted by believers nor free of gender and other biases. The polygamist practices of the Fundamentalist Church of Jesus Christ of Latter Day Saints collide with existing criminal laws.[54] Based on the submissions and concerns of a number Muslim Canadians, let us assume for the purpose of this article that under any equality analysis,[55] a number of religious laws do violate *Charter* rights, both expressly, and in effect.[56]

The Constitution as the supreme law of Canada

The Constitution of Canada, including the *Charter of Rights and Freedoms*, is the supreme law of Canada and, to the extent that other laws are inconsistent with it, they are of no force or effect.[57] The *Charter* expressly overrides other statutes democratically passed by governments. Canadian laws are open to *Charter* scrutiny. Muslim law or religious law is not. Canadian laws are founded on parliamentary accountability, and are subject to democratic checks and balances. Muslim law or religious law is not. While the *Charter* does not apply to private parties,[58] it applies to arbitration acts. It applies to the statutory role of arbitrators to select the applicable law.[59] Once government creates a statutory regime to facilitate arbitrations, it has an obligation to ensure that these are conducted on the basis of constitutional laws.[60] Governments must accept responsibility for creating arbitration statutes and then turning a blind eye to arbitrations conducted through the application of blatantly unconstitutional rules. Legislatures may not enact laws that infringe the *Charter*, and they cannot authorize or empower another person or entity to do so.[61] For example, adjudicators who exercise powers delegated by governments cannot make orders infringing the *Charter*.[62] Granting arbitrators the right to choose unconstitutional laws to govern the proceedings is akin to delegation of legislative authority, something that attracts *Charter* scrutiny.[63] A governmental nexus may be found insofar as it pertains to the selection of rules governing the arbitration.[64] The action or inaction of governments in defining their relationships with relgious tribunals, and their use of Muslim laws or religious laws to arbitrate, is subject to the *Charter*.

Governments, just as they are not permitted to escape *Charter* scrutiny by entering into commercial contracts or other "private" arrangements, cannot evade their constitutional responsibilities by delegating

the implementation of their policies and programs to private entities.[65] Arbitrations are not simply mechanisms to provide for private dispute resolution, but rather, are a means of providing quasi-judicial, comprehensive dispute resolution.[66] By requiring arbitrators to use Canadian law, Ontario has preserved *Charter* accountability.

Access to justice

All persons and all subsets of Muslim Canadians must have access to the protection of secular courts.[67] Through arbitration agreements some Muslim Canadians may be compelled to limit or extinguish their rights to appeal religious tribunal decisions to Canadian courts. Arbitration statutes generally provide for limited rights of review by superior courts from arbitral awards.[68] For example, the Ontario *Arbitration Act* provides appeals in limited cases, such as fraud.[69] While governments should continue to respect the role of private arbitration and the need to avoid recourse to the courts in private dispute resolution,[70] they must not permit private arbitrators to use laws that are not democratically passed and are not subject to constitutional scrutiny. Rule of law, in a secular sense, is the foundation of Canadian democracy and of the *Charter.*[71]

Had Ontario failed to act by ignoring Muslim law arbitrations, this would have been tantamount to the state permitting arbitrations under vague and arbitrary rules.[72] Legislatures must set reasonably clear and specific standards in circumstances where the grant of an unfettered discretion would lead to arbitrary, discriminatory, or otherwise unconstitutional restrictions.[73] A limit on *Charter* rights must be clearly determinable.[74] A limit must offer an intelligible standard.[75] Limitations on rights cannot be left to the unfettered discretion of administrative bodies,[76] in this case religious tribunals.

Cannot contract out of *Charter* rights and human rights

Some may argue that private parties are entitled to choose Muslim law to govern their private relationships, irrespective of any violation of constitutional rights. However, it is trite law that persons cannot contract out of constitutional and human rights protections.[77] To permit government to pursue policies violating *Charter* rights by means of contracts and agreements with other persons or bodies cannot be tolerated. The Supreme Court has consistently held that agreements that discriminate contrary to human rights codes are invalid.[78] In other words, persons cannot waive constitutional and human rights by way of contract. This is the case even if human rights statutes contain no explicit restriction on such contracting out.[79] Human rights law constitutes fundamental law, and no one, unless clearly authorized by law to do so, may contractually agree to suspend its operation and thereby put oneself beyond the reach of its protection.[80]

The prohibition against waiver of human rights provisions arises not only from a concern about inequality in bargaining power, but also because the rights guaranteed by human rights codes are seen as inherent to the dignity of every individual within our society.[81] "As a matter of public policy, such rights are not the common currency of contracts, but values which, by their very nature, cannot be bartered."[82] For example, if employees, through their union, voted to sign a collective agreement with their employer whereby they agreed that female employees would be laid off first in case of an economic slowdown, that contract would be invalid. Even if a female employee sincerely believed that it made economic sense that male employees have greater job security, because in her view they are the primary bread-winners in most families, courts would not condone a contract which, on its face, defined and devalued the position of an individual on the sole basis of her gender. As another example, employees can take jobs that require fingerprinting and disclosure of criminal records pertaining to offences for which a pardon has been granted, and even sign contracts to that effect. However, if the employees subsequently challenge the practice as violating the federal human rights act, the employer cannot rely upon the employees' consent to defend its conduct. The contract provisions would be void.

Nor can constitutionally entrenched rights be changed by a simple vote of Parliament. Human rights legislation is analogous in many respects to constitutional law. Indeed, section 7 of the *IRPA* protects the same equality right as section 15 of the Canadian *Charter*. Once extended, rights provided by provincial legislation cannot easily be withdrawn or circumscribed.[83] It is equally unacceptable that, by a simple majority vote, a group of private citizens would be permitted to waive fundamental rights, barring truly exceptional circumstances. In short, contracts having the effect of infringing human rights and constitutional rights are void, as contrary to public policy. This is equally applicable to contracts purporting to allow religious tribunals to adjudicate disputes on the basis of unconstitutional religious laws.

Human rights codes

In addition to constitutional challenges, human rights codes prohibit discriminatory conduct by both governments and private sector entities such as businesses, schools, restaurants, landlords, and private individuals.[84] Discrimination on the basis of gender, race, ethnic origin, religion, or sexual orientation is prohibited through federal and provincial human rights statutes.[85] These statutes have been held to be quasi-constitutional in nature and take supremacy over other statutes.[86] Both direct discrimination and adverse impact discrimination are prohibited,[87] and the manner of discrimination analysis is consonant with that undertaken in section 15 *Charter* analysis. Reasonable accommodation in a human rights context is generally equivalent to the concept of "reasonable limits" in a *Charter* case.[88] Governments that allow adjudication on the basis of Muslim law and other religious law violate anti-discrimination provisions of human rights statutes for the same reasons that they violate the *Charter*, and this conduct will not be defensible. In short, Ontario has correctly proceeded to legislate the use of Canadian law as the *modus operendi* of arbitrations.

Freedom of Religion

On the reverse side of the issue, does prescribing the use of Ontario law or Canadian law for arbitrations, at least in the family law context, violate the freedom of religion of consenting Muslim Canadians? Does the constitutional protection of freedom of religion and recognition of the multicultural heritage of Canada require that governments respect the choice of Muslim law or other religious law such as Jewish law or Catholic law by private parties in arbitrations?

Parameters of freedom of religion

Given that religion is a dominant aspect of culture, freedom of religion must be interpreted in light of section 27 of the *Charter*.[89] A law infringes freedom of religion if it makes it more difficult or costly to practice one's religion. All coercive burdens on religious practice, be they direct or indirect, intentional or unintentional, foreseeable or unforeseeable, are potentially within the ambit of section 2(a). Still, this does not mean that every burden on religious practices is offensive to the constitutional guarantee of freedom of religion.[90] Freedom of religion is not absolute.[91] Fundamental to a *Charter* right is the "no harm rule" contained in the definition of each right or freedom in the *Charter*. In other words, one is free to do only that which does not harm others.[92] Freedom of religion is inherently limited by the rights and freedoms of others.[93] This is consistent with international covenants that reflect similar restrictions. For example, the *International Covenant on Civil and Political Rights*[94] provides that freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or *the fundamental rights and freedoms of others*.[95] The *ICCPR* provides a restriction of freedom of religion when the freedoms and rights of others are at issue.[96]

Importantly, freedom of religion includes the right not to believe. Freedom of religion encompasses equally freedom from religion and coercion to comply with religious dogma.[97] In Canada, as with any religious institution, members of a faith will exemplify varying

levels of belief to the tenets of the religion. Religious belief is, by its nature, individual and personal.[98]

Maintaining a secular system of justice, grounded in constitutionally entrenched anti-discrimination guarantees, does not infringe freedom of religion;[99] to the contrary, preserves it. Governments have a positive duty to safeguard the freedom of non-belief of their citizens. The essence of freedom of religion is the right to entertain such religious beliefs a person chooses, the right to declare religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.[100] There is a distinction in determining the scope of freedom of religion between belief and conduct. The freedom to manifest beliefs is broader than the freedom to act on them.[101] Thus, freedom to hold certain gender or minority based views is broader than the right to implement such views through conducting arbitration rooted in unconstitutional laws.[102] Freedom of religion is not infringed by the requirement that Canadian law be followed.

Discrimination on the basis of religion

Under section 15 of the *Charter*, does denial of adjudication on the basis of religious law constitute discrimination on the basis of religion? A number of religious groups made submissions to Boyd that they ought to be allowed to adjudicate disputes on the basis of religious law as part of the expression of their freedom of religion.[103] Yet, even among these groups, some submitted that *their* religious law ought to be condoned but had reservations about the law of *other* groups.[104] Clearly, Canadians cannot provide preference to one religious law over another. Rather, the discrimination argument arises from acknowledging that private arbitration is used in the commercial sphere to resolve private disputes. Why not in the religious sphere? Denial of adjudicative rights to Sharia tribunals, or other tribunals adjudication on the basis of relgious law, for that matter, does not constitute differential treatment amounting to discrimination. As discussed, freedom of religion does not encompass the right to adjudicate on the basis of unconstitutional laws. Generally, in contrast to arbitrations on the basis of religious laws, in commercial arbitration contracts the parties choose western democratic law as the governing law. For example, Canadian commercial contracts generally provide that the law of a Canadian jurisdiction is applicable. In international contracts, the law of the jurisdiction most closely connected to the matter is generally selected. Such law is generally democratically prescribed and constitutionally accountable. This is not to say that the law of China cannot or has not been selected. In such cases, as discussed, the contracts would be found to be void as being contrary to public policy. In fact, where a particularly offensive provision may theoretically arise, current law pertaining to public policy is useful. Currently, there exist exceptions to the enforcement of awards that are contrary to public policy.[105] Theoretically, the reach of public policy is extremely broad and not capable of being exhaustively defined.[106] It has been invoked where enforcement would be "clearly injurious to public good or wholly offensive to ordinary reasonable and fully informed members of the public."[107] Fraud, bribery and corruption,[108] breach of the competition obligations under the European Community Treaty,[109] and an award obtained by perjury or some serious procedural unfairness[110] are all examples of behaviour that could, in theory, give rise to a public policy defence. Similarly, adjudication on the basis of unconstitutional laws would lead to awards that would be unenforceable on the basis of public policy.

Thus, requiring that arbitrations be conducted on the basis of Canadian law, particularly in family law contexts, is not tantamount to discriminating against a person on the basis of religion, and it is not tantamount to an infringement of a person's freedom of religion. Indeed, some Muslim Ismaili groups adjudicate disputes on the basis of Canadian law and successfully reconcile freedom of religion with secular constitutional law.[111]

Reasonable limits

Even if it were the case that discrimination could be established, in some sense, requiring the use of Canadian law in arbitrations constitutes a reasonable limit to any alleged infringement of freedom of religion and section 15 arguments.[112] Section 1 cannot be used to legitimize laws that collide directly with *Charter* rights and freedoms,[113] as do some Muslim laws. An assessment of reasonable limits is to be guided by the values and principles essential to "a free and democratic society." Guiding principles include respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.[114] While section 27 of the *Charter* requires that the *Charter* be interpreted in a manner consistent with the preservation of the multicultural heritage of Canadians, section 27 does not confer substantive rights.[115] Indeed, the converse is true: section 27 requires that Muslim Canadians not be viewed stereotypically as a monolithic entity willing and ready to accept governance by unconstitutional, discriminatory rules that may be found in Muslim law.

Canadians are entitled to the benefit and protection of secular laws. Indeed, many Muslim Canadians may have deliberately chosen to immigrate to Canada to benefit from secular laws not amenable in their countries of origin.[116] The Ontario Government can show that its requirement that arbitrators choose the law of a Canadian jurisdiction is reasonable in the Canadian context. It can show that the requirement meets both the minimal impairment test,[117] and the proportionality test. Noteworthy is the fact that choice of jurisdiction within Canada is still permissible. Legislative inaction in the face of blatantly unconstitutional action and arbitration would not have been viewed as reasonable judgment sufficient to meet the requirements of section 1.[118] Requiring parties to adhere to Canadian law does not constitute an unreasonable limit on any alleged infringement of *Charter* rights. Indeed, where the justification advanced for a law that is impugned on one *Charter* ground, such as freedom of religion, is inconsistent with other constitutional protections, it is more difficult for proponents of religious law to argue that the concern is pressing and substantial in a free and democratic society.[119]

Conclusion

Canadian governments have an obligation to ensure that all persons in Canada are governed by Canadian laws and have the benefit and protection of the *Canadian Charter of Rights and Freedoms*. Both constitutional and human rights laws compel governments to meet this obligation. Requiring Canadians to resolve private disputes using Canadian laws as opposed to any form of religious law, including Muslim law, does not abridge *Charter* rights. Rather, it preserves them. Nor does such requirement undermine the arbitration process. Rather it respects it. It continues to acknowledge the needs of private parties to resolve their disputes without intrusion by governments and courts. It simply requires that private disputes are grounded in democratic and constitutional laws. In short, governments must necessarily be liable for failing to prevent systematic institutional *Charter* infringement by tribunals who act under the powers of provincial arbitration statutes. The integrity of Canada's justice system rests upon rule of law and secularism.

Opening the door to adjudication under religious law – whether based on Jewish, Catholic, Hindu, or Buddhist tenets – subject to multi-dimensional interpretations contravenes these precepts. Secular laws preserve and safeguard freedom of religion:

> We believe that Islam's principles are for equality of women in every aspect, from religious, spiritual duties to practical daily rights and responsibilities of citizens.
>
> For us, Islam is a religion of peace, compassion, social justice and equality, and we know that many of the interpretations and practices of Muslim law do not always reflect these

principles. Further, we think that these fundamentals are embodied in the Canadian Charter of Rights and Freedoms.

And we advocate that as we are not compelled by our faith to live under Muslim family law, we as Canadian Muslim women want the same laws to apply to us as to all other Canadians and not to have our equality rights jeopardized by the application of another system of jurisprudence.[120]

Notes

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1 "Ontario report criticised by Shariah opponents" *CBC News* (20 December 2004), online: <http://www.cbc.ca/story/canada/national/2004/12/20/sharia-boyd041220.html?print>. See also "Quebec gives thumbs down to Shariah law" *CBC News* (27 May 2005), online: <http://www.cbc.ca/story/canada/national/2005/05/26/shariah-quebec050526.html?print>; CTV.ca News Staff, "Protesters march against Shariah law in Canada" *CTV.ca* (9 September 2005), online: <http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/1126181967010_31/?hub=TopStories>; Laura Trevelyan, "Will Canada introduce Shariah law?" *BBC News* (26 August 2004), online: <http://news.bbc.co.uk/2/hi/programmes/from_our_own_correspondent/3599264.stm>; International Society for Human Rights (ISHR) Germany, "Shari'ah Law, Adultery, and Rape," online: <http://www.ishr.org/activities/campaigns/stoning/adultery.htm> [ISHR].

2 This inquiry raised the issue of adjudication using religious law in general. This article examines Muslim law as an example of issues that arise in applying religious law. For a discussion of the relationship and distinctions between Muslim law and Sharia law, see below at 64.

3 One example is the Canadian Coalition of Muslim Women. See online: CCMW <http://www.ccmw.com/MuslimFamilyLaw/muslim_family_law.htm>.

4 Marion Boyd, "Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion" (December 2004) at 5, online: Ontario Ministry of the Attorney General <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/fullreport.pdf> [*Boyd Report*]. The recommended safeguards include: facilitating continued family law arbitrations include court review if the award does not reflect best interests of children; independent legal advice; regulatory amendments requiring that arbitration agreements set out the form of religious law applicable if Ontario law not used; public legal education; training and education of professionals; oversight and evaluation of arbitrations; government funding for community development to ensure that organizations inform persons of their rights and obligations; and further policy development. *Boyd Report*, *ibid.* at 133-42.

