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THE WITHERING OF THE STATE?

Marc Lalonde

I would not be offended if some of you were to tell me that they were somewhat surprised when they saw my name as speaker on the invitation to attend the 1996 Merv Leitch Lecture. You would only have shared my own surprise when I heard Peter Lougheed on the phone inviting me to deliver this address.

Where our reactions may have been somewhat different is that, I told him that in my case, the surprise was accompanied by great joy. Mr. Lougheed can testify that, although I felt that my agenda was already overloaded, this was an offer I could not refuse; and I do not mean it in the sense which is usually given to that expression.

Indeed, it is a real pleasure and honour for me to speak to you on this occasion. As the protagonists for our respective governments during our negotiations on the National Energy Program in 1980-81, we were probably seen, in the public eye, as two individuals with considerable personal animosity against each other. It is true that I was not exactly embraced by Merv when I landed in Edmonton to discuss energy policy following the Liberal election victory in February 1980, and even less so when I showed up after the NEP was announced in the November 1980 budget. But I can truly say that, through the months of, at first sporadic, and then almost continuous meetings which led to an agreement between our two governments in September 1981, the utmost civility always existed in our relations. I have never known Merv as a man who was making a great show of his feelings but I have the impression that a great deal of mutual respect developed between us and, at least as far as I am concerned, I came to consider Merv as a true friend. Our personal and warm relationship continued well after we each left politics for greener pastures.

Obviously, we did not see eye-to-eye on every issue and I am not sure that we would have agreed on the content of tonight's address, but I am sure that we would have had a cogent, lively and friendly discussion.

I have entitled this speech "The Withering of the State?" with a question mark. One might say that this is a subject that should be treated in the political science rather than the law faculty. Yet, I hope to show that this question raises a significant challenge concerning the role of law in the society of tomorrow; and, in any event, lawyers may be the last of the renaissance citizens: nothing is indifferent to us.

The state, during the last decade, has been under attack on two fronts: the techno-economic front, and the political front.

On the techno-economic front, the creation of the World Trade Organisation, following the Uruguay round negotiations, has added to the steps taken under previous rounds a further major liberalization of trade in goods and services and in capital flows. In addition, bilateral agreements or regional groupings like the European Union, the NAFTA, the recent Canada-Chile Agreement, and the ASEAN represent, to different degrees, further openings of the borders between countries. While the process of freeing up international trade and investment has known a steady and gradual expansion since the creation of the GATT after World War II, the breathtaking technological changes of the 1980s and the 1990s have turned that process into a real firestorm. These changes have been awesome in terms of both their size and their rapidity.

In a recent World Economic Survey, the Economist magazine stated that, over the last two decades, the information-carrying capacity of the global communications network has increased a million times over and that computing power doubles every eighteen months or so; at the same time, it is estimated

that the price of that power is only one-hundredth of 1 per cent of what it was in the early 1970s, and we all know of the less spectacular but nonetheless significant decline of long-distance phone calls during the same period.[1] Product cycles also have evidenced similar fast changes; 70 per cent of the revenues of the computer industry comes from products that were not on the market two years ago; barely a week goes by without the announcement of some new product from that industry coming on the shelves. And it has become almost embarrassing to admit that you are not actually spending (or wasting) a few hours a week surfing on the Internet.

It is not surprising that the combination of the opening up of borders, at least in economic matters, and the technological explosion has resulted in a situation where international trade has grown twice as fast as output, and foreign direct investment three times as fast.

Governments and the citizens certainly had a big say in the liberalization of the international economy; acrimonious debates raged on and a national election was fought in Canada on the issue of free trade with the United States. In Europe, numerous referendums took place in connection with the decision of various countries to join in or to reject the Maastricht Treaty, and the debate is ongoing. On the whole, one can say that the evolution in favour of the liberalization of international economic relations has been the result of a democratic process.

The globalization of economic activities has affected the traditional perception of the role of the state. With the adoption of new and more effective international and regional trade and economic agreements, the States have voluntary curtailed the exercise of their political sovereignty. They do this, not out of some fascination for internationalism but because they have concluded that such steps are serving the best interests of their citizens. In the case of the European Union, those restrictions have gone beyond the economic and into the political sphere, not without some difficulty. Citizens who used to turn to their nation state to protect their economic interests are now being told that their government's hands are tied and that they have to take their complaints to another jurisdiction (Brussels, for instance, in the case of the EU) with which they are not familiar and upon which they do not feel they have political leverage. It is not surprising that, in such circumstances, they come to consider their national state is losing relevance and they tend to take matters into their own hands. This phenomenon vividly came to my attention, a few years ago, as I was visiting a friend in Normandy. I met with a local mayor who also happened to be the president of a newly formed regional administration. He told me that he was just back from a meeting with Basque colleagues in Spain where he had been discussing a common strategy to be adopted concerning fishing rights on the Grand Banks, off the shores of Newfoundland. He said they had decided upon such an approach after they had been told by their elected officials in Paris and Madrid that this was now a Community affair, not one of the French or Spanish government. I would never have thought that, in the centralized state that France is, there would be a day when a regional administration would take over the mantle of dealing in international affairs. A few years earlier, that mayor might very likely have found himself promptly removed from office by the French Government, for acting against the interests of the state. I can confirm that this example is far from unique.

In the case of Canada, the WTO and the NAFTA agreements have not led to the same transfer of sovereignty and to the same degree of frustration. But, having to adjust to the combined impact of those agreements and of the technological revolution, Canadian citizens have equally questioned the role of the state. This has taken the form not only of pressures for a greater devolution in favour of provincial governments but also from provincial governments to regional and local authorities and to what Henry Mintzberg, in a recent Harvard Business Review article, calls the "non-owned organisations," referring to non-business and non-cooperative organisations as well as to the traditional non-government organisations.[2]

I see nothing wrong in the intense debate taking place in many western countries in that regard. This is the debate about what the Europeans, after the French, have come to call the debate on the principle of *subsidiarité*; political authority should be exercised at a higher level only if it can be carried out in a better way than at a lower level.

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1 "The World Economic Survey" *The Economist* (28 September 1996) 1.

2 "Managing Government, Governing Management" (1996) 74 Harvard Business Review 75-83.

If that aspect of globalization flowing from international agreements has been the result of popular will and government action, the same certainly cannot be said about globalization resulting from the technological revolution.

I believe that the technological revolution is a significant factor leading to current questioning of the role of the state. For the first time in history, the modern state is trying to handle a wild horse that it may not be able to tame. The new technologies have resulted in a huge expansion of the expression of the right to communicate and express oneself. Yet, one cannot but feel some unease at the concept that, although traditional legal and regulatory levers still exist, they have, in many respects, become unenforceable in practice in the new communications field. You may have read an article in yesterday's Financial Post reporting on a recent seminar held in Toronto considering, among other things, the great difficulty for governments to control conduct that occurs on the Internet.[3] Reference was made to the idea advanced by some legal theoreticians to the effect that the Internet should be treated as a separate "jurisdiction," away from and beyond national jurisdictions, with its own formal laws, courts and enforcement mechanisms. Such a "jurisdiction" would be called Cyberspace and its legal code, according to one expert, would be a "geodesic dome of contracts among private parties." The best analogy to such a development would be the creation of the Law Merchant during the Middle Ages. Hearing of all this, I can tell you that negotiating the National Energy Program with Merv Leitch was a cinch compared to what we, as jurists or politicians, will have to deal with in the future.

But there is more to the current questioning of the role of the state, in every society, than the impact of globalization and of the technological revolution.

I am referring here to the ideological attack on the state itself, and the welfare state in particular, that has been going on in the last decade. The United States is without a doubt the country where that attack has been the most virulent, the most consistent, and the most coherent. Taking account of the impact that everything American has on Canada, it is not surprising that those voices have found some echo in Canada.

As in all debates, however, some people tend to take radical positions which may make good headlines in the media but which do not do much to enlighten the public as to the real options available. I have come to believe that the political spectrum is not a straight line with the left at one end and the right at the other. In fact, a more adequate representation of that spectrum would rather take the form of a horse-shoe, if not a circle, where the extreme right and the extreme left end up almost touching each other. The apologists of the "best government is no government" are not so far from Karl Marx's thesis on the perfection of communism which was to lead to "The Great Dawn," the vanishing of the state. In that regard, it is interesting to note that, in practice, the extreme right and the extreme left have both led to dictatorial regimes.

Even though I may have had the reputation (undeserved, I would argue), I have no quarrel with the notion that we can be overgoverned, that the state is not the best institution to run a business and that the burden of regulation can become excessive. The general slimming process which most western governments are going through today is not a necessary evil; it should be applauded by all those who have at heart the good functioning of a dynamic market economy and of a responsible democracy. But I am concerned when I hear pundits and/or politicians take the line that tax increases are bad and tax cuts are good *per se*; that any decrease in regulation has to be welcomed automatically; that the best government is no government and, somehow, that the state is the enemy of progress.

When President Clinton declared, in his last State of the Union Address, that the era of big government was over, he was reflecting the view of a good majority of citizens not only in the United States but in countries all over the world, although the interpretation of that statement would have significantly varied from one place to the other. Although Canadians, by and large, would have subscribed to Mr. Clinton's expression of what is more a wish than a reality, they nonetheless have resisted up to now the siren songs of politicians trying to enchant them with more extreme slogans. There is even some comfort in the fact that in the recent U.S. elections, the simple promise of a 15% tax cut was not sufficient to accede to the presidency. The repetition *ad nauseam* that "it's your money, it's your money" was not enough to convince voters that the government was necessarily making bad use of the taxes it collected.

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[3] Michael Fitzjames, "The Internet: A New Jurisdiction Called Cyberspace" *The Financial Post* (19 November 1996) 15.

We have to go back to basics and rediscover the role of the modern state.

I do not need to spend time vaunting to this audience the merits of the market economy as the best instrument to ensure economic growth and prosperity; even the few remaining communist countries are trying to square the circle by claiming that what they want to establish is a "socialist market economy."

But recognizing the virtues of markets is a very long cry from making the marketplace the sole arbiter of the elements constituting a decent society. A society built exclusively upon the satisfaction of individual wants and the production of private goods would rapidly turn into a Hobbesian one where, for a vast number of citizens, life would turn out to be "poor nasty, brutish and short."

The British North America Act of 1867 endowed the Parliament of Canada with the responsibility of exercising its powers for the "peace, order and good government" of Canada. Nobody is taking issue with the duty of the state to ensure peace and order; the whole debate is rather centered on the definition of "good government" and how the political — if not the judicial — interpretation of those words has evolved since the adoption of the BNA Act.

I will begin by stressing that our constitution talks about "good government," in opposition, I presume, to "bad government;" it does not say "peace, order and small government," in opposition to "big government." The danger in the current debate is that we may end up confusing the kind of government we want with the size of government we should have. Governments, like every other institution in society, should be efficient, although the discipline of the market is more difficult to apply to the production and distribution of public goods rather than private goods.

All western democracies are going through very difficult adjustments, as they find that their financial resources are not sufficient to ensure the services that governments have committed themselves to provide. This has led to agonizing reappraisals of the activities of governments in all fields and to the transfer of many of them to the private sector, with significant benefits to the general public, both as taxpayers and as consumers of services. But we must be careful, as we are proceeding to remove the fat from government, that we do not remove government itself in some of its essential functions.

In the face of extremely rapid changes in the economy and its globalization, the more enlightened economists and business people argue against protectionism and subsidies as a defence against those phenomenons. What governments should do, they say, is to give the people the tools they need to cope better with change. To quote from the World Economic Survey I referred to before: "The worst thing governments can do is to slow down the process of adjustment through regulation, subsidies and protectionism. Instead, governments should do everything possible to encourage adjustment — while easing the pain for those worst hit by change. They also need to ensure, by improving the skills of their workforce, that more people will be able to take advantage of the new opportunities."[4]

That is fine as far as adjustments to economic changes are concerned but that is surely not enough as a description of the type of society we want to have. A purely economic definition of the task is not enough to describe a *projet de société*, as we say in French. Such a *projet* encompasses all the activities and the interests of a collectivity of human beings. It is defined neither mainly nor only by the state, but by all the elements of a society. To speak like the ancient philosophers, the state remains the primary instrument which will ensure that a society will be able to achieve the common good. This is why we need to keep our eyes on the right objective which is "good government" rather than "small government." In cutting down government, there is no free lunch.

Nobody is contesting that the nation state must be there to ensure external and internal security (peace, law and order). Equally, it is agreed that the nation state must pursue a fiscal and monetary policy that will encourage stable economic growth. The role of the state, however, does not end there. Rather,there are common values that we have developed in Canada during the 20th century which deserve to be sustained and made to flourish equally in the 21st century. These values include: respect for individual rights, tolerance, solidarity and compassion. If a purely market-oriented state can live with the first of these values, it could not care less about the others. Yet, as pointed out by E. J. Dionne, in his book *They Only Look Dead:* "The central irony of our time is that so many of the new conservatives wish to avoid is this: A capitalist society depends on non-capitalist values in order to hold

[4] "The World Economic Survey", *supra* note 1.

together and prosper."[5] If Marx was at best naive to predict the vanishing of the state under communism, he was dead on when he stated that unbridled capitalism bore in itself the seeds of its own destruction.

In order not to appear uselessly provocative, let me take an example from our neighbours to the South. The U.S. Labor Bureau published some time ago a forecast of the changes in selected occupations in the U.S., for the period 1994-2005.[6] It is interesting to note that, while the first and second largest percentage increases will be those for home health care workers and computer system analysts/ programmers, the third and the fifth will be for security guards and police and prison officers; teachers come seventh (just after lawyers!). In terms of volume, the increase in the number of security guards almost exactly matches that of home health care workers. And if you add the guards to the police and prison officers, their total number is equivalent to that of the computer system analysts/programmers. Those figures tell you a lot about the type of society Americans are building.

Equally, in the United States, we are noticing a very significant increase in wage inequality. The gap between the earnings of the average American male college graduate in relation to a high-school graduate has increased from 49 per cent in 1979 to 89 per cent in 1993. And, in the past 20 years, the pay of the average chief executive has gone from 35 times to 120 times that of the average production worker. Even looking at the ratio of the earnings of the lowest average decile to the median wage, the disparity has increased by some 15 per cent between 1990 and 1995. In Canada, the increase in disparity has been more modest, in the range of 5 per cent. Yet, this is no cause for rejoicing when one realizes that, between 1981 and 1992, the real income, after taxes, of the average Canadian family has actually declined. I have no reason to believe that the situation has improved since.

For Canada, these figures raise a few questions. Do we want a society where personal security and the repression of crime is going to absorb a larger and larger share of our economy? Can we hope to live in peace in a society with rapidly increasing economic disparities? I am convinced that the overwhelming majority of Canadians would answer a resounding no.

If we want to preserve national Canadian values, the state will need to continue to play a major role in the field of social policy, in order to help people to adjust to the rapid changes that are inevitably taking place and to protect those that will be the victims of those changes. This means the state will need to have the financial resources to achieve those purposes; and that means that the politicians will need to have the courage to raise those funds through taxation and the voters will need to be confident that this is money well spent, that the state is not their enemy but the defender of the common good.

