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THE AMENDING FORMULA AND THE AGENDA FOR CHANGE

J. Peter Meekison

The recently released Allaire report contains a brief mention of a new amending formula. It says,

> The new agreement will include a new amending formula that will stipulate that any constitutional change will require the approval of a substantial majority of provinces representing at least 50 per cent of the population of Canada, Quebec necessarily being included.

The proposed formula is similar to the existing one with one very important difference. Quebec has to agree to amendments. Therefore, Quebec must have a veto. This one statement captures the central dilemma of the amending process in Canada — the Quebec veto. Throughout our long search for an amending formula, this principle or some variant thereof was uppermost in people's minds.

Once this reality has been identified, then a second dimension very quickly materializes, namely the question of provincial equality. If Quebec or any province has a veto, then, within a federal system, all constituent units, regardless of their population, should be treated alike. Combining the principle of provincial equality and the principle of a Quebec veto inevitably leads to a requirement for unanimity. It is the only way that both principles can be fully satisfied.

If one looks back over the various efforts to find an amending formula, it soon becomes clear that those confronting this task began to compartmentalize the constitution in an effort to limit the unanimity list. Agreement on this approach was not too difficult to achieve; the problem was identifying what to include under unanimity and under a general formula. The classic example of this approach is the Fulton-Favreau formula where the division of powers was subject to provincial unanimity while other matters could be amended by two-thirds of the provinces representing 50 per cent of the population. The framers of the 1971 Victoria formula overcame the problem by adopting a regional approach to constitutional amendment. While giving Quebec and Ontario a veto, the other eight provinces were put in a less favourable position which led, ultimately, to the rejection of this approach by the provinces of Alberta and British Columbia.

The 1982 amending formula came well after Confederation and after a number of amendments had been approved. By coming after the fact, governments had some notion of, and experience with, the Constitution. In many respects, the amending formula became seen as a defensive mechanism, for example, how to make change difficult or protective of the status quo (e.g., language provisions and natural resources, etc.) as opposed to how to facilitate change. It also meant that in its design it became far more detailed than one finds in other federal constitutions. As a result, the Constitution was compartmentalized with a different threshold for each part.

It should also be remembered that the amending formula was developed as part of a comprehensive constitutional review. In other words, it was not the only issue under consideration, although, it would be fair to say that the search for an amending formula was the *"raison d'être"* of constitutional reform for a number of years. Several phrases contained within the amending formula reflect this fact, in particular the two references to the Supreme Court, a phrase not found elsewhere in the Constitution.

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However, while developed as part of a package of constitutional changes in 1980, in the final analysis, only a few matters found their way into the *Constitution Act, 1982*: the principal ones being the *Charter*, the amending formula, section 92A on natural resources, and equalization. The remainder was and remains unfinished business.

What was the basic design of the amending formula? The general formula is contained in section 38 of the *Constitution Act, 1982*. Under this formula, amendments could be made to the Constitution by Parliament and 2/3 of the provinces representing 50 per cent of the population. However — and this next part is the key to understanding the formula — if an amendment were one which "derogates from the legislative powers, the proprietary rights or any other rights or privileges of the legislature or government of a province" a province not only could register its dissent (i.e., try to defeat the amendment) but also could opt out of it. In other words, the amendment would not take effect in that province.

Implicit in its design is the following premise. English Canada, or most of it, may at some time desire a different vision of Canada particularly with respect to the division of powers and this vision will run counter to that of Quebec. Opting out preserved the status quo as far as the division of powers was concerned.

It must be remembered that to this point all amending formulae considered have contained clauses designed either to protect Quebec or all provinces' interests. In the Fulton-Favreau formula, for example, unanimity was required for amendments to the division of powers. Under the Victoria formula, Ontario and Quebec had vetoes on all amendments. Under the so-called 1978 Toronto formula of two-thirds of the provinces representing 85 per cent of the population, Quebec had a veto on every amendment. In other words, there was no serious discussion of any amending formula which did not protect Quebec's interests (and, of course, Ontario's at the same time). A dilemma then and today is whether or not Quebec should have a veto on any or all amendments. The notion of special status in this area has been difficult to sell to other provinces, particularly those in Western Canada.

When the amending formula was agreed to by the so-called Gang of Eight in the spring of 1981, it contained not only a provision for opting out of certain amendments but also a provision for fiscal compensation for those provinces choosing to do so. It should be recalled that Quebec's main objection to the 1971 Victoria Charter was the lack of a compensation clause should the province choose to exercise its proposed new authority over family allowances. Therefore, the principle of compensation was important to Quebec and was one reason why it was attracted to the formula. When agreement was reached on the constitutional amendment in November, 1981, the compensation clause was deleted at the insistence of the federal government. A modified version was added later in an attempt to bring Quebec on side.

One of Quebec's five conditions in the Meech Lake agreement was to have certain changes made to the amending formula. This included removal of any limits or restrictions on the principal of financial compensation. The other change was a veto over changes to central institutions which are found in section 42 of the Constitution Act. It was this latter change which evoked considerable criticism because the other provinces were unwilling to give Quebec a veto without having one themselves. It was argued that unanimity would make those parts of the constitution impossible to change and that senate reform, for example, would never happen. While Quebec's position is understandable, given its isolation in 1981, the

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position adopted is at variance with the position it took on the Fulton-Favreau formula in 1964. A comparison of the items found in section 42 of the 1982 Constitution Act with section 6 of the Fulton-Favreau formula shows a considerable degree of overlap.

Surprisingly, the principle of expanding the compensation clause was not that problematical, although it had been extremely controversial a few years earlier. Criticism was directed at the potential rigidity being built into the constitution. While it was pointed out that unanimity had been achieved in the past, the failure of Meech Lake highlighted the difficulty of achieving unanimity and critics breathed a collective sign of relief when it failed.

Our experience with Meech Lake identified certain problems with the amending formula which require further consideration. Paradoxically, the original criticisms of checkerboard federalism or incremental separatism have proven to be groundless. (It may well be that the critics have been silent because that part of the formula has not been tested to date.)

The principal criticisms of the amending formula from our experience with Meech Lake appear to be the lack of public participation and the time limits. Let me deal with each of them in turn.

There are four ways in which the public can participate in constitutional amendments. The first is what I would call the grand inquest; the second is educative; the third is negotiating the text; and the fourth is ratification. Each stage is very different and each involves the public in very different ways. Hence it is important to identify exactly what is meant by public participation.

1. THE GRAND INQUEST

Beginning with the 1935 parliamentary committee on the amending formula, to the 1937 Rowell-Sirois commission, to the 1990 Spicer Commission, Canadians have been asked to express their views on the constitution, its characteristics, and the need for major overhauls. A number of recent examples come to mind including the 1970 joint committee of the Senate and the House of Commons, the 1977 Pepin-Robarts commission, and the 1983 Macdonald Commission. The Beaudoin-Edwards committee is an extension of this approach. The public have been invited to make submissions and they have expected that their comments will influence the final recommendations. In each instance, it was recognized that the objective of the exercise was to develop a comprehensive proposal for constitutional reform and modifications to the federal system. There was no guarantee that reform would eventually occur, but at the outset each committee had high expectations that it could develop a series of proposals to solve the nation's problems. These various committees or commissions have helped to set the agenda for reform and to bring issues into focus.

2. THE EDUCATIVE FUNCTION

Beginning with the 1968 Constitutional Conference, many such conferences have been televised in their entirety. In this way, the public could be involved in the dialogue, rather like spectators at a sporting event. Occasionally there were complaints that certain favourite television programs had been preempted for what, to many, had become a national pastime.

Although the public was not directly involved, they did respond to what they watched with letters, phone-calls, and telegrams. They let their governments know their views in no uncertain terms. The value of the open process is that the public became sensitized to the issues. This was very evident during the constitutional conferences on aboriginal rights.

3. THE NEGOTIATION PHASE

To date, constitutional negotiations and drafting have been done through the processes of executive federalism. The conferences referred to are first ministers' conferences, a mechanism which has evolved since 1906. Through this format, many of Canada's intergovernmental disputes including constitutional disputes have been negotiated.

In 1980-81, there was a fundamental change in the negotiating process. With the collapse of the post-referendum negotiations in September 1980, the federal government had two choices — unilateral action or deferral of the issue. They chose the former course and, as part of the process, initiated a series of televised public hearings on the draft resolution, the centrepiece of which was the *Charter of Rights*. Individuals and groups had an opportunity not only to have their say, but also to make specific suggestions for change. Accordingly, aboriginal, women's, and multicultural groups responded to the challenge to participate and continue to this day to feel a positive identification with the *Charter*. In retrospect, Canada had turned a corner vis-a-vis constitutional negotiations. This was emphatically underlined after the November 1981 agreement when both women's groups and aboriginal associations mobilized public opinion to have certain portions of the original text restored. They were largely successful.

4. RATIFICATION

The last manifestation of public participation is ratification. The 1982 amending formula requires legislative approval of constitutional amendments, a feature which is similar to what one finds in the United States. To some, legislative endorsement is sufficient; to others, more direct involvement of the public in the form of a referendum is necessary, as one finds in Australia. It must be remembered that in a referendum, the question has already been determined. All that is left to decide is whether or not it should be supported. The text cannot be changed.

In looking at these four aspects of public participation, all are important and each is distinct. The principal lesson of Meech Lake is that the public wants an opportunity to influence the text or to participate in the process before ratification. The grand inquest may be acceptable to some, because it allows them

to help set the agenda and bring issues into focus, but it is merely a beginning. The experience of 1980-81 and Meech Lake makes it clear that the public will not be content to sit on the sidelines. To me the question of ratification is a fundamentally different question and is of secondary importance if the public believes they have had a say in shaping the amendment.

The central questions, therefore, are how will the future agenda be shaped and how will changes to the constitution be negotiated. It must be realized that I am talking about a fundamental change to the Canadian constitution as opposed to a single amendment, although the foregoing arguments would continue to be valid.

The agenda will probably be a result of public discussion and input and will be found in the various reports which will be produced over the next few months from committees such as Spicer, Belanger-Campeau, Ontario, Alberta, New Brunswick, Manitoba and, last but not least, Beaudoin-Edwards. While this is certainly understandable for our current problems, what of future agendas? Serious consideration should be given to periodic reviews of the constitution, say once every decade, through either parliamentary committees or commissions like Pepin-Robarts. That way, individuals and groups will have continuing opportunities to comment on how constitutional arrangements and changes are affecting their lives. To some extent, this approach was accepted last June by first ministers when they agreed to a continuing review of the *Charter of Rights* and its interpretation.

