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The Challenges of Securing an Open Society

The Honourable
A. Anne McLellan, P.C.*

Prelude

The fifth anniversary of 9/11 has just passed. It is an appropriate time to take stock of how our world changed on that morning in New York City, because it *did* change. It is now hard to remember a time before 9/11 — a time before security became the filter or the screen through which our actions, our words, and our movements would be assessed and judged.

I remember the morning well. I was Minister of Justice and Attorney General of Canada and was attending the annual federal/provincial/territorial meeting of Ministers of Justice and Solicitors General with my colleague Lawrence MacCauley, the Solicitor General. Our host was Michael Baker, Minister of Justice for Nova Scotia, and we were at the White Point Lodge, outside Halifax. We had just begun our morning session, when I received a note, telling me that a plane had crashed into one of the towers of the World Trade Center in New York City.

I announced this to my colleagues and while everyone expressed shock and concern, at that time we presumed a tragic accident. Shortly after, I received a second note that another plane had crashed into the second tower. By this time, while we still did not know what was happening, we knew that this was not a tragic coincidence.

We, like most other people around the globe, soon watched in disbelief and horror as the television screen filled with images: bruised and bleeding victims; stunned journalists and politicians; a President frozen in disbelief for brief seconds in a grade two class in Florida as the early news was conveyed to him; and the heroic first responders as they poured into the area of the World Trade Center, unaware of the magnitude of the situation confronting them.

From that moment on *everything* changed, and no more so than for governments around the world, as we began to face the reality of the new face of transnational, non-state terrorism. Five years later it is our responsibility to reflect upon these changes and consider whether ours is a safer and more stable world because of the actions taken by governments like our own.

Introduction

Terrorism was not invented on 11 September 2001. In just the past twenty-five years, there have been close to 2000 documented incidents of terrorist actions. We recognize many of the names over these twenty-five years: Baader-Meinhoff, the Red Brigade, Black September, the IRA, the PLO, Hezbollah, Hamas, the Tamil Tigers, and the Shining Path. We also remember the events: the Munich Olympic Massacre, Air India Flight 182, Pan Am Flight 103, the first World Trade Center attack, the Oklahoma bombing, the bombings of the U.S. embassies in Kenya and Tanzania, and the attack on the U.S.S. Cole.

The United Nations (UN) had identified terrorism as the single biggest threat to global security and stability long before 9/11. Ministers and officials from many countries had

been participating in working groups for years to develop conventions (of which the UN now has thirteen), the most recent being the *International Convention for the Suppression of Acts of Nuclear Terrorism*.[1]

In the days following 9/11, then Prime Minister Jean Chrétien established the Ad Hoc Cabinet Committee on Public Safety and Anti-Terrorism, chaired by John Manley, then Minister of Foreign Affairs. As then Minister of Justice and Attorney General, I was a member of the Committee along with other key Ministers (Finance, Transport, Solicitor General, Immigration, Defence, Foreign Affairs, International Trade, Intergovernmental Affairs, and Revenue). Our mandate was to review policies, programmes, legislation and regulations across the government to assess both our approach to national security and our operational readiness to fight terrorism.

It was decided that, as part of our strategy, we would introduce a piece of legislation that was comprehensive in its approach to terrorism. Within my department, we worked long hours to develop the key provisions that would form the basis of this legislation.

Some have suggested that this legislation was created in haste. If what they are suggesting is that the legislation was drafted without careful thought, then they are wrong. If they are suggesting that there was a sense of urgency about our work, then of course, that is accurate.

Within the department, we had been working for some time on the necessary domestic legislation to permit us to ratify two of the UN Conventions Against Counter Terrorism — those dealing with terrorist financing and with the suppression of terrorist bombings. Our officials also were engaged fully in various international fora where discussions on different aspects of counter-terrorism were being pursued, for example the G-8 and the United Nations. Both the required orientation of anti-terrorism legislation as well as some of the more contentious sticking points were well known to Department of Justice lawyers.

However, it is fair to say that Justice officials, and others, worked very long hours to draft the piece of legislation that was introduced on 15 October 2001 and which is known as the *Anti-Terrorism Act* (ATA).[2] It should be noted that, as part of the drafting exercise, officials worked in teams so that proposed provisions were subjected to rigorous assessment by not only the Department's policy people and its legislative drafters, but also by its *Charter* and human rights lawyers.[3] We were fully aware that at least some of the provisions (*e.g.* preventative arrest and investigative hearings) were new tools being provided to police and would come under additional scrutiny and criticism.

Our government's goal, in the weeks following 9/11, was to get the balance right.[4] A government's fundamental obligation is to provide for the collective security of its people. However, in doing so we must always be guided by our fundamental values, which include our commitment to the *Charter of Rights and Freedoms*, the rule of law and relevant international laws.[5] We must also be mindful of our ethnic, racial and religious diversity as a country, and of our commitment to multiculturalism.

All of this is by way of background to my lecture, entitled "The Challenges of Securing an Open Society." I want to underscore, however, that the challenges, and the strategies and policies to meet them, are many in number, varied in kind, and will continue to test the fortitude and resilience of us all. In a society where we value the relatively free movement of people within our country and across its borders, where the arrival of immigrants from all over the world is seen not only as a societal good but a necessity, where we value the free and open expression of ideas and opinions, and where the Internet has created a borderless world in relation to the dissemination of those ideas and opinions, it becomes even more difficult to provide for our collective security while respecting the "openness" which we all value and dare I say, take for granted.

Much of the attention of legislators, the media, and the public has focused on the ATA. However, I do want it understood that this piece of legislation is only one part of Canada's framework of laws, policies, and programmes focused

on the challenges of twenty-first century, transnational terrorism. There are UN conventions and domestic laws that implement them; enhanced *Criminal Code*[6] provisions dealing with money laundering; agencies such as the Canadian Security Intelligence Service (CSIS), the Royal Canadian Mounted Police (RCMP), the Financial Transactions Reports Analysis Centre of Canada (FINTRAC), the Canadian Border Service Agency (CBSA), and the Canadian Air Transport Security Authority (CATSA); a new department, Public Safety and Emergency Preparedness; a national security advisor reporting directly to the Prime Minister; the first ever integrated national security policy issued in 2004, as well as a new foreign policy in 2005, which put greater emphasis on protecting North America from the threat of global terrorism.[7]

In addition, we have bilateral agreements with the U.S.; for example, the Smart Borders Declaration, signed in December, 2001 and trilateral agreements such as the Security and Prosperity Partnership Agreement of North America (SPP), signed by Presidents Fox and Bush and Prime Minister Martin in March, 2005, which focus on aspects of our collective security.

Further, starting with the federal Budget of December, 2001, and in every budget since, billions of dollars — well over 10 billion dollars to date — have been committed to enhancing our national security infrastructure.

Challenges in Developing a Counter-Terrorism Strategy

Terrorism is both inexcusable and unacceptable. There must be no equivocation about this principle. As Koffi Anan, Secretary General of the UN, said in his report to the General Assembly during its sixtieth session:

> Terrorists must never be allowed to create a pretext for their actions. Whatever the causes they claim to be advancing, whatever grievances they claim to be responding to, terrorism cannot be justified . . . we must make absolutely clear that no cause, no matter how just, can excuse terrorism. This includes the legitimate struggle of people for self-determination. Even this fundamental right defined in the Charter of the United Nations does not excuse deliberately killing or maiming civilians and non-combatants.[8]

A counter-terrorism strategy must define the action or set of actions which it seeks to counter. The challenge to define terrorism has been a long-standing and contentious one. Too often, we hear that "one person's terrorist is another person's freedom fighter." This is to misunderstand the defining characteristics of terrorism — terrorist acts are not only a form of violent struggle but the violence is used *deliberately* against *civilians* to achieve political goals.[9] As Boaz Ganor wrote in his book *The Counter-Terrorism Puzzle*, "terrorism is not the result of random damage inflicted on civilians who happened to find themselves in an area of violent political activity, rather it is directed *a priori* at harming civilians. Terrorism takes advantage of the relative vulnerability of the civilian 'soft underbelly,' as well as the tremendous fear and media impact it causes."[10]

It seems that we become confused easily about what is and what is not a terrorist activity. I think that if we stay focused on the "means" employed, and not the asserted end or goal, we have a better chance of establishing clarity around the definition. What distinguishes the terrorist from others, including the guerilla and the freedom fighter, is the deliberate targeting of civilians in the pursuit of his or her goals.

We understood the challenges involved in providing a comprehensive definition of what constitutes terrorist activities when drafting the ATA but felt that it was essential to the legislation. As we predicted at the time of drafting, the definition has proven to be controversial and continues to attract a considerable amount of academic and judicial consideration.[11] In addition, if the member-states of the United Nations are able to agree on a definition for the purpose of a comprehensive convention on terrorism, the government should then decide whether that definition is one that it wishes to adopt for the purposes of domestic law.

Much is made of the conflict between providing for the security of Canadians and pro-

tecting their rights and liberties. There should be no conflict. However, there will probably be a "tension," as discussed by the Supreme Court of Canada in *Charkaoui v. Canada*.[12] If one postulates a conflict, it will lead, inevitably, to a discussion focused on the rights and freedoms to be surrendered in the name of security, as opposed to a discussion focused on the rights to be protected and safeguarded.[13]

Section 7 of the *Charter* accords to persons the right to life, liberty, and security of the person. Life and liberty can only have meaning where there exists the precondition of human security. As Koffi Annan has stated, "Terrorist acts are violations of the right to life, liberty, security, well-being and freedom from fear. Therefore, adopting and implementing effective counter-terrorism measures is a human rights obligation for states."[14]

And, as my former colleague Irwin Cotler said in a presentation to the Special Committee of the Senate, in conducting the mandated three-year review of the ATA, "counter-terrorism is anchored in a twofold human rights perspective. First, that transnational terrorism — the slaughter of innocents [civilians] — constitutes an assault on the security of a democracy and the most fundamental rights of its inhabitants — the right to life, liberty and security of the person. Accordingly, counter-terrorism is the promotion and protection of the security of a democracy and fundamental human rights in the face of this injustice — the protection, indeed, of human security in the most profound sense."[15]

I have some hope that this conceptualization will help us avoid "conflicting rights" analysis and the theory of the zero-sum game. It establishes counter-terrorism laws and actions as an obligation on the part of government to provide for the collective security of its people. If this obligation is not met, people will live in fear and a strong, vibrant civil society will become impossible.

However, this leads me to another important underpinning of our counter-terrorism strategy — that of comportment with the *Charter of Rights and Freedoms*, the rule of law, and international law. We can not ignore our values in developing our counter-terrorism strategy. To do so is "to let the terrorists win." That is why, as I mentioned earlier, when we worked in teams in the Department of Justice, those teams included our human rights and *Charter* lawyers, to ensure that we understood both domestic and international human rights laws and the judicial interpretation thereof. Our focus (and our obligation) was to draft a law and related counter-terrorism measures that would be effective in protecting our security while ensuring respect for our fundamental values.

Now, the question of whether this comportment was achieved continues to be a matter of heated debate, both in civil society and in the courts. The Supreme Court of Canada has ruled on only one of the provisions of the ATA, dealing with investigative hearings, and upheld the constitutionality of the provision.[16] My point is a simple one — that, we, in government at the time, were mindful of the importance of developing a counter-terrorism framework that was respectful of our fundamental values and constitutional obligations.

Much of our counter-terrorism strategy is preventive or preemptive in effect. Modern terrorism, which is based on the exhortation that the more civilians you kill, the more successful you are, does not offer much scope for the traditional approaches of the criminal law, which are based on reactive measures and a theory of general deterrence. My firm belief, which I stated many times, before more House of Commons and Senate Committees than I care to remember, was “If they're on the planes — it's too late.”

Early detection and preemption have become key elements of our counter-terrorism strategy. That is why much of our approach, and many of our resources, are focused on increased intelligence gathering and analysis, and on the police investigations which often flow from the information gathered. “Detect, identify, and break-up before harm is done” has become the new mantra.[17]

Globally, what we see is an approach that not only has led to significant new resources being

devoted to intelligence gathering agencies like CSIS, but also a reorganization of agencies that collect intelligence within governments to ensure not only the collection of more and better information but also its sharing among relevant agencies in real time.[18] We all remember that the key recommendations of the 9/11 Commission, and their most damning criticisms, were reserved for intelligence gathering agencies in the U.S.[19] The new emphasis on prevention has dictated a rethinking of the importance of intelligence to our national security and of how that intelligence is analyzed and used.[20]

This emphasis on prevention also led us to enact the provisions dealing with preventative arrest and investigative hearings.[21] These provisions attracted significant criticism at the time and were described as departures from the normal approach of the criminal law and due process. The criminal law, however, is not static and unchanging. The practice of terrorism has evolved over time. As terrorists and their methods become increasingly sophisticated and lethal, our criminal laws will have to adapt.

With our new emphasis on detection and prevention, we understood that we were supplementing the more accepted operation of the criminal law, which is reactive: to investigate, prosecute, convict, and (through the sentence imposed) deter those who might have similar intentions. This model is of limited utility when those plotting harm do so with the goal not only of mass murder, but also of their own death and subsequent martyrdom.

Although we were well aware of the focus we were placing on preventative actions, I do not think that we appreciated that these measures were to become a small piece of a now much larger global debate around the doctrine of preemption in the criminal law. In his recent book entitled *Preemption: A Knife That Cuts Both Ways*, Alan Dershowitz argues that "The democratic world is experiencing a fundamental shift in its approach to controlling harmful conduct."[22] Dershowitz reminds us that after 9/11, "the 'number one priority' of the [U.S.] Justice Department [was] 'prevention'."[23] He describes this asserted shift in the following terms:

> The shift from responding to past events to preventing future harm is part of one of the most significant but unnoticed trends in the world today. It challenges our traditional reliance on a model of human behavior that presupposes a rational person capable of being deterred by the threat of punishment. The classic theory of deterrence postulates a calculating evildoer who can evaluate the cost-benefits of proposed actions and will act — and forbear from acting - on the basis of these calculations. It also presupposes society's ability (and willingness) to withstand the blows we seek to deter and to use the visible punishment of those blows as threats capable of deterring future harms.
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> . . .
>
> The classic theory of deterrence contemplates the state's absorbing the first harm, apprehending its perpetrator, and then punishing him publicly and proportionally, so as to show potential future harmdoers that it does not pay to commit the harm. In the classic situation, the harm may be a single murder or robbery that, tragic as it may be to its victim and family, the society is able to absorb. In the current situation the harm may be a terrorist attack with thousands of victims or even an attack with weapons of mass destruction capable of killing tens of thousands. National leaders capable of preventing such mass attacks will be tempted to take preemptive action.[24]

Dershowitz does not argue against preemptive measures so much as he argues for a new jurisprudence of preemption that seeks, in his words, "to balance security with freedom."[25] Whatever else may happen, one thing is clear: greater emphasis will continue to be placed on the tools available to preempt and prevent terrorists from carrying out their lethal plots.

We acknowledged that the balance struck in our counter-terrorism strategy should be open to periodic reassessment. For example, within the ATA we made provisions for a three-year review,[26] as well as a five-year sunset provision for those sections dealing with preventative arrest and investigative hearings. However, we saw neither the *Act*, nor any other of our measures, as being based upon the existence of an emergency, declared or not, and therefore temporary in nature. I do not think anyone saw then or sees

now that the challenges presented by recent terrorist actions and strategies will be susceptible to either quick or simple solutions. What we see may well be the "new normal."

The contents of a country's counter-terrorism tool kit may grow or shrink on the basis of its assessment of the situation in which it finds itself. If we, in Canada, were to suffer an event like 9/11, the Madrid train bombings, or 7/7 in London, we would call upon our government to reassess our counter-terrorism strategy. In carrying out that reassessment, the challenge for government is neither to overreact, thereby limiting people's freedoms unnecessarily, nor to under react, thereby putting in jeopardy people's right to security.

We also acknowledged the necessity for enhanced oversight and review,[27] whether performed by the judiciary, by parliamentarians, or by civil society.

Transparency and accountability will be the best protectors of rights and the best defences against government excess or abuse. Of course, oversight and review mechanisms of various kinds were in place before 9/11: the office of the Inspector General and Security Intelligence Review Committee (SIRC) for CSIS, the Public Complaints Commission for the RCMP, and the Office of the Commissioner, which reviews the activities of the Canadian Security Establishment (CSE). Further, we have an enlarged and increasingly expert Federal Court to deal with a growing number of national security matters, including ministerial decisions regarding the issuance of security certificates.[28] But with new and expanded counter-terrorism measures, including new legislation, the need for enhanced oversight and accountability was clear.

At this point it is appropriate to say a few words about Justice O'Connor's Report into the events relating to Maher Arar.[29] He produced a thorough, insightful report that not only confirmed the personal tragedy of Maher Arar and his family but identified concerns with certain aspects of the conduct of national security investigations as carried out, in particular, by the RCMP.

For purposes of this discussion, those of Justice O'Connor's recommendations that are most relevant relate to enhanced review. He concluded "that the RCMP's national security activities can most effectively be reviewed by a new review mechanism with enhanced powers that would be located within a restructured Commission for Public Complaints (CPC)."[30] Justice O'Connor recommended renaming this entity the Independent Complaints and National Security Review Agency (ICRA). He also recommended that the ICRA's mandate should include authority to conduct joint reviews or investigations with the SIRC and the SCE Commissioner into integrated national security operations involving the RCMP (Rec. 3(c)). He would also grant the ICRA extensive investigative powers; encourage it to hold open and transparent hearings to the greatest extent possible (Rec. 5(g)); and give it discretion to appoint security-cleared counsel, independent of the RCMP and the government (Rec. 5(h)).

Justice O'Connor did not restrict his recommendations to the review of the national security activities of the RCMP. He also recommended that there be independent review of the national security activities of the CBSA, Citizenship and Immigration Canada, Transport Canada, FINTRAC, and the Department of Foreign Affairs and International Trade (DFAIT) (Rec. 4). He suggested that ICRA review the national security activities of the CBSA, and that the SIRC review the national security activities of the other four agencies (Rec. 10). Finally, he recommended the creation of a co-coordinating Committee made up of the chairs of the ICRA, the SIRC, and the CSE Commissioner with an outside person as Chair. Among other things this committee would try to avoid duplicating oversight functions (Rec. 12). Further, he suggested the appointment of an independent person to reexamine this framework for independent review at the end of five years to ensure that the review of national security activities keeps pace with changing circumstances and requirements (Rec. 13).