I agree that governments must balance their books and, even, where possible, reduce their debts. But one must not go overboard; if a government should try and balance, over time, its operating expenditures with its taxation revenues, there is no necessity whatever (it could even be counter-productive) to finance all its expenditures out of current revenues. The construction of an airport or of a highway or the building of a school no more need to be paid in cash than the purchase of a house by a family.

I also agree with the efforts of governments to make the most efficient use possible of resources allocated to the social sector, whether they be for health, education or social security. But I am convinced that any reduction in the share of our GNP reserved for those purposes will only result in increased costs under another form, whether they be to fight increased crime resulting from economic misery or loss of competitiveness resulting from an inadequately trained work force.

Finally, I make a plea for national economic solidarity. To begin with, while governments in Canada claim to recognize the values of a market economy and have opened our borders more than ever to free trade, we are still facing a situation where it is sometimes easier to trade with a foreign country than between provinces. Surely we can do better than that.

Secondly, the redistributive functions of the Canadian government must receive the continued strong support from the regions of the country which are net contributors to that function. The various regions of this country have not been endowed with the same natural resources nor with the same economic opportunities since the beginning of Confederation. I do not have to remind the older members of this audience that Alberta has not always been a net

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5 E.J. Dionne, *They Only Look Dead: Why Progressives Will Dominate the Next Political Era* (New York: Simon and Shuster, 1996) at 297.

6 United States, Department of Labor, *Occupational Projections and Training Data, 1992 Edition* (Washington: U.S. Government Printing Office, May 1992).

contributor. Economic conditions change with the times and the beneficiary of today can tomorrow become the contributor. Equalization and shared-cost programs have been the privileged instruments for the manifestation of Canadian solidarity and it is hoped that Canadians from all regions and of all political convictions will continue to support their use in the future.

The rise of neo-conservatism in the 1980s and 1990s or, to be more accurate, the rediscovery of primitive economic liberalism, has had many positive consequences for the western economies as well as for developing economies and economies in transition. That phenomenon has forced us to re-examine our public institutions and their functioning — a more efficient and a more productive economy has no doubt resulted — and that questioning must continue. But let us not be deluded into thinking that freeing up the market from taxation and regulation will by itself result in a better society. Lower taxation is not automatically a virtue and deregulation a panacea. In fact, even the most reformist governments in that regard have quickly learned that, while they were removing obsolete and obnoxious regulations in some sectors, they were simultaneously enacting new regulations in the same or in other fields. In other words, deregulation often took the form of re-regulation.

The state will not whither away in the 21st century, notwithstanding the claims or the outcries of the ultra-liberals (or ultra-conservatives, if you wish; there is considerable irony in seeing the right in the U.S. accusing its opponents of being liberals). What the citizens wish and are entitled to is not necessarily smaller government but better government; this may sometimes lead to smaller government but not always. Our country has been built under strong governments, not weak ones, and there is no reason to believe that this will not be the case in the future.

The technological revolution and globalization require us to rethink the way governments have been operating. They provide us with an opportunity to have smarter and more efficient governments but they will never replace them. The modern state must not only continue to guarantee to its citizens the freedom *to* produce and sell goods and services, it must also make every effort to give them the freedom *from* poverty and misery, *from* ignorance and under-education. Nowadays, that duty applies not only within national borders but internationally; willy nilly, the 21st century will make us truly citizens of the world.

Peace, order and good government remain today the same noble task for government as it was 129 years ago. I can only hope, in spite of the contemporary denigration of governments and public officials, Canadians will in the future be fortunate enough to count on able and devoted men and women to serve them in public life as well as Merv Leitch did in our own times. And I hope and pray that the citizens of Canada will strongly support them in resisting the establishment of what Professor Michael Bliss has called "an atmosphere of private opulence and public squalor."❑

The Honourable Marc Lalonde
Stikeman, Elliott, Barristers and Solicitors, Montreal, Quebec. This is the text of the Merv Leitch Lecture delivered on November 20, 1996 at the Faculty of Law, University of Alberta.

THE ISRAELI CONSTITUTIONAL REVOLUTION: THE CANADIAN IMPACT IN THE MIDST OF A FORMATIVE PERIOD

Zeev Segal

THE CONSTITUTIONAL REVOLUTION: FIRST STEPS

In a previous article[1] I dealt with the "Constitutional Revolution" which took place in Israel under the influence of the *Canadian Charter of Rights and Freedoms*.[2] This significant event in the Israeli constitutional arena occurred when, in 1992, the Israeli Parliament (The Knesset) enacted two Basic Laws — The Basic Law: Freedom of Occupation and the Basic Law: Human Dignity and Liberty.[3] These laws recognize fundamental rights such as freedom of occupation, the right to property, and the right to freedom, privacy and human dignity. As in the Canadian Charter, limitation clauses were incorporated in the Basic Laws.

No override (or notwithstanding) clause was included in the Basic Laws when originally enacted. It was for the purpose of including an override clause, in order to prevent the importation of non-Kosher meat into Israel, that the Knesset re-enacted the Basic Law: Freedom of Occupation in 1994. The Israeli override clause differs from Section 33 of the Canadian Charter, *inter alia,* in that the clause can only be invoked by a special majority in the Knesset (61 out of 120 members).[4] The override clause also states that no law is immune from provisions of the Basic Law unless it states expressly that it is enacted notwithstanding the Basic Law. The override shall expire four years from its commencement, unless a shorter duration is expressly provided for.

Given these requirements, the Israeli Knesset enacted two laws notwithstanding the Basic Law: Freedom of Occupation. The first one — the Import of Frozen Meat Law enacted in 1994 — forbade, subject to certain exceptions, the importation of meat without a Kashrut certificate. In December 1994, the Knesset enacted a new law, Import of Frozen Meat Law (Amendment), which extended the definition of meat to include all kinds of meat and meat products fit for human consumption. The name of the statute was changed to the Meat and Meat Products Law, 1994.

Unlike the Canadian Charter, the Israeli Basic Laws do not include any clause which is equivalent to the "primacy clause" of the Canadian Charter. Section 52 of the Charter provides that "[t]he Constitution of Canada is the supreme law of Canada and any law that is inconsistent with the provisions of the Constitution is to the extent of the inconsistency of no force or effect." Nor do the Israeli Basic Laws include a remedies clause similar to section 24(1) of the Charter.[5] In light of these silences, it is of special importance to follow the Israeli Supreme Court's concept of the judicial power to declare laws unconstitutional. A further question relates to the scope of judicial review adopted by the Court once it has decided that such a power exists.

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1 Z. Segal, "Israel Ushers In a Constitutional Revolution: The Israeli Experience, The Canadian Impact" (1995) 6 Constitutional Forum Constitutionnel 44.

2 Part I of the Constitution Act 1982, being schedule B to the Canada Act 1982 (U.K.) 1982, c.11 [hereinafter the Charter].

3 These two laws were enacted in March 1992. In 1994 the Knesset re-enacted the Basic Law: Freedom of Occupation primarily with the aim of incorporating an "override clause" into this Basic Law. For the text of these laws and an analysis see Segal, *supra* note 1.

4 See *supra* note 1 at 45-46. The Basic Law: Human Dignity and Liberty does not, at present, include an "override clause."

5 See section 24(1) to the Charter.

When my previous article was written (at the end of 1994), the Israeli Supreme Court was in the midst of hearing oral arguments in an appeal of the District Court's decision which declared a law invalid because of its unconstitutionality.[6] On November 9, 1995, the Israeli Supreme Court announced its decision, by an expanded panel of nine Justices, in the case of the *United Mizrahi Bank Limited*[7] — a decision which might be retitled the "Israeli *Marbury* v. *Madison*."[8] The decision of the Israeli Supreme Court entails about 360 pages. It contains a wide-ranging analysis related to many aspects of Israeli Constitutional Law including, *inter alia*, the Constitutional power of the Knesset to bind itself by a "limitation clause." The express recognition of such power in the judgment of the Court is of major importance to Israel as a constitutional democracy. I shall restrict myself in this short article, however, to points which might be of interest to the readers outside the boundaries of Israel. A Canadian reader might find the Israeli Supreme Court's decision of special interest due to the influence of Canadian Charter jurisprudence. Such influence can be demonstrated by the *Mizrahi Bank's* decision as well as by the 1996 *Meatreal* decision[9] which relates to the standing of the notwithstanding (override) clause.

JUDICIAL REVIEW OF STATUTES: A SELF-RESTRAINED APPROACH

In the *Mizrahi Bank* case the Supreme Court heard appeals which related to the constitutionality of a Knesset Law enacted in 1993. The law, which dealt with debts owed by the agricultural sector, deprived creditors of the relief usually available through execution procedures in the courts. The law established a special mechanism for the payment of these debts and barred creditors from seeking redress in the courts. Section 3 of the Basic Law: Human Dignity and Liberty states: "[t]here shall be no violation of the property of a person." Under Section 8 of the same law, the "limitation clause" provides: "[t]here shall be no violation of rights under this Basic Law except by law befitting the values of the State of Israel, enacted for the proper purpose, and to an extent no greater than required ... ." Three creditors took action in the District Court for repayment of the debts, submitting that the law relating to the agricultural sector was in breach of Section 3 and was, therefore invalid. The debtors relied mainly on the "limitation clause," contending that the law satisfied the conditions in that section. The District Court declared the law unconstitutional and invalid, as it infringed on the property rights of the creditors and did not meet the criteria established in the limitation clause.[10]

The Supreme Court unanimously upheld the constitutionality of the law which was under attack. The Justices stated that a person's "property" encompasses debts owing to him, including contractual rights. Since the conditions of the limitation clause were fulfilled, the Court found the law constitutional and valid. In spite of the powers to reduce the amount of the debt owed to the "rehabilitators," the Court was of the opinion that the arrangement, establishing special machinery to ensure the payment of the debts, was sufficient.

The importance of the decision does not stem, of course, from the concrete decision which dealt with a specific law. Rather, the main importance which might be attached to this landmark case is that it represents the first Supreme Court pronouncement that every court in the country enjoys the power to declare laws unconstitutional and invalid. This is only true if the law violates basic rights which are recognized by the Basic Law, and goes beyond the exceptions specified in the limitation clause. Such a judicial pronouncement — especially in the absence of any express constitutional provision which recognizes the supreme status of the Basic Laws and the validity of judicial review of statutes — constitutes a "constitutional revolution" and a new era in Israeli constitutional law.

The Supreme Court's decision presents a clear and strong majority view — with only one Justice

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6 See Segal, *supra* note 1 at 46-47.

7 See *United Mizrahi Bank Ltd., and others, appellants* v. *Migdal Cooperative Village and Others, respondents* (Civil Appeal 6821/93) 49(4) P.D., p. 222 (Hebrew) (P.D.=Piskei Din-Supreme Court Judgments) [hereinafter *Mizrahi Bank Decision*]. For a summary in English, see A.F. Landau "Justices: Courts have right to review statutes" "Basic Laws Enhance Human Rights," The Jerusalem Post (1, 8 January 1996). See also D. Kretzmer, "A Landmark Court Decision," The Jerusalem Post (10 November 1995).

8 See Segal, *supra* note 1, fn. 17 and accompanying text.

9 See *Meatreal Ltd. and Others, Petitioners* v. *The Knesset and Others, Respondents* (High Court of Justice 4676/94) (not yet published, Hebrew). The decision was given in November 25, 1996 by a panel of nine Justices. For a summary in English see A.F. Landau, "Supreme Court Confirms Validity of Kashrut Law" *The Jerusalem Post* (9 December 1996) [hereinafter *Meatreal* decision].

10 See Segal, *supra* note 1 at 46-47.

dissenting on this point — that the Knesset enjoys the power to enact Basic Laws which are chapters in Israel's Constitution. These laws bind all public authorities, including the Knesset itself, and the Courts entertain the power to declare laws invalid. Prior to these constitutional developments, human rights in Israel were subject to the laws of the Knesset, but it now has became part and parcel of Israeli democracy that the laws of the Legislatures are subject to human rights as embodied in the two Basic Laws.

In his wide-ranging judgment the President of the Israeli Supreme Court, Justice Aharon Barak, stressed the importance of judicial review of statutes in a democratic society. Justice Barak mentioned the American case of *Marbury* v. *Madison*,[11] as a source of inspiration for recognizing the power of the Courts to declare laws unconstitutional in spite of the absence of an express provision in the constitution. In a key sentence in his opinion, Justice Barak said:

> In enacting the basic laws which relate to fundamental human rights, the Knesset expressed its view as to the Supreme constitutional legal status of these Basic Laws. Today the Supreme Court expresses its legal approach which approves this constitutional supreme status . A constitutional chain has been established which relates to the constitutionality of a constitution in general and to the constitutionality of Human Rights, which were recognized in the Basic Laws, in particular.

Once the power of the courts to declare laws unconstitutional was established, the Court focused on the extent to which this power could be used. The extent of this power is, in my view, the most important aspect of any judicial system which recognizes the power to annul legislation. A court reluctant to use its power, even when the use of such a power is demonstrably justified in a democratic society, deprives judicial review of its prime objective of scrutinizing legislative acts so as to strengthen the foundations of democracy.

In the *Mizrahi Bank* case the Supreme Court, unlike the District Court, decided that the law under attack was constitutional, in spite of its conflict with the right of equality before the law. In so ruling, the Court, in my opinion, reflected its reluctance and hesitation to use its power to invalidate legislation. Such a restrained approach should be examined in order to avoid diminishing the Court's possible contribution to the functioning of Israeli democracy. It so happened that, up to May 1997, no legislation was declared invalid within the framework of the "constitutional revolution" in Israel.[12] The Court expressed its view[13] that it is better to narrow the application of a law by way of interpretation than to declare it invalid.[14] If such an approach can be justified *en principe*, it should not be used to reach an unreasonable interpretation of an existing law in order to enable the court not to declare a law unconstitutional. In so doing, the Courts refrain from playing their judicial-educational role in safeguarding constitutional values.

This attitude of judicial self-restraint is very clearly stated in the *Mizrahi Bank* case. Justice Barak states that Courts:

> must examine the constitutionality of a law, and not its reasoning. The question is not if the law is good, efficient or justified. The only question is whether the law is constitutional. A 'socialist' legislature and a 'capitalist' one might enact different laws which meet, each one of them, the demands of the 'limitation clause.'

"The legislature," Justice Barak noted, "is entitled to a margin of appreciation and to a reasonable amount of room to maneuver while enacting." In so ruling, Justice Barak referred to approaches in Canadian constitutional law as a model for the Israeli Supreme Court to follow.[15]

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[11] See *supra* note 9 and accompanying text.

[12] On June 2, 1996 a panel of thirteen Justices of the Israeli Supreme Court approved the constitutionality of a validation law which related to the sums paid as a "radio and television fee." See High Court of Justice 4562/92 *Zandberg* v. *The Broadcasting Authority* (not yet published, Hebrew).

[13] *Ibid.*

[14] The Israeli Supreme Court adopted the German concept that "If a statute lends itself to alternative constructions for and against its constitutionality, the court follows the reading that saves the statute, unless the saving construction distorts the meaning of its provisions." See D. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham: Duke University Press, 1989) 58.