5 "Jews, Muslims to fight for tribunals" *CBC News* (14 September 2005), online: <http://www.cbc.ca/story/canada/national/2005/09/14/sharia-protests-20050914.html>; Beth Duff-Brown, "Jews, Muslims to Seek Tribunals in Canada" *ABC News* (14 September 2005), online: <http://abcnews.go.com/International/wireStory?id=1126490&CMP=OTC-RSSFeeds0312>; and ISHR, *supra* note 1.

6 Associated Press, "Ontario Rejects Use of Islamic Law" *FOXNews.com* (12 September 2005), online: <http://www.foxnews.com/story/0,2933,169125,00.html>. In the report, the Premier is reported as stating: "There will be no Shariah law in Ontario. There will be no religious arbitration in Ontario. There will be one law for all Ontarians." See also Margaret Atwood *et al.*, "Don't ghettoize women's rights" *The Globe and Mail* (10 September 2005) A23 ["Don't ghettoize women's rights"]; and Associated Press, "Canadians Protest Islamic Law Proposal" *FOXNews.com* (9 September 2005), online: <http://www.foxnews.com/story/0,2933,168865,00.html>.

7 Ministry of the Attorney General, "Statement by Attorney General on the Arbitration Act, 1991" (8 September 2005), online: Government of Ontario <http://ogov.newswire.ca/ontario/GPOE/2005/09/08/c7547.html?lmatch=&lang=_e.html>.

8 *Arbitration Act, 1991*, S.O. 1991, c. 17, online: <http://www.canlii.org/on/laws/sta/1991c.17/20060614/whole.html>.

9 R.S.O. 1990, c. F.3, online: <http://www.canlii.org/on/laws/sta/f-3/20060614/whole.html>.

10 *Family Statute Law Amendment Act, 2006*, S.O. 2006, c.1.

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

12 Muslims include Sunnis, Shias [including Ismailis, Druze, Voras, and Ishnashris], Ibadis, and other smaller denominations. Sunnis have two sets of enumerated creeds: the Five Pillars of Islam and the Six Articles of Belief; Shias have Roots of Religion and the Branches of Religion; while others have different denominations of creeds. See "Aqidah," online: Wikipedia, The Free Encyclopedia <http://en.wikipedia.org/wiki/aqidah#inroduction>. The leaders include ayatollahs [Shia clergymen], Caliphs [leader of the Ummah]; imams [having different meanings for Shias and Sunnis], Mawlanas [Islamic spiritual masters and guides], mullahs [who have studied the Koran and Hadith, and are considered experts in religious matters], mufti [Islamic scholars who interpret or expound upon Islamic/Sharia law], Mujtahid [interpreters of the Koran and Hadith], and Muezzins [who serve mosques]. See "Islamic Religious Leaders," online: Wikipedia, The Free Encyclopedia <http://en.wikipedia.org/wiki/Islamic_religious_leaders>. The sources include the Koran, the Hadith, Sira, and there are theological divisions among Muslims such as secularists, traditionalists, reformers, and salafis. See "Sharia," online: Wikipedia, The Free Encyclopedia <http://en.wikipedia.org/wiki/Sharia>. See also Ziauddin Sardar & Merryl Wyn Davies, *The No-Nonsense Guide to Islam* (Toronto: Between the Lines, 2004) at 13 [Sardar & Wyn Davies]; and see the Muslims of Edmonton website, online: <http://www.edmontonmuslims.com>.

13 The Ismaili Community of Edmonton Chair was a female for the years 1999-2005. See also see Muslims of Edmonton, *ibid*.

14 Sardar & Wyn Davies, *supra* note 12 at 8. See also at 16: "Even if you stretch our your hand against me to kill me, I shall not stretch out my hand to kill you. I fear Allah, the lord of the world" (Koran).

15 *Boyd Report*, *supra* note 4 at 43 (Submission of Homa Arjomand, 21 July 2004, Submission of the Muslim Canadian Congress, 26 August 2004).

16 Quoted in *ibid.* (Submission of Islamic Council of Imams-Canada, "Islamic Arbitration Tribunals and Ontario Justice System," 23 July 2004).

17 Quoted in *ibid.* at 43 (Submission of the Muslim Canadian Congress, 26 August 2004).

18 Another translation is "path leading to water." See *ibid.* at 44.

19 *Ibid.*, quoting V.A. Behiery & A.M. Geunter, *Islam: Its Roots and Wings – A Primer* (Mississauga, ON: Canadian Council of Muslim Women, 2000) at 14.

20 Submission of Canadian Council of Muslim Women to Marion Boyd Review of the Ontario Arbitration Act and Arbitration Processes, Specifically in Matters of Family Law (23 July 2004), online: <http://www.ccmw.com/MuslimFamilyLaw/submission%20made%20to%20Ms%20Marion%20Boyd.htm> [Canadian Council of Muslim Women].

21 *Boyd Report*, *supra* note 4 at 45: "Most submissions to the Review were adamant that the term Sharia should not be used to describe the proposed use of the Arbitration Act to deal with matters of family law for Muslims." See also at 45, wherein it was noted that most respondents preferred the term Islamic personal law or Muslim personal law be used by the Review to describe the issue accurately.

22 *Supra* note 8.

23 R.S.A 2000, c. A-43, s. 32(1).

24 *Supra* note 8, s. 32(1).

25 *Boyd Report*, *supra* note 4 at 4.

26 *Supra* note 8.

27 Syed Mumtaz Ali, quoted in *ibid.* at 3.

28 Joanne Lichman, *The National*, CBC Television (8 March 2004), cited in *Boyd Report*, *ibid*.

29 Quoted in *Boyd Report*, *ibid.* at 46-7 (Submission of Homa Arjomand, 21 July 2004).

30 *Ibid.* at 42-55. See also various articles posted at Stop Religious Courts in Canada, online: <http://www.muslimchronicle.blogspot.com>.

31 *Boyd Report*, *ibid.* at 3 (Submission of the Muslim Canadian Congress, 26 August 2004).

32 *Ibid.* at 29-30.

33 Quote in *ibid* at 30.

34 *Ibid* at 29-30.

35 Quoted in *ibid.* at 48 (Submission of the Canadian Council of Muslim Women, 23 July 2004). The Council did balance this view by outlining some rights ascribed to women in Islamic personal law (*ibid.* at 48-9).

36 Quoted in Ingrid Peritz, "Ebadi decries Islamic law for Canada" *The Globe and Mail* (14 June 2005) A7. See online: Stop Religious Courts in Canada, *supra* note 40, citing opposition to Sharia

law or Muslim law in Canada by many, including Margaret Atwood, Sheila Copps, Tarek Fatah, the Muslim Canadian Congress, and Amnesty International.

37 Quoted in *Boyd Report*, *supra* note 4 at 49 (Submission of Homa Arjomand and her coalition of thirty-five members, who outlined their personal experiences under Sharia law in Iran, Saudi Arabia, Pakistan, Kuwait, and Iraq, 21 July 2004).

38 Daily Telegraph, "Powers struggle over apostate's fate" *Edmonton Journal* (18 June 2006) A4.

39 *Ibid.*

40 *Ibid.*

41 *Boyd Report*, *supra* note 4 at 45. See further references to comments made by Aly Hindy, a self-described fundamentalist, to Sally Armstrong, "Criminal Justice" *Chatelaine* (November 2004) 152 at 158: "If a person says, 'I don't believe in Shariah,' he or she is not a Muslim. To go to hell is easy. To go to paradise takes work. Many people who call themselves Muslim are going to hellfire."

42 Mohyuddin Mirza, Letter to the Editor, "Many Muslim Sects" *Edmonton Journal* (18 June 2006) A19.

43 BBC News, "Muslim burial for Malaysian hero (28 December 2005), online: *bbc.co.uk* <http://news.bbc.co.uk/l/hi/world/asia-pacific/4563452.stm>.

44 See James M. Arlandson, "Sharia sure ain't gay: Muhammad and the homosexual," online: Answering Islam, A Christian-Muslim Dialog and Apologetic <http://answeringislam.org/Authors/Arlandson/homosexual.htm>; and ISHR, *supra* note 1.

45 *Boyd Report*, *supra* note 4 at 136 (Recommendation 18).

46 *Ibid.* (Recommendation 19).

47 *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551, 2004 SCC 47; but see *R. v. Jones*, [1986] 2 S.C.R. 284, 1986 CanLII 32 [*Jones*], wherein the converse was held – *i.e.* that it is not for the Court to question the validity of one's religious beliefs even though few share them. The two cases demonstrate the need to demarcate between religious tenets and secular laws.

48 This term is used here only to refer to tribunals adjudicating personal disputes using Sharia law.

49 *Supra* note 11.

50 *Ibid.*, s. 2. Section 2 states: "Everyone has the following fundamental freedoms: (a) freedom of conscience and religion; (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; (c) freedom of peaceful assembly; and (d) freedom of association."

51 *Ibid.*, s. 15. Section 15(1) states: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." Also, s. 28 states: "Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons."

52 *Ibid.*, s. 7. Section 7 states: "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."

53 *Boyd Report*, *supra* note 4 at 40.

54 CNN, "Fugitive polygamist sect leader caught near Las Vegas" (30 August 2006), online: CNN.com <http://www.cnn.com/2006/LAW/08/29/jeffs.arrest/index.html>. Also see Jeremy Hainsworth, "Polygamy power struggle predicted" *cnews* (30 August 2006), online: <http://cnews.canoe.ca/CNEWS/Canada/2006/08/30/178219-cp.html>.

55 See *Law v. Canada (Minister of Employment & Immigration)*, [1999] 1 S.C.R. 497, 1999 CanLII 675; and *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, 1989 CanLII 2.

56 The author is examining the submissions of some Muslim Canadians to Marion Boyd, rather than professing expertise in the content of Muslim law or Islamic theology.

57 *Supra* note 11, s. 52.

58 Section 32(1) of the *Charter* states: "This Charter applies *a*) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and *b*) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province."

59 See *e.g.* Alberta's *Arbitration Act*, *supra* note 23, s. 32(1); and Ontario's *Arbitration Act, 1991*, *supra* note 8, s. 32(1).

60 Both *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, 1997 CanLII 327 [*Eldridge*], and *Vriend v. Alberta*, [1998] 1 S.C.R. 493, 1998 CanLII 816, deal with laws that regulate private activity, and not the acts of a private entity.

61 *Eldridge*, *ibid.*

62 *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R 1038, 1989 CanLII 92 [*Slaight Communications*]. See also *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570, 1990 CanLII 63 [*Douglas College*].

63 The *Charter* applies to delegated legislation such as regulations, orders in council, possibly municipal by-laws, and by-laws and regulations of other creatures of Parliament and the legislatures: *Black v. Law Society of Alberta*, [1989] 1 S.C.R. 591, 1989 CanLII 132 [*Black*]. Where government action of such nature is present, and where a private litigant relies on it to cause an infringement of the *Charter* rights of another, the *Charter* applies. For example, the rule of a Law Society, purportedly adopted pursuant to statute, constituted a "law" within the meaning of the *Charter*, and was found to infringe the mobility rights provisions (*Black*, *ibid.*). The *Charter* applies to rules of civil procedure as they amount to legislation by judges sanctioned by various judicature acts, and thus amount to laws of the province having the force of statutes. See, *e.g. Baker v. Tanner* (1991), 77 D.L.R. (4th) 379 (N.S.C.A.), 1991 CanLII 2496. See also *Slaight Communications*, *ibid*: The *Charter* applies to orders made by adjudicators that are creatures of statute. They are appointed pursuant to a legislative provision and derive their powers from statute. Note that it was held in *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211, 1991 CanLII 68 that the *Charter* applies to government even when it engages in activities that are in form "private" or "commercial,", and the provision and management of the labour force necessary for the provision of public education cannot in any event be considered commercial.

64 *Blainey v. Ontario Hockey Association* (1986), 54 O.R. (2d) 513 (C.A.) [*Blainey*].

65 *Blainey*, *ibid.*; *Eldridge*, *supra* note 60.

66 In *Eldridge*, *ibid.*, while the Government's failure to prescribe sign language interpreters was not held to violate the *Charter*, it was held that the failure of the Medical Services Commission and hospitals to provide sign language interpretation where it is necessary for effective communication constituted a *prima facie* violation of the s. 15(1) rights of deaf persons.

67 Media reports indicate a public desire for maintaining the secular nature of institutions. See *e.g.* Philip Symons, "Canadian Unitarians urge Government to ensure 'separation of church and state'" (11 June 2005), online: Stop Religious Courts in Canada <http://muslimchronicle.blogspot.com/2005/06/canadian-unitarians-urge-government-to.html>. See also Nadia Khouri, Editorial, "Keep Mosque and state separate" *National Post* (21 September 2004) A17. A number of academics have called for secularization in their justice systems wherein Islamic or *Sharia law* may apply: Salbiah Ahmad, "Islam in Malaysia: Constitutional and Human Rights Perspective" (2005) 2 Muslim World Journal of Human Rights, Article 7. The author calls for increased secularization of the justice system in Malaysia.

68 See *e.g.* Alberta's *Arbitration Act*, *supra* note 23, s. 44. Section 44 provides that if the arbitration agreement does not provide for appeal to the courts then there is very limited basis for review by the courts.

69 *Supra* note 8, s. 46.

70 J. Bryan Casey & Janet Mills, *Arbitration Law of Canada: Practice and Procedure* (Huntington, NY: Juris Publishing, 2005) at 315 [Casey & Mills].

71 *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214, 1988 CanLII 3.

72 Indeed, Ontario may well have improperly allowed arbitrations under other religious law until its *Arbitration Act*, *supra* note 8, and *Family Law Act, supra* note 9, were amended in the early 1990s.

73 *Slaight Communications*, *supra* note 62.

74 *Luscher v. Deputy Minister of National Revenue (Customs & Excise)* (1985), 17 D.L.R. (4th) 503 (F.C.A.); *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, 1989 CanLII 87 [*Irwin Toy*].

75 *Irwin Toy*, *ibid.*

76 *Reference re Education Act of Ontario and Minority Language Education Rights* (1984), 10 D.L.R. (4th) 491, 47 O.R. (2d) 1 (C.A.).

77 *Douglas College*, *supra* note 61 and, in a human rights context, see *Dickason v. University of Alberta*, [1992] 2 S.C.R. 1103, 1992 CanLII 30 [*Dickason*]. Parties may not generally contract out of a human rights statute. This rule resulted from the concern that there may be a great discrepancy in bargaining power between the person contracting out of human rights legislation and the party receiving the benefit of that term. See also *Newfoundland Association of Public Employees v. Newfoundland (Green Bay Health Care Centre)*, [1996] 2 S.C.R. 3, 1996 CanLII 190: Human rights legislation sets out a floor beneath which the parties cannot contract out. Parties can contract out of human rights legislation if the effect is to raise and further protect the human rights of the people affected.

78 *Dickason*, *ibid.* See also *Ontario Human Rights Commission v. Borough of Etobicoke*, [1982] 1 S.C.R. 202, 1982 CanLII 15: In response to the city's argument that mandatory retirement at age 65 was justified because the parties had agreed to it in a collective agreement, Justice McIntyre wrote (at 213-14) that while it was submitted that a the condition, being in a collective agreement, should be considered a *bona fide* occupational qualification and requirement, to give it effect would be to permit the parties to contract out of the provisions of *The Ontario Human Rights Code*. The majority held that acceptance of a contractual obligation might well, in some circumstances, constitute a waiver of a *Charter* right especially in a case like mandatory retirement, which not only imposes burdens but also confers benefits on employees. Usually, however, such an arrangement would require justification as a reasonable limit under s. 1 especially where a collective agreement may not really find favour with individual employees subject to discrimination.

79 *Insurance Corp. of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145, 1982 CanLII 27 [*Heerspink*]; see also *Winnipeg School Division No. 1 v. Craton*, [1985] 2 S.C.R. 150, 1985 CanLII 48.

80 *Dickason*, *supra* note 77.

81 *Dickason*, *ibid*.

82 *Dickason*, *ibid*.

83 *Heerspink*, *supra* note 79 at 158

84 *Blainey*, *supra* note 64.

85 See *e.g. Canadian Human Rights Act*, R.S.C. 1985, c. H-6, and Alberta's *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 2000, c. H-14.

86 *Ontario (Human Rights Commission) v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536, 1985 CanLII 18 [*Simpsons-Sears*]; *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84, 1987 CanLII 73; and *Canadian National Railway v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114, 1987 CanLII 109.