Once the agenda has been set, the next step is to negotiate the text of the amendment. Experience has shown that not everything on the agenda finds its way into the final text. As already mentioned, the traditional technique in Canada has been the first minister's conference. I, for one, still favor this approach because it works. Although Meech Lake was not ratified, it was not because first ministers were unable to agree on a resolution. Moreover, governments will need to be involved in discussions at some point if they are to introduce and defend resolutions in their legislature. The criticism of the Meech Lake process was that the negotiators were tired and that no changes could be made once an agreement had been reached — the so-called seamless web argument. The amending formula does not contain any guidelines on how amendments are to be drafted. Nor are there any time limits for their preparation. The amending formula is concerned with ratification of amendments, not drafting them.

An alternative to first ministers' conferences is to establish and convene a constituent assembly consisting of delegates selected in some fashion to represent provincial and national interests. Although delegates are to be selected based on geographic boundaries, one can expect considerable debate on who or what these delegates represent. Favourable comparisons are usually drawn with the 1864 Charlottetown Conference or the 1787 Constitutional Convention in Philadelphia. Again, the amending formula is silent on this approach. There is nothing preventing such a group from gathering to negotiate and draft either a new constitution or a series of amendments.

I would propose a change in the process as it has evolved so far. When a draft text or set of principles has been prepared, the next phase should include public consultation. This could take the form of legislative hearings or members of the constituent assembly convening hearings to obtain feedback. Had this occurred after the Meech Lake agreement and before the Langevin Block meetings in provinces other than Quebec, much of the subsequent criticism would have been blunted. Following an appropriate interval, a second meeting would be convened to finalize the text. Obviously not all suggestions would be accepted, but people will have felt they at least had had an opportunity to influence the outcome.

The public reacted negatively to the fact that, while hearings were held on the Meech Lake agreement, they could not change the document unless there was a fundamental error. While I still subscribe to the view that the agreement, once made, could not be amended, hindsight would suggest that public input immediately after the Meech Lake agreement and before the final text had been negotiated would have been a more prudent course of action.

The next questions to be considered is that of ratification. The amending formula requires legislative approval of amendments. In my mind, there is nothing to suggest that the ratification process itself is flawed. The criticisms are related to the three year time limit and the need for public input, not to the involvement of legislatures. Indeed, having legislatures participate in the process now is a major difference between how amendments are approved today and how they were approved before 1982.

An alternative to legislative approval is a referendum. Another variation would be a combined approach where a referendum might be used under certain circumstances such as when a legislature refuses to act on an amendment. Under a referendum there can be no changes to the text; it is simply a yes or no decision. While the same is true of legislative approval, there is nothing to prevent amendments from being attempted or companion resolutions being adopted. Nor, as we have seen in the case of Newfoundland, is there any legal impediment to a legislatures changing its position and rescinding a resolution of assent.

Before adopting a referendum model, many questions need to be answered, the principal one being what constitutes acceptance. Is it a national majority of voters or, as in Australia, a double majority consisting of a national majority in a majority of states. While such an approach is certainly consistent with the majoritarian principle of democratic theory, is it the best method for Canada? We will still need to confront the issue of a Quebec veto and the very real population imbalance between the two central provinces and the other eight.

There are lots of other questions such as who will prepare the wording on the ballot and the supporting literature. In Australia this is all done centrally because state governments have no role in the initiation of amendments.

We have had very limited experience in Canada with referenda. Newfoundland had a referendum on union with Canada. There was the all-important referendum in Quebec in 1980. There was the 1942 referendum on conscription. The federal government in the 1970s introduced a referendum bill authorizing it to conduct referenda on certain issues. There is nothing to prevent this device from being used to obtain public input on any matter, but to me it is not an effective alternative to legislative review and approval of amendments. The issue is not how amendments are approved but how they are initiated, drafted, and reviewed prior to ratification.

The second major criticism of the amending formula is the question of the three-year time limit. Time limits were included in the amending formula as a means of providing some framework within which amendments would be reviewed and either fail or succeed. With the failure of Meech Lake, the time limits, particularly the three-year limit, suddenly became an issue. That in itself is not necessarily a bad thing if it allows for an informed discussion. In retrospect one might well conclude that the time limit was the major stumbling block — that if more time could have been found, the necessary consensus would have materialized. I am not convinced an agreement would have resulted from an extension of the time limit. Elimination of the time limit would have removed the pressure to take action. It is doubtful that such a decision would have been acceptable to Quebec and other governments who wanted to get on with other matters of constitutional reform such as Senate reform.

To understand the importance of time limits, one must go back to the question of why an amending formula in the first place. The purpose is to provide for future constitutional change, presumably incremental change over an indefinite period. There are basically two ways the formula can be employed. Let me give two examples.

> Example 1. The province of British Columbia wanted to include property rights in section 7 of the *Charter of Rights* and introduced an amendment providing for the change to the *Charter* in the B.C. legislature. It was subsequently passed in their legislature, thereby giving the province three years to convince the ten other governments. Although the province made a great effort to explain the merits of its position, it was unsuccessful in securing the necessary agreement and the amendment expired after three years. It must be realized that B.C. could have reintroduced the amendment, starting the cycle over again.

> Example 2. This is the one we are most familiar with because it is how we have approached constitutional amendment in Canada. After a few years of intergovernmental discussion, negotiation, compromise etc., an agreement is struck among the eleven governments which leads to a constitutional amendment being drafted and submitted for legislative approval. A reasonable assumption one would make is that the amendment is likely to pass because negotiations have been completed, compromises made and the agreement of all eleven governments secured. Prior to 1982, this was sufficient to secure passage because the only legislative involvement was that of the Parliaments of Canada and the United Kingdom.

Under the provisions of the amending formula, legislative ratification is necessary in order to secure an amendment. This feature of the amendment process does not preclude public hearings. Indeed, they are required in Manitoba. New Brunswick held hearings as did Ontario. There is, however, a dilemma or potential Catch 22 in that the hearings could result in recommendations for change in the agreement thereby presenting government with the difficult choice of reopening the negotiations to change the resolution. Here one encounters the seamless web argument. It is for this reason that I would propose a second stage — hearings followed by a final round of negotiations.

There is nothing in the amending formula which prohibits changes from being proposed and considered, or for that matter, introduced in the form of a companion or amended resolution. Until one of the legislatures adopts the resolution, the constitutional amendment clock does not start ticking. The formula also provides for legislatures to change their minds by permitting them to withdraw a resolution of assent any time prior to proclamation. The possibility is increased if there is a change in government, a distinct possibility if, for example, the subject of the amendment had been the major issue in the election.

Our experience with the new amending formula is very limited. The one and only amendment to date was aboriginal rights and it emerged from the 1983 conference on aboriginal questions. One successful amendment and one failed one is insufficient evidence upon which to judge the effectiveness of the amending formula.

When viewed closely, the Meech Lake agreement represents a series of different amendments to the Constitution as opposed to a single change. It combined some matters which fall under the general formula and other which are subject to the unanimity rule. Since unanimity had been achieved at the Langevin Block and since a package had been negotiated, no thought was given to the possibility, or necessity, of two different resolutions being approved. In retrospect, this may very well have been a mistake. Those parts of the amendment which fell under the general formula could have been proclaimed when the two-thirds, 50 per cent threshold was achieved. The balance would have been proclaimed when and if unanimity was achieved and, since no deadline was necessary, there would have been no pressure on governments. Whether or not Quebec would have

agreed to a two-stage process is unknown. For future amendments, their composition will need to be considered.

The flip side of the coin is that in the future, both timing and process will also need to be considered. Again, looking at Meech Lake, it was assumed that the necessary approvals would be secured fairly quickly. This was a major oversight and it is unlikely future negotiators will overlook the timing problem.

Let me summarize. The dilemma confronting us is to find a way for public participation in the amending process that will give Canadians an opportunity to influence what is eventually submitted for ratification. All of this discussion must be seen in the context of a total revision of the constitution — something which we have been working on since 1968. Because we are dealing with the constitution in its entirety, there is an obvious need for public involvement. But it should not stop there. Any process developed for an omnibus amendment should be equally applicable to a single amendment. Given the context of the review to date, we tend to think in terms of multiple amendments and that they are a result of intergovernmental dialogue and negotiation. To a great extent, this image had conditioned our thinking. We tend to concentrate more on the mega-amendment and less on the single amendment. While the amending formula can accommodate either, it was designed with the latter needs in mind.

The formula tells us how amendments are to be ratified, not how they are formulated. I would strongly encourage the committee to concentrate on this facet of constitutional amendment because, to me, that is the clear lesson of Meech Lake.

I would recommend:

1. public involvement in setting the agenda for change;
2. public involvement through legislative hearings after a draft text has been formulated;
3. that, as part of the draft text, a ratification schedule be included;
4. that omnibus amendments be compartmentalized according to which part of the formula is relevant; and
5. that a periodic review of the constitution be undertaken either by a parliamentary committee, a federal commission of inquiry or a joint federal-provincial committee.

None of these recommendations requires an amendment to the amending formula and can be easily incorporated into our constitutional fabric as we gain more experience with the amending process.

J. PETER MEEKISON, Vice-President (Academic), University of Alberta. This is the text of a presentation to the Special Joint Committee of the Senate and the House of Commons on the Constitutional Amending Process (the Beaudoin-Edwards Committee) dated February 21, 1991.

[The Beaudoin-Edwards Committee reported to Parliament at the end of June 1991. The Committee recommended the adoption of a new amending formula essentially along the lines contained in the 1971 Victoria Charter; four regional vetos with Ontario and Quebec each constituting a region. This recommendation has been met with widespread opposition amongst provinces outside of Quebec. (ed.)]

Mental Health and The Charter

R. v. Chaulk and *R. v. Swain*
INSANITY AND THE CONSTITUTION

David B. Deutscher

The effect of the cases of *Chaulk*[1] (delivered December 20, 1990) and *Swain*[2] (delivered May 2, 1991) is that an extensive review of the substantive, procedural, and evidentiary provisions of the law of insanity has been conducted by the Supreme Court of Canada. There is not sufficient space in a forum such as this to discuss all of the issues and their ramifications. As a result, only the major Charter issues will be dealt with in detail.