[15] Justice Barak mentions P.W. Hogg, *Constitutional Law of Canada*, 3rd ed. (Toronto: Carswell, 1992) 882. It should be noted that the Israeli Constitutional and Administrative Law stresses, at present, the requirement of proportionate effect as the most important element of the "limitation clause." Israeli judgments and academic

Justice Barak's view in this context reflects the attitude of the other Justices as well. Justice Meir Shamgar expressed his opinion, in an all-embracing analysis, that:

> The court is not asked to declare what is, in its opinion, the most logical or justifiable legislation to deal with the problem under consideration. The Court is called upon to examine only if the legislation, *grosso modo,* fits a state which is democratic and Jewish.

In referring to the limitation clause, Justice Shamgar quoted American Supreme Court judgments which stressed that the Courts should not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to enact laws.[16] It seems evident that the other seven Justices share, in this context, the same view of judicial self-restraint. Justice Eliezer Goldberg expressed this attitude in saying that "[t]he laws are presumed to be constitutional and every doubt, which relates to the question of constitutionality, should operate to approve the constitutionality of a statute."

It seems evidently clear that, for the time being, the Israeli Supreme Court is adopting a rigid approach which tries to avoid declarations of legislative invalidity. It is, in my submission, a neglect of the Court's duty to serve as the ultimate guardian of the rule of values and human rights. Such an attitude might reflect the atmosphere under which the Israeli apolitical independent Supreme Court is operating. The Court is under ongoing attacks from government because of its broad concept of judicial review which relates to administrative action.[17] These attacks are amplified by the religious faction which finds the Court too activist in dealing with matters of religious importance. Contrary to these attitudes, the Israeli public-at-large ranks the Israeli Supreme Court very highly among the institutions which enjoy a high level of public legitimation and confidence.[18] In research completed before the enactment of the Basic Laws, 65 per cent of the Israeli population approved of the principle that the Supreme Court should have the power to declare laws unconstitutional if those laws do not satisfy the basic essence of Israeli democracy, including the safeguarding of human rights. Only 10 per cent expressly rejected the idea of giving the Courts such power. This research shows that the public-at-large is ready to let the Israeli Supreme Court develop the basics of democracy, thus enhancing a liberal approach to human rights.[19] In exercising its powers of judicial review of statutes, the Israeli Supreme Court might play a very significant role in subjecting the legislature to the rule of law and basic democratic values.

THE STANDING OF THE NOTWITHSTANDING (OVERRIDE) CLAUSE

As noted, an "override clause" was incorporated into the re-enacted Basic Law: Freedom of Occupation.[20] In the 1996 *Meatreal Case*[21] the Israeli Supreme Court examined for the first time the constitutional status of a law which was enacted under the protection of the override. The petitioners in the case were importers and dealers in meat products on a large scale. They submitted that the laws which were enacted under the override would seriously affect their business. They petitioned the Supreme Court, sitting as a High Court of Justice, to declare the law invalid on the grounds that it offended against the Basic Law: Freedom of Occupation and the Basic Law: Human Dignity and Liberty.

As to the first Basic Law, which includes the override clause, the Court mentioned the Canadian Charter override, stressing the fact that the override was incorporated into the Israeli Basic Law under Canadian influence. The Court observed that the Canadian override is similar in some respects and different in others,[22] and noted the discussion on the

writings refer in this regard, *inter alia*, to *R.* v. *Oakes* (1986) 1 S.C.R., 103.

16 Justice Shamgar mentioned the decision of *Ferguson* v. *Skrupa* 372 U.S. 726 at 729-30 (1963).

17 See Z. Segal "Administrative Law" in A. Shapira, K.C. De Witt-Arar, eds, *Introduction to the Law of Israel* (The Hague: Kluwer Publications, 1995) at 59-71.

18 See Y. Peres, E. Yuchtman-Yaar, *Trends in Israeli Democracy: The Public's View* (Boulder: Lynne Rienner, 1992). A public opinion poll, which was conducted in January 1997, reveals that 84 per cent of the Israeli population have trust in the Supreme Court. The research was conducted by Professors E. Yaar and A. Nadler and Dr. T. Herman of T. Steinmetz Center for Peace Research. See *Ha'aretz* (2 February 1997) 13B.

19 See G. Barzilai, E. Yuchtman-Yaar, Z. Segal, *The Israeli Supreme Court and the Israeli Public* (Tel Aviv: Papyrus Publishing, Tel-Aviv University, 1994) at 182-183, 216 (Hebrew).

20 See *supra* note 4 and text following.

21 See *supra* note 10.

22 See the text following *supra* note 3.

override in Canadian academic literature.[23] Justice Aharon Barak, writing for a unaminous Court, referred to an argument raised in Canada that a law, enacted under the protection of the override, is not immune from judicial review if it contradicts the basic values of a democratic state.[24] Justice Barak adopted this argument. He explained that a law, enacted under the protection of an override clause, might violate the limitation clause in all its substantive aspects. Yet, Justice Barak expressed the opinion that such a law cannot infringe on the "most basic fundamental principles which our constitutional scheme rests upon." The broad power of the override clause, recognized by the Supreme Court in its ruling, relied on the concept that the aim of the override clause was to enable the legislature to fulfill its social and political aims, even if they violate the freedom of occupation and do not comply with the requirements of the limitation clause. In the *Meatreal* case, the Court said that the impact of the Meat Laws, which forbade the importation of non-Kosher meat, did not impair the essence of the constitutional regime and, therefore, was constitutionally valid in light of the override clause. It is clear from the decision that the conclusion adopted here coincides with the approach adopted in *Mizrahi Bank* case, which gives the legislature a very large margin of appreciation in which to manoeuvre.

In the *Meatrel* case, the Supreme Court also referred to the argument that the Meat Laws infringed the right to property, the right to equality, and the right to the freedom of conscience. Without ruling on whether all those rights are covered by the Basic Law: Human Dignity and Liberty, the Court examined what effect the override clause in the Basic Law: Freedom of Occupation might have on rights contained within the Basic Law: Human Dignity and Liberty, which does not include its own specific override clause.

Referring to the Canadian Supreme Court decision in *DuBois*,[25] Justice Barak held that any constitutional provision — such as an override clause — will have an impact on the interpretation of all other constitutional provisions. Thus, Justice Barak observed, the power of a law which was enacted under an override clause might operate in relation to other basic rights which are recognized in a law which does not itself include an override clause. Such an influence exists if the other rights are infringed in a minor way as a secondary result. In so ruling, the Court noted, that the rights embodied in Basic Law: Human Dignity and Liberty will be safeguarded from any major substantive injury. In the Court's view, the injury to all the rights raised in this case, including the injury to the Freedom of Occupation, was not substantial or meaningful. The Court concluded that the laws which forbade the importation of non-Kosher meat are protected by the override clause which is an integral part of the constitutional scheme.

It should be noted that the wide-ranging recognition of the constitutional power of the override clause in the *Meatreal* decision might encourage different sectors in the Israeli society to use their political influence in order to incorporate an override clause in the Basic Law: Human Dignity and Liberty. If such an idea, already suggested by some in the religious community, succeeds in the Israeli Knesset, the "constitutional revolution" might take a step backward. The Supreme Court in the *Meatreal* decision had to show respect for the express use of the override clause, but this judgment might serve as a catylyst for such a dangerous trend. Yet it should be deduced from the decision that the Supreme Court will not approve a total destruction of basic constitutional values through laws enacted under the auspices of an override clause.

CONCLUSIONS

The "constitutional revolution" in Israel is brand new. In the five years which have passed since the enactment of the two Basic Laws, the Supreme Court has attributed great influence to the new laws in the process of interpreting existing laws. Such an influence is exemplified in the criminal arena. The recognition of "human dignity" and "freedom" as basic rights led the Supreme Court to the development of substantive due process and doctrines such as "outrageous governmental conduct" serving as a defence against

[23] Justice Aharon Barak, who wrote the opinion for the whole court, mentioned the following Canadian articles: L. Weinrib, "Learning to Live with the Override" (1990) 35 McGill L.J. 541; P. Russell, "Standing Up for Notwithstanding" (1991) 29 Alta. L.R. 293; J. Whyte, "On Not Standing For Notwithstanding" (1990) 28 Alta. L.R. 347; P. Macklem, "Engaging the Override" (1991) 1 Nat. J. Con. Law 27; Weiler, "Rights and Judges in Democracy: A New Canadian Version" (1984) 18 J. of Law Reform 51.

[24] B. Slattery, "Override Clauses under Section 33" (1983) 61 Can. Ber Rev. 391; Arbess, "Limitations on Legislative Override" (1983) 21 Osgoode Hall L.J. 113.

[25] See *Du Bois* v. *R.* [1985] 2 S.C.R. 350 at 356.

criminal charges.[26] These aspects, which also are part of the "constitutional revolution," are beyond the scope of this essay. Still, it should be noted that the influence of the two Basic Laws, which relate to human rights, is being felt in every field of the law. The Supreme Court ruled that its impact should be given due weight in the application of existing laws, the enactment of new laws, and to any administrative action. In 1996 and 1997 the Israeli Parliament enacted new, much more liberal laws in relation to arrests. It was noted in the legislation that Parliament is fulfilling its duty, required of all governmental authorities, "to respect the rights under this Basic Law." The Basic Law: Human Dignity and Liberty specifies that "[t]here shall be no deprivation or restriction of the liberty of a person by imprisonment, arrest, extradition or by any other manner." The right might be limited only "to an extent no greater than required."

Still, the main test of the "constitutional revolution" is the Court's readiness to declare laws unconstitutional. In the absence of any specific legislation which provides for judicial review of statutes, it is clear that the Israeli Supreme Court, while recognizing the power of consitutional review in the *Mizrahi Bank* case, stated that Courts enjoy the power to declare laws unconstitutional. The same attitude has been adopted in Canada and the United States. It is my submission — especially within the framework of the Israeli society — that only the Supreme Court should exercise such power because of the special sensitivity of judicial review. Such an approach was put before the Israeli Knesset in 1992, with the intention of formulating a law which will recognize judicial review of statutes, but has been ignored since then.[27]

The Israeli Supreme Court opened a new constitutional era in the *Mizrahi Bank* case, which established the principle of judicial review of statutes under the Basic Laws. In my previous article,[29] I concluded that "it can be foreseen that the Israeli Supreme Court will enter into the new era with caution and respect for the Legislature, without overlooking human rights which are the basic element of a constitutional democracy."[28] Now, after the *Mizrahi Bank* and *Meatreal* decisions have been rendered — together with the *Zandberg* case[29] — I am inclined to think that the Supreme Court has been too cautious in exercising its power of constitutional review of statutes. In order to play its significant constitutional role as a watchdog of human rights — a role which the Israeli Supreme Court plays magnificently in relation to administrative action — the Supreme Court should overcome its reluctance to review of statutes. It is my belief that in the continuation of this formative period, the Supreme Court will follow in the footsteps of the American Supreme Court, the Federal Constitutional Court of Germany,[30] and the Canadian Supreme Court. It is a well-established principle that laws should be struck down only as a last resort. Sometimes it so happens that the annulment of a law is the only possible way to safeguard democracy. I am confident that the Israeli Supreme Court will not ignore its function as protector of democracy when the legislature clearly acts contrary to the fundamental values of democracy.❑

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26 See *supra* note 1.

27 For an analysis see Z. Segal, "Judicial Review of Statutes — Who Has the Authority to Declare a Law Unconstitutional" 28 Mishpatim 239 (Hebrew).

28 See *supra* note 7 at 48.

29 See *supra* note 13.

30 For a general discussion of this Court, see M. Herdegen, "Maastricht and the German Constitutional Court: Constitutional Restraints for an 'Ever Closer Union'" (1994) 31 Common Market Law Review 235.

THE CASE OF THE MISSING RECORDS: *R. V. CAROSELLA*

Christine Boyle

On February 6, 1997, the Supreme Court of Canada handed down decisions in *R.* v. *Carosella*[1] and *R.* v. *Leipert*.[2] In the former case it was held that a gross indecency trial should be stayed because the accused could not have access to records shredded by a sexual assault crisis centre in Windsor, Ontario. In the latter, it was held that a trial on charges of cultivation of marijuana and possession for the purpose of trafficking could proceed without the accused being granted access to a Crime Stopper's tip in Vancouver, British Columbia. All trials must be fair, but must some be fairer than others?

In this essay I will outline the decisions of the various levels of court in *Carosella,* make some critical comments, and contrast the decision with *Leipert*. I conclude with an analogy which, I hope, captures the reasons why the current state of the law is inadequate and has led to calls for reform with respect to production of sexual assault records in criminal cases.[3]

Carosella arose in the context of on-going political and legal battles over the extent to which persons accused of sexual assault can have access to private records in the hands of third parties, such as rape crisis centres, therapists, doctors and complainants themselves.

The facts were that on March 16, 1992, a woman went to the Sexual Assault Crisis Centre in Windsor for advice on how to lay charges with respect to sexual abuse in 1964, when she was a student in a class taught by Carosella (the accused). For an hour and a half she talked to a social worker who took notes. She was advised that whatever she said could be subpoenaed and replied that it was quite all right. Following this interview, she contacted the police and a charge was laid.

After the preliminary inquiry and the jury selection, the accused applied for an order requiring the Centre to produce its file for the trial judge to determine what should be released to the defence. The file did not contain the notes of the interview, since they had been destroyed in accordance with the Centre's policy of shredding files where police were involved but before they were subpoenaed. The defence applied for a stay of proceedings. This was granted by the trial judge on the basis that it would be unfair to proceed given that the accused had been seriously prejudiced as a result of being deprived of the opportunity to cross-examine the complainant on her previous statements.

The Court of Appeal disagreed, holding that no realistic appraisal of the probable effects of the lost notes could support the conclusion that the accused's right to make full answer and defence was compromised.[4]

The Supreme Court of Canada restored the judgment staying the proceedings. The charges therefore will not be tried because material in the hands of third parties is no longer available. The majority was of the view that if the missing material meets the threshold test for disclosure, the accused's *Charter*

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1 (1997) 142 D.L.R. (4th) 595 (S.C.C.) [hereinafter *Carosella*]. The majority judgment was delivered by Sopinka J., with Lamer C.J., Cory, Iacobucci and Major JJ. L'Heureux-Dubé was in dissent with La Forest, Gonthier and McLachlin JJ.

2 (1997) 143 D.L.R. (4th) 38 (S.C.C.) [hereinafter *Leipert*]. The majority judgment was delivered by McLachlin J., with Lamer C.J., La Forest, Sopinka, Gonthier, Cory, Iacobucci and Major JJ. Justice L'Heureux-Dubé delivered a separate concurring judgment.

3 For a companion civil case to *Carosella*, see *M.(A.)* v. *Ryan*, [1997] S.C.J. No.13. Similar issues may also arise in the administrative context. See, e.g. *R.* v. *Russell*, [1996] B.C.J. No.1362 (W.C.B.).

4 (1995), 26 O.R.(3d) 209.

rights were breached without the requirement of showing additional prejudice. The majority reasoned that since the complainant consented, the file would have been disclosed to the Crown (and, implicitly, to the defence). "But even if the somewhat higher *O'Connor* standard [discussed below[5]] relating to production from third parties applied, *it was met in this case*."[6] Given the fact that the notes were the first detailed account of the event,[7] and in the absence of an alternative remedy, the extreme remedy of a stay was felt to be appropriate.