I must caution, at this point, that while enhanced transparency and accountability are necessary objectives, we must be cognizant

of the risk of layering on so many review and oversight processes that our national security agencies spend more time "looking over their shoulders" than they do working to secure our country and its people.

Having said that, I do believe that parliamentary review should be robust. Ministers and heads of agencies are regularly asked to appear before either standing committees or special committees of the House of Commons and Senate. In fact, the ATA itself was passed only after two months of intensive hearings, in both the House and the Senate. The two special committees created each heard from approximately 100 witnesses. The three-year review of the ATA involved committee review in both the House of Commons and the Senate and again involved the hearing of many witnesses both from government and from civil society.

So important did we believe the role of parliamentarians to be, that then Prime Minister Martin committed the government to creating a new, all-party committee of both the House of Commons and the Senate whose task would be to provide review in relation to Canada's national security agenda, policies and apparatus. We had suggested that the proposed committee be based on the model of the all-party committee established by the United Kingdom Parliament. That committee appears to have set aside partisan politics and has developed expertise and an understanding of national security issues that serves the government, Parliament, and the people of the United Kingdom well.[31]

In November 2005, we introduced legislation to create this new committee and to establish its mandate and membership.[32] I encourage Minister Day, now Minister of Public Safety, to move forward with this initiative because I think it can become an important part of our commitment to transparency and accountability. It is clear that national security issues will take up more of Parliament's attention and a specialized committee that develops expertise in the area, and whose members are given security clearance to receive sensitive information, may be the way to reconcile the operational secrecy of much of our national security apparatus with the need for parliamentary accountability.

The courts have a key role to play in ensuring respect for, and observance of, the rule of law and compliance with the *Charter* and international law. The Federal Court has played a key role in the issuing of security certificates and probably will continue to do so. It also has an important role in the review process for listed entities. Provincial and superior court judges will continue to play an important role in the interpretation of the ATA, including challenges to the constitutionality of its provisions. Moreover we have recently seen our Supreme Court, as well as those of the U.S. and the U.K., discharge their responsibilities to ensure that national security frameworks comply with constitutions, domestic legislation, and international conventions.[33]

There are many other examples of oversight or review mechanisms that operate in relation to our anti-terrorism framework. For example:

- The annual reports of the Minster of Justice and Minister of Public Safety to Parliament and the counterpart reports of provincial ministers to their respective legislatures;
- The Information and Privacy Commissioners' offices;
- The authorization or consent of the Attorney General for the purpose of prosecution of certain terrorist offences;
- Review of a decision to list a group as a terrorist entity by the Minister of Public Safety and then by the Federal Court. Listed entities must be reviewed every two years by the Minister;
- The annual report by the Minister of Public Safety on the implementation of Canada's national security policy.

One cannot emphasize enough the role of the courts, parliamentarians, and civil society in providing meaningful oversight and review. As Justice O'Connor commented in the Arar Inquiry: "Threats of terrorism understandably arouse fear and elicit emotional responses that, in some cases, lead to overreaction."[34] Transparency and clear lines of accountability are, in the end, the best means by which to avoid, or at least limit, that overreaction.

The Challenges of Security in a Pluralistic Society

Canada takes great pride in being not only one of the most ethnically diverse countries in the world, but the only country with a legislated commitment to multiculturalism. As Janice Stein noted recently in a piece in the *Literary Review of Canada*, not only are we unique among western democracies because of this commitment, but we have done extraordinarily well in practice.[35] She writes that, "At its best, multiculturalism in Canada is inclusive rather than exclusionary," and that "Different communities live side by side, if not exactly together, in Canada's cities, with relatively little cross-cultural violence."[36] Of course Stein, and others, have contrasted this with that which we see in many western European cities, where ethnic ghettoization is a growing phenomenon and where the sense of "belonging" and of shared citizenship is being eroded, if it ever existed at all. And of course, in the United States, clearly a pluralistic society, there is an assimilationist policy which encourages one to take up the indicia of "being American" as quickly as possible.

Now, what does this have to do with the threat of transnational terrorism and our country's national security policy? Should Canada's cultural diversity be seen as a strength or a weakness as we pursue our collective security? In fact, the events of 9/11, and since, have brought into sharper relief, tensions that have been bubbling beneath the surface in pluralistic, western democracies for some time. These tensions include concerns regarding immigration and integration. Since 9/11, these tensions play out under the shadow of the West's growing anxiety about, and fear of, Islamic violence.

We were aware of the fears and concerns of the Muslim community, in particular, as we developed our national security framework. Some of the harshest criticism of our anti-terrorism legislation and policies has come from members of the Arab and Muslim communities. After 9/11, there was a feeling on the part of many in those communities that they were the "target" of our legislation and our actions. Of course that was not the case. But there can be unintended consequences. I think in a pluralistic society like ours, with a commitment to multiculturalism, we need to be ever mindful of how any community, any minority, may become fearful, may become the object of hate on the part of some, or may feel singled out for differential or discriminatory treatment. It is then that government, but also civil society, needs to speak up and underscore that the targets, the only targets of laws and policies dealing with national security, are those who might do harm and, moreover, that those people are of every colour, profess every religion, and speak every language.[37]

As we drafted and amended our proposed anti-terrorism legislation in the fall of 2001, I met with many groups, including representatives of Arab and Muslim organizations. We attempted to reassure them of our commitment to a fair and balanced law.

For example, we included new provisions in relation to hate. Building on existing anti-hate provisions in the *Criminal Code*, we empowered the courts to order the deletion of publicly available hate propaganda from computer systems such as an Internet site. We amended the *Canadian Human Rights Act*[38] to make it clear that using telephone, Internet, or other communications tools for the purposes of hate or discrimination was prohibited. We created a new offence of mischief motivated by bias, prejudice, or hate based on religion, race, colour, or national or ethnic origin, committed against a place of worship or associated religious property.

However, I think that, as a government, we did not engage the Arab and Muslim communities, and perhaps others, to the extent necessary to allay their fears. This is why, when we released our integrated National Security Policy in April, 2004, we included a further statement of principles and launched a new initiative: the cross-cultural roundtable.

Our National Security Policy stated: "Our commitment to include all Canadians in the ongoing *building* of this country must be extended to our approach to *protecting* it." Further: "[W]e do not accept the notion that our diversity or our openness to newcomers needs to be limited

to ensure our security." [39]

As part of the Policy, we committed the Government to the creation of a cross-cultural roundtable to provide a forum for individuals from diverse ethno-cultural backgrounds to gain a broader understanding of the security situation, and of the reasons government and its agencies pursued certain policies or actions. We hoped, also, that the Roundtable would better inform policy makers by providing a vehicle through which ethno-cultural communities could discuss candidly the effects, real or perceived, of those policies and actions on their members.

In addition, it was important for me, and the Government of which I was a part, to deal with assertions from Arab, Muslim, and other minority communities that various agencies dealing with security and safety were involved in racial profiling. I joined with senior officials of CSIS, the RCMP, and the CBSA in sessions with Imams and other Muslim leaders in Toronto, and with multiethnic groups elsewhere in Canada. We learned things about each others' perceptions that were invaluable in creating an atmosphere of greater trust and understanding.

The Canada Border Services Agency's fairness initiative was something that I asked the Agency to put in place to deal directly with complaints that its agents racially profiled people going back and forth across our borders. Better training for officers, as well as a transparent and timely complaints process, were part of this initiative.[40]

Justice O'Connor expressly called for further consultation and engagement with Canada's Muslim and Arab communities from CSIS, the RCMP, and the CBSA. He also suggested that training programmes should involve members of those communities with an aim to inform investigators of their culture, values, and history.[41]

We also introduced a new action plan on racism, entitled "A Canada for All." This plan called on all Canadians and their governments to embrace actions against racism as a shared endeavour with common responsibilities and benefits. A lessening of feelings of victimization and marginalization, leading, we hoped, to enhanced social cohesion and a shared sense of citizenship, were goals of this anti-racism policy.[42]

We also encouraged the RCMP to expand its policy on bias-free policing. As Justice O'Connor pointed out, although the RCMP has such a policy, concerns about racial profiling were raised by many of the interveners at his Inquiry. He commented that "[t]here is much value in the RCMP's policy regarding bias-free policing"[43] and that he accepted that the RCMP had an unwritten policy against racial, religious, or ethnic profiling. However, he suggested that there should be a written policy as to what constitutes racial, religious, or ethnic profiling and that the policy should clearly state that such profiling is prohibited. He believed such action would go some distance in alleviating the concerns of those who, as he said, "rightly or wrongly perceive that discriminatory profiling has occurred in some instances."[44]

I do believe that the work we did after the introduction of the National Security Policy in 2004 helped, among other things, to allay fears in Muslim communities here in Canada after the bombings of 7 July 2005 in London. Actions such as the issuance of a fatwa by over 120 Imams condemning the attacks in London were evidence that Canadian Muslims saw an important role for their communities in ensuring our collective security.[45]

In the conclusion to his report, Justice O'Connor accepts that the RCMP and CSIS are taking steps to enhance their interaction with Canada's large and diverse Muslim and Arab communities: "Increased efforts in this respect can and should be made, to ensure that discrimination does not occur and to improve relations with and co-operation from these communities."[46]

But there is more to do. These initiatives must be built upon, evaluated and re-evaluated, and taken seriously by all involved. They are not a "frill," they cannot be "window dressing." They cannot serve as "cover" for a government

or agency that wants to avoid criticism. They must build trust and understanding; they must help create a sense of inclusion and shared responsibility and alert governments to situations where our laws, policies, and actions may have unintended consequences.

While we Canadians take pride (some may suggest we are unjustifiably smug) in our multicultural society, there are emerging questions and tensions relating to our multicultural policies as to whether these policies are doing enough to ensure a socially cohesive society and therefore a more secure society. I raise this issue in the context of the radicalization of second and third-generation Muslim youth, such as we have seen in the U.K. and now see in Toronto.

I do think that we have the opportunity to learn from what has happened elsewhere, and to work with ethno-cultural communities and new Canadians in particular, to ensure that our basic values are understood and that they form the basis of a "shared citizenship." Such a society is one in which the possibility of conflict is reduced. But it is also one that is less likely to become a recruiting ground for those who would threaten and undermine our collective security and well being.

Conclusion

Any country's national security strategy must be reassessed regularly in light of new information and greater understanding regarding the nature of the threats to its people. After 9/11, we acted in ways that we believed to be responsible, effective, and measured. That there was vigorous discussion as to whether this was indeed the case was not surprising to us. In fact, in a vibrant pluralistic democracy it would be surprising if it were otherwise.

We believed that the actions we took as a Government were not only necessary but in comportment with our constitution and our basic values. Again the challenge for governments, and for intelligence and law enforcement agencies, is neither to overreact nor to under react. Overreaction may limit or constrain rights and freedoms; under reaction may put at risk our nation's security, and that of our neighbours and allies.

Ensuring our country's national security is an on-going challenge. It will require vigilance, as well as patience and understanding on the part of all of us, but most particularly, on the part of the Government of Canada and its agencies. However, I do believe that the actions taken by our Government after 9/11 provide us with a strong foundation from which to meet the challenges ahead, from wherever and whomever they may come.

Notes

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1.

1. *Convention on Offences and Certain Other Acts Committed On Board Aircraft*, 14 September 1963, 704 U.N.T.S. 219, Can. T.S. 1970 No. 5 *(Aircraft Convention).*
2. *Convention for the Suppression of Unlawful Seizure of Aircraft*, 16 December 1970, 860 U.N.T.S. 105, Can. T.S. 1972 No. 23 *(Unlawful Seizure Convention).*
3. *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, 23 September 1971, 974 U.N.T.S. 177, Can. T.S. 1973 No. 6 *(Civil Aviation Convention).*
4. *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents*, 14 December 1973, 1035 U.N.T.S. 167, Can. T.S. 1977 No. 43 (*Diplomatic Agents Convention*).
5. *International Convention against the Taking of Hostages,* 17 December 1979, 1316 U.N.T.S. 206, Can. T.S. 1986 No. 45 (*Hostages Convention*).
6. *Convention on the Physical Protection of Nuclear Material*, 3 March 1980,

1456 U.N.T.S. 124, Can. T.S. 1987 No. 35 *(Nuclear Materials Convention).*

7. *Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, 24 February 1988, 1589 U.N.T.S. 474, Can. T.S. 1993 No. 8, (Extends and supplements the *Montreal Convention on Air Safety*) *(Air Protocol).*
8. *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation,* 10 March 1988, 1678 U.N.T.S. 221, Can. T.S. 1993 No. 10 *(Maritime Convention).*
9. *Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf*, 10 March 1988, 1678 U.N.T.S. 304, Can. T.S. 1993 No. 9 *(Fixed Platform Protocol).*
10. *Convention on the Marking of Plastic Explosives for the Purpose of Detection*, 1 March 1991, Can. T.S. 1998 No. 54, [2005] ATNIA 18 *(Plastic Explosives Convention).*
11. *International Convention for the Suppression of Terrorist Bombings*, 15 December 1997, 2149 U.N.T.S. 284, Can. T.S. 2002 No. 8 *(Terrorist Bombing Convention).*
12. *International Convention for the Suppression of the Financing of Terrorism,* 9 December 1999, 2178 U.N.T.S. 229, Can. T.S. 2002 No. 9 *(Terrorist Financing Convention).*
13. *International Convention for the Suppression of Acts of Nuclear Terrorism*, 14 September 2005, [2005] ATNIF 20 *(Nuclear Terrorism Convention).*

Available online: United Nations Treaty Collection – Conventions on Terrorism <http://untreaty.un.org/English/Terrorism.asp>.

2. Bill C-36, *An Act to amend the Criminal Code, the Official Secrets Act, the Canada Evidence Act, the Proceeds of Crime (Money Laundering) Act and other Acts, and to enact measures respecting the registration of charities, in order to combat terrorism*, 1st Sess., 37th Parl., 2001 (came into force 24 December 2001); *Anti-terrorism Act*, S.C. 2001, c. 41 [ATA].
3. *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.
4. See Canadian Bar Association, *Submission on Bill C-36* (Ottawa: CBA, 2001), online: The Canadian Bar Association <http://www.cba.org/PDF/submission.pdf> at 7-8, where the CBA recommends "that the federal government's response to recent terrorist attacks balance collective security with individual liberties, with minimal impairment to those liberties in the context of the rule of law and our existing legal and democratic framework."
5. The Supreme Court of Canada described this responsibility to get the balance right in the following terms in *Charkaoui v. Canada*, 2007 SCC 9, [2007] 276 D.L.R. (4th) 594 at para. 1 (CanLII) [*Charkaoui*].

   > One of the most fundamental responsibilities of a government is to ensure the security of its citizens. This may require it to act on information that it cannot disclose and to detain people who threaten national security. Yet in a constitutional democracy, governments must act accountably and in conformity with the Constitution and the rights and liberties it guarantees. These two propositions describe a tension that lies at the heart of modern democratic governance. It is a tension that must be resolved in a way that respects the imperatives both of security and of accountable constitutional governance.

6. R.S.C. 1985, c. C-46.
7. *Securing An Open Society: Canada's National Security Policy* (Ottawa: Privy Council Office, 2004), online: Privy Council Office <http://www.pco-bcp.gc.ca/docs/InformationResources/Publications/NatSecurnat/natsecurnat_e.pdf>; Foreign Affairs and International Trade Canada, *A Role of Pride and Influence in the World* (Canada's International Policy Statement) (Ottawa, Department of National Defense, 2005), online: National Defence and Canadian Forces <http://www.forces.gc.ca/site/reports/dps/pdf/dps_e.pdf>.
8. Koffi Anan, *Uniting Against Terrorism: Recommendations for a global counter-terrorism strategy* (Report of the Secretary General), UN GA, 60th Sess., UN Doc. A/60/825 (2006) at 3.
9. Boaz Ganor, *The Counter-Terrorism Puzzle: A Guide for Discussion Makers* (New Brunswick, Prince Edward Island: Transaction Publishers, 2005) at 17.
10. *Ibid* at 17-18. See also Louise Richardson, *What Terrorists Want: Understanding the Enemy, Containing the Threat* (New York: Random House, 2006), and in particular Chapter 1, "What is Terrorism?" Richardson lists seven crucial characteristics of terrorism at 4-6:
    1. politically inspired;
    2. act must involve violence or

the threat of violence;
3. point is to send a message not defeat an enemy;
4. act and victim usually have symbolic significance
5. act of sub-state groups – not states;
6. victims of violence and the audience the terrorsts are trying to reach are not the same.
7. final and defining characteristic is the deliberate targeting of civilians;

11. In the decision of *R v. Khawaja* (2006), 42 C.R. (6th) 348, 214 C.C.C. (3d) 399 (Ont. Sup. Ct. Jus.) leave to appeal to S.C.C. refused, 31776 (April 5, 2007) Justice Rutherford struck down what has become known as the "motivation" clause, where in s. 83.01(1)(b)(i)(a) of the *Criminal Code*, *supra* note 7, a terrorist activity is defined as one that is committed "in whole or in part for a political, religious or ideological purpose, objective or cause." In spite of our best efforts to reassure concerned parties that this clause was one that circumscribed the definition of "terrorist activity," and in spite of the addition of s. 83.01(1.1), many continued to believe that this clause "[would require or encourage] police and security agencies to inquire into the personal beliefs of those under investigation or to engage in racial and religious profiling." This was the sentiment expressed by the Special Senate Committee on the *Anti-terrorism Act*: *Fundamental Justice in Extraordinary Times: Main Report of the Special Senate Committee on the* Anti-Terrorism Act (Ottawa: The Senate of Canada, 2007) at 20. It is important to note however, that in most definitions of "terrorism," achieving a political end, cause, or objective is a key component of the definition. For example, in questioning before the House of Commons Sub-committee on Public Safety and National Security, 38th Parl. 1st sess. (2 November 2005), Boaz Ganor said the following: "[W]hen I refer to political ends, they include ideological and religious ends, in my view, or the broadest sense of the term 'political.'" Further, in his book, *supra* note 10 at 17, he describes the goal underlying terrorism as always political: "… a goal aimed at achieving something in the political arena: over-throwing the regime, changing the form of governance, replacing those in power, revising economic, social or other policies … [w]ith no political agenda, the action in question is not considered terrorism." And in Richardson's list of seven characteristics she begins with the necessity of political inspiration. See note 10.
12. *Supra* note 5.
13. My former college Irwin Cotler has always been the most persuasive and eloquent proponent of this approach.
14. *Supra*. note 8 at 22.
15. Special Committee on the Anti-terrorism Act, *Proceedings*, 38th Parl. 1st sess., No. 2 (2 February 2005).
16. *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 43, [2004] 2 S.C.R. 248 (CanLII). The Supreme Court did consider the constitutionality of the security certificate process in *Charkaoui*, *supra* note 6, and found the process wanting in procedural safeguards but, of course, the process for the removal of non-citizens, on various grounds, including connections with terrorist activities, pre-dated 9/11 and the ATA.
17. See my comments before the Special Senate Committee on Bill C-36, *Proceedings*, 37th Parl. 1st sess., No. 1 (22 October 2001).
18. We created the Integrated Threat Assessment Centre (ITAC) as part of our reorganization of intelligence gathering, analysis, and sharing. The CSIS web-site (online: <http://www.csis-scrs.gc.ca/en/itac/itac.asp>) describes ITAC in the following terms:

> ITAC produces threat assessments for the Government of Canada, which are distributed within the intelligence community and to relevant first responders, such as law enforcement. The assessments evaluate the probability and potential consequences of threats, allowing policy-makers and first responders to have the information needed to make decisions and take actions that contribute to the safety and security of Canadians.
>
> . . .
>
> ITAC is a cooperative initiative, composed of representatives from various partner organizations, who bring information and expertise of their respective organizations to ITAC… ITAC also promotes a more integrated international intelligence community by developing liaison arrangements with foreign intelligence organizations. This contributes to both Canadian and international security.

