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ALBERTA NURSES v. A CONTEMPTUOUS SUPREME COURT OF CANADA

Judy Fudge and Harry Glasbeek

BACKGROUND

Whenever capital/labour conflict comes to court, the conventional portrayal of an even-handed rule of law administered by an autonomous above-the-fray institution comes under severe pressure. The story of the judiciary's involvement in these cases is one of hostility to the collective rights of labour; it sees the rule of law as a means to constrain the rights of labour in a class-divided polity. Its decisions tend to reveal the essentially conflictual nature of capital/labour relations. In part, this explains why liberal pluralist academics and policy-makers - who are keen to deny the existence of class relations - have put a great deal of intellectual and political effort into the creation of employer/employee regulatory schemes which, amongst other things, marginalize the role of the judiciary.

The resulting statutory collective bargaining regimes are presented as schemes in which labour has been granted sufficient legitimate countervailing power to do away with the grosser of the imbalances. The state's role in the schemes is characterized as that of a facilitator. It is to put the parties in a position where it can be said to be fair to leave them to determine their own fate. They are allowed to use economic warfare as a basis for the reaching of voluntary settlements in respect of the rules and conditions which are to govern work relationships. A shared ideology is to be the inevitable by-product of the web of rules so created.[1] The system, then, is pictured as one which promotes the sovereignty and autonomy of parties who are to resolve their disputes in a progressively reformed setting which they both accept. What this pictures goes to great length to hide is that the employers' and the state's capacity to restrain and repress labour has never been abandoned.

This became clear in the 1960's when workers, playing catch-up after an economic boom and in political circumstances where self-assertion was common, found themselves disadvantaged by collective bargaining law's restrictions on their economic muscle. But, with a confidence which, in large part, stemmed from the legitimacy the scheme had supposedly bestowed upon their use of collective rights, workers were willing to step beyond the technical constraints of the governing statutes. They did not believe that, in this atmosphere, their extra-legal collective efforts would cause them to be treated as outlaws. They were wrong.

Employers and governments went to the courts to ask for restraining orders. The courts were only too happy to enforce those aspects of the rule of law which they had devised to restrain and repress labour prior to the advent of statutory collective bargaining. Disobedience of the orders they made pursuant to these rules could be treated as contempt of court and lead to the imposition of fines and imprisonment.

Rapidly, the historically anti-labour courts were moving back from the margins to the centre of capital/labour regulation. Employers and governments had made this repositioning possible by their desire to exploit the judiciary's exclusive right to exercise legally-sanctioned coercive power. Simultaneously, however, they had created a dilemma: once again the rift between capital and labour was becoming visible, as was the fact that state institutions and the supposedly neutral rule of law had never ceased to favour capital's interests. The carefully-crafted labour relations regulatory mechanism was in danger of losing its legitimacy.

A spate of public inquiries resulted.[2] The conclusion of the ensuing reports was that the courts should be pushed back towards the periphery. To allow this to happen, the reports argued, it would be necessary to give the labour relations boards more remedial powers to take up the resulting slack.[3] Recently, pressures have been put on the patched-up system.

The precipitous economic decline which began in the late 1970's has led to a drive to restructure the economy. This restructuring is based on the assumption that globalized competition and production is desirable and inevitable. The resulting local unemployment has made employers impatient with the rigidities which they claim statutory collective bargaining imposes on them. While liberal pluralists and policy-makers continue to espouse the rhetoric used to bolster the labour relations system they helped establish in the 1960's and the 1970's, larger employers and conservative governments are doing everything they can to undermine it.[4]

Coincidentally, during this period of restructuring and reassertion of late 18th century ideology, the judiciary has been given the *Charter of Rights and Freedoms* to administer. Amongst other things, the *Charter* empowers the courts to interpret and apply undefined rights, such as freedom of association, expression and political belief, with a view to constraining government action. These freedoms are those which are called into question every time collective labour seeks to challenge or to resist capital. At the time of the *Charter*'s entrenchment, many of its more thoughtful liberal supporters could see that, given the history of labour law jurisprudence and the new approach of capital to labour relations, the courts' new discretionary powers might well be exercised by them in such a labour-unfriendly way as to

delegitimate the whole of the constitutional judicial review system and process.[5] They were right about the judiciary's inability to overcome its anti-labour predilections. But their fears that the judiciary might thereby bring the Charter regime into disrepute were not shared by the courts.

The courts, especially the Supreme Court of Canada, have been vicious in their interpretation of the *Charter* when called upon to deal with the rights of labour. Prior to the *United Nurses of Alberta* (*UNA*) decision, the Supreme Court of Canada had been asked to pronounce seven times on the collective rights of labour and seven times it had defeated labour's claims.[6] Apparently, if it is conscious of the larger issues at all, the Court has made a judgement that, in the new order and ideology of capital/state/labour relations, its anti-labour version of the rule of law will not undermine its legitimacy as much as it did in the more liberal years of the 1960's and early 1970's. The recently decided *United Nurses of Alberta* case makes this all too clear.[7]

THE FACTS OF THE CASE IN CONTEXT

In 1982, the UNA exercised its legal right to strike. The government passed back-to-work legislation which the union ignored. No sanctions were invoked and a collective agreement was concluded. By 1983, the government, which wanted to control government costs, passed legislation which prohibited workers in the broader public sectors from striking. Impasses were to be resolved by the imposition of an agreement by an arbitrator who was to have due regard to government fiscal policy, the state of the provincial economy and wages in both the private and non-union sectors. The government was taking the logic of economic restructuring seriously and undoubtedly hoped that its leaner and meaner approach to its employees would stiffen the backbone of recession-pressured private employers. In due course, this legislation - which took away the right to strike from unions such as the UNA - was challenged as a violation of the freedom of association guaranteed by the *Charter of Rights and Freedoms*. In the strike trilogy, the Supreme Court of Canada upheld the restricting legislation. It probably pleased the majority of the Court to let people think that, in upholding the view which courts had propounded for a century or more, namely, that the right to strike was a right which was secondary to individualistic rights, it was paying deference to legislatures which had belatedly come to the same view.

While the Charter challenge was going through the courts, the Alberta government got even leaner and meaner. Not content with having an arbitrator impose conditions after a hearing in which unions could participate, it unilaterally imposed a wage freeze for broader public sector workers in 1987.

The UNA felt it could not accept the freeze. Its leadership said it had no recourse but to call a strike and announced that it would convene a meeting of the members so that they could vote on the issue on January 22, 1988. Before this date, the employers were before the Alberta Labour Relations Board to ask that it issue a directive to the union which would tell it to desist from threatening or from leading a strike. The employers based their request on the 1983 law which had made a nurses' strike illegal. It was an irresistible application.

The Board issued the directive. Nonetheless, the strike vote was held on January 22 as scheduled. The members supported the strike. The strike was to begin on Monday, January 25, 1988. On Sunday, January 24, the employers were back before the Labour Relations Board to obtain yet another directive. This time they were armed with the certain knowledge that the union was about to lead the strike. The Board issued a second directive. The employers rushed over to a clerk of the Queen's Bench of Alberta on that very same Sunday, with both directives in their hands to have them registered as orders of the Court.[8] The strike began on January 25. Margaret Ethier, the leader of the union, told the press that she knew the directives had been filed as orders of the Court but said that the strike would go on anyway.

Four days later, on January 29, the Attorney-General of Alberta was before the Court asking that the UNA be held in criminal contempt because it was in breach of a court order not to strike. He asked the Court to impose a fine of $1 million on the union and to sequester its property. On February 3, Sinclair J. found that the union was in contempt and, on February 4, he imposed a fine of $250,000 to be paid within five days. Failure to pay within that time would lead to automatic sequestration of the union's funds. On February 9, as union officials were attending at court to pay the fine, they were served with notice of a second charge of contempt laid against UNA by the Attorney-General. Subsequently, the Attorney-General asked O'Byrne J. to convict the union for criminal contempt again because it was still on strike. On February 18, the judge did just that. Apparently the contempt was not as serious this time because the union was fined only $150,000. In due course, the union paid this fine as well.

In short, the Alberta Labour Relations Board directives were treated as if they were court injunctions. Disobedience, therefore, demonstrated a flagrant disrespect for the rule of law. This attracted the ultimate sanction: a conviction of criminal contempt of court. In 1992, the Supreme Court of Canada, in a 4:3 decision, upheld these convictions.[9]

LEGAL ISSUES

Four points of law were in contention before the Supreme Court of Canada. We will address only two of these, and one of these only briefly.[10] First, does a trade union have the kind of legal personality attributes which allowed the imposition of a criminal sanction on it? Second, is criminal or civil contempt the appropriate remedy in the circumstances which brought the union before the court in this case?

Legal Personality

One of the purposes of statutory regulation of labour relations has been to remove the legal hurdles which the common law imposed on trade unions. As unincorporated associations they had not been able to enter into enforceable agreements or have employers recognize them as legal partners. Courts in their anti-collectivism used the limited legal status subsequently bestowed on unions as a platform to make unions, as such, subject to duties and responsibilities imposed by the common law. Anti-collectivist remedies were rendered more effective in this way. This is the kind of manipulation which gave rise to the anti-judicial sentiments of modern collective bargaining proponents.

But precisely because, for so long, their own jurisprudence had treated unions as not having any legal personality, it always has been technically difficult for courts to justify their characterization of unions as legal persons.[11] Nonetheless, when the issue is whether or not a trade union can be held in contempt, the judiciary does not seem very troubled by legal technicalities. In *UNA*, the members of the Supreme Court of Canada who addressed the issue were unanimous.[12] For all of them - including Cory J., who differed substantially on the contempt issue - it was simply a matter of common sense, of evenhandedness: the statutory right to bargain collectively is a privilege; it is only fair that it should attract obligations.[13]

Criminal or Civil Contempt

In the abstract, the distinction between criminal and civil contempt is easy to maintain. Civil contempt is constituted by the disobedience of a judgment or a court order made to benefit a particular individual. The justification is the protection of an individual's interests. By contrast, criminal contempt is constituted by words, acts or writings which obstruct or discredit the administration of justice. Bribing a witness or a juror, attempting to influence a judge, accusing a judge of unacceptable bias or disobeying a court order made in a criminal case all may be treated as criminal contempt. The idea is that a sanction is warranted because society as a whole will suffer the consequences. Difficulties arise because disobedience of a judgment or a court order made in favour of an individual may well amount to wilful defiance of a court. At this point, civil and criminal contempt become conflated.

One of the more frequently recurring instances of this is the failure of workers and their unions to abide by a labour injunction which has been granted as an order favouring an employer's position during a strike. On the face of it, such an order is issued for the benefit of one individual - the employer. Defiance of such an order, however, can be characterized as public defiance of a court order and, therefore, as the kind of activity which strikes at the dignity of the rule of law. When will this be warranted? The Charter of Rights and Freedoms regime ought to have made this question more troublesome than it used to be. Section 7 of the *Charter* requires that a crime be defined with certainty, lest it violate fundamental due process principles. This means that the *mens rea* of the offence needs to be spelt out clearly.

The McLachlin majority held that a criminal contempt was committed when an accused defied a court order[14] with the intent or knowledge of, or recklessness as to, the fact that the public disobedience will tend to depreciate the court's authority in the public mind. She indicated that these guidelines were precise enough to satisfy the requirements of s.7. That is, given these criteria a citizen would be able to know when she was going to cross the line which separates legitimate dissent from criminal conduct. This is highly tendentious.

Cory J. did not address the question of whether the vagueness of the definition of criminal contempt of court offended s.7 of the *Charter* directly. However, he did have to face the issue of whether or not there had been the kind of public defiance which was the hallmark of criminal contempt. He went through the statements made by Margaret Ethier, the president of the UNA, when she acknowledged that she understood that a court order had been made, in great detail. He characterized her behaviour not to be the kind of defiance which amounted to a criminal discrediting of judicial authority. Rather, Cory J. thought that what the union and its leadership was doing was to exercise another Charter right: freedom of speech. He underlined the fact that the union leaders had clearly indicated that they were not quarrelling with the Court, but with their employers. Cory J. also emphasized that "both unions and management rely on publicity to raise public awareness of the issues involved in [a labour] dispute."[15] He noted that unions had more trouble communicating with the public than employers generally do and suggested that speeches, picket lines and strikes were inherently legitimate tactics during an on-going dispute between *private* parties.

The fact that this analysis was possible suggests that McLachlin J. and her associates were overstating their case considerably when they argued that the elements of the *mens rea* of the offence of criminal contempt they had specified made for certainty in the law. After all, two wings of the Supreme Court of Canada were able to characterize the same words and events very differently. The incoherence and indeterminacy of rights and freedoms under the *Charter of Rights and Freedoms* is, once again, made evident. Clearly, the way in which a judge views labour relations and the appropriate content of freedom of speech will change the meaning given to the elements which need to be proved to make a criminal contempt charge stick.

This is made manifest by the way in which Cory J. wrote his judgment. He argued that, over time, the naked anti-labour attitude of the courts had brought the judiciary into disrepute. Public opinion and public policy had made it crystal clear that capital/labour relations regulation had to allow for a collective role for unions. The relative autonomy of the regimes created derived its justification from the conceptualization that private parties were reaching voluntary settle-

ments and that the law should be used to facilitate this and enforce the collective agreement which resulted. Cory J. pointed out that for the judiciary to use sanctions traditionally employed by it to smash unions would be to attack the legitimacy of the labour relations regime and, even more importantly, would threaten to bring the courts into the same kind of contempt they had been held in by policy-makers and labour relations participants in the 1960's and 1970's.[16]

Cory J.'s apparent sensitivity is not to be mistaken for softness on the issue of unruly worker behaviour. To the contrary, his approach mirrors that of a long line of liberal pluralist labour relations experts who see the statutory collective bargaining scheme as a way of co-opting and containing the collective power of workers.[17] Thus, Cory J. goes to great length to point out that there were plenty of other ways to sanction the disobeying trade union:

> The decision to violate the Board's order is repugnant. It left the union open to civil contempt proceedings as well as the penalties provided by the provincial *Labour Relations Act*. Yet those penalties were quite sufficient to punish any union's conduct and discourage any future disobedience of orders.[18]

Indeed, the Alberta *Rules of Court* provide that people in civil contempt are liable to imprisonment until they have purged their contempt, or to imprisonment for at least one year, or to pay a fine of $1,000 per day and, in default thereof, to imprisonment for a year. In addition, the *Labour Relations Act* itself provides for penalties for breaches of the Board's order. The penalties are fines of up to $10,000 a day for each day that a strike continues illegally, as well as fines of up to $10,000 for officers or representatives of the trade union who encourage or condone illegal strikes. That is, there were plenty of other ways to repress workers and trade unions. Cory J. thought that it was quite inappropriate to use something as potentially delegitimating of both labour relations and the judiciary as criminal contempt of court, at least as long as containment could be achieved by letting the administrative regime work:

> The unrestrained use of criminal contempt proceedings in labour relations matters will once again give rise to the perception that the courts are interfering with the collective bargaining process and intervening on behalf of management. If that perception persists, the courts will no longer be seen as impartial arbiters but as the instrument used by society for imposing crushing penalties on unions and union members.[19]

His emphasis, then, was that, whenever possible, labour struggles should be treated as private realm disputes subject to private realm rules. Here it is to be noted that a number of individual nurses were held in civil contempt for refusing to work during the strike. This was a consequence of their employers' application to a court for such an order, that is, the result of a private individual enforcing private rights. As much as $27,000 was paid in fines by these convicted nurses, hardly a bagatelle. Obviously, Cory J. was right; effective restraint is possible without resort to the use of the criminal contempt power.