CHAULK: WHAT TO PROVE? SANITY OR INSANITY?

The Facts

On September 3, 1985, Robert Chaulk and Darren Morrisette, 15 and 16 years of age respectively broke into an elderly man's home, ransacked it, and viciously beat the occupant to death with various implements. Their only defence was insanity. The evidence was that they suffered from a joint delusion (labelled a paranoid psychosis) that they had the power to rule the world. In order to achieve that objective they believed that it was necessary for them to kill the victim. They knew this was against the law as it existed, but believed themselves to be above the law. They believed that, given their powers, they had a right to kill "losers" such as the deceased.

They were tried and convicted of first degree murder. This conviction was upheld by the Manitoba Court of Appeal.

Relevant Statutory Provisions

Criminal Code

16. (1) No person shall be convicted of an offence in respect of an act omission on hiss part while that person was insane.

(2) For the purposes of this section, a person is insane when the person is in a state of natural imbecility or has disease of the mind to an extent that renders the person incapable of appreciating the nature and quality of an act or omission or of knowing that an act or omission is wrong.

(3) A person who has specific delusions, but is in other respects sane, shall not be acquitted on the ground of insanity unless the delusions caused that person to believe in the existence of a state of things that, if it existed, would have justified or excused the act or omission of that person.

(4) Every one shall, until the contrary is proved, be presumed to be and to have been sane.

Non-Charter Issues

The primary issue argued before the Supreme Court of Canada was that the word "wrong" in section 16(2) of the *Criminal Code* ought to be interpreted as meaning "morally wrong". In order to succeed, the appellants would have to convince the Court to overrule its previous decision in *R. v. Schwartz*[3]. In that controversial decision, the Court decided 5-4 that the proper interpretation was "legally wrong". If the earlier decision was upheld, there would be no defence available on this ground. Instead, the Court reversed itself and held 6-3 that "wrong" henceforth would mean "morally wrong". As a result, on this ground alone, a new trial was ordered.

The Court also considered the interpretation to be given to the concept of "specific delusions" in section 16(3). The majority held that in view of the expanded meaning of "wrong" in section 16(2), this provision had been effectively rendered superfluous. That is, any person falling within the provisions of this section would also fall within the provisions of section 16(2). As a result, it was not necessary to separately interpret this section.

In addition, the Court confirmed the right of the Crown to present its evidence on the issue of insanity by way of rebuttal. This splitting of the Crown's case was allowed, since the Crown was under no obligation to challenge a defence that might be raised by the accused. This is the case, even if the Crown in aware of the nature of that defence.

The Onus of Proof

The constitutional issue dealt with by the Court was whether the section 16(4) of the *Criminal Code*, which puts the onus on the accused to establish insanity on a balance of probabilities, was inconsistent with section 11(d) of the *Charter*. If this were the case, then it was necessary to determine whether or not the provision could be justified under s.1 of the *Charter*.

The Court split on this question. Lamer C.J. (Dickson C.J., La Forest and Cory JJ. concurring) and Wilson J. (in separate reasons) held that the provision was inconsistent with the *Charter* provision. McLachlin J., (L'Heureux-Dubé, Sopinka and Gonthier JJ. concurring) held that there was no inconsistency. The split resulted from differing views of the nature of insanity as a legal concept. Lamer C.J. took the position that if a person is insane, that person will be found not guilty. In his view it was irrelevant for the purpose of section 11(d) whether insanity is characterised as "as a denial of *mens rea*, an excusing defence, or ... as an exemption based on criminal incapacity". It therefore followed that since it was necessary to be sane to be guilty, the presumption of innocence required that there be proof

beyond a reasonable doubt of this factor when it was in dispute. As a result, the principle enunciated by the Court in *R. v. Whyte*,[4] (any provision that permitted a conviction while a reasonable doubt existed was inconsistent with the *Charter*) was applied and section 16(4) was held not to meet the standard set out in section 11(d).

McLachlin J. saw the issue of insanity not as a defence, but a matter that determined whether or not accused persons could be held to be criminally responsible for their actions. She was of the view that since an individual who successfully pleaded insanity was not released immediately, but was held at the pleasure of the Lieutenant-Governor, insanity could not be treated as a true exculpatory defence. That is, the guilt of the accused person was not dependent upon the proof of sanity. She stated that since the Crown had to prove both *actus reus* and *mens rea*, and negative any exculpatory defences raised beyond a reasonable doubt, all elements that constituted guilt had to be proved by the Crown. Since sanity was not an element that had to be proved in order to result in a guilty verdict, the presumption of innocence was not violated by section 16(4).

Lamer C.J. then went on to consider whether or not the provision was a justifiable limit under section 1 of the *Charter*. In order to resolve the question he utilised the framework set out in *R. v. Oakes*[5]. He stated that the objective of the legislation was to avoid placing the impossibly onerous burden on the Crown of disproving insanity and thereby to secure the conviction of the guilty. The burden was in this form because of the relatively meagre state of society's knowledge of mental illness, the fact that the Crown could not force an accused person to undergo a psychiatric examination or to co-operate with such an examination, and that the Crown may not know that insanity will be an issue until sometime after the event.

For these reasons he held that the objective was sufficiently important to warrant limiting constitutionally protected freedoms. He did not, however, give any reasons, nor did he discuss why he viewed the matter as a pressing concern.

Given that the reverse onus is one that will alleviate the Crown's impossible burden of proving insanity, the provision was rationally connected with the objective. The question of whether the provision impaired the right as little as possible was also positively answered. This problem was addressed by determining whether "less intrusive means would achieve the same objective or achieve it as effectively." In his view any alternate means would have the effect of increasing the number of cases where insanity would be asserted by accused persons and as a result, there would be more persons found not guilty by reason of insanity. Therefore any lesser burden would not achieve the objective as some persons who are not in fact insane would be found not guilty on this basis. Although this may not be the absolutely least intrusive means of achieving the objective, it was within an acceptable range of such means.

On the question of proportionality between the means and the objective, he stated that imposing the burden on the accused of proving insanity on a balance of probabilities, rather than imposing the "full criminal burden" (presumably beyond a reasonable doubt), achieved an appropriate balance by ensuring that the Crown would not have to meet an impossible burden, resulting in the conviction of the truly guilty and the acquittal of the truly insane. He was prepared to accept the fact that some persons who are in fact insane will be convicted. In his view, this was inevitable given the state of medical knowledge at the present time. In the result, section 16(4) is still operative and the onus remains on an accused person to prove insanity on a balance of probabilities.

Wilson J. severely criticised Lamer C.J.'s section 1 analysis. She stated that the purpose of the section is to prevent "perfectly sane persons" from being acquitted on bogus claims of insanity. In her view, in order to justify the provision, evidence would have to led to show that sane persons had successfully pleaded insanity in significant numbers and that this was a problem that had to be dealt with. This could not be shown since the provision was a restatement of the common law and there had never been a provision in Canadian law that gave rise to the problem. As a result, there was no "pressing and substantial concern" which would justify an interference with section 11(d) of the *Charter*.

As a result, in her view, the purpose of the provision is to guard against a problem that might arise if the provision were not there. This is a purely hypothetical situation and an infringement on the *Charter* ought not to be justified where there is no history of an actual problem caused by the use of another burden of proof. In addition, she did not accept Lamer C.J.'s premise that proving insanity beyond a reasonable doubt is an "impossibly onerous" one. In her view, the fact that the accused has to bring forward some evidence of insanity within the meaning of the *Criminal Code* means that the Crown need only address the evidence presented within the context of the definition of insanity. Depending on the facts of the case, this may or may not be difficult. As a result, there is no reason for stating that the burden was an impossibly onerous one.

In her view, in order to address such a hypothetical situation, there should be some evidence from other jurisdictions to support the notion that putting the burden of proof on the prosecution resulted in a pressing and substantial problem. She reviewed the American experience (where the various jurisdictions are evenly split between having the accused prove insanity on a balance of probabilities and the Crown disprove it beyond a reasonable doubt) in order to determine if an analogy could be drawn. This review, together with a review of commentaries made on the American experience, led her to the conclusion that there was no problem in that country and, as a result, no basis for believing that there will be an increase in the number of successful pleas of insanity by those who are, in fact, not insane.

Comment

The decision in *Chaulk* represents a significant clarification of the substantive law of insanity and a standstill position in the procedural and evidentiary aspects of that defence. In reality, given the infrequency with which the defence is proffered, there will be no noticeable change in the number of successful pleas of insanity.

Of significant interest, however, is the basis upon which a problem will be considered pressing and substantial for the purposes of section 1 of the *Charter*. Four members of the Court were prepared to declare a problem that had not existed in Canada to be of that nature. The reasons for this declaration were at best meagre and unconvincing. Although some concerns may be self evident, that was not the case here. Prior to holding that an interference with constitutionally protected rights is justified, there should be some solid evidence to back up that proposition. There was no such evidence here. In fact, much of the evidence seemed to lead to the opposite conclusion. Wilson J. was correct when she stated that, in the event that there is some room for debate, the debate ought to be resolved in favour of a solution that will result in a "guilty person being (sic) found not guilty by reason of insanity and committed for psychiatric treatment than an insane person be convicted of a crime."

SWAIN: WHO DECIDES INSANITY?

The Facts

Owen Swain attacked his wife and infant children causing superficial injuries. At the time he appeared to be fighting with the air and talking about spirits. He testified that he felt that his family was under attack by devils and that in order to protect them he had to do certain things. Mr. Swain spent seven weeks in a psychiatric hospital after the offence. After treatment with anti-psychotic drugs his condition improved to the extent that he was released into the community pending his trial.

The Trial

Mr. Swain was charged with assault, and assault causing bodily harm. At his trial, he chose not to rely on the defence of insanity. However, over his objection, the Crown was permitted to adduce evidence of insanity. As a result, he was found not guilty by reason of insanity and after an unsuccessful *Charter* challenge to section 542(2) of the *Criminal Code*, was ordered into custody to await the pleasure of the Lieutenant Governor. In the result, he spent approximately 15 months in custody pursuant to the provisions of the *Code* relating to insane acquitees. The Ontario Court of Appeal upheld the accused's acquittal.

Statutory Provision

> 542.(2) Where the accused is found to have been insane at the time the offence was committed, the court, judge, or magistrate before whom the trial is held shall order that he be kept in strict custody in the place and in the manner the court, judge or magistrate directs, until the pleasure of the lieutenant governor is known.