19. The National Commission on Terrorist Attacks upon the United States was a bipartisan, independent commission created by legislation in 2002. It released its final report in 2004.
20. Both Justice O'Connor, in the Arar Inquiry, and Bob Rae, in his report on the bombing of Air India Flight 182, underline the importance of information sharing. However, Justice O'Connor reminds us that such sharing "must take place in a reliable and responsible fashion": Commis-

sion of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Analysis and Recommendations* (Ottawa: Public Works and Government Services Canada, 2006) at 331, online: Arar Commission <http://www.ararcommission.ca/eng/AR_English.pdf> [Arar Inquiry: *Analysis and Recommendations*]; Public Safety Canada, *Lessons to be learned: The report of the Honourable Bob Rae, Independent Advisor to the Minister of Public Safety and Emergency Preparedness, on outstanding questions with respect to the bombing of Air India Flight 182* (Ottawa: Air India Review Secretariat, 2005), online: Public Safety Canada <http://sss.securitepublique.gc.ca/prg/ns/airs/repl-en.asp>.

21. Sections 83.28 and 83.29 of the *Criminal Code*, *supra* note 7. These provisions were subject to a five-year sunset clause, s.83.32, and despite efforts on the part of the Harper Government to extend them, they were allowed to expire. I have expressed my strong opposition to the sunsetting of these clauses elsewhere.
22. Alan M. Dershowitz, *Preemption: A Knife That Cuts Both Ways* (New York: W.W. Norton, 2006) at 2. It is interesting that this book is dedicated to "my dear friend and colleague… the Honourable Irwin Cotler."
23. *Ibid*. at 3.
24. *Ibid*. at 7-10.
25. *Ibid*. See the final chapter of Dershowitz's book entitled "Toward a Jurisprudence of Prevention and Preemption."
26. Section 145 of the ATA, *supra* note 2, required a comprehensive review of the provisions and operation of the Act within three years.
27. Justice O'Connor talks about the difference between review and oversight in that part of his Inquiry Report which dealt with a new review mechanism for the RCMP: Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *A New Review Mechanism for the RCMP's National Security Activities* (Ottawa: Public Works and Government Services, 2006) [*A New Review Mechanism*]. In Chapter IX at 457 he describes the two mechanisms in the following way:

    > In their pure forms, oversight mechanisms can be seen as direct links in the chain of command or accountability: they both review and are responsible for the activities of the overseen body. By contrast, review mechanisms are more appropriately seen as facilitating accountability: they ensure that the entities to which the organization under review is accountable, and the public, receive an independent assessment of the organization's activities.

28. One presumes that the Harper government will take the advice of the Supreme Court of Canada in relation to the procedural deficiencies identified with security certificates and amend the existing provisions accordingly. In fact, work had begun in the Department of Justice, at the request of my then colleague, Irwin Cotler, to consider how the existing process could be enhanced to provide greater procedural fairness.
29. Arar Inquiry: *Analysis and Recommendations*, *supra* note 20. It should be noted that I became Minister of Public Safety and Emergency Preparedness, as of 13 December 2003 and was asked by then Prime Minister Paul Martin "to get to the bottom of what happened to Maher Arar." By February, 2004, I and my colleague, then Minister of Justice, Irwin Cotler, and numerous senior Government officials, concluded that the only way "to get to the bottom of what happened" was to appoint a commission of inquiry under the *Inquiries Act*, R.S.C. 1985, c. I-11. In addition to conducting a factual inquiry into how and why Maher Arar was deported to Syria, we asked Justice O'Connor to make recommendations for an independent, arm's length review mechanism for the national security activities of the RCMP. His conclusions on this latter matter are found in *A New Review Mechanism*, *supra* note 27.
30. *A New Review Mechanism*, *ibid*, Chapter XI, at 499 ff.
31. The *Intelligence Services Act 1994* (U.K.), 1994, c. 13, s. 10 created the Intelligence and Security Committee. The Committee describes itself as an "oversight body - with a questioning spirit." It is not a committee of Parliament strictly speaking; it was created by statute, not by order of the House. It has a membership of nine, drawn from both the House of Commons and the House of Lords. The members are appointed by the Prime Minister in consultation with the leaders of the main opposition parties. The Committee reports directly to the Prime Minster and, through him, to Parliament.
32. Bill C-81, *An Act to establish the National Security Committee of* Parliamentarians, 1st Sess., 38th Parl., 2005 (first reading 24 November 2005), online: Parliament of Canada <http://www2.parl.gc.ca/HouseBills/BillsGovernment.aspx?Language=E&Mode=1&Parl=38&Ses=1#C81>.
33. A sampling of these decisions include: *Charkaoui, supra* note 5; *Hamdan v. Rumsfeld*, 598 U.S. 1 (2006); *A and others v. Secretary of State for the*

Home Department, [2004] UKHL 56 (BAILII).

34. *Supra* note 20, Arar Inquiry: *Analysis and Recommendations* at 25.
35. Janice Gross Stein, "Living Better Multiculturally" (2006) 14:7 *Literacy Review of Canada* 3.
36. *Ibid*. at 3.
37. And apparently can be a member of any profession, as the recent incidents involving health care professionals, including doctors, in the United Kingdom, would prove.
38. R.S.C. 1985, c. H-6.
39. *Supra* note 8 at 2 (emphasis added).
40. Canadian Border Services Agency, News Release, "CBSA launches consultation on a new Fairness Initiative" (11 July 2005), online: CBSA <http://cbsa.gc.ca/media/release-communique/2005/0711toronto-eng.html>.
41 Arar Inquiry – *Analysis and Recommendations*, *supra* note 21, Recommendations 3(E) at 327 and Recommendations 19 and 20 at 355-358, *supra.*
42 Department of Canadian Heritage, *A Canada for All: Canada's Action Plan Against Racism*, (Ottawa: Public Works and Government Services, 2005), online: Canadian Heritage <http://www.canadianheritage.gc.ca/multi/plan_action_plan/index_e.cfm>.
43 *A New Review Mechanism, supra* note 27 at 356.
44 *Ibid*.
45 Shortly after the events of 7 July 2005 Prime Minister Martin met with Imans from across Canada to, among other things, seek their help in better understanding the potential for radicalization of, in particular, young Muslim males in Canada.
46 Arar Inquiry: *Analysis and Recommendations*, *supra* note 20 at 358.

Charkaoui: Beyond Anti-Terrorism, Procedural Fairness, and Section 7 of the Charter

James Stribopoulos*

The Anti-Terrorism Story

The Supreme Court of Canada's unanimous decision in *Charkaoui v. Canada*[1] has attracted much public attention. Perhaps most newsworthy is the fact that these cases —challenges by three men to provisions of the *Immigration and Refugee Protection Act* (*IRPA*)[2] under which they were detained — represent the first time since September 11, 2001 that the Supreme Court has delivered a defeat to the government in its anti-terrorism efforts.

Until *Charkaoui*, the Court had shown much deference toward the government in this sensitive area. For example, in *Suresh v. Canada (Minister of Citizenship and Immigration)*,[3] the Court left open the possibility that at least in "extraordinary circumstances" it might be permissible for the government to deport a non-resident to a country where she faces a substantial likelihood of torture. Even more important in that case was the Court's endorsement of a deferential approach for reviewing the Minister of Immigration's determination about the likelihood of torture on deportation. Through this move the Court abdicated much responsibility for protecting individual rights to the executive.

Less significant, but still noteworthy, was the Court's decision in *Application under s. 83.28 of the Criminal Code (Re)*,[4] upholding the controversial anti-terrorism investigative hearings that were hastily added to Canadian law as part the *Anti-Terrorism Act*.[5] That legislation was introduced in the fall of 2001, while the Twin Towers were still smouldering.

To many observers, these cases seemed to signal that *everything* may have indeed changed since 9/11, even in Canada. As in other western democracies, our commitment to longstanding human rights principles suddenly seemed vulnerable when suspected terrorists were the targets.

In *Charkaoui*, however, the government's honeymoon before the Supreme Court in anti-terrorism cases came to an end. For those who followed these cases as they made their way to the Court, the result is not entirely surprising. At the hearing, the judges aggressively challenged government lawyers on the fairness of holding individuals for potentially indefinite periods without providing the detainee, or a lawyer acting on his or her behalf, with an opportunity to review and respond to the actual evidence. It is not surprising, then, that Chief Justice McLachlin's reasons for the Court in *Charkaoui* recognized the fundamental unfairness of denying people their liberty without affording them a chance to know the case against them, or to respond to that case.

A legislative response from the government, within the one-year grace period granted by the Court, will undoubtedly follow. The most likely solution will be a regime like that in the United Kingdom, where a small group of lawyers with security clearance are charged with the responsibility of responding to the confidential aspects

of the government's allegations. Any portion of the proceedings that might reveal state secrets will take place *in camera*, with the targeted individual excluded from the courtroom while the lawyer with security clearance challenges the secret evidence on that person's behalf. Such a scheme would seem to be the minimum demanded by the *Charkaoui* judgment, in which the Court referred to the English approach with approval.[6]

The Section 7 Story

Equally important, but not reported in the popular press, is the significance of *Charkaoui* to the Supreme Court's section 7 *Charter of Rights and Freedoms*[7] procedural fairness jurisprudence.

In truth, had the Court wanted to turn a blind eye to the unfairness inherent in the current security certificate system, its existing section 7 precedents gave it much flexibility in choosing a more deferential path. I will momentarily explain the topography of the road not traveled, but for now a more detailed consideration of the Court's analysis is warranted.

In *Charkaoui* the Court restated many of the key principles that have emerged from its prior section 7 procedural fairness cases. For example, the Court reminded us that what is constitutionally required from a procedural standpoint may vary from one context to another, depending on the individual and state interests that are implicated.[8]

The Court also pointed out something that has too often been forgotten by some western democracies in the post-9/11 world. Simply because the state's interest happens to be national security does not mean that long established principles of fair process should automatically be suspended:

> [W]hile administrative constraints associated with the context of national security may inform the analysis on whether a particular process is fundamentally unfair, security concerns cannot be used to excuse procedures that do not conform to fundamental justice at the s. 7 stage of the analysis. If the context makes it impossible to adhere to the principles of fundamental justice in their usual form, adequate substitutes may be found. But the principles must be respected to pass the hurdle of s. 7. That is the bottom line.[9]

The difficulty with the procedure contemplated by the challenged provisions in the *IRPA* is that they fail to meet what the Court identifies, for the first time, as the minimum constitutional requirements for fair process:

> [I]t comprises the right to a *hearing*. It requires that the hearing be *before an independent and impartial magistrate*. It demands a *decision by the magistrate on the facts and the law*. And it entails the *right to know the case put against one*, and the *right to answer that case*. Precisely how these requirements are met will vary with the context. But for s. 7 to be satisfied, each of them must be met in substance.[10]

Here, the regime fell down because it did not respect the final two requirements: the right to know the case one is facing and the right to answer that case. Nor did it provide an adequate substitute for those rights, for example by employing a system like that in the United Kingdom, as mentioned above.

This was so, even though the *IRPA* requires the reviewing judge to provide the affected individual with a summary of the information furnished by the government so as to enable him to be reasonably informed of the circumstances giving rise to the certificate. The person could then use that summary to argue that the security certificate should not have been issued. The summary, however, cannot include anything that would, in the opinion of the judge, be injurious to national security or to the safety of any person.

For the Court, the summary, and the chance to respond to it, were not enough to comply with section 7. The difficulty with this, said the Court, was that:

> [i]t could mean that the judge may be required to decide the case, wholly or in part, on the basis of information that the named person and his or her counsel never see. The person may know nothing of the case to meet, and although technically afforded an opportunity to

> be heard, may be left in a position of having no idea as to what needs to be said.[11]

Given its conclusion that the scheme is inherently unfair and therefore fundamentally unjust, the Court had little difficulty concluding that the resulting constitutional violation could not be reasonably justified in a free and democratic society.

The Court's analysis seems clear and compelling. The main difficulty with its approach is that it is hard to reconcile with its own prior judgments. Before *Charkaoui*, the Supreme Court had consistently rejected the idea that fair process necessitated full access to all relevant information and an opportunity to address the decision-maker on the merits.[12]

For example, just last year in *R. v. Rodgers*,[13] the Court rejected a section 7 challenge to section 487.055 of the *Criminal Code*. That provision allows for the issuance of a court order, on *ex parte* bases, for the collection of DNA samples from already convicted and incarcerated offenders. In other words, the Court upheld a scheme whereby an individual's DNA could be taken without prior notice or an opportunity to address the judge who is asked to issue the order. This procedure was upheld, even though there was no compelling state interest necessitating an *ex parte* process. Remember, in that context, those affected are already in custody and therefore unable to flee the jurisdiction if given notice and a chance to be heard. In addition, the DNA of these offenders was not something that could be destroyed or concealed, such that the need for stealth on the part of the government could be justified.

Even more significantly, in *Chiarelli v. Canada (Minister of Employment and Immigration)*,[14] the Supreme Court upheld the impugned provisions. *Chiarelli* was a case involving a landed immigrant who was subject to an immigration removal certificate for alleged connections to organized crime under a legislative scheme that was strikingly similar to that at issue in *Charkaoui*. It did so, even though at the time, the legislation required only that a summary of the evidence relied on be disclosed to the individual whose deportation was being sought.

The challenge in *Charkaoui* was how to distinguish these prior judgments. The Court did so by emphasizing the stakes involved in *this* case:

> Where limited disclosure or *ex parte* hearings have been found to satisfy the principles of fundamental justice, the intrusion on liberty and security has typically been less serious than that effected by the *IRPA* . . . . It is one thing to deprive a person of full information where fingerprinting is at stake, and quite another to deny him or her information where the consequences are removal from the country or indefinite detention. Moreover, even in the less intrusive situations, courts have insisted that disclosure be as specific and complete as possible.[15]

Of course, conspicuously absent from this paragraph is any attempt by the Court to distinguish the circumstances in *Chiarelli* from those in *Charkaoui*. This is not entirely surprising. The cases are difficult to distinguish, remembering that both involved the permanent removal of individuals from Canada.

Also refreshingly absent from *Charkaoui*, no doubt because of the ultimate result, is the rhetorical device that the Court has often offered up whenever a procedural fairness claim is denied — that the principles of fundamental justice require only fairness, not "the most favourable procedures that could possibly be imagined."[16]

What I hope is apparent by this point is that there has been much imprecision in the Court's prior section 7 jurisprudence regarding what procedural fairness demands. As a result, it would have been very easy for the Court to rationalize upholding the sections at issue in this case.

That said, I do not mean to suggest that the decision in *Charkoui* should not be celebrated. It is profoundly unfair that someone could be arrested, held in custody, and ultimately deported based entirely on evidence that neither they nor their legal representative is permitted to see and consequently answer.

My complaint is much more general, extending well beyond the context of Canada's

anti-terrorism efforts. In short, that the judgment fails to provide much guidance on when the implications for liberty or security of the person will be sufficiently great that notice, full disclosure (at least to the individual's legal representative) and an opportunity to be heard will be constitutionally mandated.

The standards for engaging liberty or security of the person under section 7 are not low. Only serious interferences with individual autonomy qualify.[17] Therefore, simply suggesting, as the Court does in *Charkaoui*, that when the stakes are great enough the demands of procedural fairness increase, tells us very little.

By choosing the path it did, the Court carefully avoided acknowledging any limitation in its prior section 7 decisions involving procedural fairness claims. In the process, it missed an important opportunity to offer a more coherent account of how to go about measuring what due process demands in any given context.

You may be wondering what I have in mind.

An alternative approach

Ultimately, "how much due process?" is a question that necessitates an analysis that begins from the perspective of the individual whose interests are affected. The concrete impact on that individual's liberty or security of the person must be considered against the state's more abstract and competing interest(s). In measuring how much due process to provide, the most sensible question is to ask is: how much can the state reasonably afford? Here, I do not mean simply monetary cost, although that is undoubtedly a legitimate consideration. Rather, what I have in mind are the potential drawbacks for the interests of the state if more due process is given.

Returning to the circumstances in *Charkaoui*, the individual interests involved in this case are significant. The issuance of a security certificate leads to arrest, detention, and, ultimately, deportation. Weighted on the other end of the scale are the legitimate interests of the state, which would seem to be twofold here: first, streamlining security certificate procedures so that individuals who do pose a threat to the safety of Canada are removed from the country as quickly as possible; and, second, ensuring that sensitive state secrets remain confidential. Both state objectives are very important.

Once the competing interests are identified and placed on the scale in this way the question to be asked is this: if more due process is provided, would the state's legitimate objectives be undermined? If the answer to that question is "no," as it is in *Charkaoui*, then the amount of procedural fairness being provided should be increased until the balancing point is reached. Here, as the Court correctly concluded, the interests of the state could be more than adequately met through a system of security cleared counsel who could have full access to the evidence and could therefore meaningfully challenge the government's case.

In other words, the existing regime is fundamentally unjust because it subordinates the interests of the individual to those of the state in circumstances where there is no appreciable benefit to state interests. Unfortunately, a more coherent account of how to go about determining how much due process section 7 of the *Charter* demands will need to await some future case.

Notes

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1 *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9 (CanLII) [*Charkaoui*].

2 S.C. 2001, c. 27, ss. 33. 77-85.

3 *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3. (CanLII).

4 *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42, [2004] 2 S.C.R. 248 (CanLII).