The dissenting judgment focused on the lack of any duty in third parties to preserve evidence for prosecutions or otherwise; the case law requiring accused persons to establish prejudice in situations of lost evidence; the broad implications of an inability to hold trials in such cases; the difference between constitutional rights such as the right to counsel where prejudice can be inferred and constitutional rights such as those contained in sections 7 and 11(d) of the *Charter* where a measure of prejudice is required;[8] the view that the *O'Connor* production threshold was not satisfied by a bare assertion; and the fact that the accused was in the same position as if the notes had never been taken.

I find a number of aspects of the decision very disturbing. First, there is the off-hand ease with which the majority concluded that the *O'Connor* threshold of likely relevance would have been met in this case. A majority of the Supreme Court of Canada in *O'Connor* set out a process by which accused persons could gain pre-trial access to records in the hands of third parties. Before a judge will look at the records, the accused must show that the information is likely to be relevant, that is that there is a reasonable possibility that it is logically probative to an issue at trial or the competence of a witness to testify. While not onerous, this is supposed to be a significant burden, preventing the accused from engaging in speculative, disruptive and unmeritorious requests for records.[9] After examining the records and weighing the salutory and deleterious effects and considering a number of factors such as the reasonable expectation of privacy in the records, the judge may order production to the accused.

Since there will be an invasion of privacy once the judge looks at the records, the "likely relevance" test is crucial as it is the concept which is the primary shield against production. It would appear from *Carosella* that this test can be met by the mere assertion that there is material relating to the charge, thus reducing its ability to act as any sort of filter.[10]

Second, I find disturbing the majority characterization of what the Centre did. It is a characterization that can, at best, be described as a rude and deplorable departure from any sense of courteous discourse about a sensitive topic. The judgment, written by Sopinka J., accuses the Centre of deliberate destruction of "relevant" evidence.[11] It referred to "conduct designed to defeat the processes of the court. The agency made a decision to obstruct the course of justice . . ."[12] Another perspective, shared by people whose commitment to the rule of law cannot be doubted, is that the Centre engaged in the prudent destruction of irrelevant material which could only be used to discourage complainants in general (a point ignored in the majority's focus on the consent of this individual complainant) and distort the trial process. Discourteous and inflammatory characterization of people with whom one disagrees, especially given the very close vote on the Court, can only add to the perception that people who are prepared to be witnesses in sexual assault trials, and the people who advocate for them, are accorded a very low status in our current legal culture.

Third, the dissent, understandably, tends to focus on the problems with the majority view if given a broad reading. What I wish to do, in contrast, is suggest the narrowest possible reading of the *Carosella* decision

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5 *R.* v. *O'Connor*, [1995] 4 S.C.R. 411.

6 *Supra* note 1 at 613 (par.41) [emphasis added].

7 This fact seems to have been assumed. The report does not reveal any inquiry into whether the complainant or her husband had made notes.

8 The majority seems to miss the fact that in order to determine if there is a breach of the right to make full answer and defence one has to determine the scope of the right, which cannot sensibly be done by the bald assertion that there is a right to be breached by some action of a third party irrespective of prejudice.

9 For a rare example of inability to meet the test, however, see *R.* v. *Bane*, [1996] O.J. No.2750 (Ct. of Just. Gen. Div.).

10 "[T]he notes related to the very subject of the trial, the alleged sexual incidents. *On that basis*, it was open to the trial judge to conclude that the notes were likely relevant, in that they might have been able to shed light on the "unfolding of events," or might have contained information bearing on the complainant's credibility" [emphasis added]. *Supra* note 1 at 614 (par. 44).

11 *Supra* note 1 at 614 (par. 43).

12 *Ibid.* at 618 (par. 56).

which leaves scope for Parliament to reform the law in this area. The majority stressed that the Crown and the complainant consented to disclosure.[13]

> Given the circumstances, it is clear that the file would have been disclosed to the Crown. As material in the possession of the Crown, only the *Stinchcombe* standard would have applied.

R. v. *Stinchcombe*[14] is the leading case on the duty of Crown disclosure to the defence. The Crown has an ethical and constitutional obligation to disclose all relevant, non-privileged information in its possession to the defence. While it is still unfortunate that the majority took the view that the notes would have been relevant even in the hands of the Crown, the decision can be read as a Crown disclosure case, with its higher, and more clearly constitutionalized, obligation. The majority did go on to say that the *O'Connor* standard was met, but this was not necessary for the decision, and the reasoning also was influenced by the assumption that the presence of consent removed any need for balancing of interests. There is nothing in *Carosella* which *compels* the conclusion that the majority is constitutionalizing the "likely relevance" test in *O'Connor*, or applying it in a way they see as compelled constitutionally. Even though there is *some* constitutional core to the right to disclosure, it can be argued that *O'Connor* articulates a common law rather than a constitutional threshold for production of material in the hands of third parties. This is implicit in the set of factors, adopted by the Court in *O'Connor*, as relevant to the question of whether the judge should disclose the records to the defence.

> We also agree [with the dissent] that . . . the following factors should be considered: "(1) the extent to which the record is necessary for the accused to make full answer and defence; (2) the probative value of the record in question; (3) the nature and extent of the reasonable expectation of privacy vested in that record; (4) whether production of the record would be premised on any discriminatory belief or bias" and "(5) the potential prejudice to the complainant's dignity, privacy or security of the person that would be occasioned by production of the record in question." [15]

Thus this list contemplates the disclosure of information which is *not* necessary for full answer and defence, suggesting a broader right at common law than under the *Charter*.

The *Leipert* case provides the strongest argument that the Court could not conceivably have been applying the *O'Connor* approach as a constitutional rather than a common law standard.

Crime Stoppers is a controversial programme. Some see it as an essential protection for citizens prepared to help the police. Others see it as a seedy encouragement of snitching.[16] Anyone can call Crime Stoppers and leave an anonymous tip. Mr. Leipert was the subject of just such a tip. His lawyer wanted to see the tip just as Mr. Carosella's lawyer wanted to see the file. The Crown was concerned that the identity of the informer might be revealed to the accused. The case went to the Supreme Court of Canada on the issue of whether the accused should have access to the tip.

The Court reached the unanimous conclusion that the defence can only see the tip when innocence is at stake, when there is a basis in the evidence for concluding that disclosure is necessary or essential to demonstrate the innocence of the accused. No balancing is permitted.[17] The accused has to justify disclosure without seeing the tip, so apparently this "Catch 22" is constitutionally tolerable. Furthermore, the high standard of necessity to demonstrate innocence suggests considerable constitutional toleration of trials where the accused does not have access to information. If *Leipert* sets the constitutional minimum, then this suggests that the much broader test of likely relevance, especially as used in *Carosella*, cannot possibly be a constitutional one. I will argue below that this means there is a good deal of constitutional room for Parliament to substitute its view of relevance, so long as it is prepared to attach similar importance to the interests of sexual assault complainants as the courts attach to informers. After all, in some sense sexual

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[13] *Ibid.* at 613 (par. 41).

[14] [1991] 3 S.C.R. 326.

[15] *Supra* note 5 at 442.

[16] For a critical analysis, see K.D. Carriere and R.V. Ericson, *Crime Stoppers: A Study in the Organization of Community Policing* (Toronto: Centre of Criminology, University of Toronto, 1989).

[17] "Informer privilege is of such importance that once found, courts are not entitled to balance the benefit enuring from the privilege against countervailing considerations..." (*supra* note 2 at 45 [par. 12]).

assault complainants are simply informers who are prepared to come forward and give evidence.

Fourth, in my view *Carosella* made the need for reform of this area of law even more urgent. Parliament has now passed Bill C-46 as a legislative response to these problems.[18] Before turning to the Bill itself, I want to try to explain at least some of the concerns behind it. Why do the recent developments which give accused persons the right of pre-trial access to complainants' records arouse enough concern to generate the political impetus to change the law?

The following is an imaginary scenario, but one which is not far from reality. Several years ago lawyers defending people charged with sexual assault started to search through the garbage of complainants. Some hoped that the long shot would pay off and that they might just chance across something useful. Maybe a complainant had written to her mother saying she had made the whole thing up and then torn up the letter. Maybe a discarded diary would say that the assault occurred on the evening of May 8th instead of the morning. Perhaps a complainant had discarded a book which had given her the false impression that she had been sexually assaulted. Others thought that the sheer unpleasantness of someone going through her garbage would make the complainant refuse to proceed.

There was a good deal of concern about this. First, this practice was mostly confined to sexual assault cases, so women and children were the primary targets. Some people took the view that toleration of such practices indicated the low status of women and children in our culture. Second, there were concerns about privacy. It was easy for people to imagine how unpleasant it would be to have others scrutinizing the things they had discarded. Third, there were concerns about social utility. Law enforcement would be undermined if the practice discouraged prosecutions. As well, it was not a good idea for people to be forced to keep their garbage in their homes.

So there were disputes in court about these garbage expeditions. Judges on the whole did not pay attention to the concerns about low status.[19] They were willing to order complainants and others to produce garbage for inspection. However, because of concerns about privacy and social utility, judges offered to go through the garbage themselves first. They made it clear that in order for the defence to be allowed to see the garbage, the standard of "likely relevance" would be very easy to meet. For example, it might be enough to suggest that the garbage could contain material that would make the complainant mistakenly believe that she had been sexually assaulted.[20]

The *Carosella* decision suggests that the stage has now been reached where, if the garbage has been taken away (perhaps in the usual course, or to protect the complainant), a sexual assault trial cannot be held.

Of course there is no simple parallel between what people say to their doctors, therapists and counsellors and what they put in their garbage. Of course the whole network of support for victims is far more important than garbage collection. Of course, being forced to chose between keeping your garbage and assisting with a prosecution is not nearly as bad as being forced to chose between keeping the pain and fear of sexual assault to yourself or assisting with a prosecution. Nevertheless, I think this story gives some flavour of the phenonomen we have seen develop in the nineties. While we have not yet seen a case where a sexual assault trial could not be held because a charge was laid after garbage collection day, *Carosella* is the equivalent with respect to missing records. It is only a short step away from the requirement that a complainant actually create records so that they can be examined by the accused.

Will Bill C-46 make any difference in future cases similar to *Carosella*?[21] In general, the Bill can be said to be designed to limit judicial and defence access to a broad, non-exhaustive, range of personal records, including medical, counselling, and education, but not explicitly rape crisis centre, records. In a future case,

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18 An Act to amend the *Criminal Code* (production of records in sexual offence proceedings), S.C. 1997, c.C-30.

19 In *O'Connor*, *supra* note 5, only the dissenting justices, L'Heureux-Dubé, La Forest, McLachlin and Gonthier JJ., included equality in their analysis of such disclosure (*ibid.* at 487-88).

20 In *O'Connor*, the majority consisting of Lamer C.J., Sopinka, Cory, Iacobucci and Major JJ., included in their illustrations of when records may be relevant the following: "they may reveal the use of a therapy which influenced the complainant's memory of the alleged events" (*supra* note 5 at 441).

21 For much fuller discussions of the Bill, see D. Oleskiw and N.Tellier, *Submissions to the Standing Committee on Bill C-46 An Act to Amend the Criminal Code in Respect of Production of Records in Sexual Offence Proceedings* (The National Association of Women and the Law, 1997), and J. Scott and S. McIntyre, *Submissions to Standing Committee on Justice and Legal Affairs* (Women's Legal Education and Action Fund, 1997).

therefore, a Centre would need to start by arguing that its records contained "personal information for which there is a reasonable expectation of privacy" (section 278.1). The process for seeking production set out in the Bill applies to records "in the possession or control of any person, including the prosecutor . . . unless . . . the complainant or witness . . . has expressly waived the application" of the provisions (section 278.2 (2)). While this is very positive, in that there is no automatic disclosure of material in the hands of the Crown, it also means that a person in the position of the complainant in *Carosella* can consent to disclosure, even if a particular rape crisis centre feels that is not in the interests of sexual assault victims generally.

A person seeking production of records under Bill C-46 must make an application to the trial judge who is to apply the tests of likely relevance and necessity in the interests of justice. There are three crucial differences between the Bill and *O'Connor*, however. The first two are significant here. First the Bill adds the test of necessity to *O'Connor's* likely relevance, thus bringing the required approach into line with *Leipert*. Second, the Bill sets out the assertions which are not sufficient on their own to meet that tests [section 278.3(4)].[22] Four of these assertions appear in *Carosella*: that the records exist [(4)(a)]; that they relate to the incident which is the subject-matter of the charge [(4)(c)]; that they might contain inconsistencies [(4)(d)]; and that they might relate to credibility [(4)(e)].[23] The Bill requires that courts treat all of these as insufficient grounds to establish "likely relevance." Since a judge would not be entitled to look at the records in a future case, then the fact that they are missing will not be grounds for a stay of proceedings. Consequently, a *Carosella* application should fail at this stage.[24]

It is obvious, therefore, that it matters a great deal whether the majority in *Carosella*, in its opinion that the *O'Connor* "likely relevance" test was met in that case, saw itself as doing something constitutionally required. Of course, even if it did, Parliament can still change the content of what is likely relevant if it grounds the Bill in a careful consideration of all co-existing constitutional rights, as it does in the Preamble to the Bill.[25] I would prefer to argue, however, that the decision that a trial could not be held without the missing records did not track the applicable constitutional doctrine as embodied in *Leipert* and can simply be changed by Parliament. The idea, rejected in *Leipert*, that an accused person has a constitutional right, absent a showing of prejudice, of access to all records which ever existed and which may relate to the charge, is one which could only be taken seriously in a legal culture tolerant of distinctive suspicion and scrutiny of people who report sexual assaults.❑

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22 The section numbers are to the *Criminal Code*, as it has been amended by Bill C-46.

23 *Supra* note 1 at 614-15 (paras. 44-46).

24 The second difference between the Bill and *O'Connor* is that the judge must balance the salutory and deleterious effects of production before deciding to look at the records (s. 278.5(2)). If (s)he does examine the records then these factors must be considered again in deciding whether to order production to the defence, the test again being likely relevance (s. 278.7). The Women's Legal Education and Action Fund has taken the position that the higher standard of necessity should be required (*supra* note 20).

25 The Preamble explicitly grounds the Bill in the constitutional rights to equality and states that Parliament intends to promote protection of the rights of those accused of, and those who are or may be the victims of, sexual violence. It is clear therefore that Parliament is attentive to a broader range of constitutional rights than the majority in *Carosella*.