The Issues

The Primary issues dealt with by the Court were:

1. Whether it was consistent with the *Charter of Rights* to permit the Crown to raise evidence of insanity when the accused chooses not to raise the issue at the trial.
2. Whether the provisions of section 542(2) violate the *Charter*.

The Crown's Right to Raise Insanity

The rule permitting the Crown to adduce evidence of insanity is one that is governed by the common law and has been set out in cases such as *R. v. Simpson*[6] and *R. v. Saxell*[7]. This being the case, the Court confirmed that common law rules are subject to *Charter* scrutiny so long as they fall within section 32 of the *Charter*.

The rule was attacked primarily on the grounds that it violated section 7 of the *Charter*. Lamer C.J. for the majority (Sopinka and Cory JJ. concurring; Wilson, Gonthier and La Forest JJ. concurring wrote separate reasons but generally agreed with Lamer C.J.) held that fundamental justice included the notion of the adversarial system, and within that notion the fact that the accused person ought to have the right to control his or her own defence. Permitting the Crown to adduce evidence of insanity interferes with that right and is, as a result, a violation of section 7. This violation is compounded by the fact that the Crown's evidence would put the accused's credibility in issue, should he or she choose to rely on a different defence. As well, it could put the accused in the position of having to put forward inconsistent defences, for example, insanity and alibi.

Lamer C.J. went on to consider whether or not the common law rule could be justified by section 1. He characterized the objectives of the rule as: (1) to avoid the conviction of persons who are in fact insane but refuse to adduce evidence of that insanity; and (2) to protect the public from dangerous persons requiring hospitalization.

In his view, these objectives were of pressing and substantial concern and of sufficient importance to warrant overriding a constitutionally protected right or freedom. As well, there was a rational connection between the rule and the objective.

However, the rule was not one which did not interfere with the *Charter* right as little as possible. In cases involving statutory provisions, the Court will uphold the provision if it comes within a range of means that impair the *Charter* right as little as possible. However, the Court held that a common law rule must be the least intrusive means of attaining the objective in order to be justified under section 1. The present rule did not meet this test.

Rather than simply declaring the rule to be inoperative pursuant to section 52 of the *Charter*, the Court fashioned a new common law rule which it believed conformed to constitutional

standards. This rule would permit the Crown to adduce evidence of insanity in two separate circumstances. The first would be where the accused as part of his or her defence raises the issue of mental capacity at the time of the offence. The Crown could then bring in evidence of insanity and the finder of fact would have the alternative of bringing in a verdict of not guilty by reason of insanity. The second circumstance would permit the Crown or the defence to adduce such evidence after a finding has been made that the accused would be otherwise guilty of the offence. In effect the new rule calls for a two stage trial. The first stage will determine guilt or innocence without taking insanity into consideration. If the accused is acquitted, he or she is discharged and is free from any criminal sanctions. If the finder of fact finds that the offence is proved and the accused cannot benefit from any exculpatory defences raised, then either the Crown or the defence may raise insanity as an issue and the finder of fact must then determine if it has been established that he or she was insane at the time of the offence. This unique remedial device may effectively change the way in which trials are conducted in the rare case where either the Crown wishes to lead evidence of insanity or where the accused wishes to rely on another defence and use insanity as an alternative.

Section 542(2) of the Criminal Code

This provision requires a trial judge to order an insane acquittee to be held in custody pending a determination by the Lieutenant Governor as to what is to be done. This latter determination, which was not an issue in the case, can include detention, discharge on conditions or a complete discharge. The judge has no discretion and there is no provision for a hearing or any other forum in which the accused can make representations regarding his or her fate. This lack of hearing or other procedural safeguards caused the Court to hold that the provision was not in accordance with the principles of fundamental justice and thereby violated section 7 of the *Charter*. As well, since there is no discretion in the trial judge, and no standards set out to determine whether or not the accused ought to be detained, the section constituted an arbitrary detention and a violation of section 9 of the *Charter*.

Although the goal of protecting the public through the prevention of crime by detaining insane acquittees is an objective that is pressing and substantial, and the means used have a rational connection with that objective, the Court held that the minimal impairment requirement of section 1 was not met. Although some detention may be required, individuals should be detained no longer than necessary to determine their present dangerousness in order to meet the minimal impairment test. Since there is no time period set out in the legislation, it failed the test and, as a result, was in violation of the *Charter*.

Again, rather than declaring the section to be inoperative, the result of which would have been to release all insane acquittees until Parliament acted, the Court devised a specific remedy. Because of the dramatic effect of invalidity, it held that there would be a period of temporary validity for a period of six months. Any detention order could only be for a period of 30 days unless the Crown established that a period of up to 60 days was necessary. If there was no order by the Lieutenant Governor within this period, or if no time period is set out and no order is made within 30 days, the accused would be entitled to apply for *habeas corpus*. It must be remembered that only the initial period of detention is affected by this decision. The constitutional validity of the Lieutenant Governor's determination was not resolved in this case. At least on this issue, the ball is clearly in Parliament's court.

Comment

The remedies fashioned by the Court in this case blur the distinction between the judicial and the legislative function. On the Crown's right to raise the insanity issue, there is no provision in the *Criminal Code* which could be interpreted to allow a finder of fact to make intermediate findings of fact prior to determining guilt or innocence. A jury would have to be brought in and asked if the accused was guilty or not guilty absent any consideration of insanity. If it found the accused guilty, it would then have to hear new evidence and perhaps turn around and make a finding of not guilty by reason of insanity. This remedy in effect turns the criminal trial into two trials. All of this to permit the Crown to lead evidence of insanity and, in a case such as Swain's, achieve a period of detention longer than that which would have been imposed if he was found guilty of the offence. There is a good argument to be made that Parliament should be the institution mandating this result, and not the Court.

As well, by setting out a time period for the initial detention of the insane acquittee, the Court has taken on a purely legislative function. In effect, a person found not guilty by reason of insanity would never be set free immediately. Swain is a good example. After his initial detention under provincial legislation, he was on bail and in the community for a period of 18 months. The effect of the remedy would have such an individual who, having been released on bail and adjudged not to be a danger, then taken into custody and held for at least 30 days. It would seem that determining how, and under what circumstances, an individual's liberty is to be taken away would ordinarily be the function of Parliament. In this case, the Court took on that role.

It must be appreciated, however, that the Court is put into an untenable position. For, if it declared the provision inoperative and let the chips fall where they may, there is a possibility that dangerously ill individuals would be let into the community. If they simply stayed the operation of the judgement for a period of time, well individuals might be detained for an inordinate period of time without a final resolution of their situation. Perhaps the price of giving the courts the power to declare statutes inoperative is effectively to permit the courts to act as a temporary legislative body in order to ameliorate the deleterious effects of those decisions.

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(Notes continued on page 105)

INDETERMINATE CUSTODY AFTER *SWAIN*

Patricia L. James

The recent landmark decision by the Supreme Court of Canada in *Swain*[1] is seen by some as reflective of a modern, enlightened view regarding mental illness and by others as evidence of "white glove liberalism" run rampant which will enable the criminally insane to stalk Canadian streets.[2]

THE FACTUAL BACKGROUND

The events giving rise to Mr. Swain's committal and encounter with the criminal justice system began the night of October 30, 1983. He arrived home late that evening and began attacking his infant children and wife while apparently suffering from what was later characterized as an acute psychotic episode. In carrying out his attacks, he believed he was protecting his family from evil spirits. Fortunately, his family's injuries were superficial. Mr. Swain was ultimately subdued by the police and taken to jail.

Subsequently, he was charged with three offences under the *Criminal Code*. On November 1, 1983, pursuant to a warrant issued under the Ontario *Mental Health Act*[3], he was transferred to the Ontario Mental Hospital at Penetanguishene where he was treated with anti-psychotic drugs. He responded well to treatment and his psychiatrist (Dr. Fleming) considered he was ready to be released back into the community. On December 18, 1983 he was released from that hospital and returned briefly to jail. Shortly thereafter, he was granted bail on conditions. He remained out in the community for 18 months prior to the date of trial. During this period he continued to take medication and to see a psychiatrist (Dr. Johnson) on an outpatient basis. In addition, he returned to his job and subsequently was re-united with his family.

During the trial, the Crown sought to adduce evidence of Swain's insanity at the time of the offence over the objections of defence counsel. The trial judge ruled that the Crown could adduce such evidence and Swain was subsequently found not guilty by reason of insanity on all three counts.

This verdict triggered the provisions of section 542 (now section 614) of the *Criminal Code*. Section 542(2) provides that, where an accused is found not guilty by reason of insanity, the trial judge shall order that he be kept in strict custody until the pleasure of the Lieutenant-Governor of the province is known. Section 545(1) (now section 617) further provides that where an accused is found to be insane, the Lieutenant-Governor of the province in which he is detained may make an order for the safe custody of the accused in a place and manner directed by him, or, if in his opinion it would be in the best interests of the accused and not contrary to the interest of the public, discharge the accused either absolutely or subject to such conditions as he prescribes.

Prior to the issuance of the trial judge's orders under section 542, defence counsel challenged the constitutional validity of that section pursuant to sections 7, 9, 12 and 15 of the *Charter*. The trial judge ruled that the appellant's constitutional rights were not infringed by section 542(2) and ordered that the accused be kept in strict custody until the Lieutenant-Governor's pleasure was known. A notice of appeal was filed in the Ontario Court of Appeal and Mr. Swain applied for bail pending the appeal.

On June 12, 1985 (two days after the trial judgment was rendered), the Lieutenant-Governor issued a warrant, detaining the appellant in a psychiatric hospital for assessment and requiring a report to the Advisory Review Board within 30 days. (An Advisory Review Board is a body which may be appointed to assist the Lieutenant-Governor concerning decisions with respect to insanity acquittals.) Since neither the appellant nor his counsel had received prior notice of this decision, they were unable to make submissions with respect to the Lieutenant-Governor's warrant.

Following the appellant's 30 day assessment, the Advisory Review Board held a review hearing pursuant to the provisions of section 547 of the *Criminal Code* (now section 619). Both the appellant and his counsel were present for this hearing. Following the hearing, the Advisory Board recommended to the Lieutenant-Governor that the appellant continue his detention in safe custody. The Lieutenant-Governor accepted these recommendations of the Board. These included a recommendation that the Mental Health Centre construct a treatment program for the appellant and that the administrator have the discretion to permit the appellant to re-enter the community at the appropriate time with conditions as to supervision and follow-up treatment as were deemed necessary.