5 *Anti-terrorism Act*, S.C. 2001, C. 41.

6 *Supra* note 1 at para. 80.

7 *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 (CanLII).

8 *Charkaoui*, *supra* note 1 at para. 20.

9 *Ibid.* at para. 23.

10 *Ibid.* at para. 29 [emphasis in original].

11 *Ibid*. at para. 55.

12 See *Goodis v. Ontario (Ministry of Correctional Services*), 2006 SCC 31, [2006] 2 S.C.R. 32 at para. 21 (CanLII); *R. v. Rodgers*, 2006 SCC 15, [2006] 1 S.C.R. 554 at para. 51-52 (CanLII); *Ruby v. Canada (Solicitor General)*, 2002 SCC 75, [2002] 4 S.C.R. 3 at para. 38-44 (CanLII) [*Ruby*]; and *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711 at 744 (CanLII) [*Chiarelli*].

13 *R. v. Rodgers,* 2006 SCC 15, [2006] 1 S.C.R. 554 (CanLII).

14 *Chiarelli*, *supra* note 10.

15 *Charkaoui, supra* note 1 at para. 60.

16 *R. v. Lyons*, [1987] 2 S.C.R. 309 (CanLII). See also *Ruby*, *supra* note 10 at para. 46; *Winnipeg Child and Family Services v. K.L.W.*, 2000 SCC 48, [2000] 2 S.C.R. 519 at para. 130 (CanLII); *R. v. Rose*, [1998] 3 S.C.R. 262 at para. 99 (CanLII); *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 at para. 101 (CanLII); *R. v. Harrer*, [1995] 3 S.C.R. 562 at 573, Justice La Forest (CanLII); R. v. Finta, [1994] 1 S.C.R. 701 at 744, Justice La Forest (CanLII); *R. v. Bartle*, [1994] 3 S.C.R. 173 at 225, Justice L'Heureux-Dubé (CanLII); *Dehghani v. Canada (Minister of Employment and Immigration)*, [1993] 1 S.C.R. 1053 at 1077, Justice Iacobucci (CanLII); and *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425 at 540, Justice La Forest (CanLII).

17 See *Blencoe v. British Columbia Human Rights Commission*, 2000 SCC 44, [2000] 2 S.C.R. 307 (CanLII), the Court's most recent and definitive pronouncement on when "liberty" or "security of the person" are implicated by state action.

Can a Middle Ground be Found on Senate Numbers?

Bruce M. Hicks*

Introduction

Seven years after Confederation, the House of Commons gave unanimous consent to a motion to consider reforms to the Senate.[1] The proposal included such radical notions as the adoption of a Senate electoral system based on proportional representation, the allotment of six senators for each region, and the fixing of terms to eight years, staggered to ensure the election of only half the Senate at a time.[2]

In 2006, the Conservative government of Stephen Harper introduced a similar agenda of reform. Cognizant of past failures to substantively advance any of these ideas during the intervening 132 years, the Harper approach is to try to achieve incremental changes that either do not require amending the *Constitution Act, 1867*[3] or do not require provincial consent.[4]

One of the principal reasons that substantive Senate reform has failed to get traction since Confederation, despite repeated attempts by governments of different political stripes to secure it, is the issue of numerical representation in the upper chamber. At some point, any proposal to change the Senate inevitably turns to the question of the number of senators to which each province should be entitled. Provinces with a larger proportion of Senate seats tend to be reluctant to alter the status quo, while those provinces with a smaller proportion of seats tend to see a dramatic rebalancing of Senate numbers as essential to their ability to defend provincial and sectional interests.

As former Liberal Senate Leader Royce Frith put it in the context of demands for an equal, effective, and elected or "Triple E" Senate: "Elected and effective are quite straightforward, but the debate on 'equal' could go on forever."[5] Frith suggested that this problem alone will ensure that genuine and comprehensive Senate reform will never happen, since "[l]arger provinces will simply not agree to equal representation for the smaller ones."[6]

Substantive Senate reform would seem to require a compromise on the number of senators to which each province is entitled. This is no simple undertaking, as getting proponents of provincial equality and proponents of broader regional equality to compromise on numbers would make those who find the current Senate "laughably incoherent . . . laugh even harder."[7] In my view, the key is to propose a distribution of seats in the Senate which can be defended on the basis of a principled representation structure. Since it would move beyond a compromise position on Senate numbers, such a middle-ground proposal might appeal to Canadians on its own merits; it might even be politically palatable to elites who have previously endorsed either provincial equality or regional equality in Senate seat distribution.

In the dark days of constitutional negotiations over the adoption of the Meech Lake Accord,[8] when Newfoundland and Labrador had rescinded its approval and Quebec was refusing to reopen the document, I privately advanced a proposal that I believed had the potential to break the impasse and open up negotiations on Senate reform. My motivation was admittedly due less to a desire to contribute to the ratification of the Meech Lake Accord in its then

agreed-to format than it was to a long-held desire to see the upper chamber reformed in a coherent manner; therein, perhaps, lies the strength of this proposal.

The *Hicks Amendment*, as my proposal was later dubbed, has never been published.[9] As Canadians again embark on the path toward Senate reform — a path that will inevitably lead to a discussion about seat numbers — it seems appropriate and timely to present the details of that initiative with respect to numerical representation in the upper chamber. After all, when my proposal was first advanced it was considered meritorious enough to open the door to discussions between Newfoundland Premier Clyde Wells and Quebec Premier Robert Bourassa, two intransigent opponents in the debate over the Constitution and the Senate.[10]

This article will examine the two dominant approaches to representation underpinning debate on Senate seat distribution (which, as will be noted, have also driven debate on constitutional amending formulae advanced during the latter half of the twentieth century), namely, provincial equality and regional equality. Then, this article will present the *Hicks Amendment* with respect to Senate numbers.[11] My hope is that this proposal might provide a mechanism for genuine, principled reform of the upper chamber without relying on a mere compromise between provincial and regional equality.

The Review Function and Conceptions of Representation in the Senate

A number of scholars have suggested that bicameralism is a theory of legislative institutional design with a rationale applicable equally to federal and unitary states.[12] The theory suggests two distinct roles for an upper chamber: that of *review* and *representation*. The idea of legislative review is well known and has been used to defend both appointed and elected upper chambers. In 1787, Alexander Hamilton suggested that an appointed Senate "will be less apt to be tainted by the spirit of faction, and more out of the reach of those occasional ill humors, or temporary prejudices and propensities."[13] His colleague, James Madison, suggested that the inclusion of an upper chamber in the design of the legislature would prevent "a variety of important errors in the exercise of legislative trust."[14] In 1918, The Bryce Committee in England argued that an upper chamber, even an appointed one, was needed in a democracy for the "interposition of so much delay so the opinion of the nation can be adequately expressed,"[15] and to ensure, in some cases, that controversial legislation would be "submitted to the deliberate judgment of the electorate."[16] The Supreme Court of Canada echoed these sentiments when it applied to the appointed Canadian Senate the label of chamber of "sober second thought."[17] While it may be common to justify the presence of an upper legislative chamber by referring to its review function, the question of which approach to representation should underpin the distribution of seats in an upper house is fraught with disagreement.

The Canada of the nineteenth century was marked by duality in language, culture, religion and legal system. As a result, multiple conceptions of the nature of the new country emerged including a view of the Canadian political community as: (i) a compact of provinces, (ii) a partnership between two (or more) peoples or "nations,"[18] and, more recently, (iii) the coming together of individual citizens to create a new country. To the extent that these conceptions of community underlie positions taken on seat distribution in Parliament, the presence of these different conceptions helps to explain the complex representation structures that have developed over time in both the Canadian House of Commons and the Senate.

It is illustrative that the recent debate over the Harper government's proposals on Commons seat redistribution[19] saw provinces advancing many of the arguments associated with debate over Senate numbers in this article. For example, Quebec argued that it must have 25 percent of Commons seats because it is a nation, while Ontario objected to a seat adjustment which favours B.C. and Alberta, arguing that its own proportion of Commons seats is inadequate. Indeed a general debate ensued over

what constitutes a "fair" balance between considerations of population size and the interests of smaller provinces and the regions.[20]

At the time of Confederation, the Canadian Senate had a seat arrangement which reflected the several conceptions of community held by the Framers of the *Constitution Act, 1867.* The Senate was to be simultaneously regional, provincial, and sectional — a chamber representing founding peoples, founding regions and founding provinces.

Section 22 of the *Constitution Act, 1867* began: "In relation to the Constitution of the Senate Canada shall be deemed to consist of Three Divisions."[21] The three divisions — the Maritimes, Quebec and Ontario — expanded geographically with a fourth division of the West added by the *Constitution Act, 1915*.[22]

In 1867, the Senate gave an equal number of appointments to each of the existing divisions of Canada, and senators were to represent provinces and be "resident in the province for which he is appointed."[23] Thus, even at that time, the representation principle for the upper chamber included equally a provincial and a regional dimension, even if the principle was not one of strict provincial equality of seat numbers.

Quebec's Senate seats were apportioned within the province in a unique manner. Sections 22 and 23 of the *Constitution Act, 1867* specified property requirements for senators from Quebec to ensure they reside in one of the twenty-four separate electoral divisions of the old colony of Lower Canada.[24] This stipulation was added to ensure that the province's different sectional interests — linguistic, cultural, and religious — would be represented within that province's one-third of the total of Senate seats.

Regional Equality

As Table 1 below shows, while every major Senate reform proposal advanced between the late 1970s and constitutional patriation in 1982 advocated some form of government-controlled appointment, each also attempted to rebalance Senate seats to reflect population growth in western Canada.

The reason for the need to address Western under-representation in the Senate is partly historical. At the time of Confederation there were no western provinces. Manitoba became the first in 1870, but it was a small territory in the Red River Valley[25] and was given just two senators. British Columbia was brought in by Order-in-Council in 1871, and Alberta and Saskatchewan were created out of the Northwest Territories in 1905.[26] It was only in 1915 that a "Western region" was given twenty-four senators: six senators were allocated to each of Manitoba, Saskatchewan, Alberta, and British Columbia.[27] In the Maritime division, the number of Senate seats for New Brunswick and Nova Scotia was reduced from twelve to ten to provide Prince Edward Island with four senators when it joined Canada in 1873.[28]

When it comes to the principle of regional equality, the *Constitution Act, 1915* both "giveth and taketh away." On the one hand it created a new, clearly defined, and equal fourth region of Canada for the purpose of apportioning Senate seats. On the other hand, the Act confirmed and expanded the provision that allowed for Newfoundland to join Confederation without assuming that province was part of the maritime region. As a result, thirty-four years later Newfoundland was given six seats on top of those allotted to the four existing regions, and several generations of Canadian school children have been forced to learn the difference between the Maritimes and the Atlantic provinces.[29]

On 16 June 1971, the provinces and the federal government agreed to a series of constitutional changes known as the Victoria Charter.[30] Although the Quebec government subsequently rejected the Charter and it was not adopted, the amending formula it proposed drew inspiration from Senate divisions in adopting a regionally-based formula; the Senate model remained central to later amendment proposals. [31]

Indeed, a four-region conception of the country was used in amending formulae proposed by most governmental and legislative constitutional advisory bodies including the Molgat-MacGuigan Special Parliamentary Committee in 1972 and the Pepin-Robarts Commission in 1979, and figured prominently

Table 1
Distribution of Senate Seats: Actual and Proposed (Appointed)

	Actual (1975-1999)[32]	Bill C-60 (1978)	Pepin-Roberts (1979)	Beige-Paper (1980)[33]	Ontario (1980)	Alberta (1982)
Atlantic	30	32	14	14	30	14
Quebec	24	24	12	20	30	10
Ontario	24	24	12	20	26	10
Prairies	18	26	14	18	26	18
Pacific	6	10	8	9	12	8
North	2	2	0	0	2	0
TOTAL	**104**	**118**	**60**	**81**	**126**	**60**

in virtually all of the federal government's proposals during the decade prior to patriation of the Constitution.[34] The proposal tabled by the federal government in the House of Commons in 1980, when it announced its intention to achieve patriation unilaterally, also contained a variation of the four-region principle.

In the final stages of the patriation negotiations in November 1981, the four-region formula was abandoned by all provinces including Quebec. Given the political dynamic of these negotiations, however, not much should be read into this abandonment other than the fact that the subsequent *Constitution Act, 1982*[35] did not adopt an amending formula based on a four-region formula.[36] Following the defeat of the Meech Lake Accord, and in response to concerns raised by Quebec, the Beaudoin-Edwards Special Parliamentary Committee recommended that the "amending procedure should be changed to adopt the procedure already proposed in the Victoria Charter as a general rule for amendment."[37] Thus the four-region formula was resuscitated.

In 1995, Parliament introduced Bill C-110, *An Act respecting constitutional amendments*.[38] This bill prevents any federal Minister of the Crown from proposing a motion to amend the Constitution unless the amendment has first been consented to by a majority of the provinces in each of the regions. When introduced on 29 November 1995, one month after the Quebec referendum on secession, the bill recognized four regions — Atlantic, Quebec, Ontario and the West.

As early as the 1970s, British Columbia had called for five regional divisions in the Senate to match that province's sense of its growing importance in the country; thus it should not be surprising that Bill C-110 provoked an outcry from B.C. The federal government of Jean Chrétien quickly amended the Bill on 12 December 1995 to allow for a veto for each of *five* regions: Atlantic, Quebec, Ontario, Prairie, and Pacific.[39]

Chrétien's original assertion of four rather than five Canadian regions may have been a reflection of the Eastern-centric era in which he began public service (particularly his time at the Justice Ministry in the early 1980s). After all, the federal government has since adopted five administrative regions in the civil service, with all major departments having established regional directorates for Atlantic, Quebec, Ontario, Prairie and Pacific regions (something mirrored in ministers' offices and even Chrétien's own Prime Minister's Office).[40]

The use of regional divisions in Bill C-110 as a rationale for regional equality in the Senate was evident recently when Senator Lowell Murray introduced a motion to amend the *Constitution Act, 1867* to change the number of Senate seats. His initiative, introduced on 28 June 2006, to be considered concurrently with the Harper government's Bill S-4 on Senate tenure,

argues for a division of seats loosely based on five regions.[41] Indeed, Murray justifies this configuration purely on the basis that "this status was recognized by the Government of Canada in the mid-nineties"[42] through the constitutional amendment provisions of Bill C-110.

Provincial Equality

Western Canada has been at the centre of the push for provincial equality in the Senate for the last quarter of the twentieth century. Gordon Robertson explains the origin of this push: "In western eyes there was and is neither provincial nor genuine regional equality to offset the preponderance of population in the industrialized and prosperous centre of Canada."[43]

There is no disputing that the Canadian federation has *loci* of power. Historically, these can be found not so much in the provinces of Ontario and Quebec as within what David Kilgour calls "Inner Canada"[44]: the urban Montreal — Ottawa — southwestern Ontario nexus. To aggravate matters, this powerful part of Canada is perceived by some in the West to pander to the economically challenged Atlantic provinces and culturally and linguistically threatened Quebec at their expense.

Further, it is not surprising that the Senate is seen as a possible panacea by Western politicians. Before anyone in the West had Senate reform in mind, dozens of high profile royal commissions and parliamentary committees — even the federal government itself — had already offered up the Senate as a way to rebalance the federation.

Proponents of provincial equality in the Senate point to the U.S. and argue that there is a "dual nature of representation that is required in a federal system: the representation of citizens in the national legislative process on the basis of both population and [administrative] region."[45] Proponents claim that "it is only in Canadian politics that the principle of equal representation for all provinces regardless of population is regarded as radical or unusual."[46] Although this characterization of equal representation in the bicameral legislatures of other federations is not factually correct, given the proximity of Canada to the U.S. it is not surprising that American political approaches are held in such esteem.

An organization closely associated with the Triple E Senate slogan is the Canada West Foundation (CWF). It goes so far as to argue that Canada, even more so than the U.S., needs provincial equality in Senate representation to mitigate the uneven distribution of Canada's population. According to the CWF, population distribution among the ten provinces is "more unequal than any other federal country in the western democratic world."[47]

As Table 2 below illustrates, proposals for an elected Senate appearing on the scene since patriation have tended to call for provincial equality in seat numbers. An Alberta Select Committee of the legislature recommended allotting six senators to each province[50] (as did the CWF), a principle also endorsed by the Government of Newfoundland (the latter with the recommendation of a slightly larger ten senators for each province[51]).

Perhaps reflective of the evolution of growing popular sentiment regarding Senate representation, former Prime Minister Pierre Trudeau, in his testimony before the Joint Parliamentary Committee on the Meech Lake Accord, talked about his preference for the Victoria formula as a fairer reflection of the Canadian social contract while simultaneously suggesting that perhaps there was a need for a move in the direction of equal representation in the Senate. Trudeau added: "that will call for a national spirit which will oblige, for instance, Quebec and Ontario to realize that when they say that all provinces are equal they should mean it."[52]

I would suggest that neither Trudeau nor the governments of Ontario and Quebec have ever embraced the idea of equality of provinces, nor should they. If a constitution is a social contract then principled demands for a veto over constitutional changes should be driven by the same principles that determine who should be represented and in what proportions with respect to governance at the centre. In other words, the concepts that underlie an amending formula should be the same as those that underlie demands for representation in Parliament.

Table 2
Distribution of Senate Seats: Actual and Proposed (Elected)

	Actual (1975-1999)	Alberta Select (1985)	Nfld. Gov. (1989)[48]	Beaudoin-Dobbie[49] #1	#2	Lib.	Charlotte-town Accord (1982)
NF	6	6	10	7	6	8	6
PE	4	6	10	4	4	4	6
NS	10	6	10	10	8	8	6
NB	10	6	10	10	8	8	6
Qc	24	6	10	30	20	18	6
ON	24	6	10	30	20	18	6
MB	6	6	10	12	8	8	6
SK	6	6	10	12	8	8	6
AB	6	6	10	18	12	8	6
BC	6	6	10	18	12	8	6
YK	1	2	2	2	2	1	1
NT	1	2	2	2	2	1	1
TOTAL	**104**	**64**	**104**	**154**	**109**	**100**	**62**

Compromise

The Beaudoin-Dobbie Committee offered one of the few proposals for an elected Senate to argue that the equality of provinces is not a fundamental principle of federalism. It correctly noted that no such principle was "asserted in the classical theoretical works on federalism, such as *The Federalist*, or the writings of Alexis de Tocqueville."[53] More important than provincial equality in Senate seat numbers, according to the Beaudoin-Dobbie Committee, is the building of strong regional blocks which could be accomplished if the smaller provinces were "assigned a sufficiently large number of seats to enable the Senate to perform its role of counterbalancing the principle of representation by population embodied in the Lower House."[54]

While this point is correct, the Committee failed to take the next step and offer a principled defence of its preferred form of Senate representation. As a result, the numbers put forward by the Beaudoin-Dobbie Committee left no one satisfied, as they were little more than a compromise between those wanting regional equality in the Senate and those preferring provincial equality. Such compromise positions only illustrate the futility of suggesting compromises in Senate seat numbers unhinged from an agreed-upon set of principles.