ADLER v. *ONTARIO*: THE TROUBLING LEGACY OF A COMPROMISE

S.M. Corbett

In 1985 the government of the Province of Ontario referred Bill 30 to the Court of Appeal for Ontario.[1] Bill 30 proposed an amendment to the province's *Education Act* which would extend public funding through the secondary school level of the Roman Catholic school system. Supporters of the legislation argued that it merely fulfilled the province's commitment under section 93 of the *Constitution Act, 1867*. The Supreme Court, upholding the judgment of a majority on the Court of Appeal, agreed with this interpretation.[2] The *Education Act* was duly amended to extend funding. Opposition to the legislation has come from two different quarters. On the one hand, there are those, including a minority on the Court of Appeal, who have argued that any funding for denominational schools is inappropriate in a pluralist society with a fully accessible public school system. On the other, there are those who have argued that if funding is to be given to the Roman Catholic system then it should also be available to members of any religious faith who wish to establish sectarian schools. The recent Supreme Court decision in *Adler* v. *Ontario* deals with an objection of this second sort.[3]

The appellants in *Adler* were members of the Jewish (the Adler appellants) and Christian Reformed (the Elgersma appellants) faiths. While their claims were not identical, taken together they argued that by failing to provide for the public funding of denominational schools the Education Act, R.S.O. 1990 violated their rights under sections 2(a) and 15(1) of the Charter.[4] Although differing somewhat in the reasons given, the Court unanimously agreed that the legislation did not violate the guarantee of freedom of religion under section 2(a) but they disagreed over whether there was a violation of section 15(1). Writing for the majority Iacobucci J. (joined by Lamer C.J.C., La Forest, Gonthier and Cory, JJ.) concluded that funding for public schools and for Roman Catholic schools was immune from Charter attack because the Province of Ontario was exercising its plenary power under section 93 of the *Constitution Act, 1867*.[5] On the basis of a different reading of section 93, Sopinka J. (joined by Major J.) maintained that the Charter did apply to the funding of public schools but that the legislation did not create a distinction which violated section 15(1).[6] Justice L'Heureux-Dubé and McLachlin J. also agreed that the Charter applied and both found a violation of section 15(1). They disagreed however on the application of section 1 with McLachlin J. finding that the legislation was saved and L'Heureux-Dubé J. concluding that it was not.[7]

The majority in *Adler* followed the decision in the *Ontario Education Act Reference*. Writing for the majority in the *Reference* decision Wilson J. noted that

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1 *Education Amendment Act*, 1986 (Ont.), c. 21 (Bill 30).

2 *Reference Re Act to Amend the Education Act (Ontario)* (1987), 40 D.L.R. (4th) 18, 1 S.C.R 1148, aff'g (1986), 25 D.L.R. (4th) 1 (O.C.A.) [hereinafter *Ontario Education Act Reference*].

3 *Adler* v. *Ontario* (1996), 140 D.L.R. (4th) 385, aff'g, (1994), 116 D.L.R. (4th) 1 (O.C.A.), aff'g (1992), 94 D.L.R. (4th) 417 (O.C.J.) [hereinafter *Adler*].

4 Both appellants also made claims regarding the School Health Support Services Program but I will not be concerned with this issue in the present comment.

5 *Adler, supra* note 3 at 408.

6 Sopinka J. rejected the claim by Iacobucci J. that s. 93 set out a "comprehensive Code with respect to legislative powers in denominational schools." For Sopinka J. the subsections of s. 93 operate as restrictions on the plenary power granted by the opening words of the section; these words do not mandate the establishment of a public school system and a system of dissentient schools, they merely grant the Provinces the power to make "Laws in relation to Education." Such laws are subject to the Charter (*ibid.* at 432).

7 *Ibid.* at 461, 427.

she was concerned solely with the constitutional issue. She wrote that "it is not the role of the Court to determine whether as a policy matter a publicly funded Roman Catholic school system is or is not desirable."[8] It goes without saying that constitutions are documents written under the pressures of historical circumstance. Everyone agrees that section 93 represents a compromise reached by those who drafted the *British North America Act*. The result of the application of the distinction between policy and law in the *Ontario Education Act Reference*, an effect clearly in evidence in *Adler*, was to entrench in the constitution a policy developed in a very different political climate at the time of Confederation. The Preamble to Bill 30 contained the following characterization of the purpose of the legislation:[9]

> . . . whereas it is just and proper and *in accordance with the spirit of the guarantees given in 1867* to bring the provisions of the law respecting Roman Catholic separate schools into harmony with the provisions of the law respecting public elementary and secondary schools . . .

The "spirit of the guarantees given in 1867" was one of compromise. It is important, therefore, to consider the precise nature of this compromise and to ask whether legislation flowing from that compromise remains appropriate today. While the intentions of the framers of a constitution may be an important guide to understanding the provisions of such a document, it is also possible that the conditions which were the objects of those intentions no longer obtain.

While opponents of funding for Roman Catholic schools clearly occupy very different positions, they share in common the view that the current situation in Ontario is unprincipled insofar as it provides to members of one religious community something which it denies to all others. Religious education is a particularly troubling issue in a modern liberal state. It is important, therefore, to consider briefly the motives of those seeking to have their children educated outside the public school system. While the case did not directly involve education, the conflict between the liberal idea of membership in a religious community and the goals of religious education is evident in the following passage from the Supreme Court's judgment in *Hofer* v. *Hofer*.[10] Writing for the majority Ritchie J. made the following remark regarding the conditions of membership in a Hutterite community:[11]

> There is no doubt that the Hutterian way of life is not that of the vast majority of Canadians, but it makes manifest a form of religious philosophy to which any Canadian can subscribe and it appears to me that if any individual *either through birth within the community or by choice* wishes to subscribe to such a rigid form of life and to subject himself to the harsh disciplines of the Hutterian Church, he is free to do so. I can see nothing contrary to public policy in the continued existence of these communities living as they do in accordance with their own rules and beliefs, and as I have indicated I think that it is for the Church to determine who is and who is not an acceptable member of its communities.

By effectively equating 'birth' and 'choice' as ways of becoming a member of a religious community, and then claiming that "it is for the Church to determine who is and is not an acceptable member," the above passage highlights the fundamental problem posed by religious education in a secular society. While the adult male members of the Hutterite communities may claim to be there by choice, from the moment of their birth they were raised to be adult Hutterites.[12] Their

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8 *Ontario Education Act Reference, supra* note 2 at 38.

9 *Ibid.* at 31 [emphasis added].

10 *Hofer* v. *Hofer* (1970) S.C.R. 958.

11 *Ibid.* at 975 [emphasis added].
In his judgment in *Big M Drug Mart* Dickson J. defined freedom of religion as follows:
> The essence of the concept of freedom of religion is the right to entertain such religious beliefs *as a person chooses*, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. [Emphasis added].

Here too we find the problematic use of the idea of choice. If the goal of religious education is to perpetuate religious communities by reducing the chances that children raised in such communities will leave them, then it is difficult to escape the conclusion that religious education is explicitly directed toward curtailing the individual's ability to exercise the "right to entertain such religious beliefs as (the) person chooses." See *R.* v. *Big M Drug Mart Ltd.* (1985), 1 S.C.R. 295 at 336.

12 Brian Dickson was the original trial judge in *Hofer*. Commenting on the case he described the Hutterian Brethren as "an adaptation of medieval monasticism," a somewhat misleading comparison once one recalls that medieval monasteries were inhabited by celibate adult

upbringings were directed toward constraining that 'choice' as much as possible.[13] Yet, the adult male Hutterites believe that they have chosen, as adults, to belong to the community, a belief recognized by the Supreme Court of Canada as the basis for a voluntary association among them.

While the Hutterites are an admittedly extreme example of the extent to which religious communities endeavour to ensure their continuation through the education of their children, they illustrate in a striking way the conflict between the legal conception of a religious community as a voluntary association and the use of religious education to minimize the chances that individuals brought up within a religious community will regard non-participation in their religion as a choice.[14] In her dissent in *Adler*, L'Heureux-Dubé J. picks up this theme when she draws attention to the conception of the link between education and community membership held by those who were seeking funding for religious schools:[15]

> Evidence submitted by the appellants and accepted by the trial judge establishes that to remain a member of the particular religious communities in question, and to act in accordance with the tenets of these faiths, the appellants are required to educate their children in a manner consistent with this faith and therefore outside of the public or separate schools. Also established by the appellants' evidence according to the judgment of the first instance was the finding that *control over the education of their children was essential to the continuation of the religious communities in question.*

Thus, the communities represented by the appellants in *Adler* believe that they must use their school system to keep their children from abandoning their parents' faith when they reach adulthood.[16]

The communal goal of self-preservation was also present in the minds of those responsible for the guarantees regarding minority education contained in section 93 of the *Constitution Act*. In *Brophy* v. *Attorney General of Manitoba* the motives of the supporters of a separate Roman Catholic school system at the time of Confederation were characterized as follows:[17]

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males. See B. Dickson, "The Role and Function of the Judges" (1980) XIV The Law Society of Upper Canada Gazette 138 at 152..

13 "We must determine whether the individual in question, in the circumstances, would consider him- or herself to have a choice. For members of religious communities, particularly those of the appellants, this is clearly not the case. What might be termed an objective choice of a particular religion from the court's point of view, will, from the religious adherent's perspective, entail a moral imperative. Also, commitment and adherence to the beliefs and practices of one's religion define one's membership in the particular religious community" (per L'Heureux-Dubé J. in *Adler supra* note 3 at 414).

14 This goal of the religious educator was set out with particular force by David Hume in the opening pages of his *Dialogues Concerning Natural Religion*. The following statement is made by a proponent of the religious education of children:

> To season their minds with early piety is my chief care; and by continual precept and instruction and, I hope, too, by example, I imprint deeply on their tender minds an habitual reverence for all the principles of religion. While they pass through every other science, I still remark the uncertainty of each part; the eternal disputations of men; the obscurity of all philosophy; and the strange, ridiculous conclusions which some of the greatest geniuses have derived from the principles of mere human reason. Having thus tamed their mind to a proper submission and self-diffidence, I have no longer any scruple of opening to them the greatest mysteries of religion, nor apprehend any danger from that assuming arrogance of philosophy, which may lead them to reject the most established doctrines and opinions.

Hume wrote this passage to reflect the views of a particularly strident Protestant but its counterpart can be found in the educational writings of the defenders of numerous other religious faiths. See D. Hume, *Dialogues Concerning Natural Religion* (New York: Hafner Press, 1948) at 5-6.

15 *Adler*, *supra*.note 3 at 413 [emphasis added].

16 There is a deep irony here. Jacob Huter, the founder of the Hutterite communities, was, like Martin Luther and John Calvin, an adult and, also like them, a dissenter. Indeed, all first generation Protestants were adult converts from Roman Catholicism. Similarly, all first generation Christians, the disciples being but the first in a very long line, were adult converts from Judaism or from one of the pagan sects in the classical world. In all of these cases converting adults who had took their children with them into their new faiths. The adults then set out to deny their children the freedom to convert. As the above passage from Hume so clearly states, one of the means whereby adults attempt to deprive their children of the freedom to choose their own religious faith is religious education (see *Hume, supra* note 14). Yet, all of these converts in whose names the various faiths continue to be practised can be offered as evidence of the failure of their parents to pass their faith on to their children successfully.

17 *Brophy* v. *Attorney-General of Manitoba*, [1895] A.C. 202 at 214 [emphasis added].

> They regarded it as essential that the education of their children should be in accordance with the teaching of their Church, and considered that such an education could not be obtained in public schools designed for all the members of the community alike, whatever their creed, but could only be secured in *schools conducted under the influence and guidance of the authorities of their Church.*

It is readily apparent that this is precisely the same attitude toward religious education that motivated the parents seeking public support for sectarian schools in *Adler*. Yet, they are to be excluded from the benefits conferred upon Roman Catholic schools because they were not present to make their case at the time of the "political compromise" that lies at the heart of section 93.

On the surface, at least, this compromise looks like an agreement between supporters of a secular school system and those who want their children to receive a religious education. When conceived in this way the parallels between the motives of religious minorities in the nineteenth century and those in the latter part of the twentieth century seem self-evident. Yet, a superficial resemblance can mask a more significant difference, something that turns out to be the case when one examines the historical context in which the compromise was reached. In his history of Protestantism in nineteenth century Ontario, William Westfall remarks upon the close links that existed between education and religion:[18]

> In the first decades of the Victorian era, the established church lost its favoured position at almost all levels of education as the state took control of the instruction of the youth of the colony. This process of "secularization," however, reorganized rather than rejected the close relationship between religion and education. . . . Even at the elementary levels of education, where the new state reigned supreme, the advance of secularism was met by a stern defence of the importance of instilling an unshakeable religious code in the minds of youth. Egerton Ryerson, to whom is ascribed such praise for creating the system of public education, never questioned the necessity of religious instruction in his schools. Indeed, he hoped the creation of a system of public education would expand the place of religion in the classroom by removing special privileges and creating "a common patriotic ground of comprehensiveness and avowed Christian principles."

Seen from this point of view, the Roman Catholic minority in Ontario at the time of Confederation were not just opposed to secular education, they were opposed to a model of secular education which rested upon "avowed Christian principles" defined by Protestants. Ryerson's seemingly casual reference to "Christian principles" is disingenuous because it masks the fact that the differences among the various Christian sects, both Protestant and Catholic, derive in large part from the difficulties in defining precisely what these principles are. Furthermore, as the evidence of the project of the residential schools amply demonstrates, education can be used not only to perpetuate the beliefs of a religious community, it can also be used as a means of destroying the beliefs of members of other religious communities.[19] Religious minorities justifiably feared, therefore, that a religious majority might use a supposedly public school system as a means of indoctrinating their children in the tenets of an alien faith. It is against this background that one should understand the following remark by Dubin C.J.O. about the contemporary situation in Ontario:[20]

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[18] W. Westfall, *Two Worlds: The Protestant Culture of Nineteenth-Century Ontario* (Montreal and Kingston: McGill-Queen's University Press, 1989) at 6.

[19] The use of schools as a means of destroying the religious beliefs of the aboriginal nations of Canada was already well under way at the time of Confederation. In the 1840s James Beaven, an Anglican clergyman, and one of Canada's first full time professors of philosophy, undertook a journey from Toronto to Sault Ste Marie to investigate the conditions at the various missions in what would become Northern Ontario. The task of civilising the heathens was very much on Beaven's mind. He advocated the kidnapping of children from their families so that they might be "trained up as Christians." The task of civilizing the Indians would proceed "co-ordinately with conversion, and as a means to it." Beaven's recommendation regarding the Indians was in accord with the policy advocated by the Bagot Commission in 1842. See J. Beaven, *Recreations of a Long Vacation, or, A Visit to the Indian Missions in Upper Canada* (London: James Burns, 1946; Toronto: H. and W. Rowsell, 1846) at 161; J.R. Miller, *Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada*, rev'd ed. (Toronto: University of Toronto Press, 1991) at 104ff.

[20] *Adler* v. *Ontario* (1994), 116 D.L.R. (4th) 1 at 24; cited by Iacobucci J., *Adler*, *supra* note 3 at 398.

> [The] public school system is solely secular and, in my view, because it is secular, it cannot found a claim of discrimination because it does not provide public funds for religious education under private auspices.

The project of secular education in the closing years of the present century cannot simply be identified with the idea of secular education which was dominant at the time of Confederation. A "solely secular" school system is a relatively recent development in the Province of Ontario.[21]

When examining the issue of denominational schooling there are two different sorts of dispute that may arise between the state and religious minorities. The first dispute is inter-denominational while the second is between the religious and the secular. Each of these disputes requires taking a different approach to the problem of religious minorities. In a state in which there is no clear separation of church and state, or in a putatively secular state in which one religious community exercises *de facto* control of the instruments of government, the protection of religious minorities is necessarily a matter of protecting the rights of those who do not share the religious beliefs of those in power.[22] Such was the situation in Ontario in the middle years of the nineteenth century.[23] While none of the Protestant denominations in Ontario had succeeded in becoming the established church in the province, the public education system was clearly in the hands of the Protestant majority.[24] Read in this context, Section 93 can be understood to be a protection of a particular religious minority, the Roman Catholics, from the control of a religious majority.[25] It was the need for this protection that led to the great compromise. This situation can hardly be said to obtain today.