The appellant's counsel attempted on two occasions to request the right to appear and make submissions before the Lieutenant-Governor while the Advisory Board's report and recommendations were being considered. This request was not permitted and the report of the Advisory Board was not released to the appellant's counsel until after the Lieutenant-Governor's warrant for further detention was issued. The appellant remained in safe custody until September 1986, when the Lieutenant-Governor ordered that the warrant detaining the appellant be vacated and that the appellant be discharged absolutely. He had remained in safe custody for 15 months following the trial verdict.

Swain's appeal to the Ontario Court of Appeal was dismissed by a majority of that Court.

THE ISSUES:

Leave to appeal to the Supreme Court was granted with five constitutional questions being considered by the Court, two of which will be addressed here.

1. Does it violate the *Charter* for the Crown to raise evidence of insanity over and above the wishes of the accused?

The previous writer (Professor Deutscher) has set forth the constitutional analysis undertaken by the Supreme Court in reaching the determination that the appellant's section 7 liberty rights were infringed by the common law rule which permitted the Crown to adduce evidence of insanity during the course of the trial over the objections of the accused. As noted by Professor Deutscher, the original common law rule satisfied two objectives: (1) avoiding the conviction of persons who are insane, but who refuse to adduce evidence of that insanity, and (2) the protection of the public from dangerous persons requiring hospitalization.

Lamer C.J., writing for the majority, noted that both objectives could be met via provincial committal procedures. He wrote:

> I do not wish to be taken, however, as having ruled on the constitutionality of the various provincial Mental Health Acts. I simply wish to make the point that these provincial statutes generally provide more procedural protection than does the system of Lieutenant-Governor warrants and, in that sense, they provide an alternative to the Crown when it believes that an accused was insane at the time of the offence and may be presently insane and dangerous.

He further noted that, no matter what the state of the common law rule, the availability of provincial civil commitment procedures meant that a Crown would never be in the position of having to choose between prosecuting an accused who it believes to be insane at the time of the commission of the offence and allowing someone it believes to be presently insane and dangerous to remain at large.

Notwithstanding the attractiveness of this alternative, the Court refused to consider requiring the Crown to commence civil commitment proceedings whenever it believed an accused to be insane at the time of the offence and presently dangerous. Lamer C.J. stated that it would be "unacceptable for the Court to fashion a new common law rule which makes the outcome of a criminal matter dependent upon the existence and validity of legislation coming within a provincial head of power."

While recourse to provincial committal statutes provides an attractive alternative, it should not be assumed that the provisions contained within these statutes will necessarily withstand *Charter* scrutiny. For example, in a recent Ontario case, *Fleming v. Reid*,[4] the Ontario Court of Appeal held that certain provisions in the Ontario *Mental Health Act*[5] dealing with patient consent to psychiatric treatment violated section 7 of the *Charter*. In addition, for certain mentally disordered, dangerous offenders it may not be appropriate to bypass criminal law proceedings.

The other major question addressed by the Supreme Court was the following:

2. Does the automatic detention of a person found not guilty by reason of insanity, as required by section 542(2) of the *Criminal Code*, violate the *Canadian Charter of Rights and Freedoms*?

The appellant's procedural rights under section 7 of the *Charter* were restricted by section 542(2) since there is no requirement for a hearing prior to the trial judge's issuing of a mandatory order of the insanity acquittee into "strict custody". Thus, the appellant was afforded no opportunity to adduce evidence regarding his current mental state. The procedural defect in section 542(2) is not cured by sections 545 and 547 which provide for subsequent hearings and review since the "initial remand" is made without an opportunity for a hearing. Similarly, procedural fairness afforded to the accused during the trial itself cannot offer protection during a post-acquittal process.

The substantive defects of section 542(2) arise from the fact that the detention order is automatic. There is no discretion, nor are there rational standards, as to which insanity acquittees should be released and which should be detained. While there are statutory and judicial criteria which must be present to trigger the operation of section 542(2), once met, they leave no option to a trial judge. The automatic detention order which is then mandated is arbitrary in the sense that it fails to differentiate between those acquittees who may still be dangerous and those who may not. As a result, these substantive defects infringed upon the appellant's rights under ss.7 and 9 of the *Charter*.

The provision could not be saved under section 1 of the *Charter* since the indeterminate length of detention pursuant to the Lieutenant-Governor's initial warrant did not meet the minimal impairment requirement posited in *Oakes*.[6]

In the *Swain* case, the Supreme Court recognized that a gap in time would be necessary between a finding of a verdict of not guilty by reason of insanity and a determination being made as to whether to detain or release an insanity acquittee under a Lieutenant-Governor's warrant. This is inevitable since the evidence before the court at trial is adduced solely with respect to the accused's mental condition at the time of the commission of the offence.

All other provisions in the *Criminal Code* provide for remands of fixed duration for psychiatric observation, usually for 30 days, though provision is made for 60 day orders in exceptional cases. The existence of these provisions suggested to

Lamer C.J. that Parliament was aware of the constitutional concerns raised by indeterminate detention and clearly showed that section 542(2) did not impair an appellant's section 7 right to liberty to the least extent possible.

The Court pointed out that an automatic order was "no less arbitrary" if it was for a limited period of time where there were no set criteria for its imposition. Lamer C.J. noted, however, that this state of affairs may not be disproportionate to achieving the objective. It is the indeterminate nature of the detention which "tips the balance" and fails to satisfy the proportionality requirement stipulated in *Oakes*.

The Court ordered a temporary transitional period of 6 months for section 542(2) in order to prevent the release of all insanity acquittees, including those who might be a danger to the public. During the period of temporary validity any detention ordered pursuant to section 542(2) will normally be limited to 30 days, up to a maximum of 60 days where circumstances so warrant. If orders are made without such limits, an acquittee will have the writ of *habeas corpus* available after 30 days.

THE FEDERAL GOVERNMENT'S RESPONSE

On July 10, 1991 the Honourable Kim Campbell, Minister of Justice and Attorney General for Canada, released proposals in response to the Supreme Court decision in *Swain*. These proposals are, according to the Department of Justice, an attempt to "bring the criminal law's approach to the mentally disordered accused into line with the *Charter* and contemporary health-care practices."[7] The proposals have two objectives: (1) to ensure that individuals are not deprived of their *Charter* rights by being detained for a mental disorder without a fair hearing and regul ar review of their particular cases; and (2) to protect the public from dangerous mentally disordered persons who come into conflict with the law.

In order to protect the *Charter* rights of the mentally disordered accused, proposed amendments to the *Criminal Code* include:

- Section 16 defence of insanity be repealed. In its stead is a section 16 defence of "mental disorder" which exempts anyone from criminal responsibility for any act or omission committed while suffering from a mental disorder.
- Any assessment order issued by a court to assess the mental condition of the accused to determine whether the accused was suffering at the time of the alleged offence from a mental disorder is limited to 30 days, except for a 60 day limit where a court is satisfied that circumstances exist to warrant it.
- The verdict of not guilty by reason of insanity will be replaced with a verdict that the accused committed the act but is not criminally responsible on account of mental disorder. In such cases, the accused shall be deemed not to have been acquitted or found guilty of the offence.
- The review process is improved. Disposition hearings must be held by either the court or a review board within a certain time and are effective for a limited period. The accused is to be notified, and may attend and make submissions at a disposition hearing.
- When reaching a disposition order, a court or review board shall make a disposition that is the least onerous and least restrictive to the accused. Where the accused is not a threat to the public, the accused must be discharged absolutely, or discharged subject to conditions, or detained in custody in a hospital subject to conditions.
- Indeterminate custody is replaced with maximum detention periods, e.g., life for murder.

Measures to protect the public include:

- permitting indeterminate detention in cases where the accused has been found by a court to be "a dangerous mentally accused". (As per the current dangerous offender provisions.)

PATRICIA L. JAMES, Executive Director, Health Law Institute, University of Alberta.

1. *R.* v. *Swain*, [1991] S.C.J. No. 32 (S.C.C.).
2. Ford, "Will Criminally Insane Stalk Streets?" *Calgary Herald* (13 July 1991) A4.
3. *Mental Health Act*, R.S.O. 1980, c.262.
4. *Fleming* v. *Reid* (1990), O.R. (2d) 169 (Dist. Ct.).
5. R.S.O. 1980, c.262.
6. *R.* v. *Oakes*, [1986] 1 S.C.R. 103.
7. Canada Department of Justice, Press Release (10 July 1991).

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(Insanity and the Constitution, continued from page 102)

1. *R. v. Chaulk* (1991), 62 C.C.C. (3d) 193 (S.C.C.).
2. *R. v. Swain*, [1991] S.C.J. No. 32 (S.C.C).
3. [1977] 1 S.C.R. 673.
4. [1988] 2 S.C.R. 3.
5. [1986] 1 S.C.R. 103.
6. (1977), 35 C.C.C. (2d) 337 (Ont. C.A.).
7. (1980), 59 C.C.C. (2d) 176 (Ont. C.A.).

PSYCHIATRIC TREATMENT AND THE *CHARTER*

Gerald Robertson

Following closely on the heels of the Supreme Court's decision in *Swain*[1] comes another decision of major importance in the context of mental health legislation and the *Charter*. In *Fleming v. Reid*[2] the Ontario Court of Appeal held that certain provisions of Ontario's *Mental Health Act*[3] dealing with consent to psychiatric treatment are contrary to section 7 of the *Charter* and thus are of no force and effect. In particular, the Court held that to require a mentally incompetent patient to undergo psychiatric treatment, where previously the patient (while competent) has indicated that he or she does not wish to have that treatment, infringes the patient's right to life, liberty and security of the person in a manner which is neither in accordance with the principles of fundamental justice nor justifiable under section 1 of the *Charter*.

Like most Canadian provinces, Ontario's *Mental Health Act* provides for substitute decisionmaking on behalf of psychiatric patients who are not mentally competent to make treatment decisions themselves. The substitute is normally the patient's nearest relative or, in the absence of a relative, the Official Guardian. The *Act* provides that, when making a treatment decision on behalf of a mentally incompetent patient, the substitute must follow any wishes expressed by the patient when apparently mentally competent. However, the *Act* also provides that, in the case of an involuntary patient (that is, a person who has been committed to a psychiatric facility), if the substitute refuses consent to proposed treatment the Review Board can override this decision and authorize the treatment if it considers it to be in the patient's best interests.