The distinction between the majority and the dissent is not one of goals. Both want trade unions to respect the law and the rule of law. Technique was the issue. Cory J. was concerned about the viability of industrial pluralism and the judiciary's integrity. McLachlin J. and her associates obviously felt none of these compunctions. From their perspective it was plain that in this case, unlike in the right to strike cases, a feigned deference to other regulatory bodies would not permit the reaching of a result which they deemed desirable. Consequently, there is not even a suggestion that the judiciary should be deferential to the supposedly autonomous administrative regime or that the Court should be truly careful about how it exercises its most repressive power. Perhaps it is a little too far-fetched to suggest that these members of the Supreme Court of Canada felt that, because they are the interpreters and appliers of the sacrosanct *Charter of Rights and Freedoms*, their prestige cannot be seriously undermined. Nonetheless, there is a good deal of confidence, if not arrogance, in the majority's decision in the *UNA* case.

Perhaps the real reason for this confidence lies in the fact that big business and conservative governments are abandoning the post-war liberal pluralist entente reached between the state, capital and labour. The judiciary, as an institution, never has accepted that entente and now may feel fortified by the elites' abandonment of it. Certainly, in the *UNA* case, the majority of the Supreme Court of Canada seems to have appreciated the opportunity to reassert the validity of the judiciary's ancient views. Cory J.'s nostalgia for the mediated labour relations system of the 1950's and 1960's seems almost radical or, at the very least, out of step with the much more brutish and primitive times in which we live and which apparently resonate with the views of the majority of the Supreme Court of Canada.

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1. The literature is voluminous. Representative works include: John T. Dunlop, *The Industrial Relations System* (New York: Holt, 1958); "The Report of the Task Force on Labour Relations" (The Woods Task Force) in *Canadian Industrial Relations* (Ottawa: Privy Council, 1968); and, P. Weiler, *Reconcilable Differences: New Directions in Canadian Labour Law* (Toronto: Carswell, 1983).

2. See, for example, A.W.R. Carrothers and E.E. Palmer, *Report of a Study on The Labour Injunction in Ontario* (Toronto: Ont. Dept. of Labour, 1966); "Woods Task Force", *supra*, note 1.

3. The 1973 British Columbia *Labour Relations Code* was the most far-reaching adoption of these social engineering recommendations. It attempted to oust the judiciary's jurisdiction altogether; see H.W. Arthurs, "The Dullest Bill: Reflections on the Labour Code of British Columbia" (1974) 9 U.B.C L. Rev. 280. In Ontario, in the mid-1970's, the Ontario Labour Relations Board was given additional and much more sophisticated reme-

dial powers. This was a common response to the various reports' suggestion that the struggles between the parties would be better administered and controlled by labour relations boards than by courts.

4. L. Panitch and D. Swartz, *The Assault on Trade Union Freedoms* (Toronto: Garamond Press, 1988); D. Langille, "The Business Council on National Issues and the Canadian State" (1987) 24 Studies in Political Economy 41.

5. For an expression of sensitivity to this issue, see P.H. Russell, "Canada's *Charter of Rights and Freedoms*: A Political Report" [1988] Public Law 385 at 387-88.

6. *Reference Re Public Service Employee Relations Act*, [1987] 1 S.C.R. 313; *Public Service Alliance of Canada* v. *A.G. of Canada*, [1987] 1 S.C.R. 424; *Retail, Wholesale and Department Store Union, Local 544* v. *Government of Sask.*, [1987] 1 S.C.R. 460; *Retail, Wholesale and Department Store Union, Local 580* v. *Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; *British Columbia Government Employees' Union* v. *Attorney General of British Columbia, Attorney General of Canada, Intervener*, [1988] 2 S.C.R. 214; *Newfoundland Association of Public Employees* v. *Attorney General for Newfoundland*, [1988] 2 S.C.R. 204; *Professional Institute of the Public Service of Canada* v. *Northwest Territories Commissioner* (1990), 90 C.L.L.C. 14,031.

7. *United Nurses of Alberta* v. *Attorney General (Alta.)* (1992), 92 C.L.L.C. 14,023.

8. Who says courts are not readily accessible?

9. The UNA plans to appeal the severity of the fines. The quantum apparently was not in issue in the described proceedings.

10. The first point not to be discussed related to the question of whether a provincial board's cease and desist order could attract a judicial ruling that contempt had been committed. The argument was that, by permitting this, provincial jurisdiction would be enlarged by effectively bestowing criminal law power on its agency. The second issue was whether or not the trial court judge had violated the Charter of Rights and Freedoms' provisions which promote fair trials when he refused to allow cross-examination on the affidavits filed by the Crown on the contempt hearing. To us, these arguments are subsidiary. They are merely ways in which lawyers argue about overt policy while cloaking themselves in technicalities. Predictably, the majority and minority split on these issues in the same way as they did on the more substantial policy points discussed in the case.

11. *International Longshoremen's Association* v. *Maritime Employers' Association*, [1979] 1 S.C.R. 120. See also *Teamsters* v. *Therien*, [1960] S.C.R. 265; and, D.J. Sherbaniuk, "Actions By and Against Trade Unions in Contract and Tort" [1958] U. of T. L.J. 151.

12. They relied on *United Fisherman and Allied Workers' Union* v. *The Queen*, [1968] S.C.R. 255.

13. Per McLachlin J. at 12,121; Cory J. at 12,130. Note that the Court was also faced with an argument as to whether or not criminal contempt under the *Criminal Code* was applicable to unions. This turned on the meaning of "societies" as defined in the *Criminal Code*. The Court held that a trade union was covered by the term "societies" in that Code.

14. It was actually a provincial labour relations board which had issued the directive to cease and desist, rather than a court. Both the McLachlin and Cory judgments assumed that, for jurisdictional purposes, the cease and desist order of the board, once registered with the court, was the equivalent of an injunction issued by the Court. Sopinka J. found that this had elevated the provincial agency's role to that of a judicial one and that this offended the constitutional provisions dealing with the division of power. He relied on this to avoid the major issues in the case. He did not have to address the question of whether or not civil or criminal contempt was warranted by the union's behaviour; he was able to hold that the criminal contempt conviction was unlawful because it was made without jurisdiction; see note 10.

15. *UNA*, *supra*, note 7 at 12,131.

16. This was echoing a position Cory J. had offered when he was on the Court of Appeal of Ontario; see *Re Ajax-Pickering General Hospital and Canadian Union of Public Employees* (1981), 139 D.L.R. (3d) 270 (Ont. C.A.).

17. See, for example, "Woods Task Force," *supra*, note 2; Weiler, *supra*, note 1; H.W. Arthurs, "Note" (1963) 41 Can. Bar Rev. 580; and, H.W. Arthurs and J. Crispo, "Industrial Unrest in Canada: A Diagnosis of Recent Experience" (1968) 23 Relations Industrielles 237.

18. *UNA*, *supra*, note 7 at 12,135.

19. *UNA*, *supra*, note 7 at 12,132.

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TREATY FEDERALISM

Andrew Bear Robe

INTRODUCTION

First Nations maintain that our right to self-government emanates from our own sense of aboriginality, from our "Indianness", from our sense of justice, spirituality, customs, values and socio-political conscience. We believe that the Creator pre-ordained the orderly existence of the various nations of the earth, including their political systems, their laws and the situs of their homelands. Whenever one nation imposes itself upon another nation, as was the case in North America, the transgressor must respect the sovereignty and laws of the nation imposed upon. For this reason, mankind instituted international law to conduct the intra-relations of the nations of the earth whenever they came into contact with one another either through war, treaty-making or international cooperation. First Nations in Canada formed treaty relations with several European nations which governed their intra-relations. Part of those intra-nation undertakings included the continuance of the right of First Nation governance. This First Nation right of self-government emanates from Indian sovereignty which the transgressor nations must uphold and respect under international law precepts. We cannot deviate from this principle as ordained by the Creator himself.

I firmly believe that this can be realized within Canada through the concept of treaty federalism. The concept may be briefly explained as follows: just as First Nations entered into treaties with the British and other European powers, and subsequently with the American and Canadian governments, for the sharing of Indian lands and resources, so we can now enter into modern day treaties or agreements to share Canadian sovereignty and jurisdiction. The fifteen major land-sharing treaties in Canada dealt primarily with the land, beginning with the Robinson Treaty of 1850, which dealt with the lands of the Ojibwa First Nations of Lake Huron and Lake Superior, and ending with the 1923 Treaty with the Chippewa and Mississauga First Nations of south-western Ontario. Under the concept of treaty federalism, we can now complete the other half of that Canadian-made process by recognizing the legitimate civil and political rights of First Nation governments. That is Canada's constitutional challenge for the 21st century after 500 years of Aboriginal-European contact in North America.

First Nations of Canada had no input into the constitutional division of powers in 1867 nor in 1982. We have no sense of ownership regarding the federal and provincial laws that apply to us simply because those laws were forced upon us without our consent, consultation or input, especially the much despised federal *Indian Act*. We now have a unique opportunity to carve out our own rightful place within the Canadian federation, perhaps through treaty federalism. The concept is not foreign and falls within the political and egalitarian ideals of western democracy.

FIRST NATION GOVERNMENTS

Let me state what First Nation governments will not be like in practical terms. They will not create their own armed forces, nor create their own currency, nor establish their own High commissions in foreign countries or foreign trade offices, nor create a completely independent legal system from the Canadian system. Most importantly, they will not attempt to break up Canada. Many of our grandfathers, fathers, brothers and sisters fought voluntarily in the Two Great World Wars to preserve British and Canadian sovereignty even though our treaties guaranteed that we did not have to go to any foreign war. First Nation governments will not seek to destroy the integrity of Canadian nationhood, nor the integrity of our federal bilateral treaties, nor the integrity of our original homeland itself.

First Nation governments, whether they are established through inherent rights, the constitutional entrenchment process or through special federal legislation, will enact laws, regulations and formulate policies similar to any other responsible and democratically elected government. The laws enacted and the jurisdiction exercised will be for our own people, our resources and our lands, nothing more and nothing less. However, non-First Nation peoples, organizations and businesses operating within our lands would be subject to our First Nation jurisdiction. The areas of jurisdiction to be covered will include federal, provincial and municipal spheres of authority. First Nation legislative competence will likely resemble a microcosm of the totality of Canadian governments as we now know them; First Nation governments will exercise separate and concurrent jurisdiction in relation to the federal and provincial governments. In addition, traditional forms of governing structures and values will be incorporated into First Nation governments.

Two concrete examples of First Nation governments have been operating within Canadian federalism for a number of years now. Both are Indian local community governments which were created by special federal legislation: the *Cree-Naskapi (of Quebec) Act* (1984) and the *Sechelt Indian Band Self-Government Act* (1986). The former resulted from two historic agreements, the James Bay and Northern Quebec Agreement (1975) and the Northeastern Quebec Agreement (1978), which involved the Canadian government, Quebec government, three provincial Crown corporations, plus the Cree, Inuit and Naskapi First Nations. The *Cree-Naskapi Act* was the first Indian local community government legislation in Canada. It replaced the federal *Indian Act* and

thereby removed much of the direct authority of the Minister of Indian and Northern Affairs over James Bay Cree, Inuit and Naskapi affairs. The Act restored a limited form of First Nation sovereignty to the aforementioned peoples via legislative fiat. It allowed those First Nations to establish their own legal and governing structures to implement their business of government. Those governments are directly accountable to the will of their citizens rather than to the Minister. The negative feature of the *Cree-Naskapi Act*, from a First Nations' point of view, is that the James Bay Cree, Inuit and Naskapi exchanged their aboriginal title and rights for a complex stratified system of land title and holdings some of which still remain subject to federal and provincial jurisdiction.

The *Sechelt Indian Band Self-Government Act* resulted from eighteen years of unwavering determination by the Sechelt First Nation to be freed of the shackles of the *Indian Act*. The Sechelt peoples' primary objective was to convert the Crown's underlying title to their lands to fee simple ownership and to oust the federal Department of Indian and Northern Affairs as an intermediary between themselves and third party interests such as non-Indian lessees using Sechelt lands. The second objective of the Act was to enable the Sechelt First Nation to negotiate directly with both the federal and British Columbia governments regarding the delegation of federal and provincial powers in order to establish the Sechelt's local community government. The delegated powers were incorporated into the *Sechelt Band Constitution*. The Act does not profess to deal with the Aboriginal rights of the Sechelt people and is viewed merely as an interim step on the road to the entrenchment of the inherent right to aboriginal self-government in the Canadian Constitution.

Legislated First Nation local community governments, such as the James Bay and Sechelt models, are recent forms of government that came into existence through federal or provincial fiat. The Band Council governments under the federal *Indian Act* are the oldest form of legislated and delegated Indian Band local community governments. Both models, the old and the new, are subject to federal/provincial manipulation, control and coercion. They do not receive their authority by way of protected Indian sovereignty, aboriginal title, aboriginal rights, or by way of treaty. Although the *Cree-Naskapi* and *Sechelt* Acts have allowed those First Nations under those respective Acts to distance themselves from the paternalistic provisions of the *Indian Act*, they nonetheless create federal municipalities. Regarding their newly bestowed authority, the community governments are limited to whatever the legislation permits them to do provided that either the federal or provincial governments (Quebec or British Columbia in this case) agree to such jurisdiction. Their new fiscal arrangements are not much different from the status quo under the current *Indian Act*; for example, they are subject to federal and provincial financial discretion as the James Bay Agreement has shown. As far as their legislative interface with the federal and provincial governments is concerned, there are no departures from what the *Indian Act* Band Council governments currently have. Their relationship with the dominant governments is still characterized by paternalism and coercion. They do not enjoy nation-to-nation nor government-to-government *modus operandi*.

There are many *Indian Act* Band Council governments in Canada that already exercise local government jurisdiction in areas such as social assistance, child welfare, education, health, policing, taxation, citizenship and immigration, local trade and commerce, and a limited form of administration of justice. The Siksika Nation Tribal Council and Administration has already taken control of the aforementioned areas of jurisdiction with the exception of the administration of justice. Under its proposed *Siksika Indian Government Act* and the companion *Siksika Indian Government Fiscal Arrangements Act*, the Siksika Nation proposes to exercise legislative and regulatory competence in the following areas:

- Siksika Nation membership
- transportation
- election code and procedures
- health
- social services and child welfare
- education
- financial powers, accountability and fiscal arrangements
- land title, land use and land management
- renewable and non-renewable resources
- environment
- water
- public works and undertakings
- language, heritage and culture
- administration of justice
- intra-tribal transfers of membership and economic resources
- local trade and commerce

Therefore, it is apparent that the practical aspects of First Nation governments at the community/district/regional levels, whether they are established through the constitutional amendment process or through some other treaty or federal channels, and whether they are established pursuant to s. 91(24) of the *Constitution Act, 1867* or s. 35(1) of the *Constitution Act, 1982*, would simply formalize what is already being done informally by many *Indian Act* Band Council governments. In comparing provincial powers and *Indian Act* Band Council powers, Donna Lea Hawley concludes:

> It can be seen that bands have similar powers of self-government as the provinces in eleven of the fifteen areas of control under Section 92 [i.e. *Constitution Act, 1867*]...extension of provincial laws does not apply to Indian lands. The jurisdictional areas of legislative authority on reserve lands approximate those currently controlled by the provinces under Sections 92 and 93. The main difference between them is that the exercise of powers on reserves rests in the hands of the federal minister rather than a self-governing body.