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21 In his dissenting opinion in *Adler*, Sopinka J. notes that "[while] education in common schools [in the nineteenth century] might have been classed as non-denominational, it certainly did not conform to the model" of public schooling in the present. He then traces the history of secularization in the public school system in Ontario in the years since the Second World War. He notes that the Hope Commission in the early nineteen fifties "endorsed the existing system of religious education in public schools, in particular the teaching of 'honesty and Christian love.' The McKay Report ... released in 1969, ... concluded that the religious curriculum was designed to indoctrinate students in the Christian faith and way of life ..." Elsewhere he cites this remark from the decision by Winkler J. in *Bal* v. *Ontario*:

> "[the *Elgin County* decision] signifies] the end of an era of majoritarian Christian influence, and mark[s] the beginning of a period of secularism in education, based on an awareness of a changing societal fabric and Charter protection for minority rights to freedom of religion".

See *Adler*, *supra* note 3 at 438-9, 450; *Bal* v. *Ontario (Attorney-General)* (1994), 121 D.L.R. (4th) 96 (Ont. Ct. (Gen. Div.)); *Canadian Civil Liberties Assn.* v. *Ontario (Minister of Education)* (1990), 65 D.L.R. (4th) 1 (Ont. C.A.) (the *Elgin County* case).

22 Writing with reference to the circumstances in which s. 93 was drafted Sopinka J. notes "[the] majority was in control of the legislature and had no need to have special guarantees in the Constitution Act, 1867." *Adler*, *supra* note 3 at 438.

23 In Ontario in 1881 Roman Catholics made up 16.7% of the population; the combined total for the various different Protestant denominations was 76.9%. In 1951 the corresponding percentages were Roman Catholic, 24.8%, and Protestant, 66.1%. By 1981 the percentage of Protestants had declined to 44.2% while the percentage of Roman Catholics had increased to 33.3%. The largest growth between 1951 and 1981 was in the combined categories of 'Other Religions' and 'No Religion' which climbed from 7.2% in 1951 to 18.1% in 1981. This latter figure is almost certainly higher today.

The figures for 1881 are from G. Stevenson, *Ex Uno Plures* (Montreal & Kingston: McGill-Queen's University Press, 1993) 35; the figures for 1951 and 1981 are from *Report of the Ministerial Inquiry on Religious Education in Ontario Elementary Schools* (Toronto: Government of Ontario, 1990) 24-5.

24 It is in light of this that one should understand the following remarks by Wilson J. in the *Ontario Education Act Reference*:

> The protection of minority religious rights was a major preoccupation during the negotiations leading to Confederation because of the perceived danger of leaving the religious minorities in both Canada East and Canada West at the mercy of overwhelming majorities.

The 'overwhelming majorities' referred to by Wilson J. were not secularists, they were Catholics and Protestants. Wilson went on to note that "it seems unbelievable that the draftsmen of [s. 93] would not have made provision for future legislation conferring rights and privileges on religious minorities in response to new conditions." The problem with this is that it misconstrues s. 93 as an example of religious tolerance when, in fact, it served to protect a privileged minority in Quebec by extending education rights to a minority in Ontario who had significantly less influence in the political life of that province. It is unlikely that the draftsmen of 1867 even considered the prospect of "conferring rights and privileges" on non-Christian minorities. See *Ontario Education Act Reference, supra*, note 2 at 42.

25 For a variety of reasons the situation in Quebec was not precisely parallel but, as Garth Stevenson has noted, "[the] Roman Catholic Church enjoyed a quasi-official status in Quebec, where its primacy had been recognized in the Quebec Act of 1774" (G. Stevenson, *supra* note 23 at 34).

The second type of dispute arises between a 'solely secular' state and those who reject the idea that a secular state can provide their children with the type of education required by their religion.[26] They are not seeking protection from a religious majority, they are seeking an exemption from a requirement to educate their children in a non-religious environment. The appellants in *Adler* are clearly involved in this second type of dispute.[27] When understood in this way it is possible to distinguish their claim from that of the supporters of a Roman Catholic school system at the time of Confederation, but not from that of the supporters of a contemporary separate school system. It might seem as if proponents of religious education are seeking protection from the secular majority and that their situation is, therefore, analogous to that of religious minorities seeking protection from a religious majority. Such an interpretation would, however, rest upon a fundamental misunderstanding of the idea of secularism.

Secularism is not, by itself, a complete world view. It is a response to the political problem of democratic government in a pluralist society. Such a society may, of course, contain atheists as well as those for whom religion is a matter of complete indifference, but such individuals are not secularists. The notion that secularism (or liberalism for that matter) is an alternative to religion is mistaken. Commitment to the idea of secularism is not, in and of itself, antithetical to religious faith. Strictly speaking secular institutions are neutral regarding denominational disagreements unless those disagreements threaten the social order. The point of secular institutions is to prevent members of one religion from using the instruments of state power to the disadvantage of members of other religious communities. The modern secular state provides a framework within which different religious minorities, as well as those with no religious beliefs at all, can coexist but such coexistence will only be peaceful if no religious minority is seen to exercise a disproportionate share of power within the institutions created to maintain and promote the secular ideal. One of the goals of public education in a secular state must be the articulation of the idea of secularism in an environment designed to illustrate the viability of the idea. Such an environment is difficult, if not impossible, to achieve in a denominational school.[28]

If, as I have suggested, "the spirit of the guarantees given in 1867" was the protection of a religious minority from a religious majority which had *de facto* control of a supposedly secular school system, then Bill 30 may have been a consequence of that compromise but it had little or nothing to do with its spirit. Moreover, at a time when other provinces (Newfoundland and Quebec) are in the process of rejecting the type of arrangements set out in section 93, Ontario's funding of a separate school system looks increasingly anachronistic. Although one may disagree with the reasoning of the majority in *Adler*, the decision to withhold funding from denominational schools was the appropriate one. On the other hand, we are left with the public funding of the Roman Catholic system. Supporters of non-Catholic religious schools, like the appellants in *Adler*, are correct in seeing this as the favouring of one religious minority over others. There is no reason, in principle, why Roman Catholic schools should have access to public funds while such funding is denied to other minorities. It is unfortunate that an historically conditioned compromise at the time of Confederation continues to haunt debates over school funding in an era when a truly secular system of education requires all the support that it can muster.❑

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[26] Since numerous Christian denominations also reject the separation of religion and politics this dispute may ultimately call into question the very foundations of the secular state.

[27] "Insularity has become necessary to maintaining the religious lifestyle practised by the appellants by virtue of the powerful economic and other forces of secularization in society" (per L'Heureux-Dubé J. in *Adler*, *supra* note 3 at 417).

[28] "The decision to fully fund public secular schools . . . is at base a political decision. Its objective, the record shows, is to foster a strong public secular school system attended by students of all cultural and religious groups. Canada in general and Ontario in particular is a multicultural, multi religious society" (per McLachlin J. in *Adler*, *supra* note 3 at 458).

LE DIPTYQUE CÔTÉ-ADAMS OU LA PRÉSÉANCE DE L'ORDRE ÉTABLI DANS LE DROIT POSTCOLONIAL DES PEUPLES AUTOCHTONES

Ghislain Otis

Introduction

La concrétisation des droits ancestraux des peuples autochtones exige que l'on compose avec certaines données propres au contexte postcolonial. Parmi ces données mentionnons: l'implantation d'un État euro-canadien prééminent, l'imbrication permanente des populations autochtones et allochtones, la mobilisation toujours plus lourde des terres et des ressources au service de l'économie de marché, le triomphe de l'individualisme libéral, la marginalisation économique et culturelle de l'autochtonie et, enfin, la montée du courant identitaire autochtone.

L'ampleur du défi lancé par l'article 35 de la *Loi constitutionnelle de 1982* est proprement sidérante et les jugements rendus par la Cour suprême du Canada dans les affaires *R.* c. *Côté*[1] et R. *c. Adams*[2] sont venus clore une année qui aura fait ressortir le refus du pouvoir judiciaire de bouleverser, au nom des droits historiques des peuples autochtones, l'ordre social et économique hérité de la colonisation européenne du Canada.

Je m'attacherai donc à démontrer que l'intérêt de cette jurisprudence intervenant dans la foulée de l'affaire *R. c. Van Der Peet*[3] va bien au-delà des questions principales que la Cour était appelée à trancher, savoir, les retombées du régime français sur les droits ancestraux des autochtones au Québec (*Côté*) et la nature du rapport entre les droits ancestraux et le titre foncier autochtone (*Adams*).

[1] [1996] 3 R.C.S. 139.
[2] [1996] 3 R.C.S. 101.
[3] [1996] 2 R.C.S. 507.

1. *R.* c. *Côté*: La mort du droit colonial et l'enterrement du régime français

La question de l'impact du régime colonial français sur l'application de l'art. 35 au territoire de l'ancienne Nouvelle-France a soulevé une vigoureuse controverse parmi les historiens et les juristes.[4] La position défendue par certains voulant que le droit colonial français ait tenu l'Amérique pour *terra nullius* n'a en outre pas manqué d'avoir des répercussions négatives sur les débats publics au Québec. Elle ne pouvait que déconsidérer l'héritage français aux yeux des autochtones du Québec et du Canada. La Cour d'appel du Québec, dans l'affaire *Côté*, s'était néanmoins montrée favorable à cette thèse selon laquelle aucun droit ancestral n'avait survécu à la souveraineté française.[5]

D'une très grande importance symbolique, politique et juridique pour le Québec, le problème n'était pas sans intérêt immédiat pour le reste du pays puisque la Nouvelle-France s'étendait bien au-delà des frontières actuelles du Québec.

On n'aura guère été surpris de voir, dans *Côté*, la Cour suprême récuser péremptoirement une logique

[4] Voir notamment H. Brun, «Les droits des Indiens sur le territoire du Québec» dans H. Brun, dir., *Le territoire du Québec: six études juridiques*, Québec, Les presses de l'Université Laval, 1974, à la p. 50; P. Dionne, «Les postulats de la Commission Dorion et le titre aborigène au Québec: vingt ans après» (1991) 51 *R. du B.* 127; R. Boivin, «Le droit des autochtones sur le territoire québécois et les effets du régime français» (1995) 55 *R. du B.* 135; A. Émond, "Existe-t-il un titre originaire dans les territoires cédés par la France en 1763?" (1995) 41 R.D. McGill\McGill L.J. 59; A. Lajoie, J.M. Brisson, S. Normand et A. Bissonnette, *Le statut juridique des peuples autochtones au Québec et le pluralisme*, Cowansville, Y. Blais, 1996.
[5] *Côté* c. *La Reine*, [1993] R.J.Q. 1350, aux pp. 1363-1365.

menant à nier aujourd'hui toute incidence constitutionnelle, pour ce qui concerne les droits ancestraux, à la préexistence multiséculaire des autochtones sur une partie substantielle du territoire canadien. L'application d'un régime constitutionnel unique pour l'ensemble du pays s'imposait, non pas au nom d'un quelconque droit positif préétabli, mais plutôt par le jeu d'impératifs politiques tels la justice intercommunautaire et la cohésion nationale.

Si le résultat n'a donc rien d'étonnant, le procédé par lequel la Cour y parvient bouscule par contre les orthodoxies doctrinales quant à la mise en rapport du droit colonial et de l'article 35 de la *Loi constitutionnelle de 1982*. Le raisonnement adopté dans *Côté* pour régler le dilemme de l'incidence contemporaine du régime français marginalise et banalise la référence au droit colonial alors que tant les universitaires que les avocats tenaient cette référence pour nécessaire et déterminante.

Le plus haut tribunal du pays opère l'autonomisation de l'article 35 en refusant de manière univoque que la protection des droits constitutionnels soit aujourd'hui "fonction des particularités historiques de la colonisation dans les diverses régions."[6] La Cour dénonce ceux qui voudraient voir les juges porter un regard "statique et rétrospectif" sur les droits ancestraux; elle plaide pour un régime de protection constitutionnelle "prospectif" et uniforme au Canada.[7]

Je propose de prendre la mesure du caractère novateur de cette position en rappelant d'abord l'importance donnée jusque là au "référent colonial" et, ensuite, en rendant compte du processus par lequel la plus haute juridiction se donne la latitude pour construire un droit constitutionnel conforme à ce qu'elle juge être les grands enjeux contemporains de la question autochtone.

1.1. Le référent colonial comme fondement du retour aux rapports originels

Le rapport entre le droit colonial relatif aux droits ancestraux et l'article 35 de la *Loi constitutionnelle de 1982* n'a pas paru problématique aux analystes. Cette disposition ne faisant que reconnaître et *confirmer* des droits ancestraux *existants*, on n'a en général pas douté que la référence aux "droits ancestraux" renvoyait à une doctrine de common law bien connue issue de l'époque coloniale[8] et dont l'effectivité au Canada avait d'ailleurs été affirmée dans les affaires *Calder c. Colombie Britannique*[9] et *Guérin c. La Reine*.[10]

La décision de la Cour suprême dans *Sparrow c. La Reine*[11] sembla d'ailleurs confirmer que l'effet principal de l'inscription constitutionnelle des droits ancestraux était, non pas de créer un corpus juridique autonome, mais plutôt de prémunir contre toute action étatique unilatérale et arbitraire des droits, acquis dans l'ordre positif, mais fragilisés parce que ne jouissant jusque là que d'une reconnaissance infraconstitutionnelle.

C'est ainsi qu'on s'attacha à cerner le sens et la portée des droits désormais protégés constitutionnellement en procédant à l'analyse de la common law relative au "titre" ancestral des peuples autochtones. Cette common law étant elle-même le fruit de la juridicisation de pratiques historiques érigées en politique impériale officielle vers le milieu du XVIII siècle, les auteurs ont accordé une grande importance aux origines et aux modalités des pratiques coloniales relatives aux droits ancestraux des autochtones. La détermination des droits constitutionnels des peuples autochtones devenait de la sorte largement une question de droit colonial.[12]

Dans le cas des terres comprises dans le territoire de l'ancienne Nouvelle-France, il fallait procéder à l'analyse des pratiques des autorités coloniales françaises et du droit colonial français. On se devait aussi d'examiner les conséquences, en droit colonial britannique, de la transition vers la souveraineté de la Grande-Bretagne.[13]

Cette approche a suscité l'engouement de la doctrine puisqu'elle permettait de prétendre que les droits ancestraux contemporains, dont la portée reste encore largement indéterminée en droit positif, doivent refléter les rapports initialement établis entre la puissance colonisatrice et les premiers occupants. Le

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6 *Supra* note 1, par. 53, à la p. 175.

7 *Ibid.*

8 Voir notamment B. Slattery, "Understanding Aboriginal Rights" (1987) 66 R. du B. Can. 727; M. Asch, *Home and Native Land: Aboriginal Rights and the Canadian Constitution*, Vancouver, UBC Press, 1984.