87 *Simpsons-Sears*, *ibid.*,and *British Columbia (Public Service Employee Relations Commission) v. B.C.G.E.U.*, [1999] 3 S.C.R. 3, 1999 CanLII 652 [*Meiorin*].

88 *Eldridge*, *supra* note 60. See also *Meiorin*, *ibid.* Finally, regarding s. 11.1 of the Alberta *Human Rights, Citizenship and Multiculturalism Act*, *supra* note 85, see *Dickason*, *supra* note 77, wherein the *Oakes* analysis (*R. v. Oakes*, [1986] 1 S.C.R. 103, 1986 CanLII 46) was applied in the context of human rights codes with a measure of flexibility.

89 *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, 1986 CanLII 12 [*Edwards*]. In the case of holiday shopping legislation preventing Sunday sales, the legislation was held to abridge the freedom of religion of some Saturday-observers, but was held justifiable as a reasonable limit under s. 1 of the *Charter*.

90 *Ibid.*

91 *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006], 1 S.C.R. 256, 2006 SCC 6.

92 *Syndicat Northcrest v. Amselem*, *supra* note 47: religious conduct which would potentially cause harm to or interference with rights of others is not automatically protected and must be measured in relation to other rights.

93 *P.(D.) v. S.(C.)*, [1993] 4 S.C.R. 141, 1993 CanLII 35.

94 19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force 23 March 1976, accession by Canada 19 May 1976) [*ICCPR*].

95 *Ibid.*, art. 18(3).

96 While international treaty norms are not binding in Canada unless incorporated by enactment into Canadian law, the courts may be informed by international law in seeking the meaning of *Charter* provisions: *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1 (CanLII).

97 In the seminal case of *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, 1985 CanLII 69 [*Big M Drug Mart*], the *Lord's Day Act*, R.S.C. 1970, c. L-13, was held to violate s. 2(a) of the *Charter:* to the extent that it bound all persons to a sectarian Christian ideal, the *Act* worked a form of coercion inimical to the spirit of the *Charter* and the dignity of non-Christians. In proclaiming the standards of a Christian faith, the *Act* created a climate hostile to, and giving the appearance of, discrimination against non-Christian Canadians. The *Lord's Day Act* translated a law, rooted in Christian morality, using the power of the state to bind believers and non-believers alike.

98 For example, many Catholics use birth control and favour abortion in contradiction to the commonly held tenets of their faith, yet still regard themselves as Catholics.

99 See *Edwards*, *supra* note 89 regarding the general principle in the context of secular holiday legislation. See also *Jones*, *supra* note 47, wherein the Court held that a pastor's freedom of religion was not offended by requiring him to recognize the secular role of school authorities.

100 *Big M Drug Mart*, *supra* note 97.

101 *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772, 2001 SCC 31 (CanLII). In this case, the Supreme Court of Canada was faced with the task of reconciling the religious freedoms of individuals wishing to attend a private institution, the tenets of which prohibit homosexuality, with broader equality concerns ensuring non-discrimination against homosexuals. The Court divested itself of dealing squarely with the conflict between equality rights and religious freedoms by finding that the rights in this case could be reconciled. It held that absent evidence that training teachers at TWU fosters discrimination in the public school system, the freedom of individuals to adhere to certain religious beliefs while at TWU should be respected. It held that any potential conflict between religious freedoms and equality rights should be resolved through the proper delineation of the rights and values involved.

102 *Big M Drug Mart*, *supra* note 97. See also *Jones*, *supra* note 47, wherein the majority of the Supreme Court of Canada held that a pastor's freedom of religion was not offended by requiring him to recognize the secular role of school authorities. The provisions of the Alberta *School Act*, R.S.A. 1980, c. S-3, required every child of a certain age to attend public school unless excused for certain reasons, such as where a child is under certified home instruction or in private schooling. The accused, a fundamentalist pastor, claimed that the authority over his children and his duty to attend to their education came from God, and that it would be sinful for him to seek certification from the state to permit him to do God's will. The Court ruled that the provisions did not offend freedom of religion.

103 *Boyd Report*, *supra* note 4 at 55-68.

104 "It is much more difficult to balance competing rights of religious freedom and equal treatment under the law when a religious community does not believe that all members of the community are to be treated equally (for example if women are considered less worthy)." Submission of the Christian Legal Fellowship (27 August 2004), quoted in *Boyd Report*, *supra* note 4 at 68.

105 David Joseph, *Jurisdiction and Arbitration Agreements and Their Enforcement* (London: Sweet & Maxwell, 2005) at 444-47. See also Casey & Mills, *supra* note 69 at 73-76; and David St. John Sutton & Judith Gill, *Russell on Arbitration*, 22d ed. (London: Sweet & Maxwell, 2003) at 16 and 377.

106 Joseph, *ibid.* at 444.

107 *Joseph, ibid.* See also the English Court of Appeal case of *Deutsche Schachtbau v. Shell International Petroleum Co. Ltd.* [1990] 1 A.C. 295, 316 (CA), Lord Donaldson, reversed on other grounds in the House of Lords.

108 *Omnium de Traitement et de Valorisation SA v. Hilmarton Ltd.* [1999] 2 All E.R (Comm) 146 (challenge unsuccessful).

109 See the decision of the Court of Justice of the European Communities in *Eco Swiss China Time Ltd. v. Benetton International NV*, [1999] 2 All E.R (Comm) 44, ECR 1-3055 (BAILII).

110 As a note, there are certain types of arbitration agreements that are manifestly void or illegal. An example commonly given is an agreement between two highwaymen to arbitrate the division of spoils. Where this is apparent from the award, such an agreement will not give rise to any enforceable award, as the making of the arbitration agreement itself would almost certainly be considered to be unlawful. Even if the making of the arbitration agreement is not unlawful, where it is apparent from the award that sums have been awarded in respect of an illegal enterprise (illegal either under the governing substantive law or the law of the place of performance or under the curtail law), then the English courts will be entitled to conclude that the enforcement of the award would be contrary to public policy. The fact that in such a case the illegality is recited in or manifest from an award and not a court judgement makes no difference. The court is entitled to protect the integrity of its own process and to see that it is not abused. *Minmetals Germany Gmbh v. Ferco Steel Ltd.*, [1999] 1 All E.R (Comm) 315, Justice Colman; *Irvani v Irvani* [2000] 1 Lloyd's Rep. 412.

111 Quoted in *Boyd Report*, *supra* note 4 at 59-60 (Submission of His Highness Prince Aga Khan, Shia Imami Ismaili National Concilation and Arbitration Board of Canada, 10 September 2004):

> "The Ismaili CAB system is rooted in tradition, yet its modern infrastructure interfaces comfortably with the national legal systems within which it functions. The CAB system is grounded in the ethics of the faith and complies with the laws of the various lands where the Ismaili live"

112 Section 1 states: "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." Two central criteria must be satisfied to establish that a

limit is reasonable and demonstrably justified in a free and democratic society. First, the objective to be served by the measures limiting a *Charter* right must be sufficiently important to warrant overriding a constitutionally protected right or freedom. The standard must be high to ensure that trivial objectives or those discordant with the principles of a free and democratic society do not gain protection. At a minimum, an objective must relate to societal concerns, which are pressing and substantial in a free and democratic society, before it can be characterised as sufficiently important.

113 *A.G. (Que) v. Quebec Assn. of Protestant School Boards*, [1984] 2 S.C.R. 66, 1984 CanLII 32.

114 *Oakes*, *supra* note 88.

115 *Roach v. Canada (Minister for State for Multiculturalism & Culture)* (1994), 113 D.L.R. (4th) 67, 1994 CanLII 3453 (F.C.A.). See also two recent articles by Ayelet Shachar regarding critiques of multiculturalism pertaining to gender and other minority rights: "Two Critiques of Multiculturalism" (2001) 23 Cardozo Law Review 253 at 257-59, 261-75; and "Religion, State, and the Problem of Gender: New Modes of Citizenship and Governance in Diverse Societies" (2005) 50 McGill Law Journal 49.

116 See *Boyd Report*, *supra* note 4. See also Natasha Fatah, "One law for all" *CBC News* (1 April 2004), online: <http://www.cbc.ca/news/viewpoint/vp_fatah/20040401.html>: "I've lived in Pakistan and Saudi Arabia, two countries that practise Shariah law. I love the country of my birth, and the country of my youth, and now Canada, the country of my choice. And with that choice I've agreed to live by the laws of this land."

117 Oakes, *supra* note 88. The impairment must be "minimal"; that is, the law must be carefully tailored so that rights are impaired no more than necessary. As held in *Eldridge*, *supra* note 60, the application of the *Oakes* test requires close attention to the context in which the impugned legislation operates. The failure to provide sign language interpreters fails the minimal impairment branch of the *Oakes* test under a deferential approach. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. Legislatures are given some flexibility in exercising legislative choice, and legislation need not be tuned to judicial precision: *Edwards*, *supra* note 89. See also *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S. C.R. 199, 1995 CanLII 64 at para. 160. Legislative inaction in the face of blatantly unconstitutional action and arbitration cannot and will not be viewed as reasonable judgment sufficient to meet the requirements of s. 1: *Irwin Toy*, *supra* note 73.

118 *Irwin Toy*, *ibid.*

119 *Kask v. Shimizu*, [1986] 4 W.W.R. 154 (Alta. Q.B.), 1986 CanLII 100 (AB Q.B.).

120 Canadian Council of Muslim Women, *supra* note 20.

Re-Framing the Sharia Arbitration Debate

Trevor C.W. Farrow*

> Dear Mr. McGuinty:
> An important tenet of Canadian democracy hangs in the balance of your response to the matter of religious arbitration in the province of Ontario.[1]

Introduction

The "matter of religious arbitration in . . . Ontario" to which Margaret Atwood and nine others are referring is a vocal, polarized debate – the "[S]haria debate."[2] It has largely been framed by two questions. Should Ontario "[p]rohibit the use of religion in the arbitration of family law disputes"[3] to avoid "the ghettoization of members of religious communities as well as human-rights abuses?"[4] Or would such a prohibition do a "great disservice to a number of religious groups in Ontario, and nothing to safeguard the interests of Muslim women?"[5] Several fundamental rights and interests are engaged by this debate, including religious freedom, gender equality, the rights of children, national and cultural identity, freedom from hatred, the role of the state in family law, and others.

Because the stakes involved in this debate are high, this debate has captured the interest of many sectors of civil society. It has also captured the interest of the Ontario government, which has recently passed legislation on the issue.[6] While this issue is clearly important and should be addressed,[7] there are three problems with the way in which it has framed – and confused – the specific arbitration context of the debate. First, the issue is not about simply prohibiting religious tribunals. Second, it is not only an Ontario issue. Third, it is not necessarily even a Sharia (or religion) issue. This article focuses on these three problems.

Dispute Resolution and Religion

In Ontario, Jews, Christians, Muslims, and others have engaged in religious-based dispute resolution processes for years.[8] However, a public debate about whether Sharia law should be used in family disputes in Ontario commenced in 2003 after the announcement of the creation of the Islamic Institute of Civil Justice (IICJ). The IICJ stated that it planned to establish a *Darul-Qada* – judicial tribunal – to conduct arbitrations in Ontario according to Islamic law.[9]

In June 2004, following the IICJ announcement, former Ontario Attorney General Marion Boyd was given a mandate by the Ontario government to look into and make recommendations on the issue of family law and arbitration in Ontario, including religious-based arbitrations.[10] Her report was released in December 2004. In it, she essentially recommended the continuation of arbitrations in the context of family law, including regulated religious-based arbitrations.[11] From the time of the IICJ announcement, through the release of the *Boyd Report* and certainly for most of the following year, the public debate surrounding these issues escalated. Those in favour[12] and

those opposed[13] to the use of Sharia law in family disputes actively debated their positions in the media,[14] at the bar,[15] and in the academy.[16] Finally, in September 2005, after witnessing the public debate and reviewing the *Boyd Report*, the Ontario government announced that it did not plan to follow Boyd's recommendations.[17] Ontario Premier Dalton McGuinty told the Canadian Press that there "will be no Sharia law in Ontario" and, further, that there "will be no religious arbitration in Ontario."[18] Notwithstanding that, for years, faith-based arbitrations had been conducted in accordance with numerous religious practices, the Premier decided to abolish "religious arbitration in Ontario."[19] It was this decision that ultimately led to the February 2006 enactment of Ontario's *Family Statute Law Amendment Act*.[20]

While the Ontario Premier's intention is to prohibit religious arbitrations in Ontario (at least those not conforming to Canadian law), this intention will likely not materialize, despite the new legislation. There are legal and practical impediments to prohibiting faith-based arbitrations altogether. The primary legal impediment consists of constitutional protections, including protections for freedom of religion and others.[21] The thorny *Charter* implications of the Premier's initial statement likely led Ontario's Attorney General, the Hon. Michael Bryant, to make an important but more modest announcement. Prior to the drafting of the recent legislation, the Attorney General announced that the Ontario government "will ensure that the law of the land in Ontario is not compromised, that there will be no binding family arbitration in Ontario that uses a set of rules or laws that discriminate against women."[22]

Moreover, as a practical matter, religious tribunals will not be abolished because the government is not typically in the business of regulating and policing the private religious affairs of Ontario residents. As Marion Boyd stated, Sharia arbitration "'will happen in mosques and community centers and it will just happen.'"[23] Similarly, Mubin Sheikh, a member of the Masjid-al-Noor mosque in Toronto commented: "'Is the government going to stand outside every mosque and ask if people are going in to do faith-based arbitration? No . . . . A ban will change nothing.'"[24]

So, as I stated in the introduction to this article, one problem with the Sharia debate as it has been framed is that it is not about simply prohibiting religious tribunals. What is at stake, rather, is whether the state will sanction, or defer to, decisions of a faith-based dispute resolution panel operating within its jurisdiction. In Ontario, this deferral process is provided for in the *Arbitration Act, 1991*.[25] Under that statute, parties to essentially any dispute can subject their proceeding to its provisions provided the dispute is not "excluded by law."[26] Parties choose arbitration because of its many benefits, including the choice of decision-maker, process, pace, and of course, privacy.[27] To the extent that parties agree to subject their arbitration to the parameters of the *Arbitration Act*, the courts retain very limited power to review the result of that arbitration.[28] As a result, the parties are in large measure bound by the result.[29] The legitimacy of this regime has been fully recognized by the courts. For example, when referring generally to arbitration, Supreme Court of Canada Justice LeBel stated that it is, "in a broader sense, a part of the dispute resolution system the legitimacy of which is fully recognized by the legislative authorities."[30]

The first question in the debate, therefore, needs to be kept technically clear: does the jurisdictional reach of a provincial statute – *i.e.*, an arbitration statute – include family disputes resolved pursuant to faith-based laws that do not conform to Ontario or Canadian laws, which would in turn require a provincial superior court to defer to an arbitral decision regarding such a dispute? On this question the Ontario government – in its new legislation – clearly says no (thereby disagreeing with the recommendations in the *Boyd Report*[31]). According to section 2.2(1) of the recent *Family Statute Law Amendment Act*:

> When a decision about a matter described in clause (a) of the definition of "family arbitration" in section 1 is made by a third

person in a process that is not conducted exclusively in accordance with the law of Ontario or of another Canadian jurisdiction,

(a) the process is not a family arbitration; and
(b) the decision is not a family arbitration award and has no legal effect.[32]

Legislating that a religious family arbitration not conducted in accordance with Ontario or Canadian law is "not a family arbitration" and, further, that such arbitration "has no legal effect" under Ontario law is clearly different from the project of prohibiting religious tribunals altogether. Even if the result of the new legislation is essentially to exclude religious tribunals (employing various non-Ontario or non-Canadian legal regimes) from taking advantage of Ontario arbitration legislation, it would be virtually impossible for a province to prohibit altogether (or police) the practice of private faith-based dispute resolution.

Given that the new legislation contemplates the drafting of regulations designed to govern the details of the arbitration process, how the new legislation will work and the differences it will make are largely still open questions.[33] In any event, while I am in favour of the new legislation, both in the immediate context of family law protections and more broadly as a signal that we should be concerned about public interest values that get dealt with behind the veil of private arbitration,[34] we need to be clear about what is, and what is not, at stake in this debate.