This difficulty was also in evidence during negotiation of the Charlottetown Accord,[55] which proposed an equal number of senators per province while restricting the Senate's constitutional authority, and creating double majorities, linguistic divisions, and joint sessions to facilitate deviation from provincial equality for various votes in Parliament.[56] This constitutional amendment initiative was rejected by Canadians, including Quebecers, in a country-wide referendum in October 1992. Subsequent research has shown that Charlottetown's Senate proposals failed to strike a chord with Canadians, even among those who might otherwise have favoured Senate reform.[57]

More recently, discussion of Senator Murray's motion to increase the number of senators in the West resulted in the characterization of compromise on seat numbers as "a dog's breakfast of numbers that can only be explained sequentially because they do not make any sense coming in the front door."[58]

While provincial equality and regional equality may be linked to two distinct visions of the character of the Canadian political community, this situation is complicated by the fact that a number of core beliefs held by elites and by Canadians more generally about the nature of the federation are resistant to compromise. Indeed, competing visions based on duality, a compact of provinces, or popular sovereignty continue (in slightly modified form) to animate positions taken by Alberta, Ontario and Quebec with respect to Senate numbers.

Appearing before the Senate Committee studying Bill S-4 (Senate Tenure), the Minister of Inter-governmental Affairs from Alberta laid out Alberta's position which, not surprisingly, had as its first principle "that representation to the Senate is equal from each province."[59] Two days later, his counterpart from Ontario responded by saying:

> If Senate reform is to proceed, the under-representation of Ontario citizens must be addressed. Electing Senators under the existing system would entrench and exacerbate inequities that are acceptable for an appointed body acting as a "chamber of sober second thought," but clearly would not be acceptable in a body that would become a potential democratic competitor to the House of Commons.[60]

Quebec staked out its traditional claim for Canadian duality regarding representation in the upper chamber, citing the words of Ontario's George Brown during the pre-Confederation debates:

> The very essence of our compact is that the union shall be federal and not legislative. Our Lower Canada friends have agreed to give us representation by population in the Lower House, on the express condition that they shall have equality in the Upper House. On no other condition could we have advanced a step and, for my part, I accept this in good faith.[61]

In the century since Conferation, additional representational claims have emerged. There is a significant tension between rural and urban populations emergent as a political fault line in Canadian politics. Ethnic and group identities have become the focus of discussion about multiculturalism, group rights, and the need for substantive, symbolic, and descriptive representation in legislatures.

Recently, as Michael Pal and Sujit Choudhry have illustrated by combining the lower voter-to-MP ratios in the House of Commons evident in rural ridings with the distribution of ethnicity over largely urban ridings, visible minorities in Canada are particularly underrepresented.[62] In 1996, the *Royal Commission on Aboriginal Peoples*[63] pointed out the need to accommodate the Aboriginal population in Parliament; this idea has been largely ignored in Canadian discussions about political representation.[64]

In an increasing number of other democracies, the mechanism used to redress ethnic underrepresentation is to set aside seats in the legislature for ethnic groups.[65] In Canada there appears to be resistance to this solution. To date, debate among elites directed toward the redrawing of electoral boundaries (federal and provincial) or toward Senate reform tends to link representation to territory. Even in the only area where ethnic-political representation has gained some legitimacy in Canada—the dualism of French and English—seats are invariably tied to geography. And recent moves to Aboriginal self-government have increasingly used models of public rather than ethnic government.

Our tendency to link representational concepts with territory ensures that successful proposals to alter the apportionment of Senate seats will fail to accommodate many of Canada's group-representational demands, both historic and current. That does not mean, however, that Senate reform cannot move us towards this goal (and I would argue that one of the strengths of the *Hicks Amendment* is that it moves us in this direction).

Contrary to the assertions of supporters of provincial equality, there is no uniquely appropriate configuration an upper chamber should take in a federal system. There is general agreement that the representation objectives of the lower chamber should involve a commitment to representation by population, although even here there is dramatic variation among democracies. However, any number of different approaches to representation may guide seat dis-

tribution in an upper chamber. The important point for the theory of bicameralism is that the upper chamber be organized on the basis of an approach to representation different from that used in the lower chamber, thus allowing the former to become a chamber where under-represented groups may have their interests advanced in the process of reviewing the activities of the latter.

The Hicks Amendment as a Principled Middle Ground

There are clearly two types of compromise position regarding representation in Parliament that cannot be ignored, something as true of 1867 as it is of today. The first attempts to resolve divergent claims to representation which are themselves based on different conceptions of Canada as a federal political community. The second is more practical and focuses on the political reality that larger provinces are unlikely to accept a Senate reform proposal in which they are allotted the same or a similar number of Senate seats as smaller provinces. As the constitutional amendment process requires the consent of most if not all provinces, consideration of the demands of smaller provinces are also important.

The strength of the *Hicks Amendment*, when compared to other Senate proposals such as that of the Beaudoin-Dobbie Committee or the Charlottetown Accord, is that it is not a mere compromise between provincial and regional equality. It was advanced specifically to address representational deficiencies in the Canadian federation, and it attempts to do this while not requiring provincial governments to sacrifice their various principled positions on Senate reform.

The CWF was correct in noting that the distribution of Canadians across provinces is the most uneven and unequal of any federal country. Canada is also one of the most ethnically diverse federal states. Nowhere is that truer than in the two largest of the provinces—Ontario and Quebec—where multicultural, urban mega-cities dominate, and where bilingualism is a daily reminder of the duality that was at the heart of the Canadian community. As a result, there are several approaches to representation currently underlying the seat distribution of both chambers of Parliament. These are evident in the compromises already reached on Senate representation and in the uneven distribution of seats in the Commons.

As noted at the outset, even before Confederation and certainly in the discussions leading to union, the representation demands for the upper chamber included the need to represent smaller provinces, the need to represent Canada's duality, and the need to represent Canada's diversity. Add to that the modern complexities of urban and rural, bilingual, multicultural, federal and multinational communities, and the representational demands seem insurmountable. The challenge is to reconcile all of this complexity in a single upper chamber, leaving the lower chamber free to represent the population more proportionately.

In some ways the answer to this challenge is already evident (i) in the 1867 Senate, (ii) in the Commons (which continues to consider factors other than population when redistributing seats) and (iii) in provincial legislatures (which have been forced, in a unicameral legislature, to find ways to represent diverse populations unevenly distributed across their territories, with particular adjustments for historic groups such as official language minorities and rural communities).[66]

Following this tradition, the *Hicks Amendment* proposes a simple and straightforward representational structure for the Senate. It suggests that: (i) every province but the two (or three) largest be given equal representation; (ii) the largest geographic and populous provinces — Ontario, Quebec and possibly British Columbia — be internally divided for Senate purposes; and (iii) there be separate representation for Canada's North.

Table 3
The Hicks Amendment (Elected)

Newfoundland	6
Prince Edward Island	6
Nova Scotia	6
Quebec	

- Northern	6
- Eastern	6
- Western	6
Ontario	
- Northern	6
- Eastern	6
- Southwestern	6
Manitoba	6
Saskatchewan	6
Alberta	6
British Columbia	
- Northern	6
- Southern	6
Northern Canada	6
TOTAL	96

The *Hicks Amendment* is not dissimilar in conception to the original configuration of the Senate, where Quebec was given representation equal to that of Ontario, where Quebec senators were assigned to divisions within the province so that they would represent sectional interests, and where the smaller provinces of Nova Scotia and New Brunswick were given fewer senators but, when combined, had numbers equal to the large provinces.

Table 3 offers a Senate configuration which takes similar considerations into account: Quebec is divided into three regions, with the dominance of Montreal and the Outaouais limited to the eastern region; Ontario is divided into three regions with southwestern Ontario (from Windsor through Toronto) serving as the boundary for most of Inner Canada; and British Columbia is divided into two. In this configuration the North would be one division. Each division would be represented by six senators, giving the Senate a manageable total of ninety-six seats.

There are, of course, other possible configurations. Ontario and Quebec could be divided into four, Quebec could be four and Ontario three, B.C. could remain undivided or be divided into three, and the North could be divided into two or three. The overall number of seats in the Senate should be based on a balance of competing needs: population, geography, diversity, linguistic duality, and provincial interest. Socio-economic, political, cultural, and historical factors should be the determinants of division boundaries within large provinces.[67]

Representational Considerations

When we consider the philosophical dimension of representation — the principled claim to representation based on an understanding of the component parts of Canada — then the demands from the various regions of Canada reflect different philosophical conceptions of Canada. For a number of provinces ranging from the geographically small Prince Edward Island to the economically powerful Alberta, the demand at the negotiating table has been and continues to be for stronger provincial representation at the centre to counterbalance Inner Canada's population size and economic influence. Francophones in Quebec hold a conception of Canada based on duality, necessitating a larger number of Senate representatives than other provinces. For many in Ontario, a conception of representation exists based on the matching of that province's proportion of Senate seats to its proportion of Canada's population (in fact, this majoritarian principle has been championed in Ontario since the days of George Brown in the colony of Upper Canada).

In conjunction with Senate reform, the majoritarian principle will be accommodated largely, though not completely, through the redistribution of seats in the Commons. As a result, Ontario may accept a smaller proportion of seats in the Senate than its population would recommend as long as Ontario's seat share in the Commons reflects its proportion of Canada's population. Ontario might even accept fewer seats than Quebec (as seen in Table 1, this was suggested in the proposal of the Ontario Legislature in 1980), though it would not agree to be overwhelmed in the Senate by the smaller provinces.[68] The fact that Ontario and Quebec (and increasingly B.C.) have been and continue to be considered by many Canadians to be separate regions further buttresses their representational demands.

What have been less acceptable historically are the representational demands of the Northern and the Aboriginal populations, both in the Territories and further south. Most Senate proposals make scant mention of the North and, when they do, argue that Senate representation should be linked to provincehood. The North must be considered at least one full region if not three distinct regions by territory (Yukon, Northwest and, since 1999, Nunavut) for the purposes of the Senate, a recognition that would ensure a modicum of Aboriginal representation in the upper chamber.

Currently, northern Quebec is being restructured as a self-governing majority Inuit territory, to be called Nunavik, to parallel earlier self-government initiatives undertaken jointly by Quebec and Ottawa with respect to the Eeyou (or Cree) of James Bay. Clearly, the division of a province like Quebec for the purposes of the Senate could also lead to increased Aboriginal representation in the Canadian Senate. This would be one argument in favour of the larger geographic territory of Quebec requiring more divisions than Ontario.

Table 4 below compares one possible configuration of the *Hicks Amendment* where Quebec and Ontario are divided into three equal divisions, B.C. into two, and the North and other provinces being one division (i.e. the structure outlined in Table 3), and juxtaposes this to the current population totals and territorial area of these political divisions (as well as to the current division of seats in the House of Commons). What comes immediately to light is that the large province-regions of Ontario, Quebec and, to a lesser extent, B.C. are distinct from the other Canadian provinces and regions (and how underrepresented they are in today's Commons). Quebec and Ontario account for roughly one-quarter and one-third of Canada's total population, respectively, and together represent one-quarter of Canada's landmass (even more if fresh water is included). British Columbia accounts for 13 percent of the population and 10 percent of Canada's territory. Interestingly the North also stands out as distinct, mainly for the reason of its sparse population (smaller than Prince Edward Island), and enormous territory (three times the size of Quebec, Canada's largest province).

From the perspective of geography and population, any principled or practical negotiation on Senate reform requires that the three large region-provinces be given a larger seat share in the Senate than the other provinces. A similar case could be made on the basis of these provinces' ethnic, linguistic and religious diversity (three of the factors considered by the Framers of the Constitution in organizing the original Senate, and considered central to representational claims in many bicameral systems). Indeed, these three region-provinces are the most ethnically, linguistically and culturally diverse of the provinces.

Both the challenges facing the rural and northern parts of these province-regions and the increasing ethnic presence in Canada's major urban centres offer compelling arguments for the relative strength of the *Hicks Amendment* over a simplistic Senate configuration based on provincial or regional equality. In separating Ontario, Quebec and B.C. into two or three large socio-economic divisions, it is likely that one division in each of these provinces will represent the urban areas surrounding Toronto, Montreal and Vancouver, respectively. In these major urban centres, senators would likely accept responsibility for substantively representing the ever-growing ethnic population of these cities. With a number of large-city issues garnering attention at the federal level, these senators would ensure a sustained focus on urban matters.

Yet it is in these urban areas that the supposed political and economic domination of the House of Commons and the federal government is taking place, while the northern and eastern parts of Ontario and Quebec lack influence in both chambers of Parliament.[69] The same is increasingly true for B.C. outside the Lower Mainland.

Underrepresentation in the House of Commons has not historically been as problematic for non-urban areas, as Commons seat redistribution has tended to favour rural populations (this is true also of provincial legislatures). This

Table 4
Comparison of Population and Area to Seat Allocation under the Hicks Amendment

	Current Commons	Population (,000)	The *Hicks Amendment* (Senate)	Land area (,000 km^2)
ON	106 (34.4)	12,754 (38.8)	18 (18.8)	918 (10.1)
QC	75 (24.4)	7,687 (23.4)	18 (18.8)	1,365 (15.0)
BC	36 (11.7)	4,353 (13.2)	12 (12.5)	925 (10.2)
AB	28 (9.1)	3,455 (10.5)	6 (6.3)	642 (7.1)
MB	14 (4.5)	1,183 (3.6)	6 (6.3)	554 (6.1)
SK	14 (4.5)	990 (3.0)	6 (6.3)	592 (6.5)
NS	11 (4.5)	932 (2.8)	6 (6.3)	53 (0.6)
NB	10 (3.6)	749 (2.3)	6 (6.3)	71 (0.1)
NF	7 (2.3)	507 (1.5)	6 (6.3)	374 (4.1)
PE	4 (1.3)	139 (0.4)	6 (6.3)	6 (0.0)
North	3 (1.0)	104 (0.3)	6 (6.3)	3,594 (39.5)

Sources: area: Canada's population estimates (2007-06-28), and land and fresh water area, by province and territory (2005-02-01), Statistics Canada.

Notes: provinces are listed in order of declining population size. Percentages are in parenthesis and may not add up to 100 due to rounding.

would likely change following Senate reform as the Commons migrates towards more consistent representation by population. Admittedly, the rural-urban divide is not limited to the three largest cities in Canada; nevertheless, the population size and economic influence of Canada's three mega-cities — not to mention the party/partisan considerations that favour these urban centres — is the cause of much resentment not just in the other provinces but within Ontario, Quebec and B.C. as well.

Strikingly enough, most Senate reform proposals recommending an elected Senate are silent on issues related to the choice of electoral system. Of those that are not silent, the majority propose multiple-member province-wide districts using the plurality (or "first-past-the-post") system currently used in House of Commons and provincial elections. The issue of riding size — an issue important to Canada's rural areas — has been virtually ignored. The one proposal to address the size of constituencies in Senate elections was offered by the Molgat-Cosgrove Committee which endorsed a plurality electoral system with single-member constituencies (on the basis that this system was familiar to most Canadians).[70] Three other proposals recommend some form of proportional representation but again on the basis of large multi-member, province-wide districts.[71]

Were the Senate to adopt a plurality electoral system based on province-wide districts, the accusation of underrepresentation for rural regions in the Senate would likely increase. After all, in the northern regions of Ontario, Quebec and British Columbia, senators would be elected by voters in Toronto, the island of Montreal, and Vancouver, respectively. Even if the Senate were elected on the basis of proportional representation (PR) based on province-wide districts, there would still be no mechanism by which rural Ontario, Quebec and B.C. would be represented in the upper chamber. The same may be true of other provinces, but the geographical size and population diversity of Ontario, Quebec, and B.C., and the concentration of people in urban areas, makes the problem more acute there. The solution, however, is not to divide the Senate into a large number of single member constituencies, as proposed by Molgat-Cosgrove. That

would duplicate the representation logic of the House of Commons and thus undermine the rationale for a second chamber. The adoption of large sub-provincial regions with multi-member constituencies creates an alternative form of representation that lessens the tension between urban and rural in Parliament, and keeps the Senate functionally distinct from the House of Commons.

It is worth noting that sub-province Senate divisions also provide the opportunity to use electoral rules (and even set-aside seats) to address the underrepresentation of women, ethnic groups, and most urgently Aboriginal peoples. The examples of northern Quebec and the territories of the North have already been used in this article to illustrate how the *Hicks Amendment* could be important to the election of First Nations persons to the Senate. However, there is no reason that the electoral rules set by Parliament for the Senate in the future could not be used to encourage representational diversity. Once again, the strength of the *Hicks Amendment* lies in its reconceptualization of representation. While the current appetite in Canada may be for territorial representation, by breaking the three largest provinces down and acknowledging that the North requires separate and significant representation, the possibility exists to address other representational concerns down the road.[72]

Partisan Considerations

While institutional design should be based on theoretical principles, the reality is that political actors tend to support institutional configurations which they believe will produce outcomes in their interest. So what are the partisan arguments that justify changes to Senate numbers?

The most obvious partisan questions are "what do we get" and "what do we lose" — questions that would be important to both Ontario and Quebec, were they to enter into constitutional negotiations (both provinces are needed to make any change to the *Constitution Act, 1867* given the current general formula as modified by Bill C-110). To answer the partisan question, it is essential to look at both chambers together. After all, the issue is the overall representation structure of Parliament.

It probably does not need to be pointed out just how woefully inadequate a unicameral system is to defend the interests of such a vast and diverse country like Canada, particularly with the large differences in the size of provinces and territories. Yet Canada has been effectively operating with a unicameral system for some time. Particularly in comparison to upper chambers in other countries, but also in light of its unused constitutional powers, one could argue that Canada's Senate is ineffectual. Indeed, it has fallen to the Commons to balance representational considerations of geography, linguistic difference, and population density, with the result being a chamber with no obvious representational structure. In its current configuration, small and mid-sized provinces are overrepresented and the larger provinces are underrepresented.