9 [1973] R.C.S. 313.

10 [1984] 2 R.C.S. 335.

11 [1990] 1 R.C.S. 1075.

12 L'influence des travaux de Brian Slattery sur cette question fut sans doute déterminante, voir notamment son article "Understanding Aboriginal Rights," *supra* note 8.

13 Voir les auteurs cités, *supra* note 4.

débat autour des droits ancestraux devenait ainsi un débat historique où chacun invite la société, et surtout les juges, à retenir son interprétation de l'histoire quant aux droits des autochtones.

À partir d'une "relecture" pluraliste du contexte historique et des pratiques coloniales ayant caractérisé la période initiale de l'expansion européenne en Amérique, on a présenté les droits ancestraux comme le résultat d'une alliance ou encore d'un *modus vivendi* interculturel qui se serait imposé aux colonisateurs à la faveur d'un rapport de force moins déséquilibré entre les Européens et les autochtones.[14]

L'article 35 devient alors un instrument privilégié de revitalisation d'une relation originelle jugée plus respectueuse et égalitaire, relation que la société dominante, une fois assurée de son hégémonie, aurait trahie. Par ce retour à l'esprit et aux modalités des rapports anciens empreints de plus de coopération et d'interdépendance, on espère fonder dans l'ordre juridique étatique postcolonial la légitimité d'un corpus autochtoniste "plus proche du sens que lui donnait l'époque qui l'a produit."[15]

Cette vision, empreinte d'un certain romantisme, n'exige pas une remise en cause fondamentale de l'ordre étatique mais plutôt qu'on lui insuffle une positivité métissée grâce à une réactualisation d'un passé pluraliste que l'archéologie des interactions premières permet aujourd'hui de mettre au jour.

La Cour suprême s'est toutefois abstenue dans l'affaire *Côté*, même après avoir longuement exposé les données du débat, d'arbitrer les lectures antagonistes de l'histoire et du dualisme colonial canadien. Elle a plutôt choisi de se ménager l'espace nécessaire à la réalisation de son propre programme de mise en équilibre des intérêts autochtones et allochtones. Cette quête d'un nouveau *modus vivendi* ne visera pas la projection dans le présent de relations intercommunautaires caractéristiques du passé. Elle sera plutôt ancrée dans la perception que se font les juges des enjeux actuels de la question autochtone.

1.2. La banalisation du régime français par la consécration d'un droit constitutionnel autonome et prospectif

L'affaire *Côté* ne peut être bien comprise que comme l'aboutissement d'une dynamique enclenchée par la décision de la majorité dans l'affaire *R. c. Van Der Peet*. En effet, la Cour suprême avait déjà dans cette affaire démontré une volonté de détacher l'article 35 de la *Loi constitutionnelle de 1982* des réalités et pratiques propres aux débuts de la colonisation.

a) *Van Der Peet*: l'occultation du référent colonial

Tout en reconnaissant que les droits ancestraux puisaient leurs racines dans la common law coloniale,[16] le juge en chef a retenu dans *Van Der Peet* une interprétation réductrice de ce droit colonial en lui attribuant pour fondement la volonté de préserver, en harmonie avec la souveraineté revendiquée par la Couronne, les pratiques, coutumes ou traditions faisant partie intégrante de la culture précoloniale des autochtones.[17]

Dans son interprétation téléologique de l'article 35, le juge en chef Lamer se laisse guider, bien qu'il s'en défende expressément,[18] non pas d'abord par les rapports historiques à l'origine de la doctrine coloniale des droits ancestraux mais plutôt par sa compréhension du contexte contemporain dans lequel l'article 35 concrétise l'avènement du "statut constitutionnel unique des peuples autochtones du Canada."[19]

C'est la réalité sociale et politique contemporaine qui amène le juge en chef, dès le départ, à penser le régime de l'article 35 en fonction de "la nécessaire spécificité qui résulte de la protection constitutionnelle spéciale accordée à un segment de la société canadienne."[20] C'est sous l'emprise du présent, par l'observation du Canada d'aujourd'hui travaillé par les courants identitaires, qu'il postule une distinction nette entre, d'une part, la logique différentialiste dans

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[14] Voir par exemple J. Webber, "Relations of Force and Relations of Justice: The Emergence of Normative Community Between Colonists and Aboriginal Peoples" (1995) 33 Osgoode Hall L.J. 623; Commission royale sur les peuples autochtones, *Une relation à définir: deuxième partie*, vol. 2, Ottawa, Groupe communications Canada, 1996, aux pp. 514-515. Voir aussi A. Lajoie *et al.*, *supra* note 4.

[15] Lajoie *et al.*, *supra* note 4, à la p. 3. Voir aussi Webber, *ibid.*, à la p. 658-660.

[16] *Supra* note 3, par. 28-29, à la p. 538.

[17] *Supra* note 3, pars. 55-67, aux pp. 553-558.

[18] *Supra* note 3, par. 29, à la p. 538.

[19] *Supra* note 3, par. 3, à la p. 527.

[20] *Supra* note 3, par. 20, à la p. 535.

laquelle il inscrit l'article 35 et, d'autre part, la philosophie universaliste à la base des droits individuels consacrés dans la *Charte canadienne des droits et libertés*.[21]

Ainsi mûe par l'idéologie du "droit à la différence," la majorité de la Cour verse dans l'essentialisme autoritaire et folklorisant en limitant l'objectif de l'article 35 à la préservation de l'héritage autochtone précolonial.[22] Ce faisant, elle escamote les enseignements du contexte historique ayant donné lieu à l'emergence des droits ancestraux en droit colonial. Elle occulte le fait que la politique coloniale de non-empiètement sur les terres traditionnellement occupées et exploitées par les autochtones procédait de la nécessité de préserver de bons rapports avec les autochtones aux plans politique et commercial. Cette politique intervenait dans le contexte d'un désir, tant chez les autochtones que chez les Européens, de favoriser la commercialisation à grande échelle des ressources prélevées par les autochtones à même leurs terres traditionnelles.[23]

Bien qu'ils aient pu imposer aux colonisateurs le respect de leurs droits de premiers occupants, les autochtones tenaient pour inévitable voire même souhaitable leur ouverture à l'économie de marché. La reconnaissance du droit des autochtones de continuer à occuper et à utiliser leurs terres ancestrales ne visait donc nullement à enfermer ces communautés dans les pratiques de subsistance et les coutumes vivrières précolombiennes. Or le référent précolonial, qui devient dans *Van Der Peet* la clef analytique du processus de détermination des droits ancestraux, fait complètement l'impasse sur la dynamique d'adaptation culturelle qui se trouve au coeur même du rapport intersociétal ayant généré la politique de reconnaissance des droits ancestraux.

En définitive, bien qu'elle réfère à l'ancienne jurisprudence inspirée des pratiques coloniales, la Cour se soucie primordialement d'imprimer à l'article 35 sa logique identitaire propre. Ce procédé fut mené à son terme dans l'affaire *Côté*.

b) *Côté*: la mise au rancart du régime français et du référent colonial

Si la Cour s'en était tenue aux représentations des procureurs, le sort réservé au droit colonial aurait été tout autre. En effet, aucune des parties ne remettait en cause la nécessité de chercher dans les règles du droit colonial la réponse à la question de l'existence ou non de droits ancestraux aux fins de l'article 35. Le débat portait dès lors sur le contenu du droit colonial français et sur les conséquences, en droit colonial britannique, de la cession de la Nouvelle-France à la Grande-Bretagne.

Ainsi, d'un côté on faisait valoir que le régime colonial français n'avait donné lieu à aucune reconnaissance de droits ancestraux, situation qui, en raison du principe de continuité appliqué aux colonies conquises en droit colonial britannique, ne pouvait avoir été modifiée par l'avènement de la souveraineté britannique.

De l'autre côté, on avancait qu'au contraire le droit colonial français était parfaitement compatible avec la persistance de droits autochtones afférents aux terres et aux ressources et que, de toute façon, s'il tel n'était pas l'état du droit sous le régime français, l'avènement de la couronne britannique avait en quelque sorte fait table rase du régime antérieur quant aux autochtones et opéré la transposition de la doctrine des droit ancestraux aux terres nouvellement acquises.

La Cour refuse toutefois de rendre la reconnaissance constitutionnelle des droits ancestraux tributaire d'un simple renvoi au droit colonial français ou britannique. Elle récuse l'approche qui subordonne le droit constitutionnel contemporain à l'examen plus ou moins pointilleux des pratiques coloniales et des rapports précis qui existaient entre les autochtones et les premiers colons européens. Elle estime plutôt que la question de la reconnaissance de droits ancestraux devra être résolue "en fonction du libellé et de l'objet du par. 35(1) de la *Loi constitutionnelle de 1982*."[24]

Le juge en chef précise sa pensée en décrivant dans les termes suivants l'impact de l'inscription constitutionnelle des droits ancestraux en 1982:

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21 *Supra* note 3, par. 18, à la p. 534.

22 Voir J. Burrows, "The Trickster: Integral to a Distinctive Culture" (1997) 8 Constitutional forum constitutionnel 27.

23 Voir entre autres Slattery, *supra* note 8, à la p. 747.

24 *Supra* note 1, par. 50, à la p. 174.

> L'inscription des droits ancestraux et des droits issus de traité au par.35(1) *a modifié la situation des droits ancestraux au Canada.* Comme il a été expliqué dans la trilogie Van Der Peet, le par.35(1) visait à étendre la protection de la Constitution aux coutumes, pratiques et traditions fondamentales de la culture distinctive des sociétés autochtones qui existaient avant le contact avec les Européens[25] (soulignement ajouté).

Se trouve ainsi affirmée l'autonomie de l'art. 35 qui peut dès lors fonder un régime autochtoniste obéissant à une logique contemporaine singulière parce qu'affranchie de l'hypothèque des pratiques coloniales:[26]

> Le noble objet visé par le par.35(1), savoir la préservation des caractéristiques déterminantes qui font partie intégrante des sociétés autochtones distinctives, ne saurait être réalisé s'il ne protégeait que les caractéristiques déterminantes dont le sort a bien voulu qu'elles soient reconnues légalement par les colonisateurs européens.

L'autonomisation de l'article 35 permet en outre de conférer un caractère pancanadien au droit des autochtones et, par voie de conséquence, de conjurer le spectre d'un particularisme québécois peu propice à la réconciliation parce que négateur des droits autochtones. La Cour peut donc configurer un droit "national" unitaire, libéré de tout déterminisme historique lié au dualisme colonial. Le juge en chef exprime ainsi ses convictions unitaristes:[27]

> Si elle était retenue, la thèse de l'intimé entraînerait la création, à la grandeur du pays, d'un ensemble de mesures disparates de protection constitutionnelle des droits ancestraux, mesures qui seraient fonction des particularités historiques de la colonisation dans les diverses régions. À mon humble avis, une telle interprétation statique et rétrospective du par.35(1) ne peut être conciliée avec l'objectif noble et prospectif de l'inscription des droits ancestraux et des droits issus de traité dans la *Loi constitutionnelle de 1982.*

L'émergence d'un "nouveau" droit prospectif des autochtones, fortement imprégné d'une vision culturaliste de l'autochtonie, devient possible. La dogmatisation de l'identité autochtone annoncée à l'occasion de l'affaire *Van Der Peet* peut de la sorte se déployer sans encombre. La voie est dégagée pour la construction d'un droit constitutionnel qui n'aura nullement à rendre des comptes au droit colonial, ni à refléter les modalités précises de l'ancienne common law.

Il appert que les autochtones ne pourront guère dans l'avenir miser sur la référence systématique au droit colonial, et aux pratiques dont il est issu, pour faire appliquer l'article 35 d'une manière qui leur est favorable. C'est un revers de taille pour ceux qui souhaitaient, grâce à la mise en rapport du droit colonial et de la *Loi constitutionnelle de 1982,* amener les juges à renouer avec l'esprit d'une relation ancienne caractérisée par une égalité relative et un respect mutuel.

Le juge en chef eut l'occasion de confirmer, dans l'affaire *Adams,* la position de la Cour sur la question du régime français.[28] Cette même affaire *Adams* allait en outre permettre à la haute juridiction de confirmer que la réforme constitutionnelle de 1982 a mis le Canada sur le chemin d'un droit postcolonial apte à opérer des arbitrages à partir de la perception que les juges se font des nécessités de la situation présente.

2. *R.* c. *Adams*: le rejet de l'exclusivisme foncier au profit de l'enchevêtrement des droits afférents aux terres et aux ressources

Dans *Adams,* la Cour devait notamment trancher la question de savoir si la preuve d'un titre ancestral sur des terres constitue une condition *sine qua non* de la reconnaissance de droits ancestraux de pêche sur ces terres. Tout comme la vigoureuse répudiation de la *terra nullius* dans l'affaire *Côté* a pu occulter un développement qui n'est pas de nature à favoriser les autochtones sur le long terme, la réponse de la Cour à cette question laissera croire à une avancée pour les autochtones. À y regarder de près, toutefois, on peut se demander s'il ne s'agit pas d'une victoire à la Pyrrhus.

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[25] *Supra* note 1, par. 51, à la p. 174.
[26] *Supra* note 1, par. 52, aux pp. 174-175.
[27] *Supra* note 1, par. 53, à la p. 175.
[28] *Supra* note 2, par. 33, aux pp. 121-122.

2.1. La dissociation juridique du fonds de terre et des ressources comme préalable à une exploitation conjointe

À l'instar de l'affaire *Côté*, la décision de la Cour dans *Adams* vient accuser une logique préalablement mise en action dans *Van Der Peet.* Rappelons que dans cette affaire, la majorité avait usé du référent précolonial comme d'un outil de conciliation des sociétés autochtones préexistantes et de la souveraineté de la Couronne. La Cour recourt à une rhétorique différentialiste pour étayer la restriction des droits ancestraux actuels aux pratiques issues de l'époque antérieure au contact, estimant que ces pratiques reflètent "l'essence même de l'autochtonité"[29] telle qu'appréhendée à travers la lorgnette des juges.

On remarque cependant qu'en évincant ainsi du domaine des droits ancestraux les pratiques apparues exclusivement au contact de la société occidentale, la Cour se donne les moyens de minimiser l'impact préjudiciable des droits autochtones sur les activités économiques que la société dominante juge essentielles au développement du pays. Nul ne poussera l'angélisme jusqu'à penser qu'il ne s'agit là que du résultat fortuit d'une volonté par ailleurs affichée de pérenniser l'"identité autochtone."

Les pratiques et les traditions précoloniales emporteront souvent des systèmes d'utilisation de la terre et des ressources ne requérant pas une emprise foncière exclusive, donc permettant au plan opérationnel, une coincidence de droits autochtones et allochtones sur un même espace. L'aménagement d'un régime foncier apte à superposer ainsi les légimités sur l'espace serait la clef non seulement d'un partage symbolique de la terre, mais surtout d'une exploitation partagée de celle-ci de nature à prévenir toute perturbation grave du statu quo socio-économique. Ce régime plural, bien qu'il ne favorise pas la sécurisation foncière, pourra dès lors être un moyen privilégié de concilier les droits ancestraux et les droits de la Couronne ou des tiers conformément à l'objet que la Cour suprême attribue à l'article 35.