A National Issue

Second, we should also be clear that while the debate has been largely focused on Ontario, it is certainly not limited to Ontario (as evidenced by the 8 September 2005 protests about Sharia-based tribunals that occurred in cities internationally[35]). As Atwood and others have commented, the "eyes of the world are quite literally watching."[36] Canadians across the country have joined the worldwide protests against Sharia tribunals. As reported by Sheldon Gordon, "Developments in Ontario are already reverberating elsewhere in Canada."[37] This national and international interest has obviously stemmed from the fundamental gender, religious, and cultural questions at play in the debate. Equally crucial, and it is again an important reason for being accurate in this debate, is that any jurisdiction – whether Canadian or international – that has arbitration legislation similar to Ontario's *Arbitration Act* will potentially be facing the same dispute resolution issues.[38] Therefore, it is important not to limit the potential reach of this debate, notwithstanding a late 2005 poll in which a majority of Canadians felt that faith-based arbitration should not be used to resolve family disputes.[39]

Alberta, for example – where the discussion in this article was first presented and where the "[Sharia] debate has barely begun"[40] – has arbitration legislation[41] that provides for a very similar dispute resolution landscape to that provided by Ontario's *Arbitration Act* (except for the recent *Family Statute Law Amendment Act* amendments). In British Columbia, even though the provincial government announced that it has "no plans to . . . . change the laws . . . . to give any special recognition to any set of religious laws,"[42] there has been at least some interest expressed in formalizing the use of Sharia law in state-sanctioned arbitration proceedings.[43] As it stands now, British Columbia's *Commercial Arbitration Act* leaves room for disputes falling within its jurisdiction to be resolved according to Sharia law.[44] Finally, given that the *Uniform Arbitration Act*[45] forms the basis of much of the arbitration legislation that exists in Canada, this is clearly a national (and potentially international) issue.[46]

Privatizing Civil Justice

Third, and most fundamental, is the fact that – while the family law, gender, and cultural issues at stake are clearly important – the Sharia debate is really a red herring for something much bigger at play: the ongoing and systematic privatization of the Canadian public civil justice system. This third concern, in turn, involves a pair of sub-issues. One is that there is an increasing tendency to resolve important

human rights and other public and private interest disputes behind closed doors without any kind of public scrutiny of the processes or results (Sharia or other). The other is that, as a result, we are systematically downloading – privatizing – a fundamental tool of democratic governance.[47]

With respect to the withdrawal of dispute resolution from public scrutiny, the basic concern in the Ontario debate about arbitral tribunals employing Sharia law is that human rights under Sharia law are not adequately protected, particularly the rights of women and children. As summarized by the open letter to Dalton McGuinty by Margaret Atwood and others, quoted at the outset of this article, the concern is essentially that Sharia-based tribunals will lead to human rights abuses, "particularly for those who hold the least institutional power within the community, namely women and children."[48] Although I am certainly not an expert in Muslim law, my reading of the debate is that these concerns are justified. Moreover, they are important concerns that should be – and at least in Ontario are being – addressed.

Unfortunately, as we have seen, almost any dispute (now excepting some family disputes in Ontario) can take advantage of current arbitration legislation and thereby, with the blessing of the state, exempt itself from the public civil justice system. At the same time, governments, courts, the bar, and industry are actively pushing the use of dispute resolution methods that are alternative to the public court system. These methods include, but are not limited to, processes governed by arbitration legislation.[49] Therefore, an increasing number of commercial services disputes, employment disputes, pay-equity disputes, police complaints, family disputes, human rights disputes, etc. are being decided in private, using private adjudicators, without any of the procedural safeguards that are typically provided by our public court system. In this regard, it never ceases to amaze me that the public, while typically up in arms about the "activism" of our public judges,[50] is largely silent (or ignorant) about the significant decisions made everyday by private decision-makers behind closed doors.

There is no doubt that many disputes lend themselves to these alternative processes. There is also no doubt that many of these disputes involve important public and private interest issues – often impacting upon the rights of individuals, including "those who hold the least institutional power within the community"[51] – that should be dealt with under the scrutiny of the public eye.[52] Sharia panels, therefore, do not have a monopoly on potential state-sanctioned (or at least state-encouraged) human rights violations and other injustices resulting from private dispute resolution processes in Canada. If we are going to concern ourselves with the potential shortcomings of private dispute resolution processes, which I think we should (and which the new Ontario legislation does), then we should do so in a way that avoids casting our net too narrowly. By treating the Sharia debate as an element of the broader move largely to privatize the civil justice system, we are by no means in danger of throwing the baby out with the bathwater.

I recognize that the private resolution of disputes has occurred since the beginning of disputes themselves, and this is often a good thing. To the extent that it can avoid becoming involved, the state certainly does not need (or want) to interfere, for example, with two roommates negotiating over what movie to see, or how the phone bill should be shared. On the other hand, some disputes that occur in private should ideally be dealt with in public, or at least with public procedural safeguards regarding transparency, fairness, power, equality, etc. Disputes involving children or other vulnerable individuals are often examples of these sorts of disputes. Unfortunately, unless we are going to rewrite fundamental constitutional and privacy legislation and jurisprudence, the state is not going to get involved in all of those disputes either. To the extent that the state does come into play – either directly through its public court system or indirectly through court-annexed mediation, arbitration legislation, or government-sanctioned or encouraged dispute resolution procedures, etc. – it should take an active role in ensuring that it is not sanctioning human rights violations or other injustices. The new Ontario legislation admirably seeks

to assist in this regard in terms of family disputes. But family arbitration is only the tip of the proverbial iceberg in terms of private, state-sanctioned dispute resolution processes involving important public interest values.

With respect to the sub-issue of public governance in a community, this is a procedural matter largely conducted through the institutions of legislation and adjudication. Clearly the decisions of public civil courts play an important normative role in our democratic processes.[53] Likewise, private dispute resolution processes – through direct application or indirect processes of behaviour modification – also have an impact upon the broader public community in which those private processes occur. As such, to the extent that we are privatizing our public civil dispute resolution system, we are essentially privatizing a significant part of the way we govern ourselves in a democratic society. There may be good reasons to pursue privatization, at least to a limited extent; however, the current trend of privatization – largely in the name of cost and efficiency – is being conducted without adequate public debate about, let alone public understanding of, those reasons. Whether or not family disputes – religious or otherwise – should be privatized is just one element of that broader debate.

Conclusion

There are fundamental procedural and constitutional issues underlying the Ontario Sharia debate. The issues are of interest to people across the country and around the world. This debate must be framed clearly and accurately in order to foster and understand its informed and meaningful resolution, and also to understand and address the fundamental issues underlying the debate. Unfortunately, clarity and accuracy have not characterized the debate to-date, a failure that jeopardizes its proper understanding. This failure also potentially jeopardizes our understanding of the important underlying procedural and governance issues at play in the debate that are also at the heart of our democratic process. It is these issues, in my view, that – in the words of Atwood *et al*. quoted at the outset of this article – "han[g] in the balance."[54] Reframing the Sharia debate will provide us with an opportunity to take a closer look at what we are doing not only to family law in Ontario, but also at adjudication as a form of governance in all parts of the country. This is an opportunity we should not pass up.

Notes

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1 Margaret Atwood *et al*., "Don't ghettoize women's rights" *Globe and Mail* (10 September 2005) A23 [Atwood *et al*.], online: International Campaign against Shari'a Court in Canada <http://www.nosharia.com/OPEN%20LETTER%20TO%20ONTARIO%20PREMIER%20DALTON%20McGUINTY.htm>.

2 Sheema Khan, "The sharia debate deserves a proper hearing" *Globe and Mail* (15 September 2005) A21 [Khan].

3 Atwood *et al., supra* note 1.

4 *Ibid*.

5 Anver Emon, "A mistake to ban sharia" *Globe and Mail* (13 September 2005) A21 [Emon]. For a background summary of the debate, see Marion Boyd, "Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion" (December 2004) at 3-6, online: Ontario Ministry of The Attorney General <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/fullreport.pdf> [*Boyd Report*].

6 *Family Statute Law Amendment Act, 2006*, S.O. 2006, c. 1.

7 Many of these important issues are being specifically addressed elsewhere. See *e.g.* "Religious Tribunals: Civil and Constitutional Law Perspectives" (Panel discussion, Centre for Constitutional Studies, Edmonton, 1 November 2005) ["Religious Tribunals"]. In addition, see the *Boyd Report*, *supra* note 5.

8 See generally *Boyd Report*, *ibid.* at 4; Diana Lowe and Jonathan H. Davidson, "What's Old Is New Again: Aboriginal Dispute Resolution and the Civil Justice System" in Catherine Bell & David

Kahane, eds., *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press, 2004) 280 at 286-88.

9 Judy van Rhijn, "First steps taken for Islamic arbitration board" *The Law Times* (24 November 2003) 11. See generally *Boyd Report*, *ibid* at 3.

10 *Boyd Report*, *ibid.* at 5.

11 See *ibid*. For news commentaries and reactions to her report, see *e.g.* Keith Leslie, "Let Ontario families use Muslim law in disputes, report urges" *Globe and Mail* (21 December 2004) A12; Editorial, "Islamic arbitration, by the rules all follow" *Globe and Mail* (22 December 2004) A18; and Margaret Wente, "The state should not give its blessing to Muslim courts" *Globe and Mail* (23 December 2004) A23.

12 See *e.g.* Khan, *supra* note 2; Emon, *supra* note 5; and Marina Jiménez, "B'nai Brith recommends sharia-based tribunals" *Globe and Mail* (9 September 2004) A8.

13 See *e.g.* Atwood *et al.*, *supra* note 1; Margaret Wente, "Whistling sharia while we go completely off our rocker" *Globe and Mail* (8 September 2005) A23 [Wente, "Whistling sharia"].

14 See *e.g.* Marina Jiménez, "Debate stirs hatred, sharia activists say" *Globe and Mail* (15 September 2005) A6; Marina Jiménez, "Sharia decision sparks Jewish protest" *Globe and Mail* (13 September 2005) A1 [Jiménez, "Sharia decision sparks Jewish protest"]; Editorial, "Of common values and the sharia fight" *Globe and Mail* (13 September 2005) A20; Marina Jiménez, "A Muslim woman's sharia ordeal" *Globe and Mail* (8 September 2005) A1; Canadian Council of Muslim Women, "Concerned about traditional religious interpretations" in "Shari'a arbitration proposal in Ontario hits New York Times' pages" 24:14 *The Lawyers Weekly* (August 2004) ["Shari'a arbitration proposal in Ontario hits New York Times' pages"]; Lynda Hurst, "Ontario sharia tribunals assailed" *Toronto Star* (22 May 2004) A1; and Lynda Hurst, "Protest rises over Islamic law in Ontario" *Toronto Star* (8 June 2004) A4.

15 See *e.g.* Mark Bourrie, "Still wiggle room for faith-based arbitration" *Law Times* (28 November 2005) 9 [Bourrie]; Sheldon Gordon, "Sacred Settlements" *National* (March 2005) 32 [Gordon]; Raj Anand, "Constitutional and Human Rights Issues in Religious Tribunals – Faith Based Arbitrations" (joint meeting of the Canadian Bar Association – Alberta Branch, Constitutional and Civil Liberties Section – Northern, and the Centre for Constitutional Studies, University of Alberta, Edmonton, 20 September 2005) [Anand]; and Michelle C. Christopher, "Sharia Law in Canada" 29:2 *Law Now* (October 2004) 36.

16 See *e.g.* "Religious Tribunals," *supra* note 7; Ayelet Shachar, "Religion, State, and the Problem of Gender: New Modes of Citizenship and Governance in Diverse Societies" (2005) 50 McGill Law Journal 49; Annie Bunting & Shadi Mokhtari, "Migrant Muslim Women's Interests and the Case of 'Shari'a Tribunals' in Ontario" in Vijay Agnew, ed., *Migrant Women's Quest for Social Justice* (forthcoming); Annie Bunting, "Mediating Cultures, Arbitrating Family Disputes – the Proposed 'Shari'a Tribunals' in Ontario" (November 2004 Draft), online: National Judicial Institute <http://nji.ca/nji/CCIAWJ/papers/new/53_Bunting_Arbitrating_.pdf>; Natasha Bakht, "Family Arbitration Using Sharia Law: Examining Ontario's Arbitration Act and its Impact on Women" (2004) 1 Muslim World Journal of Human Rights, online: <http://www.bepress.com/cgi/viewcontent.cgi?article=1022&context=mwjhr>; Jean-François Gaudreault-Desbiens, "The Limits of Private Justice" *Nexus* (Fall/Winter 2004) 27; and Gerald Gall, "Religious tradition and Canadian law" *The Canadian Jewish News* (3 March 2005), online: <http://www.cjnews.com/viewarticle.asp?id=5575>. See further Susan B. Boyd & Claire F.L. Young, "Feminism, Law, and Public Policy: Family Feuds and Taxing Times" (2004) 42 Osgoode Hall Law Journal 545 at 582; Sonia N. Lawrence, "Cultural (in) Sensitivity: The Dangers of a Simplistic Approach to Culture in the Courtroom" (2001) 13 Canadian Journal of Women and the Law 107 at 134; and Yash Ghai, "Universalism and Relativism: Human Rights as a Framework for Negotiating Interethnic Claims" (1999-2000) 21 Cardozo Law Review 1095. For further background commentary, see Special Issue, "Islam and Human Rights Advocacy for Social Change in Local Contexts" (2005) 2 Muslim World Journal of Human Rights, online: Berkeley Electronic Press <http://www.bepress.com/mwjhr/vol2/>.

17 "Ontario Premier rejects use of Shariah law" *CBC News* (11 September 2005), online: CBC News <http://www.cbc.ca/story/canada/national/2005/09/09/sharia-protests-20050909.html>; "McGuinty rules out use of sharia law in Ontario" *CTV.ca* (12 September 2005), online: <http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/1126472943217_26/?hub=TopStories> ["McGuinty rules out use of sharia law in Ontario"].

18 "McGuinty rules out use of sharia law in Ontario," *ibid*.
19 *Ibid*.
20 *Ibid*.
21 See *e.g. Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*], ss. 2(a), 15, 27, and 28, as further discussed in Anand, *supra* note 15.
22 Ministry of the Attorney General, "Statement by Attorney General on the Arbitration Act 1991" (8 September 2005), online: Government of Ontario <http://ogov.newswire.ca/ontario/GPOE/2005/09/08/c7547.html?lmatch=&lang=_e.html>.
23 Quoted in Jane Sims, "Boyd says ban on Shariah law won't end it: The former London MPP predicts religion-based arbitration will simply move 'underground'" *The London Free Press* (10 November 2005), online: Canadian Jewish Congress <http://www.cjc.ca/template.php?action=itn&Story=1556>.
24 Quoted in Jiménez, "Sharia decision sparks Jewish protest," *supra* note 14 at A1. If this is right, as a practical matter, there are strong arguments for making room for regulated, state-sanctioned religious-based arbitrations (in the same way that there are strong arguments for legalizing a regulated form of state-sanctioned prostitution). Put simply, if Sharia arbitrations are going to happen, then we should at least try to make them as fair as possible. For support for this argument, see *e.g. Boyd Report*, *supra* note 5. For further discussion, see Bourrie, *supra* note 15.
25 S.O. 1991, c. 17, [*Arbitration Act, 1991*].
26 *Ibid*., s. 2(1)(a). For further comment, see Bourrie, *supra* note 15.
27 I have discussed these benefits elsewhere. See *e.g.* Trevor C.W. Farrow, "Privatizing Our Public Civil Justice System" (2006) 9 *News & Views on Civil Justice Reform* 16 at 16, online: Canadian Forum on Civil Justice <http://www.cfcj-fcjc.org/issue_9/CFCJ%20(eng)%20spring%202006-Privatizing.pdf> [Farrow, "Privatizing Our Public Civil Justice System"]; Trevor C.W. Farrow, "Dispute Resolution, Access to Civil Justice and Legal Education" (2005) 42 Alberta Law Review 741 at 746 [Farrow, "Dispute Resolution"].
28 *Arbitration Act, 1991*, *supra* note 25.
29 *Ibid*. s. 37.
30 *Desputeaux v. Éditions Chouette (1987) inc.*, [2003] 1 S.C.R. 178, 2003 SCC 17 (CanLII)at para. 41.
31 *Supra* note 5.
32 *Family Statute Law Amendment Act*, *supra* note 6. A "family arbitration" is defined in s. 1 of the legislation to include an arbitration that "deals with matters that could be dealt with in a marriage contract, separation agreement, cohabitation agreement or paternity agreement . . . " and "is conducted exclusively in accordance with the law of Ontario or of another Canadian jurisdiction . . . ." *Ibid*.
33 For a discussion on this point, see Bourrie, *supra* note 15.
34 See further Farrow, "Privatizing Our Public Civil Justice System," *supra* note 27.
35 See International Campaign Against Shari'a Court in Canada Homepage, online: <http://www.nosharia.com/index.htm>. See further Wente, "Whistling sharia," *supra* note 13; Jiménez, "Sharia decision sparks Jewish protest," *supra* note 14 at A1.
36 Atwood *et al*., *supra* note 1. See further "Shari'a arbitration proposal in Ontario hits New York Times' pages," supra note 14.
37 Gordon, *supra* note 15 at 35.
38 For a useful international background source for Canadian and other international arbitral legislation, see Asia-Pacific Economic Conference, "A Guide to Arbitration and ADR in APEC Member Economies", online: <http://203.127.220.111/query.html?qt=Arbitration>. For a useful domestic background summary, see Julie Macfarlane, gen. ed. *et al*., *Dispute Resolution: Readings and Case Studies*, 2d ed. (Toronto: Emond Montgomery, 2003) 622-25 [Macfarlane].
39 See Norma Greenaway, "63 percent oppose faith-based arbitration" *The Ottawa Citizen* (31 October 2005), online: <http://www.canada.com/ottawa/ottawacitizen/soundoff/story.html?id=997485b8-bf66-41a1-bd58-8b8e1e434193>.
40 Sheila Pratt, "Muslim religious tribunals to settle family disputes a regressive step" *Edmonton Journal* (26 September 2005), online: Canadian Council of Muslim Women <http://www.ccmw.com/MuslimFamilyLaw/Muslim%20religious%20tribunal%20to%20settle%20family%20disputes%20a%20regressive%20step.htm>. The issue of religious-based tribunals was, however, actively discussed in Alberta both at a September 2005 Canadian Bar Association - Alberta Constitutional and Civil Liberties Law Section meeting (see Anand, *supra* note 15) and again at "Religious Tribunals," *supra* note 7.
41 *Arbitration Act*, R.S.A. 2000, c. A-43. Specifically, see *e.g.* ss. 2, 6, 44-45.