Even if Commons seats were to be distributed more proportionately according to population size, the larger provinces would still be slightly underrepresented because of the nature of provincial and territorial boundaries, and the impact of these boundaries on rounding and on minimum representation levels.[73] A Senate reorganized specifically to facilitate the better representation of regional and sectional interests might, if bicameral systems in other countries serve as a useful guide, encourage a reorientation of Commons seats: (i) permitting numerical representation in that chamber to better reflect actual population distribution across the provinces, and (ii), freeing up Commons' representatives to orient themselves more toward local matters and, by extension, to become decidedly more majoritarian. Both points would be attractive to the government of Ontario.

The most important issue for Quebec will be its overall proportion of Senate seats. An effective Senate, one in which Quebec has a guarantee of one-fifth to one-quarter of the seats, will ensure that Quebeckers always have an effective voice at the centre no matter how Canada's population is distributed in the future (demographic projections suggest an increasingly westward shift). This level of protection is not assured by a

unicameral legislature, even with all the allowances that have historically been made in Commons seat redistributions.

Quebec's concerns may require that it receive more seats in the Senate than Ontario, but given the linguistic duality of Canada, this is entirely in keeping with the representational role of an upper chamber.[74] Further, it is possible that the allocation of more seats to Quebec would have a symbolic importance for many Québécois, something that in turn would have benefits for Canadian unity.

Table 5
Parliamentary Seat Share under the Hicks Amendment

	Commons (Seats)	Senate (Seats)	Parliament (%)
Ontario	124	18	28.0
Quebec	75	24	23.4
Prairies	56	18	17.5
Pacific	42	12	12.4
Atlantic	22	24	15.2
North	3	6	3.4
TOTAL	**322**	**102**	**100.0**

In Table 5, a Senate seat configuration is proposed in which Quebec receives more seats than Ontario. Specifically, the Senate seat distribution is based on Quebec having four regions, Ontario three and B.C. two. In this scenario the Commons seats are distributed to provinces more in keeping with their population size, and on basis of the historic distribution formula without the grandfather clauses and compensatory adjustments necessitated by Canada's lack of an effective upper chamber. Using this redistribution of seats, the regions have been listed in order of decreasing proportion of Commons' seats to illustrate how the *Hicks Amendment* provides a general equilibrium between the regions of Canada, one far superior to a Senate seat distribution based on simple regional equality, and one not even contemplated by any notion of provincial equality.[75]

However, while a Senate thus configured might well produce an equilibrium in regional representation, it does not favour the politically influential urban centres of the three large region-provinces. For example, the political powerhouse of urban Ontario, which many believe controls the federal government and the House of Commons, would not have more influence than any other province in the Senate (it would be represented directly by only six Senators). Moreover, northern Ontario would have its interests securely represented in the Senate for the first time.

It is hard to argue that the northern regions of Ontario, Quebec, B.C. or Canada, more generally, do not deserve stronger representation in a chamber designed to rebalance the political influence of densely-populated urban Inner Canada, especially when these rural areas together lack the representation that Alberta or Prince Edward Island already enjoy by virtue of their status as provinces.

The same argument applies to Quebec, with the populous western region having significantly different interests than both eastern Quebec and northern Quebec. The differentiation of Quebec into three or four Senate divisions would ensure a strong francophone presence in the Canadian Senate, and ensure that the diversity of Quebec is adequately represented in the upper chamber. This is in the interest of both nationalists and federalists.

Given the recent Quebec provincial election which exhibited clear regional differences in voting preference, and which split the vote almost equally among the Quebec Liberal Party, the Action Démocratique du Québec and the Parti Québécois, one can imagine how a Senate constituted along the lines of the *Hicks Amendment* might result in a greater diversity of voices in the upper chamber. These voices would inevitably come together on linguistic and cultural issues to form a unified front, while offering alternative political and regional perspectives on other policy issues (the sine qua non of an upper chamber).

Under the *Hicks Amendment*, one can imagine senators from eastern or northern Quebec siding with senators from the West or Atlantic Canada on economic issues, but with senators

from Montreal on linguistic and cultural issues. Although voting would be tempered by existing party allegiances, the result would likely be that such coalitions of common interest would increase the influence of the smaller provinces in the Senate.

It is worth noting that the primary argument for a larger proportion of Senate seats for Quebec advanced during the Charlottetown Accord negotiations (which led to the idea of double majorities) was that they were needed to protect francophone language and culture. Yet with senators elected province-wide (as most Senate proposals, whether equal by province or by region suggest), the result would be that bilingual and increasingly immigrant Montreal would tend to determine the winning candidates in an elected Senate. A Quebec premier would be hard pressed to argue that this would be a preferable result to having Quebec divided into east, west and north, with each region given its own seats in the Senate (regardless of the overall size of the upper chamber).

Similarly, an Ontario premier might find it politically difficult to argue that the provision of additional Senate seats to Ontario ought to come at the cost of a subdivision of the province for purposes of allocating Senate seats. A plea for the majoritarian principle of representation by population might permit some flexibility in negotiation but the message to northern Ontario, for example, would surely be that the premier of their province opposes separate Senate representation for their distinct (and relatively economically disadvantaged) region.

So, on the one hand, Ontario and Quebec would be able to find comfort in the provision of additional senators. On the other, the distinctive nature of this representation will permit smaller provinces to temper the will of the most populous provinces. And the resultant changes to the Commons could combine with this Senate format to create a regional equilibrium across Parliament. In short, the *Hicks Amendment* would not require proponents of Senate reform to compromise on principle, even as they compromise on numbers. Those who believe regions need to be protected numerically in Parliament, and those who believe smaller provinces need a stronger voice at the centre, would both find solace in the proposal.

Conclusion

Whether or not the cry for reform has grown out of dissatisfaction with the current Senate, the demand to make the Senate more democratic is irresistible and has found resonance across Canada.[76] Like many others, the *Hicks Amendment* is a Senate reform proposal calling for an elected upper chamber. Where it differs from other proposals is in its attempt to situate its structure in both bicameralism theory and the various alternate conceptualizations of the Canadian polity advanced since Confederation. In the process the *Hicks Amendment* makes a plea for an arrangement of Senate seats that accommodates both those who argue that the upper chamber must be organized on the basis of provincial equality and those who argue that it must be regionally based. Indeed, the genius of the *Hicks Amendment* is that neither side has to compromise its political constituency, its representational demands, or its conception of how power would operate in a reconstituted Parliament.

A Senate thus constituted can protect rural and regional interests, probably better than can a Triple E Senate. The *Hicks Amendment* would ensure that the different regions of Ontario and Quebec would receive a separate voice in the upper chamber, something they currently lack at the federal level and at first ministers and intergovernmental conferences. It would ensure a stronger voice for the North. It would secure the francophone minority, based largely in Quebec, a level of representation that it would not be accorded in a Triple E Senate. Finally, it would circumvent the demands of both Ontario and Quebec that they not be overwhelmed numerically by the other provinces in the Senate (without giving additional influence to Inner Canada).

The *Hicks Amendment* leaves it to first ministers to actually negotiate the numbers, yet provides a theoretical basis from which to enter into negotiations over Senate seat distribution. As Royce Frith puts the point, the *Hicks*

Amendment "would finesse the most difficult of the Triple-E (equal, elected and effective) propositions for Senate reform."[77]

Notes

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1 *House of Commons Debates*, 87 (13 April 1874).

2 Elections would be done by and from the provincial legislature.

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

4 Bill S-4, *An Act to amend the Constitution Act, 1867* (Senate Tenure), 1st Sess., 39th Parl., 2006. This bill proposes to limit Senate terms to eight years for new senators; Bill C-43, *An Act to provide for consultations with electors on their preferences for appointments to the Senate*, 1st Sess., 39th Parl., 2006. This bill authorizes Elections Canada to conduct consultative elections on behalf of the Prime Minister to determine public support for nominees to fill Senate vacancies.

5 Royce Frith, *Hoods on the Hill: How Mulroney and His Gang Rammed the GST through Parliament and Down Our Throats* (Toronto: Coach House Press, 1991) at 114 [Frith].

6 *Ibid*.

7 Special Senate Committee on Senate Reform, *Report on the Motion to Amend the Constitution of Canada* (Ottawa: The Senate of Canada, 2006), online: <http://www.parl.gc.ca/39/1/parlbus/commbus/senate/com-e/refo-e/rep-e/rep-02oct06-e.htm> [Senate Reform Committee].

8 (3 June 1987), online: The Solon Law Archive <http://www.solon.org/Constitutions/Canada/English/Proposals/MeechLake.html>.

9 It was briefly mentioned by the author's mother during a nomination contest in Nova Scotia, at which time it was given the label the "Hicks Amendment" and received some coverage in the local media (see e.g. The Daily News and Chronicle Herald). It also received mention in Frith, *supra* note 5.

10 On 12 February 1990 the idea was broached in a letter to Newfoundland Premier Clyde Wells and, shortly thereafter, by telephone to Quebec International Affairs Minister John Ciaccia, who took the idea to Premier Robert Bourassa. After agreement in principle was obtained, the author submitted a more detailed proposal which included draft wording for a constitutional amendment (what subsequently became known as the *Hicks Amendment*) on 12 March 1990. Having opened the door to discussions, the federal government entered the fray in late May 1990 and Intergovernmental Affairs Minister Senator Lowell Murray did a tour of provincial capitals. Prime Minister Brian Mulroney then brought each of the premiers to his official residence at 24 Sussex Drive in Ottawa. On 3 June 1990, Mulroney convened a First Ministers' Meeting which lasted for six days. On 9 June 1990, they released a communiqué, which committed the premiers to seek a final decision on *Meech* prior to 23 June 1990 and then to adopt a companion resolution which would have redistributed seats in the Senate.

11 It will not review, except for what appears in the previous note, the historical context for this proposal or the details of the discussions with the previous governments of Newfoundland and Quebec.

12 H.B. Lees-Smith, *Second Chambers in Theory and Practice* (London: George Allen & Unwin Ltd., 1923); J.A.R. Marriott, *Second Chambers: An Inductive Study in Political Science* (Oxford: Clarendon Press, 1910); Samuel C. Patterson & Anthony Mughan, *Senates: Bicameralism in the Contemporary World* (Columbus: Ohio State University Press, 1999); Harold W. Temperley, *Senates and Upper Chambers* (London: Chapman and Hall Ltd., 1910); and George Tsebelis & Jeannette Money, *Bicameralism* (Cambridge: Cambridge University Press, 1997).

13 Alexander Hamilton, "Federalist No. 27" in Clinton Rossiter, ed., *The Federalist Papers* (New York: Mentor, 1999) at 143.

14 *Ibid*. at 347.

15 "Bryce Conference Report of 1918" in Lees-Smith, *Second Chambers in Theory and Practice*, *supra* note 12 at 33.

16 Marriott, *Second Chambers: An Inductive Study* *supra* note 12 at 86.

17 *Reference re Legislative Authority of Parliament of Canada*, [1980] 1 S.C.R. 54.

18 There are several ways that the uniting of "peoples" has been characterized, including the recent characterization of "nations." At the time of Confederation, George-Étienne Cartier

spoke of the union of English, French, Irish and Scottish peoples. Henri Bourassa suggested there was a dual compact. More recently, Romney has suggested there was a compact between the conquered French and the English conqueror stemming from the capitulations of Quebec and Montreal; from the *Quebec Act, 1774* (U.K.), 14 George III, c.83; the *Constitutional Act, 1791* (U.K.), 31 Geo. III, c. 31 (which divided the old province of Quebec into Upper and Lower Canada); and finally from the *Constitution Act, 1867*. These authors all point to the same idea that Canada is more than simply a union of provinces or individual Canadians. (For a more detailed discussion see Paul Romney, "Provincial Equality, Special Status and the Compact Theory of Canadian Confederation" (1999) 32 Canadian Journal of Political Science 21; Kenneth McRoberts, *Misconceiving Canada: The Struggle for National Unity* (Don Mills: Oxford University Press, 1997); and Ramsay Cook, *Provincial Autonomy, Minority Rights and the Compact Theory 1867-1921* (Ottawa: Queen's Printer, 1969).

19 Bill C-56, *An Act to amend the Constitution Act, 1867 (Democratic representation)*, 1st Sess., 39th Parl., 2007.

20 See *e.g.*, Jeffrey Simpson "Harper fiddles with the electoral map while Ontario burns" *The Globe and Mail* (25 May 2007) A25.

21 *Constitution Act, 1867*, *supra* note 3.

22 *Constitution Act, 1915*, (U.K.) 5 & 6 Geo. V, c. 45, s. 22. Newfoundland and the Territories were assigned representation outside of the four formal divisions.

23 *Constitution Act, 1867*, *supra* note 3 at s. 23(5).

24 *Supra* note 3.

25 The colony covered only 36,000 km² of the 650,000 km² landmass of Manitoba.

26 *British Columbia Terms of Union* (formerly *Terms of Order of Her Majesty in Council admitting British Columbia into the Union*), dated the 16th day of May, 1871, online: The Solon Law Archive http://www.solon.org/Constitutions/Canada/English/bctu.html; *Alberta Act*, S.C. 1905, c. 3; *Saskatchewan Act*, S.C. 1905, c. 42.

27 *Constitution Act, 1915* (U.K.), 5 & 6 Geo. V., c. 45.

28 *Prince Edward Island Terms of Union* (formerly *Order of Her Majesty in Council admitting Prince Edward Island into the Union*), dated the 26th day of June, 1873, online: The Solon Law Archive, <http://www.solon.org?Constitutions/Canada/English/peitu.html>.

29 Even at the time of Confederation it was not expected that Newfoundland would be included in the "Maritime division" and an additional four Senate seats had been allowed for in section 147 of the *Constitution Act, 1867*, *supra* note 3. This same section instructed that Prince Edward Island, which, it had been thought, would join the original union of 1867, would be included as part of the "Maritime division."

30 Text available online: The Solon Law Archive <http://www.solon.org?Constitutions/Canada/English/Proposals/Victoria_Charter.html>.

31 Victoria Charter, s.1: "Amendments to the Constitution of Canada may from time to time be made by proclamation issued by the Governor General under the Great Seal of Canada when so authorized by resolutions of the Senate and House of Commons and of the Legislative Assemblies of at least a majority of the Provinces includes: a) every Province that at any time before the issue of such proclamation had, according to any previous general census, a population of at least twenty-five per cent of the population of Canada; b) at least two of the Atlantic Provinces; and c) at least two of the Western Provinces that have, according to the then latest general census, combined populations of at least fifty per cent of the population of all the Western Provinces."

32 In 1990, the Senate numbers were temporarily increased by eight through section 26 of the *Constitution Act, 1867*, *supra* note 3, with two additional Senators being appointed by Brian Mulroney for each of the four regions so as to break a senate deadlock with the House of Commons.

33 The Beige Paper makes clear that its numbers are for illustrative purposes only. For the full text of the Beige Paper see: The Constitutional Committee of the Quebec Liberal Party, *A New Canadian Federation* (Montreal : The Quebec Liberal Party, 1980).

34 The Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, *Final Report* (Ottawa: Information Canada, 1972) [The Molgat-MacGuigan Report]; Task Force on Canadian Unity, *A Future Together: Observations and Recommendations* (Ottawa, Supply & Services Canada, 1979), online: The Solon Law Archive <http://www.solon.org/Constitutions/Canada/English/Committees/Pepin-Robarts. [The Pepin-Robarts Report].

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

36 The general amending formula adopted in the *Constitution Act, 1982* is based on the "Fulton-Favreau Formula" of 1964, originally proposed by E. Davie Fulton (Minister of Justice in 1961) and modified slightly by his successor Guy

Favreau. This is loosely based on the principle of equality of provinces and requires the consent of Parliament and two-thirds of the legislatures representing at least 50 percent of the population of Canada. The Trudeau government had offered the provinces either the Fulton-Favreau Formula, the Victoria Formula, or some variation that included referenda during the patriation negotiations.

37 Canada, Special Joint Committee on the Process for Amending the Constitution of Canada, *The Process for Amending the Constitution of Canada*: *The Report of the Special Joint Committee* (Ottawa: Supply and Services, 1991), recommendation 1.

38 Bill C-110, *An Act respecting constitutional amendments*, 1st Sess., 35th Parl., 1995.

39 Bill C-110, *An Act respecting constitutional amendments*, S.C. 1996, c.1

40 Bruce M. Hicks, ed., *Directory of Government* (Toronto: The Financial Post Company, 1990).

41 Senator Murray's motion would give the region of British Columbia only twelve Senate seats. The other regions would maintain the current twenty-four seats, with the twenty-four in the prairies redistributed to give seven each to Manitoba and Saskatchewan and ten to Alberta.

42 Senate Reform Committee, *supra* note 7 at 12.

43 Gordon Robertson, *A House Divided: Meech Lake, Senate Reform and the Canadian Union* (Halifax: The Institute for Research on Public Policy, 1989) at 3.

44 David Kilgour, *Inside Outer Canada* (Edmonton: Lone Pine Publishing, 1990).

45 Peter McCormick, Ernest C. Manning & Gordon Gibson, *Regional Representation: The Canadian Partnership* (Calgary: Canada West Foundation, 1981) at 110 [McCormick *et al.*].

46 *Ibid*.

47 Peter McCormick, *The 1988 Senate Vote* (Calgary: Canada West Foundation, 1998) at 4.

48 *Correspondence Relating to the Meech Lake Accord and the Constitutional Proposal Submitted by the Government of Newfoundland & Labrador* (18 October — 6 November 1989) [unpublished] [Newfoundland and Labrador].

49 The Committee offered two alternative sets of numbers as the basis of negotiation. The Liberal Party dissented and proposed its own numbers. Special Joint Committee on a Renewed Canada, *A Renewed Canada* (Task Force Report) (Ottawa: Supply and Services, 1992) at 51 — 52 [Beaudoin-Dobbie Committee].

50 Alberta, Special Select Committee on Upper House Reform, *Strengthening Canada: Reform of Canada's Senate* (Edmonton: 1985).

51 See Newfoundland and Labrador, *supra* note 48.

52 *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on The 1987 Constitutional Accord* (Ottawa: Queen's Printer for Canada, 1987) at 2025.

53 Beaudoin-Dobbie Committee, *supra* note 49 at 50.

54 *Ibid*.

55 Canada, Intergovernmental Affairs, Charlottetown Accord (28 August 1992), online: Government of Canada — Privy Council Office http://www.pco-bcp.gc.ca/aia/default.asp?Language=E&Page=consfile&doc=charlottetwn_e.htm>.

56 The Charlottetown Accord also recommended separate Aboriginal people's representation in the Senate over and above provincial and territorial representation, though it left the numbers to be determined by future negotiations.