The *Fleming* case involved two involuntary patients at a psychiatric facility in Ontario. Both were diagnosed as suffering from schizophrenia and their attending psychiatrist proposed treating them with neuroleptic (anti-psychotic) medication. Both patients were certified as being mentally incompetent to make treatment decisions, and so the substitute decisionmaker (the Official Guardian) was called upon to consent to the neuroleptic medication. However, as both patients had previously indicated (while mentally competent) that they did not wish to receive neuroleptics, the Official Guardian refused to give consent. Accordingly, the attending psychiatrist applied to the Review Board for an order authorizing the treatment. The Board granted the order, and this was upheld on appeal to the Ontario District Court.[4] However, the order was set aside on appeal to the Court of Appeal, on the basis that the governing provisions of the *Mental Health Act* offended section 7 of the *Charter*.

Central to the Ontario Court of Appeal's conclusion was its reiteration of the principle which it had enunciated a few months earlier in a case involving a Jehovah's Witness who refused consent to a blood transfusion, namely, that a mentally competent person has the right to refuse medical treatment even if that treatment would be in the person's best interests.[5]

In the present case the Court did not question the constitutional validity of providing a system of substitute decisionmaking for mentally incompetent persons, nor indeed was its validity challenged by counsel. The challenge was aimed at the fact that, notwithstanding that a person prior to becoming incompetent has expressed a desire not to have certain psychiatric treatment, the Ontario legislation permits (and indeed, requires) the Review Board to ignore those competent wishes and authorize the treatment if it considers the treatment to be in the patient's best interests. It was this aspect of the legislation which the Ontario Court of Appeal found to be contrary to section 7 of the *Charter*.

The Court held that it was no answer to say that a patient had been afforded procedural protections with respect to the Board's hearing when, at the hearing, the substitute's decision based on the patient's own wishes is considered irrelevant. The Court concluded that "it is plainly contrary to the principles of fundamental justice to force a patient to take anti-psychotic drugs in his or her best interests without providing the patient, or the patient's substitute, any opportunity to argue that it is not the patient's best interests but rather his or her competent wishes which should govern the course of the patient's psychiatric treatment."[6]

Having found a violation of section 7 of the *Charter*, the Court went on to conclude that this infringement could not be saved by section 1. The Court held that the State had failed to demonstrate any compelling reason for eliminating the fundamental right of a competent person to refuse psychiatric treatment in order to further that person's best interests.

Clearly this decision has significant implications for mental health legislation and the treatment of psychiatric patients across Canada. Legislation in a number of other provinces provides for psychiatric treatment without consent. For example, in Newfoundland the *Mental Health Act* expressly provides for treatment to be given to involuntary patients without their consent.[7] Similar provisions exist in several other provinces.[8] Likewise, the *Mental Health Act* of Alberta empowers a Review Panel to authorize psychiatric treatment for an involuntary patient, where the patient is mentally competent and has refused consent to the treatment, if the Panel is satisfied that the proposed treatment is in the patient's best interests.[9] In light of the decision in *Fleming v. Reid*, and of the publicity surrounding the decision,[10] it is likely that provisions such as these will themselves be the subject of challenge under the *Charter*.

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1. *R. v. Swain*, unreported, 2 May 1991, [1991] S.C.J. No. 32.
2. Unreported, 28 June 1991, [1991] O.J. No. 1083 (C.A.).
3. R.S.O. 1980, c. 262, ss. 35(2)(b)(ii), 35a.
4. *Fleming v. Reid* (1990), 73 O.R. (2d) 169 (Dist. Ct.).
5. *Malette v. Shulman* (1990), 72 O.R. (2d) 417 (C.A.).
6. [1991] O.J. No. 1083, at p. 46.
7. *Mental Health Act*, S.N. 1971, c. 80, ss. 6(1), 7(3).
8. See generally G.B. Robertson, *Mental Disability and the Law in Canada* (Toronto: Carswell, 1987).
9. *Mental Health Act*, S.A. 1988, c. M-13.1, s. 29 [proclaimed in force January 1, 1990].
10. See for example *The Globe and Mail* (4 July 1991) A3.

THE EUROPEAN SOCIAL CHARTER: AN END TO THATCHERISM?

Keith Ewing

1. INTRODUCTORY

The purpose of this article is to consider the controversial European Social Charter, and in particular to consider whether it marks an end to Thatcherism in Britain. The Social Charter was concluded by member states of the European Communities, the institutions of which have the power to legislate on economic and social questions. The Charter may be of more than passing interest for Canadians, highlighting a missed opportunity in the negotiations for the free trade agreement with the United States, an agreement which is functionally equivalent to the E.C.

2. THE EUROPEAN SOCIAL CHARTER

The European Social Charter is a solemn declaration adopted by 11 of the 12 member states at a summit in Strasbourg on 10 December 1989. The only government not to sign was the British, by whom the document was dubbed a "European Socialist Charter", running counter to the free market philosophy which had informed domestic labour law policy since 1979. The aims of the Charter were first to remove regional imbalances in social matters in order to ensure fair economic competition between enterprises in different member states, but secondly to promote social consensus by ensuring that workers as well as corporations benefit from the creation of the "single market" in 1992. The proposal, then, is to raise the level of social protection throughout Europe.

In order to achieve these goals, the Charter addresses a member of items in a comprehensive package of some 30 articles. These deal with freedom of movement of workers (articles 1-3); the right to a fair and equitable wage, defined to ensure that workers have a decent standard of living (article 5); the improvement of living and working conditions (with reference particularly to the needs of atypical workers who are often denied social protection) (articles 7-9); the right to adequate social protection and an adequate level of social security benefits (article 10); the right to freedom of association and collective bargaining, including the right to strike (article 11); the right to equal treatment for men and women (article 16); and procedures for worker participation in decisionmaking, particularly in the cases of technological change and business restructuring (articles 17 & 18).

It has to be said, however, that the European Social Charter has no legal status. As others have pointed out, it is not a treaty under international law, nor is it part of community law. It can only become effective if its terms are formally implemented by the community legal institutions. This means that provisions of the Charter must be adopted by the Commission and approved by the Council of Ministers after consultation with the European Parliament, following which they may be implemented as regulations or (more usually) directives which would be binding in Member States under Community Law. But having said this, under the direction of the Greek commissioner, Ms. Papandreou, aggressive steps have been taken to implement the Charter. Its publication was soon followed by an Action Programme by the Commission, in which no fewer than 47 different initiatives were proposed, many of these having led in turn to the publication of draft directives. These cover a wide range of issues, and if introduced will lead eventually to a radical change in the shape of British labour law.

3. THATCHERISM IN BRITAIN

There is a great deal of misunderstanding about the nature of Thatcherism. It is, however, not a unique or distinctive political theory or philosophy. Rather, it is simply a commitment to a particular form of economic liberalism which places faith in the functioning of the free market and the removal of regulatory legislation from economic and social affairs. As such it has an honourable intellectual pedigree which can be tracked back to Adam Smith and which finds contemporary expression in the works of Friedman and Hayek, and less convincingly, yet more despairingly, in the U.S. law reviews. But just as Thatcherism is not a novel economic theory, equally it is not the first time such policies have been pursued by governments in Britain. A similar approach to economic policy was adopted in the inter-war period when the state withdrew from economic management and allowed market forces to prevail, with devastating consequences for unions and their members. The effect of post-war Keynesian policies adopted by governments of both parties until at least the early 1970s has tended to dull our memories about historical trends.

So far as contemporary labour law is concerned, the effect of Thatcherism has been to deregulate employment standards legislation and deconstruct collective labour law. Both varieties of labour law were viewed as distorting the proper functioning of the free labour market, leading in turn to a lack of competitiveness and to unemployment. Under Thatcherism, then, labour law assumes a radically different role than that which it had performed in the past. Rather than being regarded as a means for protecting workers from the naked abuse of employer power, such legislation is removed and workers are left with whatever protection the common law and the market-place can provide. And rather than being viewed as a means of allowing workers to participate through their trade union in making and administering the rules which govern the working life, both trade unionism and collective bargaining are denied any legitimacy in a regime which worships the free market above all else.

The deregulation of employment standards has not led to a complete removal of such legislation but, equally, government initiatives have been far-reaching. Legislation introduced since 1980 has seriously undermined the British minimum wage fixing laws and has also withdrawn the statutory protection from unjust discharge for many workers. The deconstruction of collective labour law has on the other hand removed some of the state props for free collective bargaining. There is now in Britain no procedure equivalent to the Canadian certification procedure, where an employer can be required to bargain with a union enjoying high levels of support in the workplace. Most forms of

trade union security are unlawful. It is unlawful for an employer to refuse to hire someone because he or she is not a trade union member and it is unlawful to take action short of dismissal and unfair to dismiss someone on the ground of non-union membership. Finally, the freedom to strike has been seriously curtailed by the introduction of measures which make it easier for an employer to obtain injunctive relief and damages against trade unions on the one hand, and to dismiss striking workers on the other.

4. THE SOCIAL CHARTER AND THATCHERISM

At first sight there thus appears to be a conflict between Thatcherism and the Social Charter. In contrast to the free market thinking informing labour law under Thatcher, the Charter is inspired by a vision of a social market which will require regulation and reconstruction on a large scale. As a result, the British labour movement is greatly optimistic about the Charter, and the labour party is committed to signing it as soon as it comes into office. But at a risk of sounding cynical, that optimism may be misplaced. For even though community law is a form of higher law, and even though Thatcherism is in decline (with her successor apparently more committed to European integration), there may still be a need for some caution about the future and several reasons for thinking that the ideology which informed Thatcherism will not be easily replaced. Not least among the problems in this direction is the text of the Charter itself. Although it refused to sign, the British government did successfully negotiate the inclusion in article 11 of a right of workers not to join a trade union (thereby prohibiting the union shop on a European wide basis), as well as an exclusion of civil servants from the protection for the right to join trade unions, (thereby avoiding any further embarrassment over its decision to withdraw union rights from 5,000 or so civilian staff employed at General Communications Headquarters [a listening station]).