42 CBC News, "No religious-based law for B.C., says AG" *CBC.ca* (8 September 2004), online: CBC British Columbia <http://www.cbc.ca/bc/story/bc_shariah20040908.html>.

43 See *e.g.* "*Vancouver Sun* reports some local interest in formally introducing Islamic sharia law to family disputes in BC: No official word from BC Muslim Association on issue" (updated 9 September 2004), online: JP Boyd's British Columbia Family Law Resource <http://www.bcfamilylawresource.com/20/2004body.htm#0053>.

44 See *Commercial Arbitration Act*, R.S.B.C. 1996, c. 55, s. 2. But see *ibid*. at s. 2(2). For a discussion of family arbitration in B.C., see Catherine Morris, "Arbitration of Family Law Disputes in British Columbia: Paper prepared for the Ministry of Attorney General of British Columbia" (7 July 2004), online: <http://www.bcjusticereview.org/working_groups/family_justice/paper_07_07_04.pdf>.

45 Uniform Law Conference of Canada, *Uniform Arbitration Act*, online: <http://www.ulcc.ca/en/us/arbitrat.pdf>.

46 See *e.g.* the various arbitration statutes in Saskatchewan, Manitoba, New Brunswick and Nova Scotia. For a useful collection and discussion of Canadian arbitration legislation, see Wendy J. Earle, *Drafting ADR and Arbitration Clauses for Commercial Contracts*, looseleaf (Toronto: Thomson Carswell, 2001). See further Natasha Bakht, "Arbitration, Religion and Family Law: Private Justice on the Backs of Women" (March 2005), online: Law Commission of Canada <http://www.lcc.gc.ca/research_project/bakht_main-en.asp>.

47 Because this third concern is the subject of my broader, ongoing research examining current trends of privatization in our civil justice system, I only briefly introduce and develop my concerns here. For further discussion of these ideas, see *e.g.* Farrow, "Privatizing Our Public Civil Justice System," *supra* note 27; Farrow, "Dispute Resolution," *supra* note 27 at 797, n. 365.

48 Atwood, *et al.*, *supra* note 1.

49 For a general discussion of these initiatives, see Farrow, "Privatizing Our Public Civil Justice System," *supra* note 27; Farrow, "Dispute Resolution," *supra* note 27 at 741-54.

50 For comments on judicial activism, including from Canadian judges themselves, see Kirk Makin, "Judicial activism has gone too far, court says" *Globe and Mail* (12 December 2002) A1, online: <http://www.fact.on.ca/news/news0212/gm021212.htm>; Kirk Makin, "Attack on judiciary shatters strategic silence" *Globe and Mail* (10 May 2006) A5. Compare Kirk Makin, "Judicial activism debate on decline" *Globe and Mail* (8 January 2005).

51 Atwood *et al.*, *supra* note 1.

52 See Farrow, "Privatizing Our Public Civil Justice System," *supra* note 27; Farrow, "Dispute Resolution," *supra* note 27 at 797-98. See further Carrie Menkel-Meadow, "Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)" (1995) 83 Georgetown Law Journal 2663, discussed in Macfarlane, *supra* note 38 at 619-20.

53 See *e.g.* Owen Fiss, "The Forms of Justice" (1979) 93 Harvard Law Review 1, reprinted in Owen Fiss, *The Law as It Could Be* (New York: New York University Press, 2003) 1; Owen Fiss, "Against Settlement" (1984) 93 Yale Law Journal 1073, reprinted in *The Law as It Could Be* at 90; and David Luban, "Settlements and the Erosion of the Public Realm" (1995) 83 Georgetown Law Journal 2619. For a collection and discussion of these and other materials on this issue, see Macfarlane, *ibid* at 615-20.

54 Atwood *et al., supra* note 1.

The Truth About Canadian Judicial Activism

Sanjeev Anand*

Introduction

The topic of judicial activism in Canada generates considerable disagreement. At a recent conference, retired Supreme Court of Canada Justice John Major stated that "there is no such thing as judicial activism in Canada."[1] In 2001, speaking in his capacity as the Canadian Alliance's Justice critic, the current federal Minister of Justice and Attorney General, Vic Toews, told Parliament that the Supreme Court has "engaged in a frenzy of constitutional experimentation that resulted in the judiciary substituting its legal and societal preferences for those made by the elected representatives of the people . . . [producing] legal and constitutional anarchy."[2] One prominent constitutional scholar fears that the debate on judicial activism in Canada has begun to produce excessive judicial deference that allows legislatures and officials to act without scrutiny by the judiciary concerning the effects of state action on vulnerable minorities.[3]

But it is impossible to properly discuss Canadian judicial activism without first defining the term. Although the components of judicial activism have been described slightly differently by a number of individuals,[4] these definitions either expressly incorporate or at least accommodate the following characteristics: the tendency for judges to make, as opposed to simply interpret, the law; the willingness of courts to issue rulings reversing or altering the legislative enactments of Parliament and the provincial legislatures; and the inability of legislatures to effectively respond to such rulings, thereby giving judges the last word over matters involving rights and freedoms.

Judges Making Law Without Relying Upon the *Charter*

It is commonly believed that, prior to the enactment of the *Canadian Charter of Rights and Freedoms*[5] in 1982, judges *interpreted* the law, and did not take it upon themselves to *make* law. Thus, many people view the *Charter* as ushering in an era of law-making by the judiciary. While there is truth in the statement that judges play a larger role in shaping government policy and legislation today than they did prior to 1982, it would be inaccurate to portray the judiciary of the past as not engaging in law-making. In many areas of private law, such as torts[6] and contracts, the law has been largely dependent on judicial decisions.[7]

A prime example of such judicial activism is the famous 1932 case of *Donoghue v. Stevenson*,[8] in which the plaintiff and her friend visited a café, and the friend ordered a ginger beer for the plaintiff. Unfortunately, the ginger beer bottle contained a decomposed snail. Upon discovering the remains of the snail after consuming a portion of the contents of the bottle, the plaintiff alleged she suffered shock and gastroenteritis. As a result, she sued the manufacturer for damages. Although a strong contention could be made that the manufacturer was in breach of its contract

with the café owner by supplying a defective bottle of ginger beer, a lower court, applying the judicially created precedents of the time, held that because the plaintiff was not a party to the contract, she was not eligible to sue for damages. However, the British House of Lords overturned the lower court's ruling, and held that a suit for damages in tort by the plaintiff against the manufacturer was not precluded. The Court reasoned that a duty of care was owed to all reasonably foreseeable victims of the defendant's negligent conduct. This judicial creation of a robust negligence tort continues to animate product liability cases today. In 1995, the Supreme Court of Canada held that women who received defective breast implants, and who were not the purchasers of these implants, since they were sold only to doctors and to medical establishments and not directly to the public, had viable tort actions against the manufacturers.[9]

Albeit that many people would applaud the Court's creation of a tort of negligence, there are times when judge-made law proves problematic. In 2004, the Supreme Court recognized a judicially created police power that represented a significant departure from the status quo. The traditional view had long been that the police could forcibly detain individuals, absent specific statutory authorization, only if they had reasonable and probable grounds to arrest them for an offence.[10] But in the 1990s, a number of appellate courts began to recognize a police power to detain and, in certain circumstances, search an individual, if the officer had a reasonable suspicion that the individual had committed an offence – a lower standard than reasonable and probable grounds.[11] In the course of endorsing this police power, the Supreme Court provided some guidance pertaining to the power by stating that any investigative detention must be brief in duration and that, where a police officer has reasonable grounds to believe that his or her safety is in issue or that of others is at risk, the officer may engage in a protective pat-down search of the detained individual.[12]

However, the Court also failed to address some key matters and in doing so demonstrated the institutional limitations of courts to set and implement public policy even within the criminal justice sphere. The Court did not articulate exactly how long is too long for an investigative detention. The matter of how the police are entitled to respond if they have well-founded safety concerns when detaining someone who happens to be carrying a bag or driving a car was similarly omitted. These shortcomings of the ruling are not surprising because the Court is limited to addressing only those issues that are raised by the parties that happen to come before it and, as a result, the rules emanating from the Court tend to be piecemeal, as opposed to comprehensive and prospective. In addition, when the Court carves out police powers, it does so in the context of a case involving a guilty person, which evokes a strong desire to affirm the conduct of the police and expand police powers.[13]

Sometimes when judges decide to advance the state of judge-made law, the result is to remove legislatures' impetus to examine and comprehensively address the matter differently after consulting more diverse sources and hearing alternate perspectives. If the Supreme Court had failed to endorse the common law police power of investigative detention, law enforcement organizations would have undoubtedly lobbied Parliament for the power to detain short of arrest. In the course of examining the issue, Parliament would likely have held hearings on the advisability of expanding police powers, and it could have heard from groups that have been subjected to police harassment and discrimination, such as the indigent, Aboriginal Canadians, and other visible minorities. After hearing from these groups, Parliament would have been well situated to fashion a limited, highly circumscribed, and detailed police power to detain short of arrest that took into account the experiences of these groups. As it stands, police officers have a potentially expansive power that they have obtained from the Court, and law enforcement agencies lack the motivation to lobby Parliament to regulate this area. Moreover, those groups most likely to be subject to investigative detentions lack the power to get this issue on the parliamentary agenda.

There are ways to ensure that issues like investigative detention, which have been ruled on by the Court, receive the attention of legislatures. In the federal sphere, the Senate and House of Commons have standing committees that periodically review proposed legislation for its relationship to protected rights. The duties of these standing committees could be expanded to include the preparation of reports, to be tabled in Parliament, identifying significant recent common law rulings issued by the Supreme Court of Canada, as well as possible legislative responses. In the course of preparing the reports, hearings could be held in which interested groups are invited to address the Court's rulings before the committee members. A similar type of process could be developed through modifying the mandate of provincial legislative scrutiny committees.

When a legislature passes a statutory provision that falls within its jurisdiction, judges are often called upon to engage in a process that, at times, blurs the distinction between making law and interpreting law. The best-known federal statute is the *Criminal Code*.[14] Section 43 of the *Code* reads, "Every schoolteacher, parent or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child, as the case may be, who is under his care, if the force does not exceed what is reasonable under the circumstances." But what constitutes reasonable corrective force? Some people may believe that light spanking with a wooden spoon by a parent of a misbehaving one-year-old child constitutes an unreasonable amount of force, and that the parent should be subject to criminal prosecution for assault. Others may feel that such a parent used a reasonable amount of force, and his or her actions should come within the protective ambit of section 43. Recently, the Supreme Court of Canada ruled that using an object to discipline a child would not be considered reasonable force, nor would section 43 provide a defence to someone who applies corrective force against children under the age of two, against teenagers, or against children of any age who suffer from a disability that renders them incapable of learning from the correction.[15] This case serves to bolster the assertion made by the Chief Justice of Canada at a conference that "there is no clear demarcation between applying the law, interpreting the law, and making the law."[16]

Judicial Activism Under the "Old" Constitution

Despite the fact that legislatures were often content with the common law rules prevailing in an area, if a legislature disapproved of a certain judge-made law, it could pass legislation to replace the judicially constructed rule as long as it respected the division of powers between the federal government and the provinces found in the *Constitution Act, 1867*.[17] Although judicial enforcement of this division of powers has not formed the basis of contemporary claims of judicial activism, this was not always the case. In an effort to alleviate conditions caused by the Great Depression of the 1920s and 1930s, the federal government drafted legislation providing for unemployment insurance, minimum wages, maximum hours of work, and marketing legislation to raise low farm commodity prices. Prime Minister Mackenzie King then referred the legislative package to the courts for an opinion as to its constitutionality. The Judicial Council of the Privy Council, which at that time was the final court of appeal for Canada, failed to accept that the legislative package constituted an emergency measure allowing the federal government to legislate on the basis of its general power to make laws for the Peace, Order and Good Government of Canada.[18] Nor did the Court conclude that Parliament could pass the package on the basis of its power to make laws regulating trade and commerce.[19] In the end, the Court determined that the proposed legislation unconstitutionally infringed the provincial jurisdiction over property and civil rights. The difficulty of coordinating the various provincial governments into passing similar statutes proved insurmountable, and no effective set of provincial legislation was passed. A 1939 Senate report described the Privy Council decisions as having repealed by judicial legislation the centralized federalism intended by the Fathers

of Confederation, and the report accused the Court of seriously departing from the actual text of the constitution.[20]

Eventually the discontent arising from these decisions, and others in which the Privy Council was perceived as widening the ambit of provincial powers and, correspondingly, restricting the scope of federal powers, led the federal government to act. Ottawa abolished appeals to the Privy Council and, in 1940 the Constitution was amended to give the federal government power to implement unemployment insurance.[21] Consequently, what was perceived as inappropriate judicial activism was met by legislative activism.

However, faced with a similar situation today, the federal government would likely not have to change the Constitution in order to achieve its desired legislative objectives. Ottawa has increasingly used its spending power to effectively influence those areas in which it has no authority for law-making under the division of powers. For example, the provision of health care services comes within the legislative competence of the provinces, but the federal government has used its spending power to persuade the provincial governments to impose certain national standards for hospital insurance and medical care programs as a condition of federal contributions to these provincial programs. Moreover, the Supreme Court has affirmed Parliament's power to authorize grants to the provinces for use in fields of provincial jurisdiction, as well as the power to impose conditions on the recipient provinces.[22] So today, if the federal government wants to create certain national programs as it did during the Depression, and the Court rules that Ottawa's legislation infringes upon provincial jurisdiction, the federal government can use its spending power to persuade each of the provinces to adopt identical legislation establishing these programs. In effect, Ottawa can achieve indirectly what it cannot legislate directly.