> Thus it would be only a short step to transfer his authority to local Indian governments so that the latter would have legislative powers similar to those now held by the provinces.[1]

Although there remain a number of areas of jurisdiction that have never been exercised by any First Nation in Canada - for example, environment, water and air quality - without a doubt those areas will come up for discussion and negotiation sooner or later in any new First Nation self-government arrangement. In this era of increased awareness of, and evolutionary political development towards, First Nations' self-determination, it is now *passé* that federal and provincial laws of general application be simply foisted upon First Nations without any prior consultation, discussion and input. Those types of unilateral dominant government decrees contravene U.N. self-determination principles, the treaties, the principle of representative democracy, the ideologies of "consent of the governed" and the "will of the people", and certainly contravene the spirit of increased First Nation self-determination principles within a renewed Canadian federation.

Regarding the practical aspects of implementing First Nation governments, I do not envisage that all 600 (more or less) existing *Indian Act* Band governments throughout Canada will individually opt to exercise self-government arrangements if Canada and the First Nations come up with a workable arrangement. A large tribe such as the Siksika Nation certainly can undertake a separate and autonomous self-government arrangement in its own right considering the size of its land holdings, population and resources. Smaller First Nations may opt to join regional or district governments depending upon their geographical proximity to each other, their historic tribal affiliations and their common political and economic agendas. Still others may wish to remain under the paternalistic and coercive controls of the federal government via the *Indian Act* or some other derivative legislation. In any case, I anticipate that each individual First Nation will opt for its best available option as it perceives it, considering all independent variables and circumstances.

In my view, though, the federal *Indian Act*, and the federal Department of Indian and Northern Affairs Canada that administers that Act, must cease to exist as they are public administration anachronisms from a different era of First Nation-Canada relations. Robert A. Reiter sums it up nicely when he observes:

> ...The *Indian Act* is a Victorian piece of legislation. The original policy underlying the *Indian Act* was to assimilate Indians — in essence, to strip Indians of their traditional social, economic, and political systems ... The Act is essentially an administrative document for the Department of Indian and Northern Affairs Development's purposes, and provides no real definition of Aboriginal rights.[2]

THE CONCEPT OF TREATY FEDERALISM

The current push toward the recognition of the inherent right to aboriginal self-government in Canada comes just when we have witnessed the dismantling of autocratic state control over suppressed and dispossessed nationalities in the Soviet Union and Eastern Europe. The task before all Canadians today is to find the ways and means to make true aboriginal self-government a political reality within Canadian federalism in accordance with the aspirations of the First Nations. The political concept of treaty federalism may be one option worthy of our collective consideration. Treaty federalism, as a workable concept, would be a process for negotiations and discussions to be implemented after the entrenchment of the inherent right to Aboriginal self-government.

Treaty federalism is essentially an argument for the notion of "protected sovereign status", especially for those First Nations who signed land-sharing treaties either with the British or the Canadian government. Those First Nations who have never signed any land-sharing treaties, as in British Columbia, Quebec and the Northwest Territories, also have a claim to protected sovereign status due to the general protective clause offered in the Royal Proclamation of 1763. Treaty federalism stands for "Indian consensus" and "Indian consent" in regard to the manner and form of our co-existence with the Queen's white children under the Canadian constitutional framework. It builds upon what already exists within First Nation-Canada relations, for example, bi-lateral treaties, s. 35 of the *Constitution Act, 1982*, and s. 91(24) of the *Constitution Act, 1867*, which are the root sources of federal obligations toward First Nations. Treaty federalism will not disturb the existing division of powers under ss. 91, 92 and 93 of the *Constitution Act, 1867*. However, it will fill the gaps where the federal government has failed to act on its responsibilities to First Nations and, at the same time, will make the necessary adjustments to existing provincial intrusions into otherwise exclusive First Nation jurisdiction. I first read about the concept of treaty federalism in a book written by two American Indian lawyers, Russell Lawrence Barsh and James Youngblood Henderson.[3] According to the authors, the primary object of treaty federalism would be to secure internal tribal sovereignty under long-established constitutional principles governing U.S. federal-Indian relations, which would be consistent with liberal and democratic principles that characterize Western political ideology, for example, consent of the governed, being judged by one's peers, political representation, political pluralism, and the paramountcy of the "will of the people". The concept can be implemented via agreements, legislation or by way of treaty. Although those procedures are not defined in the U.S. constitution, they are nonetheless standardized in constitutional practice.

In essence, treaty federalism is a way of restating the unique First Nation-Crown relations since earliest colonial times. It translates those historic principles and under-

standings into twentieth century political thought and expression. The concept is available for the creative establishment of protected and internally sovereign First Nation governments empowered to exercise jurisdiction in circumstances where conventional provincial government status in Canada would be either geographically, politically or constitutionally inappropriate.

In the words of the authors, treaty federalism:

> ...is not an entirely novel idea. It simply re-interprets the sources of federal Indian law to be more consistent with our [U.S.] general political and ideological heritage, and in a way reconcilable with the realities of tribal survival today... The [Indian nation] in its treaty submits to federal supremacy, ceding a portion of its sovereignty. What it cedes is somewhat more or less than a new state [or a new province in Canada], perhaps also somewhat different. In any event, the acceptance of the cession requires no compensatory alteration of the general government.[4]

ABORIGINAL RIGHTS PRINCIPLES

If the theory of treaty federalism is going to work within Canadian politics as a means of bringing First Nations into the constitutional framework, there are a number of aboriginal rights principles which must be acknowledged and affirmed by Parliament and by the Canadian polity in order to facilitate progress. Those principles are as follows:

Principle One

First Nations, from time immemorial, have had and enjoyed political sovereignty, albeit now in a more limited form under the Canadian Constitution. It otherwise may be referred to as "protected sovereign status"; it is co-equal, co-existing, concurrent and reserved within Canadian federalism.

Principle Two

First Nations, from time immemorial, have had and enjoyed certain fundamental inherent powers and rights which have never been voluntarily ceded nor extinguished by any treaty or agreement with any foreign power; they are therefore "reserved". Chief among these are:

(i) the right to determine who is a member and who is entitled to become a member of the nation according to customary law or newly enacted First Nation laws;

(ii) the right to govern their own affairs for the good government of the nation according to their freely chosen aboriginal systems of government and law (now, within Canadian federalism);

(iii) the right to access and exercise separate and concurrent jurisdiction over their traditional lands and territories in order to ensure the survival and continuance of the nation (i.e. hunting, fishing and trapping);

(iv) the sovereign right to sign treaties and enter into bilateral agreements and relations with other First Nations and with sovereign European powers (now also Canada and the United States of America); and,

(v) the right to retain and exercise their culture and language.

The above mentioned inherent powers and rights should now provide the foundation for First Nation-Canada negotiations regarding renewed bilateral treaties under the Canadian constitution.

Another way of describing First Nation inherent powers and rights is in reference to David Getches' definition of "reserved rights". He explains as follows:

> Federal Indian law is characterized by certain abiding principles: (a) tribal sovereignty, (b) federal power and obligations, [and] (c) reserved rights. ... Reserved Rights [mean s]o long as Indian rights are not voluntarily ceded by the tribes in treaties or in other negotiations which are approved by Congress, or they are not extinguished by Congress, they continue in their aboriginal state. Important rights not specifically ceded in a treaty or agreement are considered to be reserved, consistent with the purpose of the United States and the Indians in entering into the transaction. And when cessions are made or rights are extinguished they are to be construed narrowly as affecting only matters specifically mentioned. Thus, the doctrine of reserved rights dictates that a treaty silent on whether the Indians retained hunting and fishing rights which were important to their survival should be read as implying the continued existence of such rights ... Treaties and agreements which expressly reserve rights to Indians even outside reservations are read to fulfil ancient promises as Indians would have understood them....*The right of self-government may be the most valuable reserved right* and one which certainly was within the purposes of Congress and the tribes as they negotiated their future rights and relations. ... A tribe's *sovereignty exists as a reserved right* and its exercise in Indian country is protected by a preemptive exercise of federal power in establishing the reservation. Likewise, *fishing rights are reserved* under a treaty, may be regulated under a tribe's sovereignty and any state laws affecting the right are preempted by the exercise of federal power which preserved the rights. (emphasis mine)[5]

Getches includes water resources, oil, gas, uranium and other minerals as falling within the doctrine of Indian reserved rights.

Principle Three

Sovereign Aboriginal rights, meaning those rights existing prior to European contact, emanate from the paramount and supreme Indian title to the North American soil and they encompass not only land-based rights such as hunting, fishing, and trapping, but also include political and social rights such as education, health and self-determination. In other words, Aboriginal rights mean that bundle of rights which ensures the continuing survival of the nation, the people and their land-based rights. Those rights emanate from only one source: the supreme and paramount Indian title as ordained and given by the Creator.

Principle Four

First Nation self-governing powers emanate from the Creator and from *the will of the people*, whose membership comprise the Aboriginal political society and who freely choose to form a government. Such societies always had and continue to have all those powers and rights whether they are inherent, reserved, residual or protected.

Principle Five

Indian sovereignty is separate and concurrent, but nonetheless co-equal in status with Canadian sovereignty just as federal sovereignty is co-equal with provincial sovereignty under Canadian federalism. The bilateral nature of First Nation-Canada relations has been acknowledged, affirmed and entrenched by the various pre- and post-Confederation treaties and land claims agreements signed by the respective sovereignties. This principle is otherwise referred to as "divided sovereignty" or "popular sovereignty".

The above five Aboriginal Rights Principles should form the foundation of any negotiation between First Nations and Canada regarding the Aboriginal right to self-government. A clear understanding and agreement regarding those principles must be achieved before proceeding any further. Failure to achieve such a consensus of understanding and agreement would continue to result in the now familiar questions: "What is meant by First Nation self-government?" or "What is meant by First Nation sovereignty?"

THE PROCESS OF TREATY FEDERALISM

Treaty federalism is not only a concept but is also a process. *It is a process proposal for the entry of Indian First Nations into the Canadian federation.* Even though Aboriginal and treaty rights, including those "rights that now exist by way of land claims agreements", are now entrenched in the constitution, the ability of First Nations to govern, legislate and enforce those sovereign rights (for example s. 35 Charter rights) has yet to be constitutionally affirmed. First Nations now possess potentially strong constitutional and legal powers; however, the governing structures and institutions required to exercise, enforce and protect those rights have not yet been realized. Here, I am suggesting the introduction and operationalization of the concept and process of treaty federalism as a way of dealing with these substantive matters.

For greater clarity, treaty federalism should not be equated with the Quebec proposals for sovereignty-association. The latter advocate complete political independence while maintaining economic ties with the rest of Canada. First Nations do not aspire to carve out separate nation states within Canada, but rather, they desire a process for their direct participation in the way Canada is governed based on their treaties, the Royal Proclamation of 1763, land claims agreements and the five Aboriginal Rights Principles listed above. Treaty federalism is a credible option because it springs from age-old understandings and undertakings between the various Indian nations and Imperial Britain, and subsequently with Canada.

IMPLEMENTATION OF TREATY FEDERALISM

Regarding the practical aspects of the implementation of treaty federalism in Canada, the process could begin immediately following the entrenchment of the inherent right to aboriginal self-government in the Canadian Constitution. Should the constitutional entrenchment process fail in the "Canada Round," similar to the F.M.C's of the 1980's, the treaty federalism process could stand alone as a viable alternative or remain as a safety valve option. For negotiation purposes only, Canada would be divided according to the existing major treaty areas where the major signatory parties to the original treaties would convene to discuss and negotiate pertinent matters of First Nation powers, rights and jurisdiction. Although, the Province of Alberta is not an original party to Treaties 6, 7 and 8, that government should now be involved by virtue of the constitutional amendment formulas entrenched in Part V of the *Constitution Act, 1982*. However, its role would have to be somewhat different from the federal role due to the exclusive federal power embodied in s.91(24), and to the treaty and fiduciary obligations of the federal Crown.

The primary purpose of the proposed fifteen separate treaty area discussions and negotiations is two fold:

(i) to arrive at a general consensus regarding the spirit and intent of the particular treaty in question and what the treaty rights and obligations mean in a modern First Nation society within the larger Canadian society; and,

(ii) to arrive at a constitutional consensus regarding the clarification of First Nation inherent powers, jurisdictional spectrum, and reserved rights with or without the en-

trenched right to First Nation self-government.

The treaty area discussions and negotiations may proceed simultaneously or proceed whenever the interested parties deem it advisable and necessary to begin the process. Also, it would be advantageous to craft a standard set of First Nation powers that would approximate a provincial model in order to avoid wide variations in jurisdictional spectrums which would create problems for intra-government relations. The five Aboriginal Rights Principles outlined earlier should provide guidelines for such discussions.

The presumption of the federal power to unilaterally abrogate power from or delegate power to First Nations should be absent from such discussions and negotiations. The playing field should be level such that the First Nations will either agree or not agree to voluntarily surrender certain portions of their concurrent sovereignty to the central federal government, for example jurisdiction in areas of paramount national importance, national interest, national security and international relations. The substance of the negotiations likely would centre around what has already been delineated in the portion of this paper regarding the proposed *Siksika Indian Government Act.*

CONCLUSION

When these discussions and negotiations are concluded and consensual agreements have been reached between the parties, new formal treaties would be drawn up to be signed by the interested parties and to be ratified by their respective governments. Those new treaties could be added as schedules to the Canadian Constitution or as addendums to the original treaties and would delineate the inherent powers, reserved rights and legal jurisdiction of the consenting First Nations. Hence the process of treaty federalism would complete within Canada what was started with the land sharing treaties made between 1850-1923. Treaty federalism would breathe life into the new political and legal relations between Canada and the First Nations.

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1. Donna Lea Hawley, "A Comparison of Provincial Powers and the Powers of Indian Bands under the Indian Act" in M. Asch, ed., *Home and Native Land, Aboriginal Rights and the Canadian Constitution* (Toronto: Methuen, 1984) 124.

2. R.A. Reiter, "Part II the Indian Act" in *The Fundamental Principles of Indian Law* (Edmonton: First Nations Council, 1990) 1.

3. *The Road: Indian Tribes and Political Liberty* (Berkely: University of California Press, 1982).

4. *Ibid.* at 275 and 277.

5. D. H. Getches, *et al, Federal Indian Law: Cases and Materials* (St. Paul, Minn.: West Publishing Co., 1979) at 18, 21 and 22.

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HARM REVISITED:

R. v. *Butler*

Sheila Noonan

INTRODUCTION

Following a massive police raid in 1987 on the premises of Avenue Video Boutique in Winnipeg, the appellant and an employee, Norma McCord, were charged with some 250 violations of the obscenity provisions of the *Criminal Code*. At trial convictions were obtained in respect of eight counts. The majority of the Manitoba Court of Appeal later granted the Crown's appeal and entered convictions in respect of all remaining charges.