57 See Richard Johnson, André Blais, Elisabeth Gidengil and Neil Nevitte, The Challenge of Direct Democracy: the 1992 Canadian Referendum (Montreal: McGill-Queen's University Press, 1996).

58 Canada, Special Senate Committee on Senate Reform, *Proceedings of the Special Senate Committee on Senate Reform*, 39th Parl., 1st Sess., No. 4 at 17 (20 September 2006).

59 Gary Mar, Marie Bountrogianni & Benoît Pelletier, "Round Table on Senate Reform" (2006) 29 Canadian Parliamentary Review 9 at 10.

60 *Ibid*. at 12.

61 *Ibid*. at 14.

62 Michael Pal & Sujit Choudhry, "Is Every Ballot Equal? Visible Minority Vote Dilution in Canada"(2007) 13 Institute for Research on Public Policy Policy Choices 1. In another paper released by the IRPP, I use Toronto municipal elections to show that socio-economic factors, including ethnicity, may be resulting in lower voter turnout (Bruce M. Hicks, "Are Marginalized Communities Disenfranchised? Voter Turnout and Representation in Post-Merger Toronto" (Institute for Research on Public Policy Working Paper, November 2006), online: <http://www.irpp.org/fasttrak/index.htm>. When these two papers are looked at in tandem, it appears that minorities have specific representational challenges in Canada that may be beyond simple remedies such as fairer redistribution.

63 Indian and Northern Affairs Canada, *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol. 2 (Ottawa: Canada Communications Group, 1996) online:

Royal Commission on Aboriginal Peoples ,http://www.ainc-ianc.gc.ca/ch/rcap/index_e.html>.

64 Some countries have been willing to set aside seats for Aboriginals in their legislatures (countries as varied in history, culture, and political systems as New Zealand, Venezuela, and Taiwan). This has not been a central point of discussion in Canada, though a third chamber for Parliament was proposed by the Royal Commission on Aboriginal Peoples. Instead, official federal government policy is to devolve authority to individual Aboriginal nations for self-government on a one-on-one basis.

65 Mala Htun, "Is Gender like Ethnicity? The Political Representation of Identity Groups" (2004) 2 Perspectives on Politics 439.

66 The adjustment of ridings in the New Brunswick legislature to accommodate the minority Francophone population in the north of the province is a typical example of this Canadian approach to addressing linguistic/cultural duality.

67 For example, a case also could be made for dividing Alberta. While two-thirds of the province is now urban, it would seem that a rural-urban divide would not provide the most appropriate representation in a federal Parliament. The political and socio-cultural divide between North and South (the north centred around Edmonton and the south around Calgary) seems a more appropriate division to ensure diversity of representation in a second chamber given the powers of the federal government.

68 The idea of limiting the Senate's powers is often advanced as a way of satisfying Ontario's apprehension over insufficient representation in the Senate. This can dramatically undermine the review function and negatively affect the representational balance envisioned by bicameralism. See Tsebelis & Money, *supra* note 12 for a modeling of how bicameral chambers interact.

69 Even in the case of Quebec, where senators are required, pursuant to s. 23(6) of the *Constitution Act, 1867*, *supra* note 3, to hold property in twenty-four specific "electoral divisions" so as to ensure that various regional and sectional interests in the province were represented in the Senate, the majority of these districts are located in southern Quebec.

70 Special Joint Committee on Senate Reform, *Report of the Special Joint Committee of the Senate and of the House of Commons on Senate Reform* (Ottawa: Queen's Printer, 1984) at 24 [Molgot-Cosgrove Committee].

71 The Canada West Foundation proposed using a single transferable vote system, which clearly has informed the Harper Government's proposals. See McCormick *et al*., *supra* note 45. The other two proposals suggested proportional representation using party lists. See the Royal Commission on the Economic Union and Development Prospects for Canada, *Report* (Ottawa: Queen's Printer, 1985); and Beaudoin-Dobbie Committee, *supra* note 49.

72 This is possible by using, on the one hand, multimember districts and, on the other, by not restricting these districts to provincial and territorial boundaries but rather drawing them along community lines so as to ensure diversity in representation.

73 The redistribution of seats in the Commons, it is assumed, would be based on a more simplified version of the formula adopted at Confederation and modified since then, without the numerous grandfather clauses and exemptions that have since come into play. In this model, Quebec is given 75 seats and the allocation of Commons seats to other provinces is then done proportionally to Quebec's (current population levels, this would means approximately one representative for every 102,000 persons), with no province or territory receiving fewer than one seat. This is the formula used in Table 5 for the redistributed Commons and the natural distortions it creates where the largest provinces come in slightly under-represented can be seen here.

74 In addition, there are the representational issues of the Aboriginal governments in northern Quebec and of the English and Allophone populations of Montreal.

75 The percentage of Parliament is arrived at by averaging the share of seats in each of the two chambers, though this obviously does not tell the whole story. For example, British Columbia would appear to have less of a share of Parliament than Atlantic Canada and yet it has double the percentage of MPs (a number that will consistently increase given population trends).

76 This is reflected in public opinion polls taken throughout the constitutional negotiations, which increasingly moved toward support for an elected Senate as follows:

Year	Appointed	Elected	Abolish	Don't Know
1990	9%	51%	22%	18%
1989	14%	51%	19%	16%
1987	15%	44%	21%	21%
1985	15%	41%	26%	18%
1961	18%	46%	17%	19%

1954	25%	31%	21%	23%
1944	18%	31%	36%	15%

Source: Gallup Canada, Inc.

77 Frith, *supra* note 5 at 114.

POGG as a Basis for Federal Jurisdiction over Public Health Surveillance

Sina A. Muscati*

Introduction

In the aftermath of Severe Acute Respiratory Syndrome (SARS) and with concern growing about avian flu, mad cow, and other emerging diseases, public health surveillance has become a matter of importance to Canadians. Such surveillance is a key component of the fight against these diseases; it involves the systematic collection, analysis, interpretation, and dissemination of data about health-related events for use in public health responses. Indeed, new technologies enable "data mining" at an unprecedented scale, both in the amount and type of information that can be collected, and in the extent to which that information can be used to identify public health concerns. All this has made the concept of "anonymous" information less and less realistic.

Laws are needed to govern the collection, use, and disclosure of personal health information. The question at issue is whether or not the federal government has the jurisdiction to legislate in this area. This article will argue that it does. After first providing an overview of the history of public health regulation in Canada, the article will identify different constitutional bases for federal jurisdiction. It will focus in particular on the national concern branch of the "Peace, Order, and Good Government" (POGG) power to justify federal involvement in the field of public health surveillance.

Public Health – An Overview

Defining Public Health

The concept of "public health" has not been explicitly defined in any Canadian legislation or case law. A 2003 report published by Health Canada's National Advisory Committee on SARS and Public Health (the Naylor Report) defines public health as "the science and art of promoting health, preventing disease, prolonging life and improving quality of life through the organized efforts of society."[1] The report emphasizes two elements: "the prevention of disease, and the health needs of the population as a whole."[2] This description of public health has also been adopted by the Canadian Public Health Association.[3] Similarly, the federal *Department of Health Act* describes the Minister's public health mandate as one of "the promotion and preservation of the physical, mental and social well-being of the people of Canada . . . the protection of the people of Canada against risks to health and the spreading of diseases . . . [and] the investigation and research into public health, including the monitoring of diseases."[4]

On this basis, public health is perhaps best described as the practice of developing measures to prevent illness and promote the general health of the entire population. This is to be contrasted with "health care," which is more curative in approach and focuses on treating the particular ailments of an individual. Public health can cover a wide range of efforts to keep Canadians healthy as well as efforts to relieve pressure on health care systems. These include

such measures as immunization, infection control, emergency preparedness and response, disease detection, surveillance, laboratory testing, and regulations to support these and other public health activities.[5] Depending on the circumstances, these activities could fall within either federal or provincial jurisdiction, or in some cases both. Jurisdiction, of course, is determined in accordance with the federal division of powers set out in the *Constitution Act, 1867*.[6] Under the Constitution, public health matters of a local nature, including city drinking water safety, school health checks, private workplace safety, and immunization fall within provincial jurisdiction. In turn, provinces frequently delegate these powers to municipalities.

Constitutional Support for a Federal Role

Traditional provincial jurisdiction over health-related matters

A key reason why public health has been so difficult to define, particularly from a constitutional standpoint, is that it did not exist as a concrete concept at the time of Confederation. The attempt to find constitutional support for federal jurisdiction over public health surveillance is further complicated by the fact that courts have traditionally assigned jurisdiction over many health-related matters to the provinces. One example is the Supreme Court decision in *Schneider v. The Queen*, where the appellant argued that British Columbia's *Heroin Treatment Act*[7] (which provided for compulsory treatment and detention of heroin users) was *ultra vires* the provincial legislature. In dismissing the appeal, Justice Dickson stated for the majority: "the view that the general jurisdiction over health matters is provincial (allowing for a limited federal jurisdiction either ancillary to the express heads of power in s. 91 or the emergency power under peace, order and good government) has prevailed and is now not seriously questioned."[8]

The basis for provincial jurisdiction over health matters is tied largely to the power of the provinces pursuant to the *Constitution Act, 1867* to legislate in relation to "The Establishment, Maintenance and Management of Hospitals," as well as to "Generally all Matters of a merely local or private Nature in the Province."[9] There is evidence indicating that in 1867 health was viewed primarily as a matter of private or local interest, with most people depending primarily on their families, neighbours, charities or religious institutions for care in times of illness.[10] Few institutionalized health services were delivered by the state, and the administration of public health was at a primitive stage. This was clearly recognized by The Royal Commission on Dominion-Provincial Relations in 1938:

> In 1867 the administration of public health was still in a very primitive stage, the assumption being that health was a private matter and state assistance to improve or protect the health of the citizen was highly exceptional and tolerable only in emergencies such as epidemics, or for purposes of ensuring elementary sanitation in urban communities. Such public health activities as the state did undertake were almost wholly a function of local and municipal governments. It is not strange, therefore, that the British North America Act does not expressly allocate jurisdiction in public health, except that marine hospitals and quarantine (presumably ship quarantine) were assigned to the Dominion, while the province was given jurisdiction over other hospitals, asylums, charities and eleemosynary institutions.[11]

Over time, health matters have come to adopt an increasingly public role in Canada. Correspondingly, the courts have come to hold that provinces possess jurisdiction to legislate over such public health-related matters as sanitation and prevention of the spread of communicable diseases.[12] Provinces have exercised this jurisdiction to engage in such activities as health surveillance, outbreak investigation, quarantine, isolation and mandatory health treatment.[13] Each province has its own public health legislation regulating these activities.

Recognition of federal jurisdiction over health

Despite this traditional provincial jurisdiction over health-related matters, courts have also recognized a federal role in those aspects of public health that are national in scope. The Supreme Court has on different occasions held that the federal government can legislate on public health matters in its own right, even in fields

in which provinces have already legislated. In *Schneider*, for example, Justice Laskin referred to a legitimate field of public health regulation under the POGG power, "directed to protection of the national welfare."[14]

Also in *Schneider*, Justice Estey argued in favour of federal legislation in relation to health problems having a national rather than local dimension.[15] He pointed out that health "is an amorphous topic which can be addressed by valid federal or provincial legislation, depending on the circumstances of each case and on the nature or scope of the health problem in question."[16] Justice LaForest in *RJR-MacDonald Inc. v. Canada (Attorney General)* later added that the "amorphous" nature of health as a constitutional matter means "that Parliament and the provincial legislatures may both validly legislate in this area."[17]

Hence, even if the provinces have, to date, been the primary actors in such fields as public health surveillance and infectious disease control, the federal government retains jurisdiction to legislate in these fields. However, provinces are still likely to view the creation of any public health system as a form of encroachment on their traditional jurisdiction. It is essential, therefore, that such a system be grounded "on an incontrovertible constitutional foundation."[18]

There are a number of possible bases for federal authority over public health, including federal constitutional authority over criminal law, quarantine, spending, inter-provincial trade, and peace, order and good government.[19] Of these, the POGG power is probably the most helpful. Over a series of cases, courts have interpreted the POGG provision as having emergency, gap, and national concern branches.[20] The emergency branch has been interpreted to apply to temporary legislative measures enacted to address an emergency situation. The gap branch has been interpreted to apply to matters not contemplated at the time of Confederation, or inadvertently omitted from the *Constitution Act*, *1867*. It is the third branch, national concern, that is likely to lend the most support to a federal power in public health surveillance. This branch is described in more detail in the next section.

POGG – National Concern

Concern to the Nation

The national concern branch of the POGG power was analyzed by the Supreme Court in *R. v. Crown Zellerbach Canada Ltd*. In that case, the respondent argued that section 4(1) of the *Ocean Dumping Control Act*,[21] which applied to the dumping of waste in waters within a province, was *ultra vires* Parliament. In allowing the appeal, the Court held that section 4(1) is constitutionally valid as enacted in relation to a matter falling within the national concern doctrine of the POGG power.

The Court went on to elaborate that the national concern branch itself has two sub-elements. The first of these is that the power applies only to matters that are of concern to the nation, in other words, to matters that have attained such significant national dimensions as to warrant the granting of federal jurisdiction.[22] As acknowledged in *Crown Zellerbach*, this aspect of the national concern doctrine was first formulated by the Privy Council in *Attorney-General of Ontario et al. v. Canada Temperance Federation et al.*[23] That case examined the validity of the *Canada Temperance Act*,[24] which provided an option for municipalities to opt-in to a scheme for prohibition. The Court held that the true test was whether the matter was one of national concern and therefore supported by the POGG power:

> [T]he true test [in invoking POGG] must be found in the real subject-matter of the legislation: if it is such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole . . . then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch upon matters specially reserved to the Provincial Legislatures. War *and pestilence*, no doubt, are instances" [emphasis added].[25]

As can be seen, it was specifically suggested in *Canada Temperance Federation* that federal legislation in response to such public health matters as an epidemic of "pestilence" would

fall within the purview of the POGG national concern doctrine.[26] The case went so far as to state that federal legislation based on national concern in respect of pestilence or disease need not be limited to an emergency measure, but could also extend to a preventative measure:

> To legislate for prevention appears to be on the same basis as legislation for cure. *A pestilence has been given as an example of a subject so affecting, or which might so affect, the whole Dominion that it would justify legislation by the Parliament of Canada as a matter concerning the order and good government of the Dominion. It would seem to follow that if the Parliament could legislate when there was an actual epidemic it could do so to prevent one occurring and also to prevent it happening again*" [emphasis added].[27]

Canada Temperance Federation was also cited by the Supreme Court in *Schneider* to support its assertion that "federal legislation in relation to 'health' can be supported where the dimension of the problem is national rather than local in nature."[28]

Increasing national dimension of public health

According to *Crown Zellerbach*, matters falling within the national concern branch may be new, but they may also be "matters which, although originally matters of a local or private nature in a province, have since, in the absence of national emergency, become matters of national concern."[29] On this basis, it can be argued that in comparison to 1867, today's society is far more national or global than provincial, a change that is significant in the context of health risk, particularly the risk of infectious disease.

The increasing permeability of international borders and the changing nature of transportation methods have altered the potential impact of what were once considered merely local health problems. Globally, there were 715 million international tourist arrivals registered at international borders in 2002.[30] The volume, speed, and reach of contemporary travel did not exist in 1867; today, Canadians live within twenty-four hours of virtually any location on Earth. This time frame is shorter than the incubation period for many communicable diseases, which increases the likelihood of the transmission of infectious diseases via human migration. As the recent SARS crisis has illustrated, a local disease affecting China's Guangdong province may be very quickly carried by travellers from there to Hong Kong, and then to Vietnam, Singapore and on to Canada.[31]

The Naylor Report also points out that certain emerging infectious diseases are a new phenomenon of the late twentieth and twenty-first centuries. Over thirty previously unknown viral and bacterial diseases have emerged in recent decades including Ebola virus, Legionnaire's disease, HIV/AIDS, hepatitis C, variant Creutzfeldt-Jakob disease, avian flu, and West Nile virus.[32] These are diseases of international significance. There are also other new infectious disease trends threatening Canadians. Environmental changes such as global warming, deforestation, and water pollution have increased the incidence of Lyme disease, for example.[33] The new health risks posed by disease re-emergence, environmental change, and such factors as globalization and bioterrorism, have arguably altered the scope and response time expected of any health surveillance program.[34]

Various parliamentary and government bodies have begun to acknowledge the importance of an increased federal role in some areas of public health. Between 1999 and 2001, for example, the Standing Senate Committee on Social Affairs, Science and Technology studied the state of the Canadian health care system and the federal role in that system. In its subsequent multi-volume report (the Kirby Report), the Committee declared that the federal government has an important role to play in the fields of health protection, disease prevention, and health and wellness promotion. It also recommended that some of the objectives of the federal government in this area should be to:

(a) "strengthen our national capacity to identify and reduce risk factors which can cause injury, illness and disease, and to reduce the economic burden of disease in Canada"; and

(b) "encourage population health strategies by studying and discussing the health out-

> comes of the full range of determinants of health, encompassing social, environmental, cultural and economic factors."[35]

International and inter-provincial aspects of public health

Another factor making certain areas of public health a matter of national concern is Canada's recent assumption of international reporting commitments, cannot be met which unless the federal government has national jurisdiction over personal health information. The World Health Organization (WHO) has established International Health Regulations (IHRs)[36] laying out expectations for member states regarding surveillance, reporting, and outbreak management to help stem the spread of infectious diseases. IHRs emphasize the collection of national data regardless of internal boundaries and the establishment of a single contact point for data collection. Both factors support the case for federal jurisdiction.

In 1995, the World Health Assembly instructed the WHO Secretariat to begin the process of revising the IHRs. Following the SARS outbreak of 2003 and the 2004 epidemic of avian flu, this revision process was accelerated. In May 2005, the World Health Assembly finally approved a new set of IHRs to "prevent, protect against, control and provide a public health response to the international spread of disease."[37] These regulations provide member states with even broader obligations to build national capacity for routine preventive measures as well as to detect and respond to public health emergencies of international concern.[38] For example, the revised IHRs call for state parties to "utilize existing national structures and resources to meet their core capacity requirements under these Regulations, including with regard to…their surveillance, reporting, notification, verification, response, and collaboration activities."[39] The new regulations are to come into force 15 June 2007.