Judicial Activism Under the *Charter*

Because it is more difficult for legislatures to achieve their legislative objectives in the face of contrary *Charter*[23] rulings than when confronted with unsatisfactory common law rulings, or unsuccessful division-of-powers judgments, it is understandable that judicial activism under the *Charter* garners the most attention and concern. However, the judiciary has responded in a curious and unpersuasive manner to claims that it is judicially active under the *Charter*. In 1997, then-Chief Justice Lamer stated that, under the *Charter*, "'very fundamental issues of great importance to the kind of society we want are being made by unelected persons.'" He pointed out, "'Now that's a command that came from where? It came from the elected [representatives of the people]. . . . [T]hat's their doing, that's not ours.'"[24] However, the governments that agreed to the *Charter* may have had very different conceptions of the way *Charter* rights should be interpreted by the Court.[25] As Christopher Manfredi observes, "If judicial review evolves such that political power in its judicial guise is limited only by a constitution whose meaning the courts alone define, then judicial power is no longer itself constrained by constitutional limits."[26]

Nevertheless, the idea that the rights contained within the *Charter* should be interpreted by using the intent of the framers of the Constitution is controversial. Some critics of this approach point out that it risks freezing rights as they were understood at the time of the *Charter*'s enactment,[27] and that such an approach is incompatible with the manner in which the courts have approached constitutional interpretation under the *Constitution Act, 1867*.[28] In the decision that interpreted the constitutional provision that allowed for the appointment of persons to the Senate, the Privy Council ruled that women were "persons," and in doing so, the Court concluded that the Constitution had "planted a living tree capable of growth."[29] Others have argued that the use of framers' intent to interpret the meaning and scope of *Charter* rights is unworkable because it is difficult to ascertain who should be

categorized as framers, and because competing and contradictory positions were often presented by those involved in negotiating and drafting the *Charter*.[30]

Yet, there exist cogent responses to these concerns about using framers' intent to interpret *Charter* rights. One of the reasons for entrenching rights within the Constitution is to freeze certain concepts for the long-term future – to make them hard to change.[31] But this freezing of concepts does not mean that the Constitution cannot be a living document accommodating new facts and developments. For example, it is not suggested that the scope of freedom of expression guaranteed by the *Charter* be regarded as frozen in the sense that it only protects those forms of expression that existed in 1982. Such an approach would mean that expressive content on the Internet would not come within the scope of *Charter* protection. The principle of expressive freedom should remain the same, and simply grow to accommodate new technologies. Entrenched freedoms should simply be applied to new facts so that the rights themselves remain unchanged. The elm must remain an elm; it can grow branches, but it does not transform itself into an oak or a willow.[32] Morton & Knopff eloquently refute the argument that a frozen rights approach is antithetical to the metaphor of the living tree: "For all its flexibility and adaptability, a living tree, in the strict biological sense, is a frozen concept."[33] Morton & Knopff are correct when they argue that what is acceptable under a "framers' intent" approach is to apply existing rights to new facts and what is unacceptable is to create new rights and apply them to old facts.[34] It must be acknowledged that the demarcation between the enforcement of existing rights and the creation of new rights is sometimes difficult to discern. Continuing with the elm and oak metaphor, the fact that it may be difficult to tell the difference between an elm and an oak does not mean that the attempt to differentiate between the species should be abandoned. As for the argument that it is impossible to identify the framers, Kelly convincingly argues that only those participants who succeeded in having their intentions entrenched in the Charter should be labeled as framers.[35]

Using framers' intent to interpret the scope of *Charter* rights does not necessarily mean that the rights will be read restrictively. The testimony of specific individuals before the Special Joint Committee on the Constitution of Canada, which held hearings on proposed drafts of the *Charter*, and the writings of then-Prime Minister Trudeau, perhaps the individual who was most responsible for the constitutional entrenchment of a bill of rights,[36] can be used to argue that a consensus emerged that the *Charter* was to be an activist document.[37] Thus, there exists an important link between judicial activism under the *Charter* and representative democracy. But an activist court promotes democracy in yet another fashion. Roach observes:

> The Court promotes democracy not because every one of its decisions is consistent with or required by democracy, but because it requires the elected government to take responsibility for and justify to the people its decisions to limit or override rights that are liable to be neglected in the legislative and administrative process.[38]

Even though a consensus emerged that the *Charter* "will confer new and very important responsibilities on the courts because it will be up to the courts to interpret [it] . . . to decide how much scope should be given to the protected rights and to what extent the power of government should be curtailed,"[39] the drafters also agreed as to the substantive meaning and scope of certain key *Charter* rights. For example, the legislative record is clear that the drafters of the *Charter* agreed that the section 10(b) right to retain and instruct counsel without delay, and to be informed of that right, does not include a right to state-funded counsel.[40] In its rejection of the argument that free duty counsel was part of the protection of section 10(b), the Supreme Court relied on the framers' intent pertaining to the interpretation of this section.[41]

Whether the framers intended to protect individuals against discrimination on the basis of sexual orientation under section 15 of the *Charter* is a more contentious matter. Section 15(1) states:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

It is evident that the text of section 15(1) does not include the words "sexual orientation." However, the provision is worded such that the enumerated grounds for equality rights protection are simply examples of the types of discrimination that are prohibited. The enumerated grounds are not a closed list. Because the Special Joint Committee on the Constitution of Canada debated whether to include sexual orientation as an enumerated ground and ultimately rejected doing so, it has been argued that the Supreme Court's subsequent interpretation of sexual orientation as being analogous to the enumerated grounds in section 15(1), and hence a prohibited ground of discrimination,[42] constitutes a direct violation of framers' intent.[43] But Kelly's analysis of the Special Joint Committee testimony reveals that the Committee excluded sexual orientation largely because it posed a drafting difficulty.[44] In addition, there is substantial evidence that the framers contemplated that new categories of discrimination could be added to section 15(1) once they matured in terms of Canadians' acceptance of these new prohibited grounds. The comments of Robert Kaplan, who appeared before the Committee as Solicitor General of Canada, are illustrative of the thinking of the drafters:

> I think there might be found a consensus among Canadians that these grounds which are enumerated are those which have the highest degree of recognition in Canadian society as being rights which ought to be recognized and the general statement gives the possibility down the road not only of those on Mr. Robinson's list being recognized [Robinson wanted discrimination on the basis of marital status, political belief, sexual orientation, and disability explicitly prohibited under section 15(1)], but of others which may not have occurred to him of being in the future as being unacceptable grounds of discrimination.[45]

Thus, it seems as if the Supreme Court's interpretation of section 15 of the *Charter*, as prohibiting discrimination on the basis of sexual orientation, is consistent with the framers' intent, and does not constitute an example of inappropriate judicial activism.

Alas, the Supreme Court has not acted in accordance with framers' intent in interpreting section 7 of the *Charter*. Section 7 provides that "[e]veryone 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." In its 1985 ruling in the *Motor Vehicle Reference*,[46] the Supreme Court cited ample documentary evidence clarifying that the framers intended "fundamental justice" to be interpreted as synonymous with "natural justice." The rules of natural justice are rules of procedure. They require a hearing, unbiased adjudication, and a fair procedure. If the principles of fundamental justice were interpreted as meaning principles of natural justice, the state could deprive individuals of life, liberty, or security of the person as long as it did so in a procedurally fair manner. Yet, the Supreme Court rejected the original intent doctrine in interpreting section 7, and instead ruled that the phrase "fundamental justice" prohibited substantive as well as procedural injustice. Understandably, some critics have charged that through this ruling, the Court has conferred upon itself the status of a judicial super-legislature.[47] Indeed, the Court has utilized this interpretation of the principles of fundamental justice to strike down a number of pieces of legislation, including the criminal provisions prohibiting abortions that occur outside a hospital and without the approval of a committee of at least three doctors,[48] and Quebec legislation prohibiting the purchase of private health insurance for services that are covered by the public plan.[49] In litigation involving the Quebec government's decision to reduce the welfare payment of an individual because she did not participate in stipulated educational or work experience programs, the Court did not find for the *Charter* claimant.[50] Likewise, no *Charter* relief was granted when the Government of British Columbia refused to fund Lovaas therapy for autistic pre-schoolers.[51]

Yet, the Court did not preclude the possibility that, given a slightly different factual context and more extensive submissions from counsel, section 7 could encompass economic rights, require that governments fully fund vital programs and treatment, and place a positive obligation on the state to ensure that all persons can enjoy life, liberty, and security of the person.

Legislatures Responding to *Charter* Rulings

History has demonstrated the futility of legislatures relying on section 1 of the *Charter* to protect the constitutional validity of a statute that is found to infringe section 7. Section 1 allows legislatures to justify reasonable limits on the rights that the court finds in the *Charter*. Yet, a majority of the Supreme Court has never held that a particular breach of section 7 was justified under section 1.[52]

Despite this fact, Canadian legislatures have responded to court rulings striking down legislation on the basis of section 7 *Charter* violations, by enacting new laws that simultaneously achieve the government's original legislative objectives while conforming to *Charter* standards. To ensure that the newly enacted legislation passes constitutional muster, legislatures often tailor their statutes so that they largely accord with the suggestions given by the Court when it struck down the original laws. For instance, in *Seaboyer*[53] the Supreme Court ruled that the *Criminal Code*'s[54] categorical restrictions preventing evidence of a complainant's prior sexual conduct from being admitted in a criminal trial violated the accused's section 7 right to a fair trial. The Court was particularly concerned that such evidence could bolster the accused's defence that he had an honest but mistaken belief that the complainant consented to the sexual activity. Although the Court struck down Parliament's legislative "rape shield" laws, it established common law rules that prevented the admission of evidence of the complainant's prior sexual conduct, with the accused or others, to support an inference that she consented, or that she was not a credible witness. Thus, the Court replaced the legislative categorical rape shield law with a common law near-categorical rape shield law. Parliament responded with a comprehensive legislative reform package that codified the Court's common law rules in *Seaboyer*, but the government also included, among other things, protection for complainants from having to testify at the evidentiary hearings to determine if their prior sexual conduct was admissible. The Supreme Court subsequently upheld this new rape shield law, including the legislature's new protection for complainants.[55] Thus, Parliament's initial rape shield legislation, which was animated by a desire to shield complainants from the often humiliating experience of being cross-examined on their previous sexual history and to encourage the reporting of sexual assault incidents to the authorities, but went too far by preventing some accused from advancing a viable defence, was eventually replaced by legislation that arguably achieves the legislature's objectives as effectively as the original legislation while preserving the fair trial rights of accused. The legislative response was creative and did not constitute slavish parliamentary compliance with judicial policy prescriptions.

The Supreme Court has often upheld legislation under section 1 that infringed *Charter* rights other than section 7. Despite the fact that the *Criminal Code* proscriptions against the wilful promotion of hatred against identifiable groups and obscenity were ruled to constitute infringements of the section 2(b) *Charter* right of freedom of expression, the legislation was upheld in its entirety under section 1.[56] More recently, the Supreme Court declared the offence of simple possession of child pornography to be constitutionally valid. Although the provision also infringed section 2(b), it was saved under section 1 by reading in two extremely limited exceptions into the statutory definition of child pornography.[57]

However, the Court has not always capitulated to Parliament's arguments that legislation infringing section 2(b) is nonetheless justified under section 1. For example, in *RJR-MacDonald*,[58] the Court decided that federal

legislation requiring an absolute restriction on tobacco advertising and the placement of unattributed health warnings on cigarette packages infringed the freedom of expression of tobacco companies. In holding that the government had not justified its legislation under section 1, the Court suggested that a more minimally-impairing rights mechanism would be a prohibition only on lifestyle advertising and a requirement that health warnings on cigarette packages be attributed to Health Canada. It would be difficult to conceive that such changes to the government's legislation would seriously hamper the legislative objective of decreasing smoking among Canadians. Parliament responded to the Court's decision by passing the legislation suggested by the Court and, consequently, there is a significant possibility that the new statute will pass constitutional muster.

But what if it does not? Will the judiciary have the last word, thereby depriving Parliament of a potentially effective tool to combat the problems posed by tobacco consumption in society? Not necessarily, because of the notwithstanding clause. Section 33 of the *Charter* allows legislatures to enact laws that override certain *Charter* rights, including: the "fundamental freedoms" of freedom of religion, freedom of expression, freedom of the press, and freedom of association; the "legal rights" such as the right to be secure from unreasonable search and seizure, and the right not to be arbitrarily detained or imprisoned; and the equality rights. In order to re-enact legislation that the Court has struck down under the *Charter*, or to shield a particular statute from judicial review, section 33 simply requires a legislature to declare expressly in its statute that the law will operate notwithstanding one or all of the *Charter* rights in section 2 and sections 7-15. The section 33 protection from judicial review expires after five years, but it can be renewed an indefinite number of times.

Unfortunately, use of the notwithstanding clause has become politically taboo, despite the central role it played in ensuring provincial agreement to the constitutional entrenchment of a bill of rights. A number of the premiers insisted on the inclusion of section 33 because they feared that without it, Canada's system of parliamentary supremacy would be replaced by a system of judicial supremacy. Indeed, without the inclusion of the notwithstanding clause, the negotiations that led to the enactment of the *Charter* might have failed.[59] Yet, Ottawa has never used the override, and the provinces have only resorted to it a few times to respond to the Court's decisions.

One of these provincial uses of the notwithstanding clause was in response to the Court's decision to invalidate a Quebec statute requiring commercial signs to be only in French.[60] When the Quebec legislature re-enacted the law and protected it by utilizing the notwithstanding clause, the reaction outside of Quebec was extremely negative. In response, then-Prime Minister Brian Mulroney characterized section 33 as "that major fatal flaw of 1981, which reduces your individual rights and mine, which holds them hostage.[61] He also stated that any constitution "that does not protect the inalienable and imprescriptible individual rights of individual Canadians is not worth the paper it is written on."[62]

The perception that the notwithstanding clause is "at best inconsistent with the idea of constitutionally entrenched rights, and at worst a constitutional abomination,"[63] has persisted. During the last federal election leaders' debate, then-Prime Minister Paul Martin pledged to remove by "constitutional means the possibility for the federal government to use the notwithstanding clause, because quite simply, I think governance says that the courts shouldn't be overturned by politicians."[64] Although the man who won the election, current Prime Minister Stephen Harper, refused to match the pledge, he has indicated that he would not use the notwithstanding clause should his government decide to repeal Parliament's same-sex marriage legislation and enact a statute adopting the traditional heterosexual definition of marriage.[65]

But opposition to the use of the notwithstanding clause is not necessarily immutable. British Columbia's Attorney General, as well as the federal opposition leader,

had urged Ottawa to use the notwithstanding clause if the Supreme Court struck down the *Criminal Code*'s child pornography provisions.[66] Thus, a politically unpopular *Charter* decision may breathe life back into the notwithstanding clause.

This is important because section 33 is a positive aspect of Canadian constitutionalism. Judges may be above playing petty politics with important social issues. In addition, access to the courts due to programs such as legal aid and the federally funded Court Challenges Program of Canada[67] may be more of a reality for lower and middle income individuals than is the prospect of influencing their elected representatives. However, the adversarial process does not ensure that judges are presented with all the information required to make complex policy decisions. The judiciary must render its rulings based on the evidence presented before it, which may be particularly one-sided because of the inequality of resources of the parties and/or the disparate quality of the advocates. Judges, unlike politicians, cannot commission reports or create public inquiries to establish the real facts. Moreover, judges may not have the experience or information to properly assess how scarce government resources should be allocated. Yet, the Court cannot abdicate its responsibility to decide the cases that are brought before it. Because of its institutional shortcomings, it is likely that the Court will render a flawed *Charter* ruling. Legislatures must have the legal and political means to override such a ruling. The presence of section 33 provides governments with the legal means to do so, but only public education about the legitimacy of governments using the notwithstanding clause will provide them with the political means.

Conclusion

By examining the Canadian experience through the lens of the definition of judicial activism provided at the beginning of this article, a number of truths have been revealed. The first of these truths is that judicial activism is a real phenomenon in Canada. Moreover, judicial activism existed and concerns about it were expressed long before the enactment of the *Charter*. However, for the most part, judicial activism is legitimate and democratic. Despite the fact that there have been important instances in which the Supreme Court has been inappropriately activist, the extent of inappropriate judicial activism engaged in by the Court has been exaggerated. Judicial activism in Canada has produced results that have been perceived as problematic by legislatures, and they have responded and prevailed with activism of their own. Yet, positive results can emanate from legislatures becoming even more activist through a number of different means, including eschewing the growing constitutional convention prohibiting the use of the notwithstanding clause.

The importance of creating and preserving a just society is too great to be entrusted to only one branch of government. Although constitutional amendments are not required to make the system work, different mechanisms and processes can enhance it. The most important of these processes is public education. When the public stops scrutinizing the work of important public institutions, the failure of these institutions may follow. This failure is the real risk with which Canadians should be concerned.

Notes

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1 26th Annual Community Seminar: The Role of Canadian Judges as Makers or Interpreters of the Law, Calgary Institute for the Humanities, University of Calgary, Calgary, Alberta, 15 June 2006.

2 *House of Common Debates*, 024 (1 March 2001) at 1398.

3 See Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001) at 89-95 and 277-85 [Roach].

4 For a flavor of the variety of judicial activism definitions, see: F.L. Morton & Rainer Knopff, *The Charter Revolution and the Court Party* (Toronto:

Broadview Press, 2000) at 15 [Morton & Knopff]; Christopher P. Manfredi, "Judicial Power and the *Charter*: Reflections on the Activism Debate" (2004) 53 University of New Brunswick Law Journal 185 at 188 [Manfredi]; and Sujit Choudhry, "Book Review: *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism,* 2d ed." (2003) 1 International Journal of Constitutional Law 379 at 386; and Roach, *ibid.* at 10.