But there are perhaps more serious difficulties associated with the Social Charter. One of these related to the legislative process in community law. As already pointed out, the Social Charter is not a self-executing document and its different provisions need to be introduced into community law in the shape of directives or regulations. Under the Treaty of Rome, however, legislative proposals "relating to the rights and interests of employed persons" need the unanimous approval of all 12 member states. As a result, the British government, not having signed the Charter, has the power to veto any of the important initiatives which are taken to implement its terms. It is true that there are a number of other treaty provisions which allow for majority approval only and that some labour law directives could be introduced under these provisions. But it is clear that the most important measures will require unanimous support and that those which do not can be frustrated by grudging implementation by national governments. Once made, a directive is not usually self-executing but will need implementing legislation in each member state before it will be legally enforceable there. Conservative governments have already frustrated earlier social policy initiatives — such as pay equity — by cumbersome procedures for enforcing the law and the creation of wide defences for employers to justify not complying with its terms.

The process of introducing and implementing the terms of the Charter is thus likely to be long and tortuous. But even if these problems are overcome, the full delivery of the Commission's Action Programme could prove to be a source of some disappointment. It is true that the Action Programme proposes a large number of initiatives and that many important draft directives have already been introduced. These include measures on the contract of employment; the organization of working time; and maternity provision for pregnant women. But while important, the measures are nevertheless peripheral to the main problems which are and which have been affecting British unions in the last decade. Perhaps the critical concern of the organized labour movement is with the collective bargaining and right to strike provisions contained in articles 11, 12, and 13 of the Charter. It is here that the unions in Britain are most vulnerable, but it is here that the Action Programme has almost nothing to say and certainly nothing concrete to offer in terms of proposed legislative instruments. Indeed, it is arguable that the pressure in the E.C. for the introduction of a works council system on the German model (with a proposed directive on a European Works Council) will further undermine trade union organization. By requiring joint consultation procedures in all European-Wide enterprises, this may make it even more difficult in practice for traditional trade unionism to become established. Employers would be well advised to seize the opportunity to set up such procedures to further dull support or enthusiasm for collective bargaining by independent trade unions.

5. CONCLUSION

The European Social Charter thus challenges the free market philosophy which has inspired labour law under the Conservative government. But although Mrs. Thatcher has been replaced by the less strident Mr. Major, there has been no softening of the hard line on labour law reform. It is thus optimistic to think that Thatcherism will wither on the vine. This is not to deny the importance of the Social Charter which is a bold and imaginative document. Nor is it to deny that the Charter may lead to some changes to British labour law, and some very significant ones at that. But there is a need for a realistic assessment of what the Charter is likely to achieve. It is clear that if the Social Charter is to make any positive contribution to the lives of working people, hard political battles will have to be fought both in Europe and at Westminster if its terms are to become a reality. The first battle is to secure the election of a Labour government which is committed to signing the Charter. But that will only be the beginning of what proves to be a long and arduous campaign. A very real concern is that, in some ways, the Charter is a potential source of trade union weakness as it is strength. It signals the end of trade union security arrangements and it adds to the pressure which has been welling up in Europe since the mid 1970s for the extension of some kind of works council system which will take British unions at least into new and potentially dangerous terrain.

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Committee for the Commonwealth of Canada v. Canada
EXPRESSION ON PUBLIC PROPERTY

June Ross

In *Committee for the Commonwealth of Canada* v. *Canada*[1] seven justices of the Supreme Court of Canada unanimously agreed that a prohibition by airport authorities of the distribution of political pamphlets in the public areas of an airport violated the respondent's freedom of expression and could not be saved under section 1 of the *Charter*. The similarities stop almost at that point. If further common ground can be found in the six judgments, or in at least five of the six judgments, it is perhaps best summarized in the brief reasons of La Forest J.:

> I agree with the Chief Justice and McLachlin J. that freedom [of expression] does not encompass the right to use any and all government property for purposes of disseminating one's views on public matters, but I have no doubt that it does include the right to use for that purpose streets and parks which are dedicated to the use of the public, subject no doubt to reasonable regulation to ensure their continued use for the purposes to which they are dedicated. I see no reason why this should not include areas of airports frequented by travellers and by members of the public. The blanket prohibition against the use of such areas for the purpose of the expression of views thus violated the freedom of expression guaranteed by section 2(b) of the *Charter*, a prohibition which my colleagues have been at pains to demonstrate is not justifiable in a free and democratic society.[2]

As indicated by La Forest J., this is all that was necessary to dispose of the appeal. However, all of the justices, including to a limited extent La Forest J., went on to attempt to provide some guidelines for future cases as to the applicability of section 2(b) of the *Charter* to restrictions on the use of government property by the public for expressive purposes. These guidelines are seriously limited in their usefulness in that three different tests are proposed, none receiving majority approval. However, to the extent the tests rely on the same considerations and give rise to the same results, although involving different rhetoric, the decision does provide real guidance. This comment will outline the tests and demonstrate that there is a large degree of overlap in them, and that they generally appear to be quite sensitive to free expression interests. The comment will not deal with the other issues raised in the case, relating to whether the government action in the case was in regulatory form or not, whether the regulation or other action was "prescribed by law", and the application of the *Oakes* test. The latter point was not controversial.[3] On the other hand, the discussion of the "prescribed by law" issues was so divided as to lack virtually any precedential force, and merely reviewed concepts previously explored in the case law without introducing new ones.[4]

On March 22, 1984, Messrs. Lepine and Deland, the Secretary and Vice-President of the Committee for the Commonwealth of Canada, went to the Montreal International Airport at Dorval armed with placards, leaflets and magazines, seeking to promote their organization and its cause and to solicit members. They started to approach the public for this purpose, but were soon told to stop by first an R.C.M.P. officer, and then the assistant manager of the airport.

The Committee and others commenced an action in the Federal Court, seeking declarations that the defendant had not observed their fundamental freedom of expression and that the areas open to the public at the Airport constituted a "public forum". The term is borrowed from the American doctrine developed in cases applying the first amendment to restrictions on the use of public property for expressive purposes. Dubé J., after reviewing American case law, agreed that airports are "contemporary extensions of the streets and public places of yesterday", and granted the declarations.[5]

A majority in the Court of Appeal affirmed this decision,[6] but granted only the first of the requested declarations, holding that it was unnecessary and inappropriate to adopt the American doctrine in the form of relief granted. Pratte J., in dissent, accepted the government's argument that it, as owner of the property, was entitled to deny permission to use the airport property for anything other than its intended function, the service of the travelling public.

In the Supreme Court all of the justices agreed that the government acting as property owner was still subject to *Charter* limits. Freedom of expression, as held by Lamer C.J., "necessarily implies the use of physical space in order to meet its underlying objectives."[7] To confine free expression to private property would deny the foundation of the freedom. L'Heureux-Dubé J. and McLachlin J., in the other two major judgments in the case, made similar points relating to the importance of allowing public property to be used for expression, particularly to communicators whose means are limited. All three of the judgments referred to the following passage from the United States Supreme Court decision in *Hague* v. *Committee for Industrial Organization*:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.[8]

Agreeing, therefore, that at least some government property must be available for expressive purposes, subject to reasonable regulation, the justices then addressed the question of what government property is so available. Must restrictions on such use of government property always be subject to review under section 1 of the *Charter*, or are there definitional limits on the scope of freedom of expression in this context? Only L'Heureux-Dubé J. took the position that section 2(b) is always engaged when government restricts the use of any of its property for expression. The other six justices all agreed that there are some definitional limits. This is, in itself, somewhat unusual, as other decisions of the court have been unwilling to imply definitional limits into section 2(b) and have kept such limits within narrow bounds.[9] In the recent *Osborne* v. *Canada (Treasury Board)*[10] the court dismissed out of hand the suggestion that the scope of freedom of expression should be limited "because of the particular status of the holder of the right, i.e., a public servant". Yet the location of the exercise of the right, i.e., on public property, does limit the scope of the freedom. The reason appears to be primarily a "floodgates" fear; that otherwise there would be a potential for too many clearly unjustified claims requiring review under section 1. Arguably this could result in a weakening of the section 1 test.[11]

McLachlin J., on the need for internal limitations, stated:

> There is no historical precedent for extending freedom of expression to purely private areas merely because they happen to be on government-owned property. Freedom of expression has not traditionally been recognized to apply to such places or means of communication as internal government offices, air traffic control towers, publicly-owned broadcasting facilities, prison cells and judges' private chambers. To say that the guarantee of free speech extends to such arenas is to surpass anything the framers of the *Charter* could have intended.[12]

Of course, one can say the same regarding a number of accepted and uncontroversial restrictions of expression; for example, laws prohibiting criminal conspiracies, or secrecy oaths required of government officials. In other contexts, the fact that some limitations are obviously justified has not persuaded the court to abandon its general position that all limits of expression that involve any balancing of interests should be assessed under section 1. Thus, implicitly, it seems to be the potential for a particularly large number of clearly justified limitations that motivated the six justices who opted for an internal limitations approach.

L'Heureux-Dubé J., who advocated that considerations relating to the location of expression be reviewed under section 1, was also aware of the potential for unjustified claims. While she declined to exclude completely such claims from section 1 review, she did propose a contextual approach to section 1 under which it would be differentially applied depending on whether or not a "public arena" was involved. "Restrictions on expression in particular places will be harder to defend than in others. In some places the justifiability of restrictions is immediately apparent."[13] "Public arenas" should be characterized by factors such as traditional openness, ordinary admission of the public, compatibility of the property's purpose with expressive activities, and symbolic significance or other factors that make access to the property important for communication. While L'Heureux-Dubé J. asserted that, since the review of these factors occurs under section 1, the onus will be on the government to justify restrictions, she also contemplated that in some circumstances no evidence would be required, because of the self-evident justifiability of restrictions on expression. She too referred to internal government offices, air traffic control towers, prison cells and Judge's Chambers as clearly inappropriate locales for leafleting or demonstrations.

This kind of a contextual approach to section 1, in which the relevant parameters of the context are set in advance, and the resulting section 1 application may vary from a standard under which no evidence need be called to a much stricter standard, is in practical effect identical to an approach that requires a review of the same factors as definitional limits of section 2(b). In either case, before any significant onus is placed on government to justify restrictions on expressive activity, the court will consider whether the place is one that is suited to communication or that is important to the communication of certain messages.