The subsequent decision at the Supreme Court,[1] where a new trial was ordered, raised squarely whether s. 163 violates the s. 2(b) Charter right to freedom of expression, and if so, whether this infringement could be justified as a reasonable limit prescribed by law pursuant to s. 1.[2] It is the first occasion on which the Supreme Court was presented with a challenge to the Criminal Code provisions which proscribe the publication and distribution of obscene material. In answering the constitutional questions, Mr. Justice Sopinka, writing for the majority, concluded that even though s. 163[3] violates the Charter, it nonetheless can be saved under a s. 1 analysis.

However, the salience of the *Butler* decision rests only in part with the resolution of the constitutional dilemmas posed. The decision also purports to provide clarification of and distinctions between the various doctrinal tests which have been deployed in assessing whether sexually explicit materials are obscene. Not only was this clarification urgently required, but it reduces the force of any future argument that current juridical standards are impermissibly vague. The relevant inquiry is now animated primarily by a reformulated notion of harm which, although thoroughly familiar to liberal discourse, is given new life in this judgment through a concentration on the threat posed to the social order and specifically to the integrity and safety of women. The existing tests are therefore tailored to capture this altered focus.

In this respect, it is the community standard of tolerance which is most thoroughly reconstituted through an infusion of an expansive assessment of harm. While it has heretofore functioned largely as a barometer of liberal tolerance, the test must now address community standards in relation to the capacity of sexual depictions to legitimate, and predispose men toward, violence against women.

In keeping with the spirit of this doctrinal metamorphosis the Charter issues are approached in a manner which centrally locates harm to women, and is cognizant of the threat posed to other Charter values such as physical integrity and equality. Social science evidence of the harm of pornography also was endorsed in proscribing the dissemination of some pornographic material. In discussing proof of harm analogies are drawn to the distribution of literature promoting racial hatred. In this respect, undoubtedly much of the analysis of pornography propounded by the intervenor LEAF was influential.

Nonetheless, questions remain as to whether the rest of s. 163, in particular s. 163(3), could withstand direct constitutional challenge. Moreover, there remains the pressing issue of what types of materials will be adjudged to be obscene in practice. Finally, the efficacy of proscribing the circulation of some pornographic material while the majority of so-called soft porn materials (which equally may constitute a threat to women) are freely disseminated needs to be addressed.

ANALYSIS OF OBSCENITY PROVISIONS

The codification in 1959 of the equivalent of our current s. 163(8) was intended to displace the pre-existing common law test for obscenity articulated in *R.* v. *Hicklin*, namely the tendency of the materials in question to deprave or corrupt morals.[4] The philosophy which underlies the *Hicklin* formulation was the safeguarding of the moral fabric of society by prohibiting sexual depictions which undermined the sacrosanct order of marital sex aimed at procreation. Instead, the focus of the statutory inquiry was to centre on the question articulated in *Brodie* v. *The Queen*:[5] whether the impugned material constituted an "undue exploitation of sex." This formulation led in turn to a series of imprecise and potentially contradictory statements which emerged for assessing whether or not material was obscene. One of the virtues of the *Butler* decision is the endeavour to resolve and clarify the jurisprudence in this area.

Tests of "Undueness"

One of the central difficulties with the jurisprudence pertaining to the "undue exploitation of sex" is that no concise standard emerged to differentiate among the various tests, or to establish guidelines as to applicability of any given test. In short, it became increasingly unclear which of the three extant tests, discussed below, should be applied, under what circumstances, and how any conflict as between the various tests might be resolved. Moreover, the last Supreme Court pronouncement on this question, *Towne Cinema*[6] left many of the these concerns fundamentally unresolved.

i) *Community Standards of Tolerance*

The community standards test has, since the codification of obscenity, been the principal measure employed to establish undueness. Considerable energy has been devoted over the past three decades to defining its contents. Basically it is a test which represents an evolving standard indicating the national levels of tolerance. While expert testimony need not be adduced to establish community standards, it is clear that the test is one of tolerance, and not taste. In former Chief Justice Dickson's words:

> What matters is not what Canadians think is right for themselves to see. What matters is what Canadians would not abide other Canadians seeing because it would be beyond the contemporary Canadian standard of tolerance to allow them to see it.[7]

The majority of the Supreme Court in *Towne Cinema* affirmed that it is not a test which depends on audience, namely time and manner of distribution, for the act of public viewing to be unlawful.

ii) *Degrading and Dehumanizing*

The second test which has evolved most recently, namely whether the material in questions portrays the participants in a degrading and dehumanizing manner, addresses some of the concerns articulated by feminists with respect to the availability of pornographic material. In particular, feminists[8] have stressed that the presence of violence, inequality and objectification within sexual representation may legitimate and encourage force, coercion, degradation and dehumanization within human relationships. The concerns encompass not only the endorsement of violence against women and false representations of female sexuality, but include the manner in which women as a group are reduced to mere objects of sexual access. Pornographic depictions rely on representations of women as "sexual playthings ... instantly responsive to male demands."[9] Moreover, pornography is distributed within a context in which women are socially, politically, economically and personally subordinate to men. In this sense, the depictions of women as affirming and welcoming male sexual desires may reinforce women's subjection to men.

The Supreme Court in *Butler* affirms that the circulation of sexually explicit material which is degrading and dehumanizing is contrary to "the principles of equality and dignity." And the appearance of consent to the represented activity will not save such material. Of primary significance though is the Court's stand on the harm of this form of sexual depictions. The Court unequivocally pronounces that the material is problematic "not because it offends against morals" but rather because it is "reasonable to conclude that there is an appreciable risk of harm to society in the portrayal of such material." While admitting that the nature of the harm prohibited is "not susceptible of exact proof," the Court stresses that a significant body of literature now suggests that such representations harm women.

Therefore, the virtue of this judgment is that it identifies the nature of the social harm pornography produces as one which particularly places women at risk. An express statement to this effect at the Supreme Court level is a potentially powerful tool in proscribing materials which pose a risk to women and children. However, although the harm is specified in a manner which is responsive to the concerns that feminists have articulated, it is undercut, in part, by rendering the degrading and dehumanizing test only one of the salient inquiries. Nonetheless, this is arguably off-set by the fact that all tests are now infused with or attentive to the risk of social harm to women.

iii) *Relationship of Two Above Tests*

a. Confusion from *Towne Cinema*

The question that had remained unresolved post-*Towne Cinema* is the degree to which the degrading and dehumanizing test had supplanted the former community standards of tolerance test. Chief Justice Dickson was clear that while the community standards test was one measure, it was not the only measure of the undue exploitation of sex. He stressed:

> Even if certain sex-related materials were found to be within the standard of tolerance of the community, it would still be necessary to ensure that they were not "undue" in some other sense, for example, in the sense that they portray persons in a degrading manner as objects of violence, cruelty, or other forms of dehumanizing treatment.[10]

However, on the facts of *Towne Cinema* Dickson C.J. indicated, though without explanation, that the only test in issue was that of the community standard of tolerance. Thus, having expressed commitment to the test he fails to "operationalize it."[11]

A significant departure from previous Supreme Court doctrine was suggested in the concurring judgment of Madam Justice Wilson in *Towne Cinema*. In her opinion the primary question is whether the exploitation of sex is undue. In making this assessment, she adopts a contextual approach to the content of sexually explicit material:

> It seems to me that the undue exploitation of sex ... is aimed ... [at]the treatment of sex which in some fundamental way dehumanizes the persons portrayed and, as a consequence, the viewers themselves. There is nothing wrong in the treatment of sex per se but there may be something wrong in the manner of its treatment. It may be

> presented brutally, salaciously and in a degrading manner, and would thus be dehumanizing and intolerable not only to the individuals and groups who are victimized by it but to society at large. On the other hand, it may be presented in a way which harms no one, in that it depicts nothing more than non-violent sexual activity in a manner which neither degrades or dehumanizes any particular individuals or groups. It is this line between mere portrayal of human sexual acts and the dehumanization of people that must be reflected in the definition of "undueness."[12]

Madame Justice Wilson comments that while the community standards test represents a measure by which to assess impugned material, it fails to articulate adequately the norms according to which some sexual exploitation is permissible and some not. In a cryptic but prescient remark she foresaw the need to explore the relationship between these two tests:

> No doubt this question will have to be addressed when the validity of the obscenity provisions of the *Code* are subjected to attack as an infringement on freedom of speech and the infringement is sought to be justified as reasonable.[13]

While the text of the judgment is unclear, it seemed that the community standards test informed the process through which a finding of undueness obtained. Substantively, it would appear that degrading and dehumanizing aspects of sexual depictions were central to her analysis. The two other judgments, concurring in the result, did not address this problem.

b. *Butler* attempt at coherence

In view of the above, it is somewhat intriguing when Mr. Justice Sopinka declares in *Butler* that Dickson C.J. treated the degrading and dehumanizing test as "the primary indicator" of undueness in *Towne Cinema*. However, the virtue of *Butler* is that both these tests are drawn together in a manner that attempts to impart cohesive expression to an underlying norm. The principle of harm unequivocally infuses Sopinka J.'s assessment of whether given material will transgress notions of "undueness:"

> The courts must determine as best they can what the community would tolerate others being exposed to on the basis of the degree of harm that may flow from such exposure. Harm in this context means that it predisposes persons to act in an anti-social manner as, for example, the physical or mental mistreatment of women by men, or, what is perhaps debatable, the reverse.[14]

Tolerance and harm each must be weighed in assessing whether a breach of community standards has occurred. In Mr. Justice Sopinka's words, "[t]he stronger the inference of a risk of harm the lesser the likelihood of tolerance." While evidence of community standards may be desirable in rendering this determination, it is not required.

In an attempt to provide guidelines as to assessments of undueness Mr. Justice Sopinka adopts a three-tier categorization of pornographic material. It should be noted that this taxonomy is not novel: this was largely the approach advocated by Mr. Justice Shannon is *R.* v. *Wagner.15* The schema, which derives from a content analysis, effectively determines whether material is undue:

> (1) explicit sex with violence;
>
> (2) explicit sex without violence but which subjects people to treatment that is degrading or dehumanizing; and,
>
> (3) explicit sex without violence that is neither degrading or dehumanizing.[16]

In the view of Sopinka J., given that explicit mention is made of violence in s. 163(8), sexually explicit materials which contain violence will "almost always" be undue. Horror or cruelty in depictions may fall into either category one or two. However, explicit sex which degrades or dehumanizes may transgress this standard "if the risk of harm is substantial." Finally, material within the third category will not be undue unless children have been involved in its production.

Necessarily, this categorization relies upon a distinction between erotic and pornographic material which presupposes that the distribution of erotic material will not pose the same risk of social harm to women that the other two categories entail.[17] But here I think we should ask ourselves Catharine MacKinnon's question. Given the present circumstances of gender inequality, "what is eroticism as distinct from the subordination of women?"[18] Has eroticism become inextricably fused with dominance and submission and with expressions of power and powerlessness such that representation of heterosexual intercourse is by definition depiction of unconsensual sex? Moreover, as argued below, we should carefully examine the question of whether sexual representations may by definition reproduce a male epistemology and, hence, reinforce patriarchal power.

Thus on one level the question is: has the decision gone far enough in proscribing images which contribute to the cultural reduction of the female body to the sexual in a manner that devalues women and undermines their claims to greater participation in public life? In effect, the essence of the minority judgment delivered by Mr. Justice Gonthier and concurred in by Madam Justice L'Heureux-Dubé suggests that the blanket license to produce material which is seen to fall within category three may not go far enough in terms of safeguarding against the very harms that the Court seeks to curtail. On another level, the issue is the utility of such measures in the face of structures of representation which operate to produce the objectification of women.

iv) Third Test: Internal Necessities

Even if a finding of undueness obtains in respect of one of the tests outlined above, the inquiry does not end here. The work as a whole must be examined in an effort to assess whether it is deployed in the serious pursuit of a theme. This is an attempt to assess the internal necessities of the work itself. In *Brodie*, Judson J. expressed the intent of this exercise in the following manner:

> What I think is aimed at is excessive emphasis on the theme for a base purpose. But I do not think that there is undue exploitation if there is no more emphasis on the theme than is required in the serious treatment of the theme of a novel with honesty and forthrightness...The section recognizes that the serious-minded author must have freedom in the production of a work of genuine artistic and literary merit and the quality of the work ... must have real relevance in determining not only a dominant characteristic but also whether there is undue exploitation.[19]

In discussing when this test is to be applied, Mr. Justice Sopinka only refers to sexually explicit material which is undue in the sense of having contravened community standards of tolerance. Therefore, it remains unclear whether application of this test can save material that is degrading or dehumanizing.

No doubt the internal necessities test is aimed at providing for "genuine" freedom of expression. The issue though is whether the distinction between high culture (art) and low culture (pornography) can be sustained. Suzanne Kappeler in *The Pornography of Representation* argues forcefully that both rely upon structures of representation which reinforce male subjectification, and hence manifest patriarchal power:

> What feminist analysis identifies as the pornographic structure of representation not the presence of a variable quality of "sex", but the systematic objectification of women in the interest of the exclusive subjectification of men is a commonplace of art and literature as well as of conventional pornography. It is in the expert domains of cultural representation and the critical discourses that support them that the attitudes to representation, the "acceptable" structures of representation are developed and institutionalized. And it is on their concepts of expression, and their understanding of the role of representation that the law bases itself in its endeavour to protect the freedom of expression.[20]

Such an analysis directly calls into question the efficacy of content-based classifications. For example, many representations invoke reading cues which rely upon and legitimate the sexualization of children without impermissibly depicting forbidden acts or deploying actual children in their technical composition. Of concern then are the social aspects of the production of pornography and the process by and through which women are "transformed from subjects into pornographic objects."[21] To the extent that the material production of culture and the realm of the social understanding of the "sexual" are grounded in the objectification of women, a content-based classification will not necessarily assist in eradicating the underlying social causes of women's oppression.[22] Nor will simply fostering the distribution of alternative sexual imagery disrupt the prevailing cultural constitution of the sexual.[23]

Finally, faced with the content-based classification endorsed in *Butler* the salient question remains: What are the processes by and through which "harm" and "substantial harm" are to be measured? Insofar as guidance is provided by the Court it is to be gleaned primarily from the resolution of the Charter issues.

CHARTER ANALYSIS

While holding that s. 163 infringes the *Charter* by virtue of its prohibition of certain expressive content,[24] the Supreme Court finds that the avoidance of harm to society is a pressing and substantial objective which justifies some restriction on freedom of speech. Further, the fact that our understanding of the nature of this harm has altered since the inception of statutory prohibition does not suggest a "shifting purpose" characterization of the legislation.[25]

In stressing that the dissemination of material which threatens the self-dignity of targeted social groups can be proscribed, the Court likens the social character of the harm of pornography to that of hate propaganda. The proliferation of both these types of material offend fundamental values which justify restrictions on expression. Various articulations of the harm posed are proffered. Sopinka J. cites with approval the MacGuigan report which delineates the danger in the following manner:

> The clear and unquestionable danger of this material is that it reinforces some unhealthy tendencies in Canadian society. The effect of this type of material is to reinforce male-female stereotypes to the detriment of both sexes. It attempts to make degradation, humiliation, victimization, and violence in human relationships appear normal and acceptable. A society which holds that egalitarianism, non-violence, consensualism, and mutuality are basic to any human interaction, whether sexual or other, is clearly justified in controlling and prohibiting any medium of depiction, description or advocacy which violates these principles.[26]

In support of the contention that the objective is pressing and substantial, Mr. Justice Sopinka refers not only to the "burgeoning pornography industry," but to growing concern about the exploitation of women and children.