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

6 The classic textbook definition of a tort is: "a civil wrong, other than a breach of contract, which the law will redress by an award of damages" (Allen M. Linden, *Canadian Tort Law*, 7th ed. (Markham, ON: Butterworths, 2001) at 2, citing John G. Fleming, *The Law of Torts*, 9th ed. (Sydney: LBC Information Services, 1998) at 1. In *Hall v. Hebert*, [1993] 2 S.C.R. 159 at 200, 1993 CanLII 141, Justice Cory explained the law of tort in the following manner:

> It provides a means whereby compensation, usually in the form of damages, may be paid for injuries suffered by a party as a result of the wrongful conduct of others. It may encompass damages for personal injury suffered, for example, in a motor vehicle accident or as a result of falling in dangerous premises. It can cover damages occasioned to property. It may include compensation for injury caused to the reputation of a business or a product. It may provide damages for injury to honour in cases of defamation and libel. A primary object of the law of tort is to provide compensation to persons who are injured as a result of the actions of others.

7 See Lewis Klar, *Tort Law*, 3d ed. (Toronto: Carswell, 2003) at 2, where the author states that "Canadian tort law is principally judge-made law, notwithstanding the growing encroachment of statutory modifications." See also John D. McCamus, *The Law of Contracts* (Toronto: Irwin Law, 2005) at 8, where the author observes: "The term 'common law' is . . . used to refer to judge-made law as opposed to laws generated by legislative enactment. For the most part, the general principles of contract law are common law in this sense."

8 [1932] A.C. 562 (H.L.).

9 *Hollis v. Dow Corning Corp.* (1993), 103 D.L.R. (4th) 520, 1993 CanLII 949 (B.C.C.A.), aff'd, [1995] 4 S.C.R. 634, 1995 CanLII 55.

10 For many years, *Koechlin v. Waugh and Hamilton* (1957), 11 D.L.R. (2d) 447 (Ont. C.A.), was cited for this proposition.

11 The common law police power to detain a person for investigatory purposes was created in *R. v. Simpson* (1993), 12 O.R. (3d) 182, 1993 CanLII 3379 (C.A.); it was expanded in cases such as *R. v. Lake* (1997), 113 C.C.C. (3d) 208, 1996 CanLII 5094 (Sask. C.A.), and *R. v. Ferris* (1998), 162 D.L.R. (4th) 87, 1998 CanLII 5926 (B.C.C.A.), to permit a search of the person as an incident of the detention under certain circumstances.

12 *R. v. Mann*, [2004] 3 S.C.R. 59, 2004 SCC 52 (CanLII).

13 James Stribopoulos, "A Failed Experiment? Investigative Detention: Ten Years Later" (2003) 41 Alberta Law Review 335 at 379.

14 R.S.C. 1985, c. C-46 [*Criminal Code*].

15 *Canadian Foundation for Children, Youth and the Law v. Canada (A.G.)*, [2004] 1 S.C.R. 76, 2004 SCC 4 at paras. 25 and 40.

16 Beverley McLachlin, "Respecting Democratic Roles" (2005) 14:3 Constitutional Forum constitutionnel 15 at 19.

17 (U.K.), 30 & 31 Vict., c.3, reprinted in R.S.C. 1985, App. II, No. 5 [*Constitution Act, 1867*].

18 *A.G. Canada v. A.G. Ontario (Employment and Social Insurance Act)*, [1937] A.C. 355 (P.C.).

19 See *A.G. British Columbia v. A.G. Canada (Natural Products Marketing Act)*, [1937] A.C. 377 (P.C.), and *A.G. Canada v. A.G. Ontario (Labour Conventions)*, [1937] A.C. 326 (P.C.).

20 Canada, Senate, *Report Relating to the Enactment of the British North America Act, 1867, any Lack of Consonance between Its Terms and Judicial Construction of Them and Cognate Matters* (Ottawa: Queen's Printer, 1939) at 12-13.

21 For a more detailed description of these events, see Roach, *supra* note 3 at 39-44.

22 *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, 1991 CanLII 74.

23 *Charter*, *supra* note 5.

24 Quoted in Stephen Bindman, "'Thank God for the Charter': Top judge staunchly defends Charter of Rights on its 15th anniversary" *Ottawa Citizen* (17 April 1997) A1. In *Reference re s. 94(2) of the Motor Vehicle Act (B.C.)*, [1985] 2 S.C.R. 486 at 497, 1985 CanLII 81 [*Motor Vehicle Reference*], Justice Lamer stated: "[T]he historic decision to entrench the *Charter* in our Constitution was taken not by the courts but by the elected representatives of the people of Canada. It was those representatives who extended the scope of constitutional adjudication and entrusted the courts with this new and onerous responsibility."

25 Roach, *supra* note 3 at 219.

26 Christopher P. Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*, 2d ed. (Don Mills, ON: Oxford University Press, 2001) at 22.
27 Roach, *supra* note 3 at 238.
28 *Supra* note 17.
29 *Edwards v. Attorney-General for Canada*, [1930] A.C. 123 (P.C.).
30 James B. Kelly & Michael Murphy, "Confronting Judicial Supremacy: A Defence of Judicial Activism and the Supreme Court of Canada's Legal Rights Jurisprudence" (2001) 16 Canadian Journal of Law & Society 3 at 9.
31 Morton & Knopff, *supra* note 4 at 45.
32 *Ibid.* at 46.
33 *Ibid.* [emphasis in original].
34 *Ibid.*
35 James B. Kelly, *Governing with the Charter: Legislative and Judicial Activism and Framers' Intent* (Vancouver: University of British Columbia Press, 2005) at 87 [Kelly].
36 Interestingly, Prime Minister Trudeau never appeared before the Special Joint Committee.
37 Kelly, *supra* note 35 at 88.
38 Roach, *supra* note 3 at 250.
39 Kelly, *supra* note 35 at 89.
40 *Ibid.* at 93.
41 *R. v. Prosper*, [1994] 3 S.C.R. 236, 1994 CanLII 65.
42 The case that first held that s. 15 prohibited discrimination on the basis of sexual orientation was *Egan v. Canada*, [1995] 2 S.C.R. 513, 1995 CanLII 98.
43 Morton & Knopff, *supra* note 4 at 43.
44 Kelly, *supra* note 35 at 98-99.
45 Quoted in Kelly, *supra* note 35 at 100.
46 *Supra* note 24.
47 Rory Leishman, *Against Judicial Activism* (Montreal: McGill-Queen's University Press, 2006) at 139.
48 *R. v. Morgentaler*, [1988] 1 S.C.R. 30, 1988 CanLII 90.
49 *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791, 2005 SCC 35 (CanLII).
50 *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429, 2002 SCC 84 (CanLII).
51 *Auton (Guardian ad litem of) v. British Columbia (A.G.)*, [2004] 3 S.C.R. 657, 2004 SCC 78 (CanLII).
52 Peter Hogg, *Constitutional Law of Canada*, 4th ed., loose-leaf (Scarborough, ON: Carswell, 1997) at 44.3, and Michel Bastarache, "Section 33 and the Relationship Between Legislatures and Courts" (2005) 14:3 Constitutional Forum constitutionnel 1 at 4. In *R. v. Oakes*, [1986] 1 S.C.R. 103, 1986 CanLII 46, the Supreme Court indicated that four criteria must be satisfied by a law that qualifies as a reasonable limit that can be demonstrably justified in a free and democratic society: i) the law must pursue an objective that is pressing and substantial in a free and democratic society; ii) the law must be rationally connected to the objective; iii) the law must impair the right no more than is necessary to accomplish the objective; and iv) the law must not have a disproportionately severe effect on the person(s) to whom it applies. Although the s. 1 test appears objective and onerous, the scrutiny with which the minimal impairment branch of the test applies, varies depending on the context. For a concise summary of how the Court has distinguished between stricter and more deferential forms of s. 1 scrutiny, see Roach, *supra* note 3 at 160-66.
53 *R. v. Seaboyer*, [1991] 2 S.C.R. 577, 1991 CanLII 76 [*Seaboyer*].
54 *Supra* note 14.
55 *R. v. Darrach*, [2000] 2 S.C.R. 443, 2000 SCC 46 (CanLII).
56 For the ruling pertaining to the offence of wilfully promoting hatred, see *R. v. Keegstra*, [1990] 3 S.C.R. 697, 1990 CanLII 24; and for the judgment concerning the obscenity provisions, see *R. v. Butler*, [1992] 1 S.C.R. 452, 1992 CanLII 124.
57 See *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2 (CanLII). The two categories of material that the Court held shall no longer come within the scope of the offence were any written material or visual representation created by the accused alone and held by the accused alone exclusively for his or her own personal use, and any visual recording, created by or depicting the accused, provided it does not depict unlawful sexual activity and is held by the accused exclusively for private use (*ibid.* at para. 128).
58 *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, 1995 CanLII 64.
59 See Roy Romanow, John Whyte & Howard Leeson, *Canada…Notwithstanding: The Making of the Constitution 1976-1982* (Toronto: Carswell/Methuen, 1984) at 193-215.
60 *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, 1988 CanLII 19.
61 *House of Commons Debates* (6 April 1989) at 153.
62 *Ibid.*
63 Manfredi, *supra* note 4 at 186.
64 Canadian Press, "Transcript of Jan. 9 English Leaders' Debate (9 January 2006), online: *CTV.ca* <http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20060109/ELXN_debate_transcript_060109/>.

65 Canadian Press, "Martin targets Harper in election debate, vows to end federal notwithstanding clause" *Canadian Press Wire Service* (9 January 2006).

66 Canadian Press, "Dosanjh would override unfavourable porn ruling" *Canadian Press Wire Service* (1 March 1999).

67 The Court Challenges Program of Canada is a national non-profit organization established in 1994 to provide financial assistance for important court cases pertaining to the language and equality rights guarantees in the Constitution. See online: <www.ccppcj.ca>.

Section 273.65 of the National Defence Act: Inappropriate and Unconstitutional

Michael P.A. Carabash*

Introduction

After six short weeks of debate, Bill C-36, *The Anti-terrorism Act*,[1] passed into law on 28 November 2001. Bill C-36 was Parliament's formal legislative response to the terrorist attacks upon the U.S. on September 11. Among other things, Bill C-36 amended the *National Defence Act*[2] to grant the Minister of National Defence, in place of a judge, the power to authorize the Communications Security Establishment (CSE) to intercept private communications for the purpose of obtaining foreign intelligence under section 273.65. The CSE's mandate includes acquiring and providing foreign signals intelligence.[3] In this article, I argue that this amendment to the *National Defence Act* abolished an essential safeguard to arbitrary state actions and likely violates section 8 of the *Canadian Charter of Rights and Freedoms*.[4] The eventual removal of section 273.65 from the *National Defence Act* would uphold the long-standing, appropriate, and constitutional doctrine that the power to authorize agents of the state to intercept private communications rests solely with the judiciary.

Section 273.65 Abolishes an Essential Safeguard to Arbitrary State Actions

By shifting the power to authorize agents of the state to intercept private communications from the judiciary to the executive, section 273.65 abolished an essential safeguard to arbitrary state actions. In the post-*Charter* era, both Parliament[5] and the courts[6] conferred the power in question on the judiciary. Judges, presumed to be impartial and independent observers, ensured that state actions were not arrived at arbitrarily. Nevertheless, section 273.65 nullified such a safeguard by granting the Minister of National Defence, a member of the executive, the power to authorize the CSE to intercept private communications. As a politician and member of Cabinet, the Minister of National Defence cannot be presumed neutral: cast in the role of adversary, in matters of national security he or she is a properly interested party in favor of security over individual freedoms. Moreover, since the CSE is an agency of the Department of National Defence,[7] the Minister cannot be considered independent with regard to CSE investigations. Absent real limits to the executive's discretion to issue such authorizations, section 273.65 defies the wisdom and strength of entrusting this power to the judiciary, thereby rendering state actions less accountable.

Section 273.65 Violates Section 8 of the *Charter*

For section 273.65 to be quashed via *Charter* review, a court must conclude that this provision violates a *Charter* right or freedom and cannot be "demonstrably justified in a free and democratic society" under section 1 of the *Charter*.[8] The test for section 1 was laid

out in *R. v. Oakes*[9] and is comprised of four criteria: (1) the objective of the impugned law must be pressing and substantial in a free and democratic society, (2) the impugned law must be rationally connected to its objective, (3) the impugned law must impair the *Charter* right or freedom in question as little as reasonably possible, and (4) the benefits the impugned law achieves must outweigh the costs that results from its infringement of the *Charter* right or freedom.[10] It is necessary that the challenged law satisfy each of the four requirements of the *Oakes* test in order to be "saved" under section 1 of the *Charter*.[11] Otherwise, that law is rendered "of no force or effect" under section 52(1) of the *Constitution Act, 1982*.[12]

Section 273.65 likely violates section 8 of the *Charter* because it allows the Minister of National Defence, in place of a judge, to authorize the CSE to intercept private communications. Section 8 provides that "Everyone has the right to be secure against unreasonable search or seizure."[13] To be reasonable under section 8, a search must be authorized by law, the law itself must be reasonable, and the search must be carried out in a reasonable manner.[14] The Supreme Court has ruled that a valid search under section 8 generally requires prior judicial authorization.[15] Moreover, interceptions of private communications (both oral and telecommunications) were found to fall within the scope of section 8.[16] The more intrusive the search, the greater the degree of justification needed to hold it within the scope of section 8 of the *Charter*.[17] Thus, subject to exigent circumstances (*inter alia*),[18] agents of the state must generally obtain prior judicial authorization in order to intercept private communications. If no such authorization is obtained, seized communications may be rendered inadmissible at trial under section 24(2) of the *Charter*.[19] Despite these long-standing precedents, however, the Minister of National Defence now has the authority to issue an authorization to the CSE to intercept private communications, once he or she is satisfied that: (a) the interception will be directed at foreign entities located outside Canada, (b) the information to be obtained could not reasonable be obtained by other means, (c) the expected foreign intelligence value of the information that would be derived from the interception justifies it, and (d) *satisfactory* measures are in place to protect the privacy of Canadians and to ensure that private communications will only be used or retained if they are essential to international affairs, defence or security.[20]

For some, given that the CSE only targets "foreign intelligence,"[21] section 273.65 does not fall within the scope of section 8 of the *Charter*. Prior to Bill C-36 coming into force, the CSE was prohibited under Part VI the *Criminal Code* from unilaterally intercepting those private communications which intelligence targets abroad sent to or received from Canada.[22] After Bill C-36 came into force, however, the CSE was exempted from Part VI of the *Criminal Code* and allowed to intercept private communications "when directing its activities against foreign entities located abroad."[23] When asked whether the CSE requires prior judicial authorization in cases where the target is foreign but the private communication has been sent to or received from Canada, the Department of Justice responded: "In our view, quite clearly it does not."[24] The Minister of National Defence's authorization is now a substitute for judicial authorization at the international level.[25] The Minister of National Defence Art Eggleton stated that, under section 273.65, the "CSE will be able to identify the communication of a foreign target abroad and to follow those communications *wherever they go*."[26] These statements suggest that, while section 8 applies at the domestic level, it has no place at the international scene – even when a person is targeted on Canadian soil.

Such a suggestion, however, cannot be reconciled with the depiction of section 8 as the "supreme law of Canada."[27] Moreover, a number of Supreme Court extradition cases support the view that *Charter* rights and freedoms apply to Canadians at the international level. In the 1991 companion cases *Reference re Ng Extradition (Canada)*[28] and *Kindler v. Canada (Minister of Justice)*,[29] the Supreme Court held: "The Charter clearly applies to extradition matters, including the executive decision of the Minister that effects the fugitive's surrender . . . ."[30] In *United States v. Burns*,[31] the Supreme Court unanimously

decided that section 7 of the *Charter* requires the Minister of Justice to obtain, in all but exceptional circumstances, assurances that the death penalty will not be applied before extraditing a fugitive. In *United States of America v. Cotroni*,[32] the Supreme Court held that, although extradition of a Canadian citizen *prima facie* infringes section 6(1) of the *Charter*, it is a reasonable limit that can be "demonstrably justified in a free and democratic society" under section 1 of the *Charter*. Finally, in *United States of America v. Kwok*,[33] the Supreme Court held that the extradition of an accused may constitute an unjustified infringement of section 6(1) if an equally effective prospect of prosecuting in Canada had been unjustifiably and improperly abandoned. By means of analogy, since section 8 likely applies to Canadians at the international level, section 273.65 infringes upon it.

Section 273.65 Cannot Be "Saved" under Section 1 of the *Charter*

Considering section 1 of the *Charter,* section 273.65 would probably fail the minimal impairment branch of the *Oakes* test. Then-Minister of National Defence Art Eggleton held that the objective of section 273.65, which is both pressing and substantial, was to enhance the CSE's ability to gather foreign intelligence and protect government electronic information and information infrastructures.[34] However, less intrusive means to achieving these objectives exist devoid of s. 273.65: the *Criminal Code* also allows the CSE to intercept private communications swiftly (*i.e.*, without having to obtain prior judicial authorization) in order to prevent harm[35] or in exceptional circumstances,[36] and it permits applications for judicial authorizations to be made by means of telecommunications where necessary.[37] No real evidence was offered to demonstrate the inadequacy of such provisions in dealing with matters of national security,[38] or that the CSE had difficulties performing its mandate since its inception in 1946. Finally, a long-standing U.S. Supreme Court case supports the view that judges are capable of appreciating the intricacies of national security investigations and preserving the secrecy that is required.[39] Therefore, absent a highly intrusive section 273.65, the CSE would still be able to achieve its objectives with the requisite speed and stealth.