Encore faut-il toutefois, pour qu'il y ait coincidence d'une pluralité de droits liés à des usages complémentaires d'un même espace, que l'on évite de généraliser un système d'appropriation axé essentiellement sur la maîtrise exclusive du fonds de terre. Il faudra en d'autres termes dépasser le modèle exclusiviste en dissociant le statut juridique du fonds de terre de celui des ressources.

C'est cette dissociation qu'a opérée la Cour suprême dans *Adams,* mettant ainsi en place une composante essentielle de sa politique d'arbitrage constitutionnel des droits autochtones et allochtones.

Selon le procureur général du Québec, le droit positif issu de la common law ne connaissait aucun droit ancestral d'accès aux ressources en l'absence d'un titre foncier, c'est-à-dire d'une maîtrise exclusive du fonds de terre. Ainsi, en l'absence de véritable contrôle des terres au moment du contact, une simple présence à des fins de chasse et de pêche ne saurait fonder aujourd'hui une revendication de droits ancestraux sur ces terres.

Pour le gouvernement, les droits ancestraux relatifs aux ressources étaient nécessairement tributaires d'une emprise exclusive sur le fonds de terre. Le statut juridique des ressources aurait été, selon ce point de vue, fonction du statut du fonds. Cette position en était une de "tout ou rien:" les autochtones pouvaient détenir un titre foncier exclusif sur des zones considérables ou, au contraire, n'avoir strictement aucun droit ancestral.

La partie autochtone, quant à elle, réclamait un titre sur les terres en litige mais avancait qu'à défaut d'un tel titre des droits d'accès à la ressource halieutique pouvaient néanmoins être reconnus.

La majorité de la Cour d'appel donna raison au procureur général du Québec en statuant que des droits ancestraux de pêche ne pouvaient exister en l'absence d'un titre ancestral. Les droits afférents aux ressources ne sauraient, de l'avis de la Cour d'appel, qu'être corrélés aux droits fonciers.[30]

La Cour suprême, au contraire, tourne le dos à toute solution purement exclusiviste et décide que des pratiques précoloniales de prélèvement et d'exploitation des ressources peuvent fonder des droits ancestraux afférents à ces ressources alors même que ces pratiques seraient insuffisantes pour justifier la reconnaissance d'un véritable titre foncier. La conciliation des intérêts par l'enchevêtrement et la superposition des droits sur un même espace devient désormais possible.

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[29] *Supra* note 3, par. 19, aux pp. 534-535.

[30] *R. c. Adams*, [1993] R.J.Q. 1011, à la p. 1029.

Le passage pertinent des motifs du juge en chef méritent d'être longuement cité:[31]

> . . . même si les revendications d'un titre aborigène s'inscrivent dans le cadre conceptuel des droits ancestraux ces droits n'existent pas uniquement dans les cas où le bien-fondé de la revendication d'un titre aborigène a été établi. Lorsqu'un groupe autochtone démontre qu'une coutume, pratique ou tradition particulière pratiquée sur le territoire concerné faisait partie intégrante de sa culture distinctive, ce groupe aura prouvé qu'il a le droit ancestral de s'adonner à cette coutume, pratique ou tradition, *même s'il n'a pas établi qu'il a occupé et utilisé suffisamment le territoire en question pour étayer la revendication du titre sur celui-ci.* Le critère établi dans *Van Der Peet* protège les activités qui faisaient partie intégrante de la culture distinctive du groupe autochtone qui revendique le droit en cause. Il n'exige pas que ce groupe franchisse l'obstacle supplémentaire que constituerait la démonstration que le rapport qu'il entretient avec le territoire sur lequel l'activité se déroulait avait, pour sa culture distinctive, une importance fondamentale suffisante pour établir le bien-fondé d'une revendication visant le titre sur ce territoire. L'arrêt *Van Der Peet* établit que l'article 35 reconnaît et confirme les droits des peuples qui occupaient l'Amérique du Nord avant l'arrivée des Européens, et que cette reconnaissance et cette confirmation ne se limitent pas uniquement aux circonstances où le groupe autochtone entretient avec le territoire visé des rapports suffisants pour établir l'existence d'un titre sur celui-ci.

Ainsi, le juge en chef accepte d'emblée que la chasse et la pêche pratiquées au moment du contact pourront faire en sorte qu'"un droit ancestral s'attache à une parcelle de terrain dont le titre n'appartient pas au peuple autochtone concerné."[32] La multiplicité de maîtrises qui en résulte, de même que la coexistence sur un seul espace de droits gouvernés par des régimes normatifs autonomes, semblent se rapprocher des conceptions pluralistes des droits ancestraux.[33]

Mais d'un point de vue autochtone, cette séparation du statut des ressources de celui du fonds de terre n'aura d'intérêt que si l'accès indépendant aux ressources devient nécessaire pour contrebalancer l'absence de titre foncier sur une partie significative des terres qu'ils ont traditionnellement fréquentées.

Une approche large et généreuse dans la reconnaissance du titre ancestral amoindrira considérablement la valeur de droits indépendants limités aux ressources. En revanche, une telle approche donnerait aux autochtones le contrôle d'espaces et de ressources considérables et ferait dès lors peser une menace réelle sur les équilibres socio-économiques existants.

Compte tenu du principe de "balancier" caractérisant la politique d'arbitrage des intérêts qui anime la Cour suprême, il faut alors se demander si les autochtones n'ont pas gagné une définition ample de leur droits de pêche de subsistance au prix d'une marginalisation du titre ancestral. La teneur des motifs du juge en chef dans *Adams* semble accréditer cette hypothèse.

2.2. La définition restrictive du titre ancestral comme stratégie de partage des terres et des ressources

Que reste-il donc de la maîtrise la plus complète de l'espace et des ressources, savoir, le titre foncier? Sur quelles terres un titre pourra-t-il dorénavant être reconnu en faveur des peuples autochtones?

La Cour indique clairement qu'il faudra davantage qu'une simple fréquentation à des fins de chasse et de pêche pour justifier l'existence d'un titre sur le fonds de terre lui-même. Pour le juge en chef, il est nécessaire de scinder les droits ancestraux relatifs aux ressources des droits fonciers afin d'éviter que le nomadisme traditionnel de plusieurs communautés autochtones ne les prive aujourd'hui de tout droit ancestral:[34]

> Afin de comprendre pourquoi les droits ancestraux ne peuvent être inexorablement liés à un titre aborigène, il suffit de rappeler que certains peuples autochtones étaient

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[31] *Supra* note 2, par. 26, aux pp. 117-118.

[32] *Supra* note 2, par. 30, à la p. 119. La Cour a réitéré sa position dans *Côté, supra* note 1, pars. 38-39, aux pp. 166-167.

[33] Voir Lajoie *et al.*, *supra* note 4.

[34] *Supra* note 2, par. 27, à la p. 118.

> nomades et que l'emplacement de leurs établissements variait en fonction des saisons et des circonstances.

Il évoque même la possibilité que la reconnaissance d'un titre foncier requière un fort degré de stabilité et d'intensité dans l'occupation ancestrale du fonds de terre:[35]

> Les faits acceptés par le juge du procès démontrent que les Mohawks ne se sont pas établis exclusivement à un endroit, que ce soit avant ou après le contact avec les Européens. Ce fait (quoique je ne me prononce pas sur ce point) pourrait faire obstacle à la preuve de l'existence d'un titre aborigène sur les terres où ils se sont établis.

L'intensité de l'occupation autochtone nécessaire à la jouissance d'un titre sur le fonds de terre reste encore incertaine, mais les propos du juge en chef n'interdisent pas de faire un rapprochement entre le titre ancestral et les formes d'appropriation foncières propres aux cultures sédentaires et agricoles.[36]

Quoiqu'il en soit, le lien direct que le juge en chef établit entre le nomadisme et la difficulté d'établir un titre donne certes à penser que l'on fera droit aux revendications de maîtrises foncières exclusives sur des espaces plus restreints que les terres qui, au moment du contact, étaient périodiquement fréquentées par les autochtones à des fins de chasse et de pêche.

En d'autres termes, il apparaît plus que douteux que l'assiette spatiale du titre ancestral correspondra aux "Hunting Grounds" traditionnels des autochtones. Or, cela annonce une autre rupture avec le régime foncier de l'époque coloniale. La pratique des colonisateurs britanniques en matière de droits fonciers consistait en effet à reconnaître que les terres traditionnelles de chasse des autochtones, leurs "Hunting Grounds," restaient théoriquement inaccessibles aux colons en l'absence d'un abandon par les premiers occupants de leur droits fonciers. C'est pourquoi on a parlé d'un véritable "titre" ancestral pour décrire l'emprise autochtone sur des terres qu'ils étaient en principe les seuls à pouvoir posséder et exploiter jusqu'à ce qu'il y ait renonciation formelle à ce titre.

Le droit colonial privilégiait de la sorte un découpage foncier de type exclusiviste que traduit à merveille le concept de "Indian Territories" dont la forme la plus achevée se retrouve sans doute dans la *Proclamation royale de 1763*. Dans cette optique, le titre ancestral exclusif pouvait grever l'ensemble des terres fréquentées et utilisées par les autochtones conformément à leur rapport singulier à la terre,[37] donc des étendues considérables dans le cas des chasseurs-cueilleurs nomades ou semi-nomades.

On notera d'ailleurs que dans *Adams* les parties s'inspiraient de ce schéma foncier colonial pour définir le titre ancestral. Le Mohawk Adams prétendait que sa communauté possédait sur les terres en litige un titre ancestral découlant du fait que ses ancêtres y chassaient et pêchaient au moment du contact avec les Européens.

Le procureur général du Québec ne remettait pas vraiment en cause cette conception du titre ancestral. Il contestait plutôt la prétention des Mohawks d'avoir occupé et utilisé les terres en litige de manière à pouvoir en réclamer le titre ancestral. La Cour suprême propose apparemment une définition du titre ancestral moins généreuse que celle que le procureur général du Québec paraissait disposé à accepter!

Si la haute juridiction avait jugé pertinentes les pratiques et les règles coloniales entourant le foncier autochtone, elle n'aurait pu, comme elle l'a fait, éluder la question de savoir si le système colonial était une simple technique de rationnalisation de l'expansion foncière européenne ou, au contraire comme le prétendent des auteurs,[38] une reconnaissance au plan substantif du caractère à priori exclusif de l'emprise juridique autochtone sur les terres traditionnelles de chasse.

La Cour suprême marque encore une fois sa détermination à ne pas être aujourd'hui à la remorque

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35 *Supra* note 2, par. 28, à la p. 118.

36 Dans *Côté*, *supra* note 1, par. 38, à la p. 167, le juge en chef associe l'existence d'un titre à "une occupation historique et continue d'un territoire spécifique".

37 Selon ce point de vue, le titre ancestral découlant des usages traditionnels sera exclusif si l'occupation ancestrale était telle ou conjoint dans le cas d'une occupation autochtone conjointe, voir Slattery, *supra* note 8, aux pp. 747, 749 et 758. Voir à ce sujet *Hamlet of Baker Lake v. Minister of Indian Affairs*, [1980] 1 C.F. 518 (1ère inst.); *Delgamuukw v. British Columbia*, [1993] 5 W.W.R. 97 (C.A.C.-B.) en appel à la Cour suprême du Canada.

38 Voir notamment Slattery, *supra* note 8, aux pp. 741-744.

des circonstances et des pratiques coloniales. Elle réitère sa volonté de mettre en place un cadre constitutionnel lui permettant d'élaborer son propre système de partage des terres et des ressources entre les autochtones et les autres composantes de la société canadienne contemporaine.

Or ce système n'est pas de nature à bouleverser l'ordre constitutionnel, social et économique résultant de l'implantation de l'État euro-canadien. C'est ainsi qu'en limitant le titre ancestral aux terres ayant historiquement fait l'objet d'une occupation "suffisante," la Cour atténue le risque que ce titre fasse substantiellement obstacle à une occupation et une exploitation des terres par les non-autochtones.

Cette présence non autochtone sur les terres traditionnellement fréquentées par les autochtones devra en principe être respectueuse des droits des premiers occupants quant à l'accès aux ressources, quant à leur prélèvement et leur exploitation. Mais comme il a été mentionné précédemment, l'utilisation complémentaire d'un même espace s'en trouvera d'autant plus facilitée que la restriction des droits ancestraux aux pratiques héritées de l'époque précoloniale confinera souvent les maîtrises autochtones au domaine des exploitations vivrières. Ces maîtrises seront moins susceptibles d'étayer une revendication monopolistique sur la ressource et de comporter des corollaires exclusivistes quant à l'occupation et l'aménagement de l'espace.

En outre, même si les activités non autochtones provoquent une "diminution appréciable"[39] des droits ancestraux, la Cour suprême ouvre la porte dans *Adams*[40] et *Côté*[41] à une défense de justification fondée sur l'importance économique de ces activités. La Cour avait déjà manifesté dans *Gladstone* son souci de sauvegarder les intérêts économiques des autres citoyens en favorisant un partage de la ressource halieutique plutôt que l'exclusivité autochtone en matière de pêche commerciale.[42] Cette logique protectrice de l'ordre socio-économique établi pourrait bien avoir franchi une étape décisive dans *Adams* et *Côté* puisque les droits ancestraux en cause dans ces affaires étaient de simples droits de *subsistance*.

Conclusion

Les affaires *Côté* et *Adams* viendront alimenter le débat sur la capacité des juges de réconcilier les droits historiques indéterminés des peuples autochtones avec la société postcoloniale. Elles ont permis à la Cour de s'affranchir des contraintes du droit colonial et de poser les jalons d'un nouveau droit fondé sur l'objet de l'article 35 de la *Loi constitutionnelle de 1982*; un droit inspiré, non pas d'une vision transcendante de la justice historique, mais de la préoccupation pragmatique d'arbitrer les intérêts antagonistes dans la société postcoloniale.

La décision dans *Côté* rend de plus en plus chimérique l'espoir d'un retour à ce que d'aucuns concoivent comme les "relations originelles" entre les communautés autochtone et euro-canadienne. Pour sa part, la décision dans *Adams* conforte la logique de protection des équilibres socio-économiques existants qui sous-tend l'attitude de la Cour suprême dans *Van Der Peet* et *Gladstone*.

Le diptyque *Côté-Adams*, surtout lorsqu'on le situe dans l'ensemble de la jurisprudence de l'année 1996, devrait faire réfléchir ceux qui, du côté autochtone, ont cru aux vertus d'une judiciarisation militante des problèmes de société que sont la répartition intercommunautaire des ressources et le partage de la légitimité politique.❑

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39 C'est ainsi que la Cour suprême formule le test de l'atteinte à première vue aux droits ancestraux dans *R.* c. *Gladstone*, [1996] 2 R.C.S. 723, à la p. 757.

40 *Supra* note 2, par. 58, à la p. 134.

41 *Supra* note 1, par. 82, aux pp. 189-190.

42 *Supra* note 39, aux pp. 774-775. Voir K. McNeil, "How Can Infringements of the Constitutional Rights of Aboriginal Peoples Be Justified?" (1997) 8 Constitutional forum constitutionnel 33.