A consideration of whether proportionality has been demonstrated is set against the backdrop of recognizing that an economic motive for expression is not at the core of the values safeguarded by s. 2(b).[27] Nor are the Code provisions directed at prohibiting the suppression of "good pornography."[28]

However, it is within the context of discussing the rational connection between the legislation and the Parliamentary objective of limiting the risk of harm that issues of proof are addressed. While admitting that a causal connection between pornography and violence cannot be conclusively demonstrated, as per *Irwin Toy*[29] and *Keegstra*, there is held to be a reasonable basis for Parliament to have adopted the mode of intervention it selected. It is sufficient that a rational link between the criminal sanction and the objective of safeguarding women be demonstrated.

Hence, it is not required that actual proof of harm be adduced in order for such legislation to withstand constitutional scrutiny. Frankly, this is a rational and welcome perspective. However, having already declared that evidence of community standards of tolerance while desirable is not required, it seems that the courts will now be faced with drawing inferences largely on the basis of the content of the material itself.

This rankles not only due to the inadequacies of solely content-based understanding of representations, but also because it raises a serious question as to which types of sexually explicit material will be targeted. In this vein it is instructive that the first seizure authorized following the release of the *Butler* decision was of gay material.[30] While this decision is currently under appeal it confirms fears that the Code provisions will continue to be deployed disproportionately against sexual depictions which contravene expressions of male heterosexual desire.

In light of this, the knowledge that Supreme Court justices are willing to employ the tools of the *Charter* in an effort to redress social and sexual inequality assumes a more dubious quality. Moreover, what the *Butler* decision graphically demonstrates is the conceptual inadequacies of much of the arsenal at the Court's disposal in this battle. Now that we are thoroughly entrenched in the era of Charter discourse, we will continue to witness efforts to balance the objective of protecting freedom against securing the goals of ending victimization and promoting substantive equality. In respect of these latter goals, Judy Fudge has stressed that the results under the Charter regime have been ambiguous.[31] On the one hand, Charter cases may provide powerful political symbols around which feminist groups can coalesce. However, on the other hand, by focusing on legislative provisions, as in *Butler*, both the socially constituted nature of sexuality and the power relations within which actual sexual practises are embedded are obscured.[32] In instances where such legal challenges are mounted, the potentially incommensurable visions and disparate strategic analyses of what concrete measures best facilitate the eradication of women's subordination cannot be aired.[33] In the end, one cannot help but wonder: in spite of juridical pronouncements sympathetic to the victimization of women and children, how much has actually been accomplished?

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1. [1992] 1 S.C.R. 452.

2. Previous lower court decisions have consistently held that although the obscenity provisions violate freedom of expression they nonetheless constitute a reasonable limit under s. 1. See *R.* v. *Fringe Products Inc.* (1990), 53 C.C.C. (3d) 422 (Ont. Dist. Ct.); *R.* v. *Red Hot Video* (1985), 45 C.R. (3d) 36 (B.C.C.A.); *R.* v. *Ramsingh* (1984), 14 C.C.C. (3d) 230 (Man. Q.B.).

3. Although the Court was faced with a challenge to the whole of s. 163, Mr. Justice Sopinka clearly articulates that the section which will be addressed is subsection 8 which provides:

> For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene.

4. (1868), L.R. 3 Q.B. 360. Whether material was found to be obscene depended upon an assessment based on the formulation of Cockburn C.J. at 371:

> ...I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.

5. [1962] S.C.R. 681.

6. *Towne Cinema Theatres Ltd.* v. *The Queen* (1985), 45 C.R. (3d) 1 (hereinafter *Towne Cinema*).

7. *Ibid.* at 508.

8. Perhaps more than any other single issue, pornography has proven incredibly contentious. By using the term feminist, I do not wish to be taken to suggest that feminists are in agreement on this issue. In fact, it has proven one the most divisive matters for the modern women's movement. While I do not propose to canvass the various positions here, a basic appreciation of the complexity of these differences can be gleaned from reading: Varda Burstyn, *Women Against Censorship* (Vancouver: Douglas & McIntyre Ltd., 1985); Dorchen Leidholdt and Janice Raymond, *The Sexual Liberals and the Attack on Feminism* (New York: Pergamon Press Inc., 1990); and, Susan Cole, *Pornography and the Sex Crisis* (Toronto: Amanita Enterprises, 1989).

9. Per Shannon J. in *R.* v. *Wagner* (1985), 43 C.R. (3d) 318 at 331.

10. *Towne Cinema, supra*, note 6 at 15.

11. Beverly Baines, "Annotation to *Towne Cinema Theatres* v. *R.*" (1985), 45 C.R. (3d) 2 at 3.

12. *Ibid.* at 29.

13. *Ibid.* at 31.

14. *Supra*, note 1 at 485.

15. (1985), 43 C.R. (3d) 318 (Alta. Q.B.).

16. *Supra*, note 1 at 484.

(Continued on page 21)

BRITAIN'S QUIET REVOLUTION

Norman Lewis

The British political and administrative machine has been undergoing a quiet revolution since, at the latest, 1988. This revolution is formally described as the 'Next Steps Initiative' and was intended to improve management in government. The form that it has taken is that of hiving off the administrative activities of government to Executive Agencies (EAs) leaving policy formulation to a thinned-down Whitehall cadre. This, in itself, may perhaps be regarded as uncontroversial but I am not alone in believing that it is accompanied by important constitutional considerations. The whole exercise has been conducted almost entirely without legislation and with precious little in the way of Parliamentary debate. We are continuing to pretend that ministerial accountability to Parliament is the only constitutional guarantee required even though a huge tranche of government work is being carried out by EA staff for most of whose actions the minister cannot, by definition, be responsible. No regime such as the *United States Administrative Procedure Act* has been introduced and the concept of the public service ethic has been left twisting in the wind.

THE BACKGROUND

At the time of writing (late Spring 1992) the total number of EAs had reached 72. 290,000 civil servants, about half the total, are working in Agencies and other organisations operating on Next Steps (NS) lines. It is intended that perhaps 75% of public servants will eventually be so employed. NS Agencies cover a wide variety of organisations ranging in size from the Social Security Benefits Agency (BA) with 63,000 staff to Wilton Park Conference Centre with just 30. The EAs have responsibilities as diverse as weather forecasting, issuing driving licences, issuing passports and providing support services for the Armed Forces.

Some trace the origins of these developments to the Fulton Committee Report of 1968 which argued for the introduction of management by objectives and the selective hiving off of departmental functions. During the Thatcher years value for money developments in central government heralded the emergence of NS. First of all the so-called Rayner scrutinies occurred. These were a programme of quick studies of departments, directed at reducing expenditure in the short term. The Financial Management Initiative (FMI) on the other hand began in 1982 as a longer term financial strategy designed intentionally to restrict expenditure programmes. FMI was also supposed to involve the devolution of financial control down to staff who are in the best position to know where resources may be deployed efficiently. This is perhaps one of the first acceptances of the weakness of traditional accounts of ministerial responsibility.

FMI was very successful in putting the budgeting systems in place which provide information on how much the activities of government cost, but less successful in delegating responsibility to the budget holders. NS was to go further. It emerged from a 1988 report to the Prime Minister entitled *Improving Management in Government: the Next Steps*. It was based on the belief that there was an insufficient sense of urgency in the search for better value for money and steadily improving services. There was a general acceptance within the civil service that developments towards more clearly defined and budgeted management were positive and helpful. It was also recognized that senior management in the civil service was largely skilled in policy formulation and had little experience of managing or working where services are actually being delivered. As a result the report recommended that agencies should be established to carry out the executive functions of government within a policy and resources framework set by a department. This was to set out the policy, budget, specific targets and the results to be achieved. A full permanent secretary was to be established as project manager.

The revolution to be worked is that a quite different way of conducting the business of government should be established. The central civil service would consist of a small core engaged in the function of servicing Ministers who will be the sponsors of particular government policies and services. Responding to those departments would be a range of agencies employing their own staff who may or may not have the status of crown servants. Managers should be free to take all decisions for their organisations within the policy they are assigned to carry out, except where the wider needs of government must override that assumption.

The rest is almost history. The Prime Minister accepted the report and the first agency (the Vehicle Inspectorate) was established in August 1988. In announcing this the Minister said that local management would have enhanced responsibilities in the areas of finance, contracts and personnel management and more scope to develop new business initiatives. For example, powers to recruit, promote and dismiss staff up to specified levels was increasingly to be assumed. Performance incentives would be introduced and, in particular, Chief Executives (ACEs) would have a performance related element to their pay. This pattern has largely been followed since. It is worth mentioning that in recent times many more ACEs are being appointed from outside the civil service. For example the head of the Defence Research Agency was recruited from private industry at a salary of £140,000, a salary somewhat higher than that of the Head of the Civil Service. The heads of the largest agencies under

the aegis of the Department of Social Security may be paid up to 12.5% of basic salary as an annual bonus according to their performance set against their published targets.

One further organisational matter might be mentioned here. There are Agencies which are fully within Parliamentary Supply and there are those with a trading capacity. A trading fund provides a financing framework for accountable units of government to operate outside the normal restrictions of Vote finance. This framework covers all operating costs and receipts, capital expenditure, borrowing and the fund's net cash flow. A trading fund has standing authority to meet outgoings from receipts; i.e. there is no detailed advanced approval by Parliament of its income and expenditure. A trading fund has powers to borrow and create reserves in the form of cash deposits. This financing regime also provides a more flexible means than is possible for a body operating on-Vote to meet unanticipated demands for its output and higher or lower than anticipated capital expenditure. Seven agencies presently operate as trading funds. This allows them to manage their finances more like a commercial company, including making a return on capital.

So far, so good. What was missing, and remains missing, was a constitutional reassessment of the sort recommended by the Fulton Report, especially where sensitive matters such as social and educational services were involved. In fact, it is widely believed that the original "Ibbs" report on which the 1988 document was based also expressed the view that such changes would necessitate a reconsideration of our system of constitutional accountability. That has not, however, happened. It is true that a great deal more information on the workings of government is available than was the case before the establishment of the EAs. Yet the only "constitutional" element of the new package is the establishment of Framework Documents for each agency which lay down aims and objectives, relations with Parliament, the department and other agencies, financial responsibilities and the measuring of performance. These are important new areas of information made available to the public but they do not directly address the dilemma of effective accountability under an altered regime. I shall return to this matter in due course.

PARLIAMENTARY ACCOUNTABILITY AND THE AGENCIES

I shall not rehearse the familiar version of Parliamentary accountability which lies at the heart of the British Constitution. Traditionally, of course, the Minister in principle accounts to Parliament for everything which civil servants do, whether we are speaking of high policy, executive actions or operational detail. The Government has constantly asserted that NS will not change these arrangements. A moment's thought, however, will reveal these assertions as somewhat hollow. The ACEs, after all, are given delegated power to conduct defined aspects of departmental work according to the Framework Document and the performance indicators/targets. They are increasingly seeking, and obtaining, more autonomy in the field of personnel and budgetary matters. Indeed, one of the main objects of the exercise is to reduce central government control over day to day policy *implementation.*

It is clear then that little or no Parliamentary control is possible in these circumstances and yet the protestations of continuity are everywhere heard. This is because ordinary MPs buy the official version of general Parliamentary accountability when its heyday is long since past. Ministers are perfectly happy to collude in this collective self-deception. In fact a warning had been posted by the Expenditure Committee of the House in 1977 that hiving off necessarily involved a weakening of ministerial control. Departmental officials will be understandably reluctant to account to ministers for matters over which they have no control. Ministers, in their turn, will feel the same in the discharge of their responsibility to Parliament. Insofar as the orthodox version holds up at all, NS should logically be confined to parliamentary supervision of the primary objectives and targets set in the Framework Documents and elsewhere, leaving day to day administration with the professionals in the Agencies. Not to mention of course the continuing role of the Parliamentary Commissioner for Administration or Ombudsman whose jurisdiction naturally includes the Agencies since they have no legal personality of their own. Indeed the Ombudsman, who has been traditionally amongst the most conservative of his ilk, might gain added impetus by the attachment of the "Citizen's Charter" to the work of the Agencies. However, what is worrying is that the Home Affairs Select Committee of the House has complained about the failure to consult them over draft Framework Documents. The Government response is that it is not policy to let Parliament contribute to the policy process at the working document stage, an interesting constitutional confession.

The Treasury and Civil Service Select Committee subcommittee (TCSC) has been by far the most active in monitoring the progress of NS. Under the chairmanship of Giles Radice it has done notable work in questioning the Project Manager, Sir Peter Kemp, other leading civil servants and the ACEs themselves. The Committee has published a report each summer to which the Government has responded with a Command Paper in the autumn at the same time as the publication of the Government's Annual Review of the NS programme. The Committee has seen itself acting as guardian of Parliament's interest in such matters. There is no doubting the importance of the TCSC's contribution but it does, naturally, operate post hoc and has, in my view, paid too little attention to non-Parliamentary forms of accountability.

This aside, there has not been a flurry of activity over NS in the other Select Committees, presumably because they are issue-oriented rather than organisation oriented. Their general lack of interest, however, is known to have caused surprise to Sir Peter. Such interest as there has been has caused some commentators to remark that they are more

concerned with administration than policy. Interesting, since it is believed that Mrs. Thatcher only agreed to the institution of the Select Committee system in 1979 on the basis that they concentrated on value for money issues and general efficiency! The formal position is that Ministers decide who is to represent them before the Committees but they will normally regard the ACE as the person most suited to represent them.

Whatever else is thought to be necessary, it would be beneficial if Select Committees were to play a part in policy-making. They should be encouraged to comment on Framework Documents as they are produced or on their renewal. Policy-making in departments needs to become more transparent if the department's role in setting targets and performance objectives is to be adequately assessed.

The formal position on Parliament and audit is unchanged. Mrs. Thatcher assured the House in 1988 that the normal rules of accountability and audit should apply to the EAs and that the National Audit Office and the Public Accounts Committee should play the same role in relation to them as they have traditionally done with departments of state. In fact, at the time of writing, the NAO had published only three value for money reports on the agencies. In one at least, that on the Vehicle Inspectorate, they were able to conclude that agency status had had a telling beneficial impact on performance achieved. This is to be expected or at least hoped for. In concept at least the EAs should improve management performance and should improve efficiency and deliver better service to customers. Being neutral about these developments initially I have become converted to the cause. This does not, however, affect my concern about constitutional accountability.

CUSTOMER SERVICE

NS is clearly about greater efficiency. Targets and indicators are intended to be robust and to be tightened with the passage of time. But the other side of the equation is improved performance and 'customer' satisfaction. How does NS fare here?