Alternatively, section 273.65 would likely fail the overall proportionality branch of the *Oakes* test.[40] By providing assistance to federal law enforcement and security agencies, the potential benefits of section 273.65 include the prevention of terrorism, the apprehension and/or conviction of terrorists, and the disruption of terrorist organizations. In order to balance the state's right to intrude on privacy to further its goals with the right of individuals to be left alone, the Supreme Court held that agents of the state must "always seek prior judicial authorization before using electronic surveillance."[41] Nevertheless, section 273.65 undermines such a balance by permitting the state to trudge heavily upon individuals' privacy interests without sufficient justification. Since that law was enacted, there have been no recorded cases of its use or of any benefits derived thereof. Section 273.65 allows the CSE to intercept private communications "on the basis of mere suspicion";[42] such a possibility surely contributes to a substantial loss of public confidence towards state actions and the administration of justice. Furthermore, the absence of opportunity to test the validity of an authorization, before and after the fact,[43] ensures that individuals' section 8 rights will be neither addressed nor protected.[44] Overall, the potential benefits of section 273.65 are exceeded by the costs incurred from its section 8 violation.

For some, section 273.65's infringement of section 8 of the *Charter* would constitute a reasonable limit and thus be "saved" under section 1 of the *Charter.*[45] This view was originally expressed by Chief Justice Dickson in *Hunter v. Southam:*[46] "Where the State's interest is not simply law enforcement as, for instance, where State security is involved, . . . the relevent standard might well be a different one than the Oakes test." Such a statement by the Supreme Court seemed to indicate that "the protection of national security [is] a particularly compelling objective that would affect the manner in which [the Supreme Court] would determine both the content of *Charter* rights and reasonable limits

on those rights."[47] Given that the CSE's mandate deals with matters of national security,[48] section 273.65 could thus amount to a reasonable limit on section 8. Nevertheless, this argument is not entirely convincing: the Supreme Court's willingness in *Hunter v. Southam* to apply different tests to matters of national security emerged from Justice Dickson's *obiter dictum* – which is not binding on future Courts.

Furthermore, in a long-standing Vietnam War-era U.S. Supreme Court case,[49] wiretaps authorized by the President via the Attorney General in matters of domestic security were found to violate the prohibition in the Fourth Amendment to the U.S. Constitution on "unreasonable searches and seizures"[50] (the U.S. equivalent of section 8 of the *Charter*). In *U.S. v. U.S. District Court*,[51] three accused were charged, based in part on the government's surveillance of their conversations, with conspiracy to destroy government property. The Attorney General argued that the special circumstances applicable to domestic security surveillances necessitated an exception to the warrant requirement. The U.S. Supreme Court aptly held that the constitutional basis of the President's domestic security role must be exercised in a manner compatible with the Fourth Amendment, which requires a prior warrant review by "'a neutral and detached magistrate.'"[52] Overall, the claim that section 273.65 constitutes a reasonable limit lacks an authoritative voice in light of an established and persuasive U.S. Supreme Court case.

Granted, Canadian courts should be wary of adopting U.S. interpretations that do not accord with the interpretive framework of our constitution.[53] However, as the Supreme Court of Canada noted in various cases, including *Hunter v. Southam*,[54] American courts have the benefit of two hundred years of experience in constitutional interpretation and this wealth of experience may offer guidance to the judiciary in this country. Worth mentioning here is that the Supreme Court of Canada has adopted American Fourth Amendment jurisprudence in interpreting section 8 on a number of occasions.[55]

Conclusion

Although then-Justice Minister Anne McLellan claimed that existing criminal laws "are clearly not adequate" in combating terrorism,[56] she did not offer any real evidence that this was in fact true.[57] On the contrary, since its inception in 1946, there is nothing to suggest that the CSE had difficulties performing its mandate in light of the provisions of Part VI of the *Criminal Code*. Moreover, the Solicitor General of Canada, who collects and annually publishes the number of judicial authorizations granted for intercepting private communications, claimed that judges follow strict procedures and require police to provide them with a lot of information before granting authorizations.[58] So what proof is there that these provisions were inadequate to fight a still-unclear threat?

Overall, the Department of Justice overstepped the boundaries of what is appropriate and constitutional by creating legislation that allowed the Minister of National Defence to authorize the CSE to intercept private communications. When he was the Liberal Minister of Justice and Attorney General of Canada in the early 1980s, former Prime Minister Jean Chrétien told the Joint Committee on the Constitution: "I think we are rendering a great service to Canada by taking some of these problems away from the political debate and allowing the matter to be debated, argued, coolly before the courts with precedents and so on."[59] Why, then, did he allow fifteen lawyers in the Department of Justice to secretly create legislation that abandoned precedents and common sense? [60] It is now up to Parliament or the courts to remove section 273.65 from the *National Defence Act*. Parliament's objective in combating terrorism was to protect Canada's political, social, and economic security.[61] In effect, Parliament has increased state security at too great a cost to our civil liberties. Benjamin Franklin put it best when he said: "They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety."[62]

Notes

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1 S.C. 2001, c. 41, online: CanLII <http://www.canlii.ca/ca/sta/a-11.7/whole.html>.

2 *National Defence Act*, R.S.C. 1985, c. N-5, s. 273.65, online: CanLII <http://www.canlii.org/ca/sta/n-5/sec273.65.html>[*National Defence Act*].

3 See "Welcome to the Communications Security Establishment," online: CSE Homepage <http://www.cse.dnd.ca/index-e.html>.

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

5 See *Criminal Code*, R.S.C. 1985, c. C-46, ss. 184.2, 184.3, 184.5, 186, online: CanLII <http://www.canlii.org/ca/sta/c-46/>.

6 See *R. v. Thompson*, [1990] 2 S.C.R. 1111, 1990 CanLII 102; *R. v. Duarte*, [1990] 1 S.C.R. 30, 1990 CanLII 2; *R. v. Garofoli*, [1990] 2 S.C.R. 1421, 1990 CanLII 111; and *Michaud v. Quebec (Attorney General)*, [1996] 3 S.C.R. 3, 1996 CanLII 81.

7 "Welcome to the Communications Security Establishment," *supra* note 3.

8 *Charter*, *supra* note 4.

9 [1986] 1 S.C.R. 103, 1986 CanLII 46 [*Oakes*].

10 Peter W. Hogg, *Constitutional Law of Canada*, student ed. (Toronto: Thomson Canada Limited, 2002), at 779. Also see *ibid.* at paras. 69-71.

11 *Oakes*, *supra* note 9.

12 *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

13 *Charter*, *supra* note 4.

14 See *R. v. Collins*, [1987] 1 S.C.R. 265, 1987 CanLII 11.

15 See *Hunter v. Southam Inc.,* [1984] 2 S.C.R. 145, 1984 CanLII 33.

16 See *R. v. Thompson, R.* v. *Duarte, R.* v. *Garofoli*, and *Michaud v. Quebec*, all *supra* note 6.

17 See *R. v. Golden*, [2001] 3 S.C.R. 679, 2001 SCC 83 [*Golden*]. A common law exception to this general rule requiring judicial authorization for searches allows the party seeking to uphold the validity of a warrantless personal search to demonstrate that there were reasonable and probable grounds for the type of search conducted by the police.

18 See *R. v. Grant*, [1993] 3 S.C.R. 223, 1993 CanLII 94 at 241-42: exigent circumstances exist if there is "an imminent danger of the loss, removal, destruction or disappearance of the evidence . . . if the search or seizure is delayed." In *Grant*, the Supreme Court held that s. 10 of the *Narcotic Control Act*, which provided that a peace officer may search a place that is not a dwelling house without a warrant so long as he believes on reasonable grounds that a narcotic offence had been committed, was consistent with s. 8 of the *Charter* if s. 10 were read down to permit warrantless searches only where mere were exigent circumstances. In *R.* v. *Golden*, *ibid.*, the Supreme Court concluded that strip searches should generally only be conducted at the police station except where there are exigent circumstances requiring that the detainee be searched prior to being transported there. Consent searches were discussed in *R. v. Stillman*, [1997] 1 S.C.R. 607, 1997 CanLII 32. Moreover, the *Criminal Code* allows agents of the state to intercept private communications without prior judicial authorization in order to prevent harm (s. 184.1) or in exceptional circumstances (s. 184.4). In the U.S., the Supreme Court held in *United States v. United States District Court*, 407 U.S. 297 (1972) (FindLaw) [*U.S. District Court*]:

> It is true that there have been some exceptions to the warrant requirement. *Chimel v. California*, 395 U.S. 752 (1969); *Terry v. Ohio*, 392 U.S. 1 (1968); *McDonald v. United States*, 335 U.S. 451 (1948); and *Carroll v. United States*, 267 U.S. 132 (1925). But those exceptions are few in number and carefully delineated . . . ; in general, they serve the legitimate needs of law enforcement officers to protect their own well-being and preserve evidence from destruction. Even while carving out those exceptions, the Court has reaffirmed the principle that the 'police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure,' *Terry v. Ohio* . . . at 20; *Chimel v. California* . . . at 762.

19 *Charter*, *supra* note 4.

20 *National Defence Act*, *supra* note 2. Law professor Lisa Austin pointed out that the term "satisfactory" in s. 273.65(2)(d) is ambiguous. See "Is Privacy a Casualty of the War on Terrorism?" [Austin] in *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill*, Ronald J. Daniels, Patrick Macklem & Kent Roach, eds. (Toronto: University of Toronto Press, 2001) [*The Security of Freedom*] 251 at 264.

21 *National Defence Act, ibid.*

22 *Criminal Code*, *supra* note 5 at ss. 183, 184.1. Also see meeting of the Special Senate Committee, *Speaking Notes of Chief CSE*, *Parliamentary Review of the Anti-Terrorism Act* (Ottawa: 11 April 2005), online: <http://www.cse-cst.gc.ca/

documents/about-cse/ccse-anti-terrorist-act-11april2005-e.pdf>.

23 *Speaking Notes of Chief CSE*, *ibid.* at 7.

24 Testimony of Richard G. Mosley, Assistant Deputy Minister, Criminal Law Policy and Community Justice, Department of Justice, *The Special Senate Committee on the Subject Matter of Bill C-36: Evidence*, Doc. 38373 (Ottawa: 29 October 2001) at 26-27, online: University of Toronto Faculty of Law <http://www.law.utoronto.ca/c-36/october29.pdf>.

25 *Ibid.* at 26.

26 Testimony of Arthur Eggleton, Minister of Defence, *Proceedings of the Special Senate Committee on the Subject Matter of Bill C-36: Issue 3 – Evidence* (Ottawa: 24 October 2001), online: <http://www.parl.gc.ca/37/1/parlbus/commbus/senate/com-e/sm36-e/03evb-e.htm?Language=E&Parl=37&Ses=1&comm_id=90> [emphasis added] [*Proceedings of the Special Senate Committee*].

27 *Constitution Act, 1867*, *supra* note 12 at s. 52(1).

28 [1991] 2 S.C.R. 858, 1991 CanLII 79.

29 [1991] 2 S.C.R. 779, 1991 CanLII 78 [*Kindred*].

30 *Kindred*, *ibid.* at para. 25.

31 [2001] 1 S.C.R. 283, 2001 SCC 7 (CanLII).

32 [1989] 1 S.C.R. 1469, 1989 CanLII 57.

33 [2001] 1 S.C.R. 532, 2001 SCC 18 (CanLII).

34 Testimony of Arthur Eggleton, Minister of Defence, *Proceedings of the Special Senate Committee*, *supra* note 26.

35 *Supra* note 5 at s. 184.1.

36 *Ibid.* s. 184.4.

37 *Ibid.* s. 184.3.

38 Martha Shaffer, "Effectiveness of Anti-Terrorism Legislation: Does Bill C-36 Give Us What We Need?" [Shaffer] in *The Security of Freedom*, *supra* note 20, 195 at 202.

39 *U.S. District Court*, *supra* note 18.

40 Though s. 273.65 will likely fail the minimal impairment branch of the *Oakes* test, this article will nonetheless continue to evaluate s. 273.65 in light of the overall proportionality branch of the *Oakes* test in order to strengthen the argument that s. 273.65 cannot be "saved" under s. 1 of the *Charter.*

41 Justice La Forest was referring to Part IV of the *Criminal Code* (now Part VI) in *R.* v. *Duarte*, *supra* note 6 at 45.

42 *Ibid*.

43 Apart from the annual report on s. 273.65 authorizations, no one – not even the commissioner of the CSE – appears to have the power to review the authorization. See Austin, *supra* note 20 at 264, note 13.

44 Testimony of Greg DelBigio, Member of the Canadian Bar Association, *Proceedings of the Special Senate Committee*, *supra* note 26.

45 *Charter*, *supra* note 4.

46 *Supra* note 15, at para. 43.

47 Kent Roach, "The Dangers of a Charter-Proof and Crime-Based Response to Terrorism" in *The Security of Freedom*, *supra* note 20, 131 at 133.

48 *Supra* note 1.

49 *U.S. District Court*, *supra* note 18.

50 The Fourth Amendment of the U.S. Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

51 *U.S. District Court*, *supra* note 18.

52 *Ibid*. at 316, citing *Johnson v. United States*, 333 U.S. 10 at 13-14 (1947).

53 See *Hunter v. Southam*, *supra* note 15 at para. 30. *R. v. Rahey*, [1987] 1 S.C.R. 588, 1987 CanLII 52.

54 See *R. v. Simmons*, [1988] 2 S.C.R. 495, 1988 CanLII 12; *R. v. Keegstra*, [1990] 3 S.C.R. 697, 1990 CanLII 24; *R. v. Elshaw*, [1991] 3 S.C.R. 24, 1991 CanLII 28; and *Golden*, *supra* note 17.

55 In *Hunter v. Southam*, *supra* note 15, the Supreme Court of Canada adopted several of Justice Stewart's statements in the U.S. Supreme Court case *Katz v. United States*, 389 U.S. 347 (1967) (FindLaw) [Katz], in interpreting s. 8 of the *Charter*. For instance, the Supreme Court of Canada quoted with approval Justice Stewart's observation that "the Fourth Amendment protects people, not places" (at para. 24, citing Katz at 351) and that a "warrantless search was *prima facie* 'unreasonable' under the Fourth Amendment" (at para. 23). In *R. v. Wong*, [1990] 3 S.C.R. 36, 1990 CanLII 56, the Supreme Court of Canada noted that its conclusion that "a person who occupies a hotel room has a reasonable expectation of privacy and that the police cannot effect a warrantless search of the room" was consistent with American experience (at para. 30). In *R. v. Edwards*, [1996] 1 S.C.R. 128, 1996 CanLII 255, the Supreme Court of Canada considered and followed the U.S. approach of granting standing only to the accused person whose privacy right under s. 8 was allegedly infringed (at paras. 34-35, 45). In *R. v. Evans*, [1996] 1 S.C.R. 8, 1996 CanLII 248, the Supreme Court of Canada noted that its conclusion that

law enforcement officers' plain view observations did not constitute a search within the meaning of s. 8 "was consistent with the position adopted in the United States" (at para. 51).

56 Testimony of Anne McLellan, Minister of Justice, *The Special Senate Committee on the Subject Matter of Bill C-36: Evidence*, *supra* note 25 at 3.

57 Shaffer, *supra* note 38.

58 The Solicitor General of Canada suggested this in 1991. See Colin Goff, *Criminal Justice in Canada*, 2d. ed. (Toronto: Nelson Thomson Learning, 2001), at 232.

59 See Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada*, rev. ed. (Toronto: Thompson Educational Publishing, 1994) at 56.

60 Professor Don Stuart, *The Special Senate Committee on the Subject Matter of Bill C-36: Evidence*, Doc. 38477 (Ottawa: 5 December 2001) at 8, online: University of Toronto Faculty of Law <http://www.law.utoronto.ca/c-36/December5-part2.pdf>.

61 The preamble of Bill C-36 states: "WHEREAS acts of terrorism threaten Canada's political institutions, the stability of the economy and the general welfare of the nation," *supra* note 1.

62 Benjamin Franklin, *Historical Review of Pennsylvania, 1759*, online: The Quotations Page <http://www.quotationspage.com/quote/1381.html>.