Two methods for providing definitional limits were provided: one by Lamer C.J., with Sopinka J. and Cory J. concurring, and a second by McLachlin J., with Gonthier J. concurring and La Forest J. indicating that he would tend to approach future cases in the manner suggested by her. Lamer C.J. proposed that individual interests in free expression should be balanced with government interests in preserving property for other uses through a "compatibility with function" test to determine whether section 2(b) has been violated:

> [T]he freedom which an individual may have to communicate in a place owned by government must necessarily be circumscribed by the interests of the latter and of the citizens as a whole: the individual will only be free to communicate in a place owned by the state if the form of expression he uses is compatible with the principal function or intended purpose of that place.[14]

It is not necessary that the place be compatible with any or even most forms of communication, only with the specific form in issue. For example, in a library, shouting a political slogan would be incompatible with its primary purpose, but wearing a t-shirt with a political message would not be. Lamer C.J. related the compatibility with function test to the court's earlier holding in *Irwin Toy Ltd.* v. *Quebec (Attorney General)*[15] that while all content of expression is protected, not all forms of expression are. Previously the court had declared that violence as a form of expression was without section 2(b) protection; similarly forms of expression that are incompatible with the

primary purposes of government property on which they are employed are without such protection.

Lamer C.J.'s approach involves a straightforward balancing test under section 2(b) rather than under section 1. This leaves only a circumscribed role for section 1, to deal with government purposes that are not specifically related to the function of the property.[16] The approach also places the onus on the individual to demonstrate that the form of expression is compatible with the function of the public property in question, which may be criticized in that government, not the individual, has the greater familiarity with that function and the greater ability to provide evidence on this issue. But showing that a peaceful form of expression that does not interfere with other activities is contemplated may be sufficient to create a *prima facie* case of compatibility to be met by the government, so that this problem may be more apparent than real. One aspect of the test that does cause some concern, though, is the somewhat narrow way in which the balancing test is defined. In introducing the test, Lamer C.J. comments on the need to balance the individual's interest in free expression against the government's interest in using its property for other purposes. The compatibility test will capture the government's interest in the property *per se*, and other government interests can be subsequently dealt with under section 1. But the individual's interests may not be adequately dealt with by this test. Other factors relevant to the individual's interest, such as the availability or lack of alternative channels of communication or the symbolic significance of a location, are not considered. It would seem that a strong individual interest as demonstrated by such factors might merit the imposition of a greater degree of interference with other government uses of property. The compatibility test may cause such claims to be excluded at the section 2(b) stage, without a full consideration of all relevant factors at the section 1 stage.[17]

McLachlin J. also based her proposed test on the *Irwin Toy* decision. She, however, did not turn to the exclusion of certain forms of expression, but instead to the categorization of government laws or actions as violating section 2(b) in either purpose or effect. Regulations that are "tied to content" violate section 2(b) in their purpose. Regulations that are aimed solely at the physical consequences of an activity do not violate section 2(b) in their purpose, but may in their effect. To demonstrate this effect the court held in *Irwin Toy* that regard must be had to the values of truth-seeking, social and political participation, and individual self-fulfilment, that underlay the guarantee of freedom of expression. The meaning sought to be expressed must reflect those values.

Pursuing this point, McLachlin J. held that where a content-neutral regulation of government property has the alleged effect of inhibiting expression, a claimant must establish a link between the use of the forum in question and at least one of the purposes of free expression. Places that by tradition or by designation have been dedicated to public expression of political or social or artistic issues are related to free expression values by that dedication. Where places are unrelated to public debate, again using the examples of internal government offices, airport control towers, judges' chambers and prison cells, "public expression" therein would not promote these values.

McLachlin J. does not indicate how she would deal with more controversial locations. However, to contrast her position with that of Lamer C.J., the essential difference appears to be that she would, at the section 2(b) stage, attempt to look at the issue from the perspective of the individual's interest in expression only, rather than balancing that interest against the government's interest in using its property for the purposes to which it has been dedicated. Her primary criticism of Lamer C.J.'s approach is that it does require such balancing under section 2(b) rather than following the court's usual approach of reserving the balancing of individual versus public interests to be assessed under section 1. But, except in the extreme cases that she refers to, it is hard to see how balancing can be avoided. The interest in using traditional or designated public forums for free expression is compelling; the interest in using the particularly private areas referred to is trivial. But in many areas, such as libraries, school grounds, or prison driveways, the interest in the expressive use of these properties can only be defined in relative terms. If McLachlin J.'s test excludes only trivial cases, these hard cases will be balanced under section 1 as L'Heureux-Dubé J. would have it. If McLachlin J.'s test excludes everything except compelling cases, it would seriously circumscribe access to public property for section 2(b) purposes. If some middle ground is to be adopted, allowing some forms of expressive use of some other properties, surely this must be determined by means of balancing. McLachlin J. does indicate that her desire is to exclude at the section 2(b) stage "[c]laims which *clearly* do not raise the concerns central to the guarantee" [emphasis added].[18] It seems she intended the test to be used to eliminate trivial cases, with any of the more difficult cases calling for balancing under section 1.

One point in common in the three decisions is that they all seem to assume that content-based decisions will always be subject to section 1 review. Clearly, L'Heureux-Dubé J. would not deny or restrict review of content-based regulations. McLachlin J. was careful to note that any government action "tied to content" violates section 2(b), and that only regarding content-neutral regulations would claimants be subject to the additional requirement that she described.[19] Although Lamer C.J. was not as explicit on this point, it appears that he too intended to restrict the scope of section 2(b) only with regard to content-neutral regulations. He described his compatibility test as a restriction of the scope of the guaranteed forms of expression, and referred to the *Irwin Toy* distinction between content of expression which is always protected by section 2(b) and forms of expression which are subject to some inherent limitations.

All of the decisions attempt to achieve flexibility and seem to be generous to expressive interests. All three allow a straightforward consideration of the values and interests truly at stake. The balancing of individual versus government interests may be done either under section 2(b) or under section 1. Given

the contextual approach to section 1 as described by L'Heureux-Dubé J., I would not attach much importance to this distinction. However, it is important that the more controversial types of claims not be screened out prior to balancing either under section 2(b) or section 1. Lamer C.J.'s test has the potential to do this. So does McLachlin J.'s test unless, as indicated above, it is used only to exclude clearly unjustified claims. In the result it would seem that either the approach of L'Heureux-Dubé J. or that of McLachlin J. as qualified here, best achieves the goal of flexibility and protects expressive interests where they can be reasonably accommodated. Alternatively, Lamer C.J.'s test, expanded to allow for a more generalized balancing, would do as well, except for the occasional advantage that may follow from the presumptive onus when balancing is pursued under section 1. Even taken in its restrictive form, Lamer C.J.'s test should be adequate in a large number of cases. The only approach with the potential to rule out the expressive use of most government property is McLachlin J.'s, but this would be contrary to the result she intended and so would seem to be a misapplication of her approach.

Generally, all of the decisions in *Committee for the Commonwealth of Canada* demonstrate a commendable sensitivity to the need to provide access to government property for expressive purposes, so that free expression will be practically as well as legally accessible. Much of the debate in the decision relates to the question of definitional or section 1 limits on rights. This debate is lessening in significance as section 1 is being treated more flexibly. Perhaps it is time to shift the debate from such structural concerns to more result-oriented concerns. Looked at in that way, *Committee for the Commonwealth of Canada* has opened up airports throughout the country and presumably other modern "crossroads" to public debate. This significant step was unanimously adopted, and for that reason alone the case should be considered a landmark.

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[1] (1991) 77 D.L.R. (4th) 385 (S.C.C.).

[2] *Ibid.*, at 402.

[3] All of the justices who reached the point (5 of 7) agreed that the total exclusion of expressive activity was overbroad in its relation to the government objective of preserving the airport for travel purposes.

[4] Lamer C.J., with Sopinka and La Forest JJ. concurring, held that the Government Airport Concession Operations Regulations, SOR/79-373, ss. 6-20 did not apply to non-commercial solicitation, including the respondents' activities. Lamer C.J. and Sopinka J. held that the government's actions in excluding the respondents was accordingly not prescribed by law. The remaining justices held that the regulations applied, and McLachlin J., with Gonthier and La Forest JJ., held that even if the government were acting only pursuant to its common law authority as an owner of property, its actions would be prescribed by law. L'Heureux-Dubé J. held, in an alternative ground for her decision, that the regulations were too vague to constitute a limit prescribed by law.

[5] (1985) 25 D.L.R. (4th) 460 (Fed. Ct., T.D.).

[6] (1987) 36 D.L.R. (4th) 501 (Fed. C.A.).

[7] *Supra*, note 1, at 394.

[8] 307 U.S. 496 (1939), at 515-16.

[9] E.g., *Irwin Toy Ltd.* v. *Quebec (Attorney General)* (1989), 58 D.L.R. (4th) 577 (S.C.C.) held that all content of expression is protected, and all forms of expression excepting only violence or threats of violence. *R.* v. *Keegstra*, [1991] 2 W.W.R. 1 (S.C.C.) maintained this position in regard to content, and the majority indicated that only actual violence as a form of expression should be unprotected. Even threats of violence should prima facie be protected, subject to section 1.

[10] Supreme Court of Canada, June 6, 1991, unreported.

[11] This reasoning was in part responsible for the Court's adoption of internal limitations pertaining to section 15: *Andrews* v. *Law Society of British Columbia*, (1989) 56 D.L.R. (4th) 1 (S.C.C.).

[12] *Supra*, note 1, at 450.

[13] *Ibid.* at 426.

[14] *Ibid.* at 394-395.

[15] *Supra*, note 9.

[16] Lamer C.J. gives the example of a government objective of maintaining law and order as one that would be considered under section 1.

[17] Both L'Heureux-Dubé J. and McLachlin J. note the need to consider other factors; *supra*, note 1, at 429-430 and 452 respectively.

[18] *Supra*, note 1, at 458. McLachlin J. also characterized her approach as "between" that of L'Heureux-Dubé J. and Lamer C.J., and stated that the latter test had a potential to forestall legitimate claims (at 447 and 453). It would seem that she felt her own approach would exclude fewer claims than that of Lamer C.J.

[19] McLachlin J. characterized the exclusion of soliciting at the airport as content-neutral because the "stated policy was to prohibit all political propaganda" and there was "no intention to favour one philosophy or idea over another" (*supra*, note 1, at 459). She and the other justices seem to have dismissed as insignificant the exclusion from this policy of poppy-vendors.