"Service to the Public" was a Cabinet Office publication in 1988 and an excellent appraisal of what is necessary for customer satisfaction. It is known to have been sunk by Treasury opposition. However in 1989 the Cabinet Office produced "Basic Issues in Customer Service Training and Management" which was to be followed up by an "action learning programme." In fact, this seems to have been swallowed up by Prime Minister Major's commitment to the Citizen's Charter, which is currently the subject of considerable debate.

The first thing to say is that the publication of targets produces important customer information about the service which can be expected. Each public body is expected to provide its own charter for the public which, in the case of the EAs, will refer to timetables for performance of tasks. Thus the Employment Service Agency's (ESA) charter for job seekers is displayed in each local office. This includes standards to be met on waiting times, the promptness and accuracy of benefit payments and the like. The customers' charter for the BA is similarly couched. What does not appear to be happening at this time is the practice of using the number of consumer complaints as a quality control exercise - something that the British are notoriously bad at.

My own view is that the greatest failure of constitutional/administrative law in Britain relates to the lack of institutional structures for consultation. It is the greatest weakness of the NS programme. What is occurring, however, is a move towards testing customer needs through market research and surveys. New-right politics are the dream time for market research and consultancy firms. Thus the ESA conducts a customer satisfaction service and also an internal attitude survey amongst its staff. The BA also has recently carried out a national survey and are encouraging local offices to find out more about what their customers want with the possibility of carrying out more local surveys. On the other hand we have seen that neither the unions, staff generally, or the public are uniformly involved in the construction of business and corporate plans.

At this point I should say a little more about the Citizen's Charter. Space does not permit of extensive treatment here but an outline should be helpful. The idea was born in a White Paper of July 1991 when the Prime Minister pledged to make public services answer better to the wishes of their users and to raise quality overall. Each public body was required to produce a charter of promises about service performance and the best would be awarded a "chartermark" by the Cabinet Office. Most of this exercise would be carried through without legislation, so that, for example, each public body is asked to provide a complaints procedure for the public but the only penalty for non-compliance is government censure. For a country that boasts of the rule of law Britain is remarkably coy about using the law for the purposes of defending citizens' rights. Only the churlish would oppose the sentiments lying behind the Citizen's Charter but the very real danger exists of the exercise falling between two stools - the legal system and Parliament. Absent legal obligations speedily enforced and the distancing of MPs from the agencies it is possible that the expectations of the Prime Minister might never be realised.

Just one more word about market research. These initiatives are very valuable but suffer from several defects. One is that they are commissioned by government itself, another is that we cannot be sure that all details are published and the last, but certainly not least, is that customers or their representatives cannot cross-examine questionnaires. I shall return to this theme when talking further about policy formulation.

The last issue I wish to raise on customer care is that of the establishment of steering groups or advisory boards by the EAs. A number of the EAs have such bodies, though the terminology used varies. For example, Companies House and the Insolvency Service have steering boards while the more controversial Benefits Agency and Employment Service do not. As we have seen the latter have chosen to rely on market surveys though in the case of social security an Act of 1980 established a Social Security Advisory Committee whose role I do not have the space to describe here.

What is of interest is that the commercial agencies will frequently have boards on which their main customers or their representatives will serve. This not only affords them information about customer needs but also provides a kind of policy community. So, for example, Companies House's user group regularly has a policy item on the agenda. Customer or citizen representation for the larger and more politically controversial agencies is, however, largely lacking. The Companies House example also says something about the conceptual divide between administration and policy and indicates yet again the incoherence of our administrative law in relation to the policy-making process.

THE POLICY-MAKING PROCESS AND ACCOUNTABILITY

The policy/execution divide is, of course, illusory. It would be absurd to imagine that those in the firing line did not have valuable information on battle plans, and so it has proved in relation to the Agencies. Furthermore, because of the high visibility of the EAs and the attempts to clarify their relationships with Whitehall, responsibility for the policy process is higher than it was previously. This is most marked perhaps in relation to social security where the process of "agencisation" produced illuminating working documents made available to the enquiring public. Even so, the lightly lifted veil reveals more starkly the hidden face of effective power.

Let me first deal with the newly emergent policy communities. We have already noticed the policy input of advisory boards which presumably formalise previously informal working practices. However, it is clear beyond doubt that the ACEs have a considerable influence on the policy process. The Fraser Report, for example, was adamant that Agencies should make a full contribution to policy formulation and was hostile to any artificial divide between policy and execution. In fact, in proceedings before the TCSC the head of the ESA claimed that his agency made a "very important input" into policy thinking. Indeed the Department of Employment looks to the Agency for information vital to policy-making, a matter which is enshrined, perhaps ironically, in the Framework Document. That allows the Chief Executive direct policy access to the Secretary of State and furthermore prohibits him from making policy proposals affecting the work of the Agency without consulting with the Chief Executive. Furthermore, a forum exists for influencing policy in the BA and the Contributions Agencies. More generally the TCSC has declared that managers should have a clear input into policy thinking, a view recently accepted by the Government itself.

At the outset some thought that the EAs were simply accountancy-led regimes, that government was concerned only with targets and inputs and that after a while targets would be sharpened to the point where the Agencies were simply seen as cost-cutting mechanisms. Time no doubt will tell all but there is clear concern being expressed by central government that emphasis is being turned to outputs. In other words, the quality of delivery and satisfying the customers' needs has assumed increasing importance. Thus the renewed emphasis on quality rather than quantity targets. This trend, if such it is, is greatly to be welcomed as is the whole thrust of NS. After all, one of the prime rationales for the Whitehall revolution is supposed to be the liberating effect on departmental policy-making that delegation of operational responsibilities to agencies would achieve. It must be said that little public information is currently available on the effect of the changes on Whitehall policy-making as opposed to Agency operations. The policy process is still shrouded in secrecy, one of the pitfalls of working dramatic change without debate or legislation. At the formal level there is discouragement from providing information about policy debate and advice in the form of the "Osmotherley" rules which restrict the evidence which civil servants can give to Select Committees. Policy options cannot be revealed and so the quality of advice remains immune to public assessment. The New Zealand approach to the NS equivalent, on the other hand, was more open and introduced through legislation. Their new financial regime clarified the role of policy advice by requiring the connection between outputs and outcomes to be identified. Policy advice has become simultaneously the output of advisory agencies. Unless advisory bodies, operating in the sunshine, become part of our new culture there is little hope that the enormous potential released by the NS initiative will be properly realised. All of this brings me to my conclusions concerning NS and constitutional accountability.

The TCSC has spoken of an "explosion of information" produced by NS and to a considerable extent this is true, certainly as compared with the previous position. Each agency produces an annual report, there is the Framework Document, and some publish their business and corporate plans. There is now an annual review of NS produced by the Cabinet Office and the Treasury has also provided guidance on the form of annual reports and accounts. There is as well a highly developed form of financial accountability, not least through the practice of "hard charging" for customers. The price of governmental services is being made more readily accessible. On the other hand, some commentators believe that since NS is about flexibility and innovation there is an increased incentive for calling off the parliamentary watchdogs. That must not be allowed to include the NAO but otherwise it seems to me to be no bad thing. If Parliament were to concentrate more on the large policy issues the state of our democratic health might be a great deal sounder. A full Parliamentary Select Committee on the Machinery of Gov-

ernment has been canvassed by some as a means of achieving this aim. As to the administration of the EAs themselves we must not overlook the role of the Ombudsman. Although a relatively low-key figure traditionally, the Citizen's Charter initiativemight re-awaken him. If the charters spell out promises of service, as they are intended to, then presumably the Ombudsman's perception of maladministration will alter to keep pace with the new culture. All this is on the plus side but there are two caveats which I need to enter in conclusion. The first relates to the still inadequate levels of accountability and the second to the ethic of the public service.

The time now seems ripe for an overall institutional examination of NS. This is the view of the TCSC and it is clearly correct. More importantly our new revolution calls for a rethink of our administrative and constitutional law. Parliament can make improvements to its own arrangements but it cannot hope to oversee the whole EA apparatus. *Pace* the Citizen's Charter we need to legislate for public grievance procedures but overwhelmingly we need to do something about the policy-making process to engage all customers and all citizens. The American way forward may not be appropriate but I should like to see all government departments shadowed by a high-powered advisory committee with a research capability and a right to participative dialogue enforceable by the courts. NS has done a great service in a number of ways, not least in opening up tantalising glimpses of the way government is actually run. Its finest service might yet be to expose the shallowness of our constitutional conventions and traditions.

What we must not fail to do is to honour the tradition of public service and the public service ethic. There is a revolution afoot here as well. Although NS has devolved power down the line and given many civil servants a greater sense of purpose and belonging, it has produced much else besides. Greater flexibility in pay regimes means removing national pay scales at the end of the day. Civil service jobs are in the process of being put out to tender as I write. If the fashion for privatisation continues unabated we may dissipate our public service element altogether. The TCSC spoke of the importance of the career civil service, of impartiality and maintaining standards. Other have spoken of the demise of the civil service as we know it. I believe that Next Steps is a very important initiative and one which is working a quiet revolution. We must examine our notion of public service more closely and tie it in with a renewed search for adequate forms of accountability.

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Sheila Noonan (Continued from page 16)

17. On this score, I am far less convinced than I once was that such a distinction can usefully be sustained.

18. "Not a Moral Issue" in *Feminism Unmodified* (Cambridge: Harvard University Press, 1987) 146.

19. *Supra*, note 5 at 704-5.

20. Suzanne Kappeler, *The Pornography of Representation* (Cambridge and Oxford: Polity Press and Basil Blackwell Inc, 1986) at 103.

21. Dawn Currie, "Representation and Resistance: Feminist Struggles against Pornography" in D. Currie and V. Raoul, eds., *Anatomy of Gender* (Ottawa: Carleton University Press, 1992) 191 at 203.

22. *Ibid.*

23. For a compelling argument as to why this may be so see *Geraldine* Finn, "Against Sexual Imagery" (1986-7) 12(2) Parallelogram 315.

24. A similar willingness to broadly characterize the scope of protected expression was displayed in *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123; and in *R.* v. *Keegstra*, [1990] 3 S.C.R. 697.

25. Such an approach to characterizing purpose was expressly rejected by the Supreme Court in *R.* v. *Big M Drug Mart Ltd.*, [1985] 1. S.C.R. 295. There the Court found that since the legislation historically had a religious purpose consistently maintained by the courts, a secular purpose could not be attributed to it.

26. *Supra*, note 1 at 493-4.

27. Here the Court relies upon *Rocket* v. *Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232.

28. This is a phrase coined by Robin West in "The Feminist-Conservative Anti-Pornography Alliance and the 1986 Attorney General's Commission on Pornography Report" (1987) 4 Am. Bar Found. Res. Jo. 681 at 696 where she suggests:

> Good pornography has value because it validates women's will to pleasure. It celebrates female nature. It validates a range of female sexuality that is wider and truer than that legitimated by the non-pornographic culture. Pornography when it is good celebrates both female pleasure and male rationality.

It should be stressed that such a definition is infused with the notion that heterosexuality is the content of sexuality.

29. (1989), 58 D.L.R. (4th) 577 (S.C.C.).

30. *Glad Day Bookshop Inc.* v. *Canada (Deputy Minister of National Revenue, Customs and ExciseM.N.R* (14 July 1992), (Ont. Ct. Gen. Div.), [unreported].

31. Judy Fudge, "The Effect of Entrenching a Bill of Rights upon Political Discourse: Feminist Demands and Sexual Violence in Canada" (1989) 17 International Journal of the Sociology of Law 445.

32. *Ibid.* at 459.

33. *Ibid.* at 449.

A REMEDY FOR THE NINETIES:

Schachter v. *R.* and
Haig & Birch v. *Canada*

Nitya Duclos

On July 9, 1992, the Supreme Court of Canada released its long-awaited judgment in *Schachter.*[1] The case concerned a challenge to the unavailability of parental benefits for biological fathers under the *Unemployment Insurance Act*. It was widely anticipated to be the definitive statement on constitutional remedies, just as *Andrews*[2] was to equality rights and *Oakes*[3] was to the balancing requirement in s. 1 of the *Charter*.

This comment will examine the guidelines set out in *Schachter* for determining remedial issues in Charter cases. I will first review the remedies analysis in *Schachter* itself, suggesting that it should arouse concern on the part of disadvantaged groups seeking to use constitutional equality rights litigation to accomplish social change. Next, drawing upon the Ontario Court of Appeal's very recent decision in *Haig*,[4] I will argue that the remedies formula in *Schachter* is not controlling of remedial outcomes in future cases. In the *Haig* case, an invalidation remedy would have been at least as consistent with *Schachter* as was the extension remedy that the court ordered.[5] Finally, I wish to suggest that the *Schachter* formula actually preserves a bias in favour of invalidation over extension remedies. Although this bias does not preclude extension entirely, it does mean that extending social benefits through the courts in a post-*Schachter* world is not a predictable or reliable strategy.

I. THE BACKGROUND OF THE CASES

A. Schachter

After the birth of their second child, Marcia Gilbert returned to work and her partner, Shalom Schachter, remained at home to care for the baby. Schachter applied for "paternity benefits" under the *Unemployment Insurance Act* which, at the time, provided fifteen weeks of maternity benefits to biological mothers under s. 30 of the Act and fifteen weeks of parental benefits for adoptive parents under s. 32.[6] When his application was denied, Schachter appealed, arguing that the failure to provide parental benefits to biological fathers constituted discrimination under s. 15 of the *Charter*.

Strayer J. heard the case in Federal Court.[7] He found that s. 32 of the *Unemployment Insurance Act* discriminated as between adoptive and biological parents with respect to parental leave. He expressly held that the maternity benefits provided in s. 30 were not comparable to the benefits in s. 32. Maternity benefits addressed the physiological and psychological stresses on birth mothers of late pregnancy, birth, and the post-partum period. Both biological mothers and fathers were therefore denied parental leave benefits by virtue of s. 32. Strayer J. determined that the appropriate remedy in such a case of underinclusiveness was to extend the parental leave benefit to all parents, rather than to strike down the provision. The declaration of extension was stayed pending appeal. On appeal,[8] the Crown conceded the s. 15 violation, arguing only that Strayer J. lacked jurisdiction to award an extension remedy. The majority of the Court of Appeal, Mahoney J.A. dissenting, dismissed the appeal concluding that extension was constitutionally permissible and appropriate, but suspended the remedy pending appeal. The Crown appealed to the Supreme Court of Canada. In the interim, Parliament enacted a comprehensive package of amendments to the *Unemployment Insurance Act.*[9] Among them was a change to s. 32. Under the new provisions, all new parents, whether adoptive or biological, are entitled to ten weeks of parental leave. The maternity benefits in s. 30 remained unchanged.

B. Haig

Graham Haig launched an application for judicial review of the *Canadian Human Rights Act* ("*CHRA*") alleging that it violated his equality rights under s. 15 of the *Charter* because it did not provide him, a gay man, with protection against discrimination on the basis of sexual orientation. He joined in his action Joshua Birch, a captain in the Canadian Armed Forces, who was explicitly denied eligibility for promotions, postings or further military training because he is gay. Birch was unable to lay a discrimination complaint before the Canadian Human Rights Commission because the *CHRA* does not prohibit discrimination on the basis of sexual orientation.