In this context, it is important to note that it is the federal government which has responsibility over treaty making. Moreover, the Supreme Court has held that where an international treaty stipulates that a policy matter straddles the divide between provincial and federal jurisdiction, the case for federal jurisdiction is stronger.[40] One prominent Canadian scholar of health law, Professor Dale Gibson, has suggested that the following two public health matters would fall "unquestionably" within the POGG (national concern) power:

> (a) "taking measures to prevent the spread of disease from one province to another"; and
>
> (b) "negotiation, implementation and enforcement within Canada of international treaties concerning health-related matters."[41]

Gibson authored an influential 1976 article in which he described the national concern branch of POGG,[42] and argued that the "national dimensions"[43] branch matters cover "beyond the ability of the provincial legislatures to deal with."[44] He also argued that where the matter at issue "requires the co-operative action of two or more legislatures, the 'national dimension' concerns only the risk of non-co-operation, and justifies only federal legislation addressed to that risk."[45] In fact, Gibson's approach to the national dimension branch of POGG was adopted by the majority of the Supreme Court in *Crown Zellerbach*, which remains the most comprehensive court review of the POGG power to date.

Single, Distinctive and Indivisible

The second sub-element of the national concern branch pursuant to *Crown Zellerbach* is that the matter at issue must have a "singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern."[46] According to the Court, in making this determination it is relevant to consider what the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the "intra-provincial aspects of the matter" would be; this has come to be known as the provincial inability test.[47]

Impacts on other provinces

To satisfy the provincial inability test, it

must be shown that significant deleterious effects would result from the inability of the provinces to address a matter. This might occur in areas where the impact of policy both within and outside a province is linked, where a province cannot effectively regulate a policy area on its own, or where the failure of one province to regulate would affect the health of residents of another province.[48] All that is required is that the "provincial failure to deal effectively with the intra-provincial aspects of the matter *could* have an adverse effect on extra-provincial interests" [emphasis added].[49] Theoretically at least, federal jurisdiction in this context could even extend to a disease outbreak confined entirely to one province.

There is a strong argument to be made that infectious disease surveillance satisfies these requirements. As was noted in the Naylor Report, "if any province fails to contain an outbreak [of disease] efficiently, the results for all of Canada are devastating on multiple levels."[50] Even Ontario's SARS Commission in its Interim Report lamented the lack of federal-provincial cooperation in public health protection. The report states outright that, "[o]ne of the biggest problems during the Ontario SARS crisis was the inability of the federal and provincial governments to get their acts together."[51] The SARS Commission goes on to argue that "the evidence from SARS makes one thing crystal clear: the greatest benefit from new public health arrangements can be a new federal presence in support of provincial delivery of public health."[52] It also warns that, "[i]f a greater spirit of federal-provincial co-operation is not forthcoming in respect of public health protection, Ontario and the rest of Canada will be at greater risk from infectious disease and will look like fools in the international community."[53]

According to the Interim Report, "[p]roblems with the collection, analysis and sharing of data beset the effort to combat SARS." This "prevented the timely transmission from the Ontario Public Health Branch of vital SARS information needed by Ottawa to fulfill its national and international obligations."[54] This point is significant because federal-provincial or inter-provincial collective action problems are important indicia of provincial inability.[55] Hence, the failure of the federal and provincial governments to agree on an effective system of national surveillance supports an argument for federal jurisdiction over this field.

Every province and territory would benefit from more effective public health policy. This is especially true for provinces with populations smaller than those of even medium-sized cities around the world (e.g., Prince Edward Island, Newfoundland, and Saskatchewan), which may not be able to generate large enough sample sizes to produce meaningful research or identify significant health trends on their own. The relatively small population of Canada, and the preference this creates for a national approach to disease surveillance, was highlighted in a 2002 Health Canada Report,[56] which urged the creation of a single national database of personal health information on the basis that:

(a) it would allow for sensitivity to patterns that may emerge from the analysis of a large number of cases, but which may not be as evident when analysing a smaller number of cases within a province or territory;

(b) it is important in disease prevention to be able to "make comparisons between different regions of the country regarding ways [a disease] is transmitted between people, the types or symptoms of the disease and the effectiveness of different prevention or control programs";

(c) it would be a "cost-effective means of ensuring that all provinces and territories, and national agencies, have access to these services";

(d) differences exist across provinces in how they keep statistics, how they define health terms, and how they count cases, making it difficult to "aggregate provincial and territorial statistics into a national picture."[57]

Other benefits of a federally-run surveillance system

In contrast to the efforts of ten individual provinces, the larger scale of a national surveillance network may be more efficient and cost-effective. It would facilitate the sharing of

expertise and the accumulation of experience within a single network.[58] This in turn would make it more competitive in attracting the type of scientists needed for a world-class health protection system. It would also provide a focal point for Canada to manage health issues at its borders and to interact with the global community.[59] For example, the Naylor Report cites the example of observers who feel that Canadian officials failed to communicate adequately with officials in Hong Kong, Singapore and China during the SARS crisis, thus missing the opportunity to learn from foreign public health officials with relevant experience. This problem could have been more easily addressed had there been a national surveillance body to coordinate these efforts.

The increasing mobility of Canada's population also means that national record sharing is needed to ensure consistency of care. In this vein, the Naylor Report recommended a national surveillance system and argued that, "surveillance … should not only detect emerging health risks, but include systems that allow public health officials to monitor and evaluate progress in health protection and disease prevention."[60] Furthermore, the report of the Commission on the Future of Health Care in Canada recommended both public health programs that deal with epidemics and a national immunization strategy.[61]

Infectious vs. Chronic Diseases

At this point it is worthwhile to consider an important secondary question arising in the context of debate over the existence of federal jurisdiction over health surveillance particularly under the POGG "national concern" branch: is federal jurisdiction restricted to infectious disease, or can it also extend to chronic diseases such as cancer, diabetes, and heart disease? A look at the history of public health regulation in Canada seems to suggest that the original mission of public health was to protect against infectious disease. For example, one of the earliest pieces of public health legislation was an Act passed in 1833 in Upper Canada calling for the establishment of boards of health "to guard against the introduction of malignant, contagious and infectious diseases in this province."[62]

Distinction between infectious and chronic disease breaking down

There are important distinctions between infectious and chronic disease which explain why jurisdiction should extend only to the former in any federal public health system. For example, the threat from infectious disease is direct and immediate: "an outbreak of infectious disease, if not controlled, can bring a province and eventually the country to its knees within days or weeks, a threat not posed by chronic or lifestyle diseases."[63] Moreover, "infectious disease prevention requires an immediate overall response because it moves rapidly on the ground and spreads quickly from one municipality to another and from province to province and country to country, thus engaging an international interest."[64]

Nevertheless, many of the traditional distinctions between infectious and chronic disease are beginning to blur. This is due in part to the changing nature of our understanding of chronic disease. More and more chronic diseases are now understood to be caused by infections, or at least to have infection co-factors.[65] Furthermore, the ability to fight chronic disease is closely linked to the ability of a population to withstand the onslaught of infectious disease. Consider the fact that the very people already suffering from a chronic disease tend to be the ones at highest risk of contracting an infectious disease. This was aptly demonstrated during the SARS crisis, when most SARS victims were people already suffering from diabetes and other chronic diseases.[66]

Chronic disease a matter of increasing national concern [since 1867]

In the past 100 years, chronic disease has taken on an increased significance relative to infectious disease as a matter of national concern to Canadians. In the early 1900s, infectious disease was the leading cause of death in Canada; today, it account for only 5 percent of all deaths in Canada and many of those are of people (particularly the elderly) already afflicted with chronic disease.[67] Not only has chronic disease become the leading cause of death and disability in Canada, it also accounts for the largest

proportion of the economic burden of illness.[68] As the picture of health changes dramatically, governments should respond accordingly.

A number of government reports have also recommended increased federal involvement in public health regulation to counter chronic disease. For example, the Kirby Report recommends the establishment of a National Chronic Disease Prevention Strategy that would incorporate public education efforts, mass media programs, and so on.[69] The Naylor Report also recommended a national public health strategy addressing infectious disease, but also the "causes of chronic diseases and injuries."[70] In this regard, it is interesting to note that the U.S. Center for Disease Control and Prevention already has jurisdiction over chronic disease prevention and control.[71]

POGG – Gap and Emergency

Gap

In addition to the national concern branch, the POGG power also has gap and emergency branches that can also be analysed in the context of public health. The gap branch applies to matters not contemplated at Confederation, or to matters inadvertently omitted from the *Constitution Act, 1867*. Indeed, the success of any gap analysis will likely depend on how the public health surveillance issue is framed.

For example, an argument could be made that concerns such as the disease trends referred to earlier or the volume and extent of international travel today, as well as the corresponding need for an intricate and wide-ranging health information network, stem from phenomena not contemplated at Confederation. However, if the matter were framed as one concerning the collection, control and use of personal health information, then it would likely not be novel enough to qualify under the gap branch.

Emergency

The last branch of POGG is the emergency power. The emergency power has been referred to in the past to grant Parliament the jurisdiction to regulate inflation (on the grounds that it posed an economic threat to Canada).[72] This applies to powers exercised to address a national emergency. There are cases holding that epidemics or pestilence would likely constitute such an emergency.[73] However, the emergency power is temporary, applying only for the duration of the emergency.[74] It cannot, therefore, constitute the basis of either preventative or permanent federal legislation in the field of public health. It was for these reasons that the Naylor Report concluded that, "the emergency branch of the POGG power could not serve as the constitutional basis of mandatory reporting for a national surveillance system."[75]

Quarantine

Another federal power worth analyzing in greater detail is the quarantine power pursuant to section 91(11) of the *Constitution Act, 1867*. The scope of this power is unclear, for example, as to whether its application is only to ship's quarantine, to quarantine at entry into and exit from Canada, or to something broader.[76] An argument can be made that the power should be interpreted broadly today to reflect the changing norms of domestic and international travel referred to earlier.

There is also some suggestion that the federal quarantine power can be derived not only from the section 91(11) quarantine provision of the *Constitution Act*, *1867*, but also from the POGG power itself. For example, in *Labatt Breweries v. Attorney General of Canada*, the Supreme Court commented that "Parliament can make laws in relation to health for the peace, order and good government of Canada: quarantine laws come to mind as one example."[77] On this basis, perhaps the quarantine power in conjunction with POGG can assist in compelling the collection of information not only at Canada's borders, but within Canada as well, pursuant to national surveillance legislation and policy.

Conclusion

Public health is an area of concurrent federal and provincial jurisdiction. Federal jurisdiction can be derived from different parts of

the Constitution, the most useful being the national concern branch of the POGG power. Public health matters are also becoming increasingly more national in scope in light of the changing scale and character of international travel, emerging disease trends, and ongoing treaty commitments. Federal control is further justified by existing challenges with respect to the coordination of data-sharing between provinces, and the increased efficiency afforded by centralized federal control.

As our understanding of the character of public health changes, so too should our interpretation of the Constitution evolve. Federal jurisdiction need not be restricted to infectious disease as the definitional line distinguishing it from chronic disease continues to blur. It must be stressed, however, that jurisdiction is limited to public health with a national scope, and will not include local and provincial public health matters. In the aftermath of SARS, public health surveillance will be essential to addressing future public health threats of national concern. The time is ripe for the federal government to draw upon its jurisdictional authority and regulate this practice.

Notes

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1 Canada, National Advisory Committee on SARS and Public Health, *Learning from SARS: Renewal of Public Health in Canada* (Ottawa: Health Canada, 2003) (Chair: Dr. David Naylor) at 46 [Naylor Report].
2 *Ibid.*
3 Canadian Public Health Association, *Public Health Goals for Canada* (Ottawa: Public Health Agency of Canada, 2004) at 1.
4 *Department of Health Act*, S.C. 1996, c. 8, s. 4(2)(a.1-c).
5 Public Health Agency of Canada, *2005-2006 Report on Plans and Priorities* (Ottawa: 2005), online: <http://www.phac-aspc.gc.ca/rpp-2005-06/> (last updated: 24 March 2005).
6 (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App.II, No.5 (CanLII) [*Constitution Act, 1867*].
7 R.S.B.C. 1979, c. 166.
8 *Schneider v. The Queen*, [1982] 2 S.C.R. 112 at 138 (CanLII) [*Schneider*].
9 *Constitution Act*, *1867,* ss. 92(7) and (16).
10 Martha Jackman, "Constitutional Jurisdiction Over Health in Canada" (2000) 96 Health Law Journal 8 at 96.
11 Canada, Royal Commission on Dominion-Provincial Relations, *Report of the Royal Commission on Dominion-Provincial Relations* (Ottawa: J.O. Patenaude, Printer to the King, 1940) (Co-chairs: N.W. Rowell, J. Sirois).
12 Naylor Report, *supra* note 1 at 166.
13 *Ibid*.
14 *Schneider*, *supra* note 8 at 115.
15 *Ibid*. at 142.
16 *Ibid*. at 143.
17 [1995] 3 S.C.R. 199 at para. 32 (CanLII).
18 Nola M. Ries & Tim Caulfield, "Legal Foundations for a National Public Health Agency in Canada" (2005) 96 Canadian Journal of Public Health 4 at 282.
19 See respectively ss. 91(27) (Criminal Law), 91(11) (Quarantine and the Establishment and Maintenance of Marine Hospitals), 91(General) (powers of the Parliament), 91(2) (Trade and Commerce), and 91(Preamble) of the *Constitution Act, 1867.*
20 See e.g. *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401 [*Crown Zellerbach*].
21 S.C. 1974-75-76, c. 55.
22 *Crown Zillerbach*, *supra* note 20 at 422.
23 *Ibid*. at 423.
24 R.S., c. 152, s.1.
25 *Attorney-General of Ontario et al. v. Canada Temperance Federation et al*, [1946] 2 D.L.R. 1 at 5 [*Canada Temperance Federation*].
26 A pestilence has been defined as "a contagious or infectious epidemic disease that is virulent and devastating." See the *Merriam-Webster Dictionary*, 2005, *s.v.* "pestilence" online edition: <www.m-w.com>.
27 *Canada Temperance Federation, supra* note 25 at 7.
28 *Schneider, supra* note 8 at 142.
29 *Crown Zellerbach*, *supra* note 20 at para. 33.
30 Naylor Report, *supra* note 1 at 2.
31 *Ibid.* at 15.
32 *Ibid.*
33 Canada, Standing Senate Committee on Social Affairs, Science and Technology, *The Health of*

Canadians – The Federal Role, Volume 2: *Current Trends and Future Challenges* (Ottawa: 2002) (Chair: Michael Kirby) at 47 [Kirby Report, Volume 2].

34 Naylor Report, *supra* note 1 at 92.

35 Canada, Standing Senate Committee on Social Affairs, Science and Technology, *The Health of Canadians - the Federal Role*, Volume 4: *Issues and Options* (Ottawa: 2001) (Chair: Michael Kirby) at 23.

36 See generally *International Health Regulations* (1969), World Health Organization, online: <http://www.who.int/csr/ihr/en/> (last visited: 24 October 2005).

37 World Health Assembly, *Revision of the International Health Regulations*, WHA 58.3, 23 May 2005 [Revised IHRs], Article 2 (purpose and scope).

38 See e.g. *ibid*. Articles 4.1 (responsible authorities) and 10.1 (verification).

39 *Ibid*. Annex 1.

40 See generally *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437; *Schneider*, *supra* note 8.

41 Dale Gibson, "The Canada Health Act and the Constitution" (1996) 4 Health Law Journal 1 at 20 [Gibson].

42 Dale Gibson, "Measuring National Dimensions" (1976) 7 Manitoba Law Journal 15.

43 The phrases "national dimensions," "national scope," and "national concern" have been used synonymously in the case law with respect to this branch of POGG.

44 Gibson, *supra* note 41 at 33.

45 *Ibid*.

46 *Crown Zellerbach*, *supra* note 20 at para. 33.

47 *Ibid*. at para. 35. As the Court explained: "It is because of the interrelatedness of the intra-provincial and extra-provincial aspects of the matter that it requires a single or uniform legislative treatment."

48 Kumanan Wilson et al., "Understanding the Impact of Intergovernmental Relations on Public Health: Lessons from Reform Initiatives in the Blood System and Health Surveillance" (2004) 30 Canadian Public Policy, at 191.

49 *Crown Zellerbach*, *supra* note 20 at para. 35.

50 Naylor Report, *supra* note 1 at 105.

51 Ontario, The SARS Commission, *SARS and Public Health in Ontario* (Toronto: 2004) (Commissioner: Hon. Mr. Justice Archie Campbell) at 163 [Interim Report].

52 *Ibid*.

53 *Ibid*.

54 *Ibid*. at 7.

55 See e.g. *Crown Zellerbach*, *supra* note 20 at para. 34.

56 Population and Public Health Branch Surveillance Coordination Committee, *Case Studies: Examples of Health Canada's Use of Personal Information for Health Surveillance and Research Activities* (Ottawa: Health Canada, 2002).

57 *Ibid.* at 35-48.

58 Federal/Provincial/Territorial Advisory Committee on Health Infostructure, *National Surveillance Networks for Chronic Disease in Canada: Charting a Path Forward* (Ottawa: 2001) at 10.

59 Canada, The Standing Senate Committee on Social Affairs, Science and Technology, *Reforming Health Protection and Promotion in Canada: Time to Act* (Ottawa: 2003) (Chair: Michael Kirby) at 19.

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61 Canada, Commission on the Future of Health Care in Canada, *Building on Values: The Future of Health Care in Canada* (Ottawa: 2002) (Commissioner: Roy Romanow) at 115.

62 Ontario, Association of Local Public Health Agencies, *Orientation and Reference Manual* (Toronto: 2004) at 1.

63 Interim Report, *supra* note 51 at 20.

64 *Ibid*.

65 Peptic ulcer disease, for instance, was recently found to be integrally linked to infection by the *Helicobacter pylori* bacteria. See *Naylor Report, supra* note 1 at 115-16.

66 Interim Report, *supra* note 51 at 199.

67 Kirby Report, Volume 2, *supra* note 33 at 45.

68 *Ibid*. at 46.

69 *Ibid*.

70 Naylor Report, *supra* note 1 at 81.

71 U.S., National Center for Chronic Disease Prevention and Health Promotion, *Mission Statement*, online: <http://www.cdc.gov/nccdphp/> (last updated: 6 October 2005).

72 *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373 at 460 (CanLII) [*Anti-Inflation*].

73 See e.g. *Toronto Electric Commissioners v. Snider*, [1925] 2 D.L.R. 5 at 15-16; *Canada Temperance Federation et al.*, *supra* note 25.

74 See *Anti-Inflation, supra* note 72 at 460.

75 Naylor Report, *supra* note 1 at 168.

76 *Ibid*. at 169.

77 [1980] 1 S.C.R. 914 at 17.