McDonald J. heard the initial application. He found that the omission of sexual orientation from the prohibited grounds of discrimination in s. 3 of the *CHRA* violated s. 15 of the *Charter*. He declared s. 3 invalid and suspended operation of the declaration for six months or until the hearing of an appeal. The federal Attorney-General appealed the case to the Ontario Court of Appeal.

II. THE *SCHACHTER* FORMULA

Lamer C.J., writing for himself and Sopinka, Gonthier, Cory and McLachlin JJ., after some preliminary comments

about the history of the case before him, embarks upon a lengthy decontextualized and theoretical explication of the available remedies under ss. 52 and 24(1) of the *Charter*. The issue of the appropriate remedy in *Schachter* itself does not resurface until the end of the judgment, when Lamer C.J. briefly applies his "guidelines" to the facts of the case. Thus the structure of the judgment implies that its remedies analysis is generally applicable and that, once formulated, it can easily be applied to determine the correct remedy in numerous Charter cases.[10]

The first part of Lamer C.J.'s analysis identifies the available remedies. In particular, he asserts that "reading in" (or extension) is the logical corollary of the accepted remedial doctrine of "reading down" or severance: "the difference is the manner in which the extent of the inconsistency is defined"[11] and "[i]t would be an arbitrary distinction to treat inclusively and exclusively worded statutes differently."[12] Thus, four[13] remedial options are available under s. 52:[14]

> Depending upon the circumstances, a court may simply strike down, it may strike down and temporarily suspend the declaration of invalidity, or it may resort to the techniques of reading down or reading in.[15]

However, as quickly becomes clear, for the kinds of cases Lamer C.J. has in mind, the single, crucial remedial choice is really between striking down the legislation and reading down or in.

Two principles are identified which, in Lamer C.J.'s view, should govern the decision whether to invalidate or extend: "respect for the role of the legislature" which means that the court must avoid "undue intrusion into the legislative sphere,"[16] and "respect for the purposes of the Charter" which means that courts should be sensitive to situations in which the "deeper social purposes" of the Charter "encourage" a particular remedy over others.[17] Choice of remedy is a three step procedure, informed by these principles.

First, the Court must define with precision the extent to which the law is inconsistent with the *Charter*. The court's s.1 analysis will be determinative of this issue, and *Oakes*, for Lamer C.J. at least,[18] is still determinative of the s.1 analysis. Briefly, if the legislation fails either the "purpose" branch or the "rational connection" test for proportionality, a declaration of invalidity is the appropriate remedy. Only if the law founders on the "minimal impairment" or "effects" tests (the second and third elements of the proportionality branch) should the option of reading in or down be considered.

Second, if the inconsistency is of the kind that allows for remedial options, the court must decide whether reading in or down is more appropriate than striking.[19] Four criteria govern this determination:

> 1. whether an extension remedy can be defined with sufficient precision;[20]
>
> 2. whether extension would interfere with the legislative objective (which entails consideration of the substance of the objective, the means chosen to effect it and budgetary implications);
>
> 3. whether the significance of the remaining law would be substantially changed so that it cannot be assumed that the legislature would have enacted it (the size of the group seeking to be included in a benefit is relevant here); and,
>
> 4. whether the provision itself is sufficiently important for the court to preserve it (judged by the length of time it has been in force and/or whether it is "encouraged" by the *Charter*).

The third and final step arises only where it is concluded that extension is inappropriate. In cases where the court proposes to declare the law invalid it may go on to consider whether to suspend temporarily its declaration of invalidity. Lamer C.J. emphasizes that suspension is an unusual and serious step, not to be taken lightly.[21] The governing consideration should be "the effect of an immediate declaration on the public."[22]

III. THE OUTCOME IN *SCHACHTER*

The subtext of Lamer C.J.'s apparently neutral remedies formula is an overriding concern with avoiding excessive interference with the legislative function. His conviction, true to legal tradition and apparently unshaken by academic criticism,[23] remains that invalidation accomplishes this objective more successfully than extension. Although "respect for the role of the legislature" is only one of two guiding principles, and Lamer C.J. nowhere states that in cases of conflict it is primary,[24] three of his four criteria to determine whether extension is appropriate are directly concerned with minimizing interference with the legislature. Of these three, the first strongly favours invalidation, since according to Lamer C.J., doubts about remedial precision can arise only in cases of extension.[25] Even the fourth criterion is not exclusively concerned with furthering Charter values.[26] Moreover, extension is the only remedial option which must satisfy all of these criteria before it can be ordered. Invalidation is the default remedy and, importantly, Lamer C.J. does not require courts to consider whether striking down a law would "interfere" with the legislative objective. Extension is appropriate only when it is "safe" and it is the exceptional case where it will be so.[27]

The preference for invalidation over extension emerges from the subtext when Lamer C.J. finally applies his remedies test to the facts in *Schachter*. While *dicta* earlier in the analysis might have created the impression that extension is a likely remedy in cases of underinclusive benefits,[28] this is

quickly dispelled. Early in his discussion, Lamer C.J. departs from his own analytical framework. Rather than leaving the question of suspension to the end of the analysis as he enjoined others to do,[29] he determines that the underinclusive nature of the benefit in *Schachter* requires that any declaration of invalidity be suspended so that the only issue "is *whether to go further* and read the excluded group into the legislation."[30] Invalidation (albeit temporarily suspended) is established as the norm and extension the exception in sharp contrast to earlier decontextualized pronouncements about the extraordinary nature of suspension. In fact, suspension of a declaration of invalidity is a very convenient outcome for a court in cases of underinclusiveness: the court awards the plaintiff a symbolic victory, while it comforts itself that, at least in theory, the final decision about the fate of the benefit will be made by the legislature.

Applying his analytical framework to determine whether extension is warranted, Lamer C.J. first attempts to characterize the legislative objective of the adoptive parents' benefit. Not surprisingly, he identifies several plausible objectives which can be taken from the text of s. 32.[31] On this basis, he concludes:

> Without a mandate based on a clear legislative objective, it would be imprudent for me to take the course of reading the excluded group into the legislation.[32]

Equality-seeking groups should be warned that this allows the government a disturbing degree of control over the remedial outcome in cases of underinclusion. Lamer C.J.'s approach implies that where the *government* fails to adduce sufficient evidence under s. 1 to define the legislative objective precisely (and in a way that would justify extension), this may well preclude an extension remedy. In other words, the government may choose strategically to lose a case by not adducing s. 1 evidence. The law which violates the *Charter* will therefore not be saved under s. 1 but, because of lack of evidence justifying extension, the remedy will be to strike down the benefit and temporarily suspend operation of the judgment. A government which is unfriendly to social welfare legislation can thus erode such benefits by simply failing to act in time to constitutionalize the legislation rather than taking the much more politically unpalatable step of repealing the benefit directly.

Also noteworthy is Lamer C.J.'s reference to Parliament's subsequent amendments to the *Unemployment Insurance Act*. After parental leave was extended to biological parents by the Federal Court, the Conservative government embarked upon a major overhaul of the *Unemployment Insurance Act*. One of the amendments was to reduce the benefit period in s. 32 but to make it available to all new parents. Lamer C.J. considers this, "a valuable illustration of the dangers associated with reading in when legislative intention with respect to budgetary issues is not clear." He finds it "significant" that Parliament's solution is "not the one that reading in would have imposed,"[33] which is additional evidence that reading in was inappropriate, and invalidation the correct remedy in this case. But what would have been the likely consequence if Strayer J. had selected the correct remedy in the first place? In amending the *Unemployment Insurance Act* with the express objective of reducing costs and implementing a self-financing scheme, would the Tories have chosen to extend 10 weeks of parental leave benefits to all parents? Or would they have quietly let adoptive parents' benefits lapse, relying on the relative political powerlessness[34] of this group?

While I have argued elsewhere that the progressiveness of the outcome of the lower court decisions in *Schachter*, particularly in light of the legislative response, is not obvious,[35] it is surely worrying that the remedy Lamer C.J. implicitly considers most appropriate in underinclusion cases is one which increases the vulnerability of groups which currently receive social benefits. In a time of fiscal restraint and a climate in which social welfare programs are rapidly being eroded, the outcome of *Schachter* makes me anxious. Suspension of a declaration of invalidity means that if the legislature does *not* act, the benefit will lapse. It leaves disadvantaged groups currently in receipt of benefits vulnerable to s. 15 challenges by other, likely less disadvantaged groups, particularly if the included group is small. Numbers are important: while the small size of the included group relative to the excluded group increases the likelihood of a temporarily suspended declaration of invalidity, it also increases the likelihood that the legislature will not act quickly to save the benefit. It also leaves disadvantaged groups who are excluded from benefits out in the cold, particularly if they are large and not "discrete." All they can accomplish in a s. 15 challenge is to threaten benefits received by others and they must then hope to be effective in the legislative process (when failure in this realm is likely what sent them to court in the first place). It might be argued that if *Schachter* is interpreted as preferring invalidation over extension of a benefit, the case may discourage future challenges to social welfare benefits by excluded groups (since they will not benefit materially from an invalidation remedy) and thus make those in receipt of such benefits feel more secure. Of course, if *Schachter* had strongly endorsed the use of extension remedies in such cases, those currently in receipt of benefits would be equally secure. The problem with *Schachter* is that it holds out the possibility of extension (thus encouraging Charter challenges on the ground of underinclusion) but makes it an exceptional remedy (thus jeopardizing existing benefits).

In sum, read alone, *Schachter* sends a veiled warning to equality-seeking groups that going to court can be a dangerous strategy. The first major interpretation of the Supreme Court of Canada's judgment, however, turned out to be the Ontario Court of Appeal's decision in *Haig*.

IV. USING THE PRIMER: *SCHACHTER APPLIED IN HAIG*

Unlike *Schachter*, the appeal in *Haig* was not confined to the remedies issue. The federal Attorney-General conceded that sexual orientation is an analogous ground under s. 15 of the *Charter*,[36] but took the position that the failure to include sexual orientation as a prohibited ground of discrimination in s. 3 of the *CHRA* was not discriminatory. The Crown argued that since Parliament was not constitutionally required to enact the CHRA, it was free to use the statute to address some social problems and not others.[37] Krever J.A., writing for a unanimous court, has little difficulty rejecting this argument, on the basis that when the legislature chooses to provide a benefit it must do so in a non-discriminatory manner.[38] Since the Crown explicitly declined reliance on s. 1, a violation of s. 15 of the *Charter* was established.

In addressing the question of remedy, Krever J.A. acknowledges at the outset that the decision in *Schachter* must govern.[39] However, although the form of the judgment closely follows the analytical framework laid down in *Schachter*, its content diverges markedly from the underlying thrust of the Supreme Court ruling. Briefly, the emphasis on "respect for the role of the legislature" leading to a strong remedial preference in *Schachter* for temporary suspension of a declaration of invalidity is disregarded. Instead, Krever J.A. puts a quite different spin on the judgment by making the other guiding principle, "respect for the role of the Charter" (which translates into protection of existing benefits to disadvantaged groups), the primary guide in his remedial determination.

Like Lamer C.J., Krever J.A. quickly ascertains that the critical remedial choice is between temporary suspension of a declaration of invalidity and reading in.[40] However, in applying the criteria set out in *Schachter*, he departs from the spirit (although not the letter) of Lamer C.J.'s rules. This is most apparent in relation to the question of whether the remedy can be defined with sufficient precision. Krever J.A. finds that "the definition of the extent of the inconsistency is easily capable of being determined with precision."[41] All that is required is to add the words "sexual orientation" to s. 3 of the *CHRA*. But on this reasoning, arguably all that was required in *Schachter* was to add a few words to s. 32 of the *Unemployment Insurance Act*.[42] For Lamer C.J., an extension remedy was insufficiently precise for two reasons. First, the objective of the particular provision was not easy to discern (although the objective of the Act itself was)[43] and second, there were a number of ways to constitutionally "equalize" the benefit and Parliament itself chose a different course. A similar argument could apply, perhaps with even greater force, in *Haig*. While the objective of the *CHRA* in general - and at an appropriate level of abstraction - is relatively clear, the precise objective of s. 3, which lists some grounds of discrimination and not others,[44] arguably is not. Further, unlike *Schachter*, where it seems to me that the Court's options likely were restricted to extending the same 15 week benefit to biological parents or denying it to adoptive parents, conceivably there were more choices available in *Haig*. Some of the listed grounds in s. 3 are qualified and restricted in scope by other sections of the *CHRA*.[45] In light of the public controversy over extending spousal and family benefits to gay and lesbian couples and the political campaign to explicitly deny them such benefits, the Court's failure to advert to the possibility of partial coverage as a remedial option, and therefore to conclude that extension was insufficiently precise, runs contrary to the thrust of *Schachter*.

In assessing the budgetary impact of the proposed remedy, which Krever J.A. acknowledges to be an important consideration in *Schachter*, the Ontario Court of Appeal takes a myopic view of the likely budgetary implications of the extension remedy that contrasts sharply with Lamer C.J.'s fears in *Schachter* about a "snowball effect" that would erode other social welfare programs.[46] *Schachter* itself is conveniently distinguished on the basis that reading in would have "directly affected the consolidated revenue fund" a factor that both Lamer C.J. and the majority of the Federal Court of Appeal did not regard as significant.[47] The budgetary implications of extending the coverage of the *CHRA* to sexual orientation discrimination are limited to the additional costs of "investigation, proceedings, and perhaps Commission staff." There is simply no mention of the allegedly enormous costs of extending family and spousal benefits to this group which would certainly affect all employers, including the federal government, in the federal sector. Yet these costs have been raised frequently by the federal government in both public and legal forums as a reason to deny coverage to lesbian and gay families.[48]

It is true that other criteria may favour extension in *Haig* to a greater extent than they did in *Schachter*. For example, with respect to the significance of the provision, it is uncontestable that human rights legislation is more "an integral part of our social fabric"[49] than is the provision of parental leave to adoptive parents.[50] And adding gays and lesbians to the group already protected by the *CHRA* is likely extending the benefit to a relatively smaller group than was the case in *Schachter*.[51] But beside these mitigating factors should be placed the fact that extension was apparently considered such an unlikely remedy that the Canadian Human Rights Commission did not itself suggest it.[52]

Thus, *Haig* conforms to the text of *Schachter* but delivers a very different message about the availability of extension remedies. The outcome of the case (at least at this moment) is a victory for gay and lesbian rights. Krever J.A. uses the very weak endorsement of extension remedies by the Supreme Court of Canada to achieve a result that more than ten years of lobbying failed to effect in the political forum. The way in which this is done makes clear that the court is rapping Parliament's knuckles. For example, Krever J.A. refers to the "commitment of successive Ministers of Justice ... to add sexual orientation to the list of prohibited grounds" in the *CHRA* as the reason why "it is surely safe to assume that

Parliament would [favour extension over invalidation]."[53] Significantly, the failure of successive governments to actually pass such legislation is ignored. It is surely gratifying to gay and lesbian rights activists who have been frustrated by empty rhetorical promises to find them fulfilled at last.

V. SECURING EXTENSION REMEDIES IN THE FUTURE

Haig is an excellent example of the allure of litigation for disempowered groups. What was not possible in the political domain appears to have been easily accomplished (in retrospect, at least) in the legal arena.[54] It looks like big wins in court are possible if you can just persuade a judge[55] of the justice of your cause and it also looks like courts might be more amenable to the arguments of oppressed groups than legislatures. Yet there remains the troubling case of *Schachter* and the lingering question of how to understand the two cases together.

While it is certainly good news for lesbian and gay rights activists that the Ontario Court of Appeal felt so strongly about the justice of the cause in *Haig* that it departed from the preference for invalidation established in *Schachter*, I do not think the case should be read as an invitation for oppressed groups to focus their reform efforts on the courts. In some ways, *Haig* was an unusually "easy" case. The substantive claim that it was discriminatory to exclude gays and lesbians from the protection of human rights legislation fit well within liberal principles. No "radical" or sophisticated equality argument was necessary here. Even on a very thin concept of equality the injustice of a formal denial to gays and lesbians of access to the human rights system, when it is conceded at the outset that sexual orientation is an analogous ground under s. 15 of the *Charter*, should be obvious. The federal Attorney-General cannot be relied upon to make equivalent concessions in other cases. Moreover, the facts supporting Joshua Birch's claim were very sympathetic and there was no direct budgetary consequence of any significance. With respect to remedy, although reading "sexual orientation" into the *CHRA* appears, at first blush, to be a radical remedy, on closer examination it becomes the preferable outcome. Because of the way in which the case and the challenged statute are framed, an invalidation remedy would jeopardize the whole of the *CHRA*. Although this could be mitigated by suspending operation of the declaration, any temporary stay would run a risk of Parliament not acting in a timely manner with potentially catastrophic consequences for human rights protection in the federal sector. On both of Lamer C.J.'s guiding principles, extension is preferable to invalidation: respect for the legislature would favour preserving such an important statute; respect for the *Charter* would dictate a similar result.

However, not all underinclusion cases (or even most of them) are going to be as easy. As illustrated by *Schachter*, cases involving more immediate and extensive fiscal consequences, cases where the provision in issue does not go to the heart of the statutory scheme, and cases where the equality violation is less glaring to the judicial mind, are all going to raise difficult questions about extension versus invalidation. For individuals and groups advancing equality claims in these kinds of cases, Lamer C.J.'s hierarchical ordering of remedies in *Schachter* is very discouraging and *Haig* may not be very helpful.[56] Although it does not prohibit the use of extension remedies outright, Lamer C.J.'s judgment in *Schachter* perpetuates the traditional judicial bias in favour of invalidation without supplying any sound justification for its preference. As *Haig* demonstrates, invalidation is no more necessarily deferential to the legislature than is extension, nor is it necessarily the superior promoter of Charter values. In fact, it is just not possible to specify *in the abstract* that any one remedy is going to be more likely to further general remedial principles like "respect for the legislature" or "respect for the *Charter*" or even a more traditional formulation like "least disruptive of the status quo." What the Chief Justice did not state in *Schachter*[57] is that the legislature is *always* free to alter any judicially-imposed Charter remedy (whether extension or invalidation or something else), as long as it remains within the bounds of the courts' interpretation of what is constitutionally required. Further, the operation of an extension remedy can be suspended just as much as a declaration of invalidity. Judicial confirmation of these propositions in *Schachter* would have gone a long way towards unseating invalidation as the usual remedy of choice.

In failing to establish extension and invalidation as equally viable options in all cases, and in its misguided attempt to "solve" all remedies problems with a decontextualized and purportedly comprehensive test which actually establishes a norm of invalidation, *Schachter* is a serious disappointment. While *Haig* confirms the promise in *Schachter* that extension will be ordered in some cases, it falls far short of assuring Charter litigants that winning on the merits will translate into a winning outcome. In fact, the debate over extension versus invalidation remedies is a particular instance of the larger and ongoing controversy over courts versus legislatures as the most appropriate forum in which to secure progressive social reform. While *Haig* suggests to me that, given the *Charter*, it might be useful to go to court sometimes, the overall message conveyed by *Schachter* and *Haig* together is that such litigation is always a very risky strategy. Groups and individuals seeking judicial orders other than invalidation in the post-*Schachter* world will still face an uphill and unpredictable battle.

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1. *Schachter* v. *Canada* (9 July 1992) (S.C.C.) [unreported] [hereinafter, *Schachter*]. Page numbers refer to the reasons of the Chief Justice unless otherwise noted.

2. *Andrews* v. *Law Society of B.C.*, [1989] 1 S.C.R. 143.

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

4. *Haig and Birch* v. *Canada (Minister of Justice)* (6 August 1992) (Ont. C.A.) [unreported] [hereinafter *Haig*]. The case concerned a s. 15 challenge by two gay men to the omission of "sexual orientation" as a ground of prohibited discrimination under s. 3 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, as amended.

5. I use the term "invalidation" to refer to situations where the court strikes down legislation, terminating the benefit in issue. By "extension" I mean to include all cases where the Court effectively extends the benefit in issue, whether by means of reading words into or out of the statute.

6. *Unemployment Insurance Act*, S.C. 1970-71-72, c. 48, as amended. Section 32 was enacted in S.C. 1980-81-82-83, c. 150, s. 5(1). The numbering of the relevant sections was subsequently changed so that in the 1985 consolidation (R.S.C. 1985, c. U-1) the maternity benefit is found in s. 18 and the adoptive parental leave benefit in s. 20. For convenience I will refer to the old section numbers which are used in the judgments.

7. *R.* v. *Schachter* (1988), 52 D.L.R. (4th) 525 (F.C.T.D.).

8. *R.* v. *Schachter* (1990), 66 D.L.R. (4th) 635 (Fed. C.A.).

9. S.C. 1990, c. 40.

10. In fact, Lamer C.J. conveniently summarizes his guidelines so as to facilitate their application: *Schachter* at 39.

11. *Schachter* at 14.

12. *Schachter* at 15.

13. In *Haig*, the court considers that there are five, not four, remedial options; severance and reading down are considered to be different remedies, at 9-10. Lamer C.J. treats severance as synonymous with reading down. In my view, this difference is largely semantic. I will avoid the term "severance" and use "extension" to refer to all situations where the remedy effectively extends the law to an excluded group, whether by reading words into or out of a statute.

14. This comment will not address the distinction between ss. 24(1) and 52. *Schachter* establishes that the Court's jurisdiction under s. 24(1) is limited to awarding "individual" remedies in cases where the Charter challenge concerns government action rather than legislation. Thus, ss. 52 and 24(1) will ordinarily provide mutually exclusive remedial options: *Schachter* at 43-44.

15. *Schachter* at 11.

16. *Schachter* at 17.

17. *Schachter* at 18.

18. In his concurring judgment, La Forest J. (writing for himself and McLachlin J.), explicitly took issue with Lamer C.J. on this point: "Where I am most doubtful about the Chief Justice's reasons is in closely tying the process of reading down or reading in with the checklist set forth in *R.* v. *Oakes*, [1986] S.C.R. 103. Though this may be useful at times, it may, I fear, encourage a mechanistic approach..." *Schachter*, Reasons of La Forest J. at 5. See also *supra*, note 4.

19. *Schachter* at 24.

20. Oddly, remedial precision does not appear on Lamer C.J.'s own checklist: see *Schachter* at 40-42.

21. *Schachter* at 38.

22. *Ibid.*

23. For example, see Nitya Duclos & Kent Roach, "Constitutional Remedies as 'Constitutional Hints': A Comment on *R.* v. *Schachter*" (1991) 36 McGill L.J. 1 at 10-17; Dale Gibson, "Non-Destructive Charter Responses to Legislative Inequalities" (1989) 27 Alta. L. Rev 181; Andrew Petter, "Canada's Charter Flight: Soaring Backwards into the Future" (1989) 16 J. Law & Soc. 151 at 160-1; Carol Rogerson, "The Judicial Search for Appropriate Remedies Under the *Charter*: the Examples of Overbreadth and Vagueness" in Robert Sharpe, ed., *Charter Litigation* (Toronto: Butterworths, 1987) 233 at 239.

24. Indeed his failure even to advert to the obvious potential for conflict between the injunction to respect the role of the legislature and the injunction to respect the purposes of the *Charter* is disturbing.

25. *Schachter* at 24.

26. Lamer C.J. refers to two indicators of the significance of the remaining portion: its "long-standing nature" and whether it is "encouraged" by the Constitution, at 33-34. The latter is clearly derived from the second guiding principle. However, the former is best described as deference to the legislature's assessment of the provision's importance a dubious indicator.

27. For example, see *Schachter* at 18, 34 and 36. In his summary Lamer C.J. states: "Severance or reading in will be warranted only in the clearest of cases....", at 41.

28. For example, see the discussion of *A.G. Nova Scotia* v. *Phillips* (1987), 34 D.L.R. (4th) 633 (N.S.S.C. A.D.) where Lamer describes nullification of existing benefits challenged by an excluded group as "equality with a vengeance," *Schachter* at 19; see also the comparison of the availability of extension with temporary suspension of a declaration of invalidity, at 37-38.

29. "The final step is to determine whether the declaration of invalidity ... should be suspended," *Schachter* at 37, and "I would emphasize that the question whether to delay the effect of a declaration is an entirely separate question...", at 38.

30. *Schachter* at 46 (emphasis added).

31. In particular, it is not clear to Lamer C.J. whether the provision was intended to help parents care for newborns at home or to respond to "circumstances peculiar to adoptive parents," *Schachter* at 47.

32. *Ibid.*

33. *Schachter* at 48.

34. While adoptive parents as a group tend to have higher socioeconomic status than biological parents because of current adoption policy and practice, their effectiveness as a lobby group is offset by their small numbers relative to the group of non-adoptive parents.

35. Duclos & Roach, *supra*, note 23 at 7.

36. *Haig* at 5. This concession was consistent with the federal Attorney-General's position in other cases: similar concessions were made in *Veysey* v. *Correctional Services of Canada* (1990), 109 N.R. 300 at 304 (Fed. C.A.) and *Egan & Nesbitt* v. *Canada* (1991), 87 D.L.R. (4th) 320 at 330 (F.C.T.D.) and may reflect some discomfort within the Department of Justice with its position in gay rights cases.

37. *Haig* at 3 and 6.

38. Curiously, Krever J.A. does not even acknowledge the jurisprudential support for the federal Attorney General's argument in *McKinney* v. *University of Guelph* (1991), 76 D.L. R. (4th) 545 (S.C.C.). One of the issues in that case was whether s. 9(1)(a) of the Ontario *Human Rights Code, 1981*, S.O. 1981, c. 53 contravened s. 15 of the *Charter* by restricting the *Code*'s protection against age discrimination in employment to persons 18 or older and under 65. Writing for the majority on this point, La Forest J. held that although the provision violated s. 15, it was saved under s. 1 of the *Charter*. He then added (at 675-6):

> The *Charter* ... was expressly framed so as not to apply to private conduct. It left the task of regulating and advancing the cause of human rights in the private sector to the legislative branch. This invites a measure of deference for legislative choice. ... Not, I repeat, that the courts should stand idly by in the face of a breach of human rights in the *Code* itself, as occurred in *Blainey*. But, generally, the courts should not lightly use the *Charter* to second-guess legislative judgment as to how quickly it should proceed in moving forward towards the ideal of equality. The courts should adopt a stance that encourages legislative advances in the protection of human rights. Some of the steps adopted may well fall short of perfection, but as earlier mentioned, the recognition of human rights emerges slowly out of the human condition, and short or incremental steps may at times be a harbinger of a developing right, a further step in the long journey towards full and ungrudging recognition of the dignity of the human person.

Although La Forest J.'s comments occurred in the context of a s. 1 analysis and could have been distinguished on this basis, it is surprising to find no mention of the case in Krever J.A.'s reasons.

39. *Haig* at 1 and 9.

40. *Haig* at 10.

41. *Haig* at 11.

42. For example, the italicized words could have been added to s. 32(1):

> Notwithstanding section 14 but subject to this section, initial benefit is payable to a major attachment claimant who proves that it is reasonable for that claimant to remain at home by reason of *the birth of his or her child or* the placement with that claimant of one or more children for the purpose of adoption pursuant to the laws governing adoption in the province in which that claimant resides.

43. *Schachter* at 47.

44. For example, political belief is protected under the Yukon Territory *Human Rights Act*, S.Y. 1987, c. 3, s. 6(j) but is not a protected ground under the *CHRA*. On the other hand, family status is a protected ground under the *CHRA* but is not listed in the B.C. *Human Rights Act*, S.B.C. 1984, c. 22.

45. The most obvious example is age. For example, s. 15(b) of the *CHRA* limits protection against employment discrimination on the basis of age to those who fall between minimum and maximum age limits which are set by regulation.

46. "If this Court were to dictate that the same benefits that were conferred on adoptive parents under s. 32 be extended to natural parents, the ensuing financial shake-up could mean that other benefits to other disadvantaged groups would have to be done away with to pay for the extension." *Schachter* at 48.

47. In the Supreme Court, see *Schachter* at 29-30; see also Lamer C.J.'s implicit finding that extension of the benefit to the excluded group would have been the appropriate remedy in *Phillips* at 19; in the Court of Appeal, see *R.* v. *Schachter*, *supra*, note 8 at 651-2.

48. See *supra*, note 46. One explanation for this difference lies in the public/private distinction: the court only takes cognizance of "public" costs appropriations from the Consolidated Revenue Fund in *Schachter* and costs incurred in administering the Act in *Haig*. "Private" costs to employers in *Haig* are invisible.

49. *Haig* at 13.

50. The difference in the specificity of the two provisions arises because the challenge in *Haig* was directed at the heart of the *CHRA* whereas *Schachter* focused on only one of many benefits conferred by the *Unemployment Insurance Act*.

51. Although the Court's assumption about the size of the group to be added in *Haig* may have been influenced by false assumptions about human sexuality.

52. *Haig* at 3.

53. *Haig* at 12.

54. Although it is important to remember the enormous effort on a variety of fronts and over a considerable period of time that laid the groundwork for such a case. For example, the Canadian Human Rights Commission itself first recommended adding sexual orientation to s. 3 of the *CHRA* in 1979 and has pressed for this amendment ever since. Public opinion in Canada, as measured by various indicators, has been favourably disposed to protection from discrimination on the basis of sexual orientation for at least the last six years: Philip Girard, "Sexual Orientation as a Human Rights Issue in Canada 1969-1985" in Boyle *et al*, eds., *Charterwatch: Reflections on Equality* (Toronto: Carswell, 1986) 276. Even with increasing public support, however, adding protection against discrimination on the basis of sexual orientation to human rights codes has been very controversial. See, for example, David Rayside, "Gay Rights and Family Values: The Passage of Bill 7 in Ontario" (1980) 26 Studies in Political Economy 109. These, among other efforts were instrumental to the success in *Haig*.

55. Or, a majority of judges at a sufficiently high level of court. As of this date, it remains to be seen whether the Attorney General will appeal the decision in *Haig*.

56. As a remedies case, *Haig* does provide another favourable precedent for gay rights litigation although, as I have implied, it may be more useful in the more "principle-oriented" cases, like extending the protection of other human rights statutes to gays and lesbians than in the more "materially-oriented" cases, like securing spousal and family benefits. For an analogous analysis of feminist litigation, see Judy Fudge, "The Privatization of the Costs of Social Reproduction: Some Recent Charter Cases" (1989) 3 Canadian Journal of Women and the Law 246.

57. Nor, for that matter, did the Ontario Court of Appeal in *Haig*.

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